SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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ELAINE D. STEINBOK,

Plaintiff,

-against-

CITY OF NEW YORK, DAVID MELLADO, NEW YORK CITY PARKS & RECREATION, ALAR HACKING CORP., RAHIMI ZAFARI, RENTA HACKING CORP. and LILI ARUTYUNOV,

Defendants.

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**DECISION AND ORDER**
Index No. 153737/2013
Mot. Seq. No. 004

**Hon. James E. d'Auguste**

Defendants Alar Hacking Corp. a/k/a Renta Hacking Corp. Inc. and Rahimi Zafari (collectively, "defendants"), through their attorneys Baker, McEvoy, Morissey & Moskovits, P.C. ("Baker McEvoy"), move for an order, pursuant to CPLR 3122 and 3124, to (1) compel plaintiff Elaine D. Steinbok to appear for physical examination(s) by physician(s) designated by defendants, and (2) for a limited order of protection excluding any non-attorney observer(s) from being present during the exam(s) in any manner: electronically, in person, or otherwise; and (3) directing that any attorney attending the examination not interfere with the conduct of the exam in any manner, including directing plaintiff not to answer the examiner's questions, other than on the basis of an established legal privilege. Plaintiff cross-moves for an order (1) deeming that defendants have waived the defendant medical examination ("DME") based on their refusal to allow a representative of her counsel's office into the examination room and comply with this Court's orders; (2) pursuant to 22 NYCRR 130-1.1, imposing costs and sanctions in the amount of ten thousand dollars ($10,000.00) on defendants and their counsel, Baker McEvoy, due to their filing of a motion that is "completely without merit in law" (Ginsberg Aff., ¶ 2), their attempt to tortiously interfere with the conducting of the DME, and utilizing dilatory tactics to delay her day

in Court; (3) permitting a representative of her counsel's choice, whether attorney or non-attorney, to attend and observe the DME; and (4) pursuant to CPLR 3126, striking defendants' answer for failure to appear for depositions as ordered by this Court, or, in the alternative, pursuant to CPLR 3124, compelling defendants to appear for depositions.

The facts, as relevant to this motion, are as follows: On August 5, 2012, plaintiff allegedly suffered personal injuries arising from a motor vehicle accident. On or about November 5, 2012, plaintiff filed a notice of claim and subsequently commenced this action by filing a summons and verified complaint on April 25, 2013, to which defendants joined issue by filing an answer. In response to defendants' demands, plaintiff served a verified bill of particulars on or about April 23, 2014, alleging physical and/or psychological injuries that she claims are serious injuries, permanent and disabling, which placed her physical condition at issue. The Case Management Order of this Court (Nervo, J.) dated January 8, 2015 directed any physical examinations of plaintiff to be noticed within 45 days after completion of her deposition (NYSCEF Dkt. No. 47, ¶ 6(a)), which took place on October 7, 2015.[1] Defendants then served separate notices for physical examinations containing specific conditions under which the examinations should be conducted; the following conditions are at issue:

> 2. Only an attorney representing the plaintiff, a court-appointed legal guardian for the plaintiff, and/or an infant plaintiff's parent or natural guardian, will be permitted into the exam room, during the examination. Any attorney or guardian, admitted into the exam room is to be admitted solely for the purpose of representing the plaintiff, and not as an observer and material witness in the action. Any attorney or guardian will be requested to furnish their full name and one form of verifying identification.
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> 3. Any attorney or guardian admitted into the exam room for the purpose of representing plaintiff should be aware that they are to have no role in the examination and should not interfere with the examination. This includes directing plaintiff not to answer the examiner's questions going to medical history and/or mechanism of injury, as well as other medical information the

[1] The Case Management Order and additional orders of this Court issued by the undersigned dated August 13, 2015 and December 3, 2015 required defendants to appear for depositions, all of which defendants have allegedly failed to comply.

examiner deems to be relevant to the conduct of a thorough examination. [see; Jakubowski v Lengen, 86 A.D.2d 398 (4th Dept. 1982) ; Tucker v. Bay Shore Stor. Warehouse, 69 A.D.3d 609 (2d Dept. 2010)]

4. No non-attorney will be permitted in the exam room, without prior consent of Baker, McEvoy, Morrissey & Moskovits, P.C., with the exception of any interpreter provided by defendant(s), or a female member of the examining physician's staff (when a female plaintiff is to be examined).

5. No surreptitious or undisclosed recording of any part of the examination is permitted, within the exam room or the examiner's facility, by any person, by any means, in any medium, including, but not limited to, video, audio, or transcription of any kind, irrespective of whether it is for purposes of use in this action.

Morrissey Aff. Ex. B. In other words, the conditions at issue are the following: (1) no non-attorney observer be permitted as an observer in the exam room, in any manner: electronically, in person, or otherwise; (2) any attorney attending the exam not interfere with the exam by objecting to questions the examiner deemed necessary and relevant to the examination; and (3) that no video or audio recording be made without prior court approval.

By letter dated October 29, 2015, plaintiff timely objected to the exclusion of a non-attorney, stating that she intended to have a non-attorney present in the exam room. Defendants responded by letter dated October 31, 2015, citing case law that limits observation of a CPLR 3121 exam to the plaintiff's attorney, unless the plaintiff has court approval for anyone other than an attorney to attend. Plaintiff sent additional letters objecting to the conditions imposed by Baker McEvoy on rescheduled examinations, specifically objecting to Baker McEvoy's refusal to permit a representative from IME Watchdog Inc. to attend any DMEs and the locations of said DMEs.

