At an IAS Term, the Jury Coordination Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of August, 2013.

PRESENT:

HON. KENNETH P. SHERMAN,

Justice.

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ERIKA OLVERA MORAN,

Plaintiff,

- against -

EMR MECHANICAL CORP.,
ROMAN FISHER,
OLEGARIO CORTEZ-ROJAS, and
MANUEL CORTEZ-ROJAS,

Defendants.

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DECISION AND ORDER

Index No. 23212/10

Mot. Seq. No. 1

The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Consent Order (Anthony Horvath, M.D.) in *Futersak v Brinen* (265 AD2d 452 [2d Dept 1999])	5
Consent Order (Harvey Grable, M.D.) in *Schissler v Brookdale Hosp. Ctr.* (289 AD2d 469 [2d Dept 2001])	6

This personal injury action presents a practical, although seldom encountered, question of whether the defense sole expert witness is considered to be unavailable as a trial witness thereby entitling the defense to retain another medical expert, serve an amended CPLR 3101 (d) expert witness disclosure, and have the newly retained medical expert conduct a second independent medical examination (IME) of plaintiff. Giving rise to this

question is the fact that the Medical Board commenced a disciplinary action against and then entered into a consent stipulation with defense's expert witness, after plaintiff had filed the note of issue/certificate of readiness and the action had proceeded to the Jury Coordinating Part in anticipation of trial, which restricts his license, by barring him from conducting future IMEs. Under the particular circumstances of this case, the Court answers the question in the negative. In the exercise of its discretion, the Court denies the moving defendants' order to show cause to compel plaintiff to appear for a second IME.

The Chronology of Events

On May 16, 2012, Dr. Robert Israel, M.D. (Dr. Israel), a board-certified orthopedist, conducted the initial IME of plaintiff. His impressions, as reflected in his IME report of the same date, were that plaintiff's numerous sprains had all been resolved. He opined that plaintiff suffered no disability as a result of the underlying accident, required no treatment, and was capable of working and performing, without restriction, her activities of daily living.

On July 31, 2012, defendants served their CPLR 3101 (d) expert witness disclosure designating Dr. Israel as their sole medical expert at trial.

On September 28, 2012, plaintiff filed the note of issue and certificate of readiness. Since then, this action has moved to the Jury Coordinating Part in anticipation of trial.

Nine months post-note of issue (May 30, 2013), the New York State Board for Professional Medical Conduct (the Medical Board) proffered a Statement of Charges against Dr. Israel. Its factual allegations recite that:

> "A. During periods between 2006 and 2008, [Dr. Israel] undertook to perform Independent Medical Examinations on Patients A through E, respectively. In doing so, [Dr. Israel] failed to obtain and note an accurate, adequate and complete medical history, and failed to perform and note an accurate, complete and appropriate physical examination on Patients A through E, respectively.

B. [Dr. Israel] failed to maintain medical record for Patients A through E in accordance with accepted medical standards and in a manner which accurately reflects his care and treatment of each patient."[1]

On the same date (May 30, 2013), the Medical Board and Dr. Israel entered into a Consent Agreement and Order (the consent order), which imposed on him sanctions in full satisfaction of the aforementioned disciplinary charges. As is relevant to this action, one of these sanctions (at page 2 of the consent order) is that, effective June 7, 2013:

> "Pursuant to N.Y. Pub. Health Law§ 230-a (3)[[2]], [Dr. Israel's] license to practice medicine in New York State shall be limited to preclude [him] from engaging in any practice as an Independent Medical Examiner, and [Dr. Israel has] voluntarily stopped practicing as an Independent Medical Examiner as of March, 2013. [Dr. Israel] shall not contract or agree to perform, nor perform any Independent Medical Examinations."

About two weeks later, on June 19, 2013, defendants Olegario Cortez-Rojas and Manuel Cortez-Rojas moved by order to show cause to compel plaintiff to undergo a second IME by another orthopedist of their choice.[3] Plaintiff opposes defendants' application.

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[1] Plaintiff could not have been one of the five patients (A through E) who formed the basis for the Medical Board to restrict Dr. Israel's license. As stated, plaintiff was examined by Dr. Israel in 2012, whereas the five patients (A through E) were examined by him some time between 2006 and 2008.

[2] Public Health Law § 230-a (3) empowers the Medical Board to restrict the scope of a physician's practice, and that restriction need not be limited in duration (*see Matter of Sternberg v Administrative Review Bd. for Professional Med. Conduct*, 235 AD2d 945, 946 [3d Dept 1997], *lv denied* 90 NY2d 809 [1997]) (footnote by the Court).

[3] Defendants' application is supported by two affirmations of defense counsel and by 11 exhibits: the verified complaint (Exhibit A), defendants' answer (Exhibit B), defendants' notice for physical examination (Exhibit C), plaintiff's bill of particulars (Exhibit D), the PC order (Exhibit E), the letter from D&D Associates, dated Apr. 16, 2012, to plaintiff's counsel, scheduling plaintiff's IME with Dr. Israel (Exhibit F), Dr. Israel's IME report, dated May 16, 2012 (Exhibit G), defendants' CPLR 3101 (d) expert witness disclosure (Exhibit H), plaintiff's note of issue and certificate of readiness (Exhibit I), the consent order (Exhibit J), and defendants' June 18, 2013 letter advising plaintiff of the instant order to show cause (Exhibit K).

Discussion

CPLR 3121 (a) authorizes physical examinations of plaintiffs in personal injury actions. It provides, in relevant part, that:

> "After commencement of an action in which the . . . physical condition . . . of a party . . . is in controversy, any party may serve notice on another party to submit to a physical . . . examination by a designated physician. . . . It [the notice] shall specify the time . . . and the conditions and scope of the examination."

Although it may be proper, under certain circumstances, to require a plaintiff to submit to more than one IME under CPLR 3121 (a), a second IME is allowed only where the defendant shows a need for "a more thorough disclosure of the plaintiff's physical condition, as, for example, where the report of the original physical examination is no longer reflective of the plaintiff's condition by reason of the long passage of time between the original physical examination and the trial following a reversal and remand for new trial, . . . or where a monetary increase in the demand for judgment is sought upon a re-evaluation due to alleged greater severity of injury" (*Korolyk v Blagman*, 89 AD2d 578, 579 [2d Dept 1982] [internal citations omitted]). In addition, after a note of issue has been filed, a defendant must demonstrate that "unusual or unanticipated circumstances"[4] developed subsequent to the filing of the note of issue to justify an additional examination (*see Schissler v Brookdale Hosp. Ctr.*, 289 AD2d 469, 470 [2d Dept 2001]); for example, death of the defense expert witness (*see Nathanson v Johnson*, 126 AD2d 475, 476 [1st Dept 1987]; *Galdi v Kaliya*, 2011 NY Slip Op 51256 [App T, 1st Dept 2011]); an abrupt retirement, coupled with an out-of-state relocation, of the defense expert witness (*see Rosado v A&P Food Store*, 26 Misc 3d

[4] The term "unusual or unanticipated circumstances" is derived from 22 NYCRR 202.21 (d). This rule provides, in relevant part, that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings."

935, 936 [Sup Ct, Westchester County 2009]); or the defense expert's hostility to his client or to plaintiff (*see Orsos v Hudson Tr. Corp.*, 95 AD3d 526 [1st Dept 2012];[5] *Miocic v Winters*, 75 AD2d 887, 888 [2d Dept 1980];[6] *see also Rosenblitt v Rosenblitt*, 107 AD2d 292, 295 [2d Dept 1985]).[7]

Here, Dr. Israel's IME report satisfies all of the requirements of CPLR 3121 (a), in that it fully informed defendants of the nature and extent of plaintiff's claimed injuries. Defendants have made no showing that Dr. Israel's IME report is, in any manner, inadequate or fails to constitute a reliable opinion of plaintiff's physical condition at the time of her initial IME. Nor have defendants made any showing that Dr. Israel, a board-certified orthopedist, was unqualified to perform an orthopedic IME or is in any way biased either to defendants or to plaintiff. Thus, defendants have failed to show that a repeat physical examination of plaintiff is required (*see Tucker v Bay Shore Storage Warehouse, Inc.*, 69 AD3d 609, 610 [2d Dept 2010]; *Frangella v Sussman*, 254 AD2d 391, 392 [2d Dept 1998]).