After reviewing the parties' submissions and the conditions contained in Baker McEvoy's notice for physical examination, the Court finds that the directions, by their very nature, are improper. A plaintiff is entitled to have a non-attorney, colloquially known as an IME watchdog, present at an independent medical examination ("IME"), previously referred to herein as a DME. Defendants' argument that a non-attorney is not permitted to accompany a plaintiff to an IME has

been raised in multiple prior litigations and has been specifically rejected by the Appellate Division, First Department in *Guerra v. McBean*, 127 A.D.3d 462 (1st Dep't 2015), which was briefed by Baker McEvoy, counsel for defendants in that case. The decision in *Guerra* specifically states that "[d]efendants failed to establish that plaintiffs' representative's presence at their physical examinations deprived defendants of the ability to conduct meaningful examinations" and cite the same case law used by Baker McEvoy in their IME conditions. *Id.* at 462 (citing *Tucker*, 69 A.D.3d 609; *Jakubowski*, 86 A.D.2d 398). An entire segment in Baker McEvoy's brief in *Guerra*, entitled "Plaintiffs cannot be accompanied to their IMEs by non-lawyer employees of so called 'IME monitoring' companies," contained the same argument to the Appellate Division as it makes in the instant litigation. Accordingly, the Appellate Division's decision in *Guerra* implicitly rejected Baker McEvoy's argument that a non-attorney is not entitled to attend an IME. *See Merriweather v. Borland & Cornelius*, 6 N.Y.2d 417, 423-24 (1959); *Borstein v. Henneberry*, 132 A.D.3d 447 (1st Dep't 2015). Had the plaintiff in *Guerra* not been entitled to the relief sought in the instant case—allowing a non-attorney to accompany the plaintiff to an IME—the Appellate Division would not have granted the requested relief by permitting the IME to take place with a non-attorney present at the examination.

As noted above, Baker McEvoy presented the same argument to the Appellate Division as it does in the instant litigation regarding a non-attorney accompanying a plaintiff to an IME. Here, Baker McEvoy is arguing that the decision in *Guerra* did not expressly state that non-attorneys are permitted to be present at an IME; however, the decision in *Guerra* cannot stand without permitting non-attorneys to be present at IMEs. Baker McEvoy's attempt to essentially collaterally attack the Appellate Division's reasoning underlying its decision in *Guerra* by attempting to continuously ban non-attorneys from being present at a plaintiff's IME, which it has been barred from doing, borders on frivolity. In fact, Baker McEvoy does little more than change the facts from its brief to the Appellate Division to fit the instant litigation and even cites to the same case law in both

litigations. As such, it is apparent to this Court that Baker McEvoy knew that its argument regarding the presence of a non-attorney at an IME was meritless because it had been raised in the *Guerra* litigation and rejected by the Appellate Division prior to submitting the instant motion.[2] Accordingly, the demand served by Baker McEvoy was a legal nullity because it contained improper conditions.

Part of the relief sought by defendants in the instant motion is to compel plaintiff to appear for a DME. Since Baker McEvoy's initial DME demand is deemed a legal nullity, in order to obtain a DME, Baker McEvoy would have to serve a new demand for a DME and the time to do so has expired pursuant to the Case Management Order, which provides an end date for conducting any such DME.[3] Given the fact that Baker McEvoy has decided to willfully engage in the practice of delaying this case by putting the aforementioned improper conditions in its DME demand, the Court finds no reason to extend the time period permitted by the Case Management Order for a DME in this instance. Thus, even if Baker McEvoy had made a request for an extension of time to perform a DME in the instant litigation, the Court would deny such relief.

The above conditions in Baker McEvoy's IME demand have become such a widespread problem that the law firm has been barred from serving IME notices containing conditions that purport to exclude a non-attorney representative present at the examination—exactly what has been protested in the instant case—in a plenary action. *See IME Watchdog, Inc. v. Baker, McEvoy, Morrissey & Moskovitz, P.C.*, 21822-16E, NYLJ 1202756064297 (Sup. Ct., Bronx County Apr. 19, 2016) (granting IME Watchdog, Inc. a temporary restraining order and preliminary injunction against Baker McEvoy). On appeal, the Appellate Division, First Department, which had

[2] *Guerra* was decided by the Appellate Division on April 9, 2015 and Baker McEvoy filed its moving papers on March 22, 2016.

[3] As the physical examination was required to be noticed within 45 days after completion of plaintiff's deposition, which took place on October 7, 2015, Baker McEvoy would have had to make a new demand on or before November 23, 2015.

originally stayed the enforcement of an injunction, vacated the stay and permitted the injunction to go into effect. *IME Watchdog, Inc. v. Baker, McEvoy, Morrissey & Moskovitz, P.C.*, 2016 WL 4133495 (1st Dep't Aug. 4, 2016). Thus, Baker McEvoy is also prohibited under this separate order from the Appellate Division from the exact conduct that is the subject of the instant motion practice. Although the Appellate Division decision in *IME Watchdog* was issued in August, Baker McEvoy never communicated with this Court that it is not permitted to interfere with a non-attorney's presence at a physical examination.

**Conclusion**

Based upon the foregoing, defendants' motion is denied in its entirety. The Court grants plaintiff's cross-motion to the extent that defendants have waived their opportunity for a DME based on their refusal to allow a non-attorney representative into the examination room and comply with this Court's prior orders, plaintiff's cross-motion for costs and sanctions is denied, plaintiff's cross-motion to permit a representative of her counsel's choice to attend and observe the DME is denied as moot, and plaintiff's cross-motion striking defendants' answer for failure to submit to an examination before trial is granted to the extent of conditionally striking their answer unless defendants produce witnesses for deposition within the next 90 days of notice of entry of this order.

This constitutes the decision and order of this Court.

Dated: October 5, 2016

Hon. James E. d'Auguste, A.J.S.C.