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5. In *Orsos*, the First Department upheld the vacatur of the initial IME, explaining (at page 526) that:

> "[D]efendants' designated physician, Dr. Hecht, upon completion of the examination, recommended that, once the litigation was over, she see his partner for follow-up care. This statement reflects potential bias on the part of the physician, which tainted his report of his findings. Accordingly, a second examination by a different physician is permissible to ensure that the focus of the medical testimony will be on the nature and extent of plaintiff's alleged injuries, rather than on any taint or irregularity in the first examination."

6. In *Miocic*, the Second Department held (at page 888) that "[i]n the peculiar posture of this case, it is appropriate to allow defendants to have the second examination conducted by a different physician. . . . Defendants should not be compelled to rely upon a physician who is openly hostile to defense counsel and is a personal friend of plaintiffs' counsel."

7. As the Second Department summarized this concept in *Rosenblitt* (at page 744):

> "Appellate courts have been known to specifically condemn the use of an examining psychiatrist or physician who is demonstrably hostile towards counsel for one side in the litigation. Consistent with this principle, it would be patently unjust to permit defendant's retained expert, who has already reached a conclusion favorable to defendant, to conduct a psychiatric evaluation of plaintiff."

While defendants do not allege that they have a problem with Dr. Israel's IME report (or with Dr. Israel per se), they are concerned with his newly imposed license restriction which, they argue, came about as a result of "unusual and unanticipated circumstances." They posit that, by virtue of the consent order's restriction barring Dr. Israel from performing any future IMEs, he is no longer available to testify at trial regarding his prior IME of plaintiff. They contend that, if he were to testify as an expert at trial of this action, he would be "engaging in any practice as an Independent Medical Examiner" in violation of the consent order. Although the Court is sympathetic to defendants' predicament, the terms of the consent order and the Second Department's precedent make it clear that Dr. Israel is available as an expert witness for trial of this action.

(1)

The consent order precludes Dr. Israel from conducting IMEs, meaning that he may no longer examine injured plaintiffs, and therefore, by definition can no longer write IME reports or testify concerning said injured plaintiffs. However, Dr. Israel can still practice medicine generally, except for performing IMEs. Because the consent order essentially bars Dr. Israel from performing *future* IMEs, his *pre-consent order* IMEs – meaning his actual examinations and his accompanying reports – are unaffected by the consent order. As noted, the consent order is effective prospectively (June 7, 2013) and is not retroactive. As such, Dr. Israel's *pre-consent order* IMEs do not become a nullity, he still examined injured plaintiffs and issued reports containing his medical opinion on the extent and nature of those plaintiffs' injuries. As those *pre-consent order* IMEs and reports were not rendered retroactively void by the consent order, there is no reason why Dr. Israel could not testify

concerning those reports. The Court understands that Dr. Israel might be subject to a somewhat intense and difficult cross-examination. However, such an attack on this expert's credibility, like any other attack on any witness's credibility, only goes to the weight of that testimony, not it's admissibility. In sum, Dr. Israel would not be precluded from testifying at trial about any aspect of his *past* IME of plaintiff. By testifying at trial of this action, he would merely be testifying about an examination he already conducted, an examination that predated the restriction imposed by the consent order. Thus, Dr. Israel is available as a trial witness by the terms of the consent order.

(2)

Equally important, the Second Department precedent establishes that Dr. Israel is available as a trial witness as a matter of law. The starting point in the quartet of the Second Department's decisions on the trial availability of defense expert witnesses is *Futersak v Brinen* (265 AD2d 452 [1999]). There, the Second Department declined to compel the infant plaintiff to undergo a second IME, even though the defense medical expert had been sanctioned, post-note of issue, by the Medical Board. In a memorandum decision, the Second Department held (at page 452) that:

> "[T]he fact that the examining physician was subjected to professional discipline subsequent to his examination of the infant plaintiff does not justify an additional examination by another physician, as the mere concern that the plaintiffs may impeach the examining physician's credibility with this information is not a sufficient basis for a second examination."

The microfilmed record on appeal in *Futersak* includes a copy of the Medical Board's consent order, which reveals, as was pertinent to that case, that the license restriction of the defense medical expert (Anthony Horvath, M.D.) precluded him from "performing

independent medical evaluations of patients in connection with *benefit determinations*, including but not limited to those involving Workers['] Compensation benefit determinations" (Record on Appeal in *Futersak*, page 36, made part of this decision and order [emphasis added]). Because the action in *Futersak* was not a "benefit determination," the Second Department did not face the issue of whether the defense expert witness would be violating his license restriction by testifying as an expert at trial.

In its next decision – *Schissler v Brookdale Hosp. Ctr.* (289 AD2d 469 [2001]) – the Second Department was again confronted with the issue of whether the plaintiff should be compelled to undergo a second IME post note of issue where, as was the case in *Futersak*, the defense medical expert had been sanctioned by the Medical Board in the interim. Echoing its holding in *Futersak*, the Second Department ruled that defendants were not entitled to a second IME. The microfilmed record on appeal in *Schissler* includes a copy of the Medical Board's consent order, which reveals that, among other sanctions, the license restriction of the defense medical expert (Harvey Grable, M.D.) barred him "from testifying as a medical expert in any *physician malpractice proceeding*" (Record on Appeal in *Schissler*, page 58, made part of this decision and order [emphasis added]). Inasmuch as the action in *Schissler* was not a "physician malpractice proceeding," the issue of whether the defense expert would be violating his license restriction by testifying at trial was similarly not before the appellate court.

Recently, however, the issue came to a head in *Carrington v Truck-Rite Dist. Sys. Corp.* (103 AD3d 606 [2013]) and, for the second time, in *Giordano v Wei Xian Zhen* (103 AD3d 774 [2013]), when, in both cases, the defense expert (Robert Orlandi, M.D.) temporarily surrendered his medical license for reasons unrelated to his medical practice. Here, the defense was stuck with a medical expert who, post-note of issue, possessed no medical license (at least not in New York State). The defense moved, in each case, for leave to conduct a second IME. Justice Donald Scott Kurtz of this court denied both motions, holding, in each case, that the defense expert witness was available to testify at trial. On separate appeals from those orders, the Second Department (at page 607 of *Carrington* and at page 775 of *Giordano*) adhered to its prior rulings in *Futersak* and *Schissler*, holding that:

> "[T]he fact that the defendants' examining physician was arrested and temporarily surrendered his medical license subsequent to his examination of the plaintiff and the filing of the note of issue did not justify an additional examination by another physician. The defendants' concern that the plaintiff may impeach the examining physician's credibility with this information was not a sufficient basis to compel a second examination (*see Schissler v Brookdale Hosp. Ctr.*, 289 AD2d at 470; *Futersak v Brinen*, 265 AD2d 452 [1999])."

The scope of the Second Department's rulings in *Carrington* and *Giordano* is quite broad. Under these rulings, it is immaterial whether Dr. Israel would be "engaging in any practice as an Independent Medical Examiner" by testifying as the defense expert witness at trial of this action and whether by doing so, he would violate the consent order. The overarching principle, which the Second Department first enunciated 14 years ago in *Futersak* and which it reiterated as recently as five months ago in *Carrington* and *Giordano*,

is that the risk of the defense expert's post-note of issue professional, ethical, or personal lapses may not be shifted to the injured plaintiff, absent "unusual or unanticipated circumstances." If the rulings in *Carrington* and *Giordano* did not count a temporary surrender of the defense expert's medical license (which prevented the expert from any practice of medicine) as "unusual or unanticipated circumstances," then Dr. Israel's license restriction, that merely precludes him from any future practice as an Independent Medical Examiner, certainly doesn't qualify as "unusual or unanticipated circumstances . The mere fact that Dr. Israel may have to testify, and be subject to cross-examination, is insufficient to warrant a further IME. All expert witnesses are subject to some degree of perhaps damaging cross-examination. Dr. Israel, who still has a medical license, and can still presumably treat patients, can certainly testify in court, subject to the same rules of cross-examination as any other expert witness. In sum, the fact that Dr. Israel's testimony may be less compelling than defendant had hoped, is an insufficient basis to order plaintiff to undergo yet another medical examination by a physician chosen by defendant.

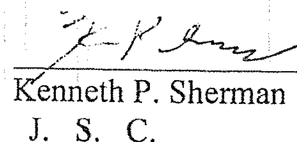
Conclusion

The moving defendants' order to show cause to compel plaintiff to appear for a second IME is denied in the Court's discretion.

This constitutes the decision and order of the Court.

E N T E R,

August 5, 2013



Kenneth P. Sherman
J. S. C.