

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X

FRANK NIETO,

Plaintiff,

- v -

CLDN NY LLC,

Defendant.

-----X

CLDN NY LLC

Plaintiff,

-against-

ECG RETAIL LOGISTICS, LLC

Defendant.

-----X

INDEX NO. 159273/2016

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595324/2017

The following e-filed documents, listed by NYSCEF document number (Motion 003) 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for DISCOVERY

This motion requires the Court to consider what a plaintiff's attorney may do during an Independent Medical Examination ("IME"). Defendant CLDN NY LLC ("CLDN") moves to compel plaintiff to appear for a neuropsychological IME; third-party defendant ECG Retail Logistics, LLC ("ECG") joins in CLDN's application. CLDN claims that when plaintiff and his counsel appeared for the original IME, the doctor told plaintiff's counsel that he could not take any notes about the specific questions being asked because it might violate copyright law. CLDN argues that counsel for plaintiff was entitled to record his client's answers and show it to his own medical expert, who would easily be able to determine which test was being administered.

CLDN observes that this disagreement (about what notes plaintiff's counsel could take) prevented the IME from going forward.

In opposition and in support of his cross-motion for an order deeming the neuro IME waived, plaintiff insists it was the doctor who refused to do the examination. Plaintiff argues that his counsel should not have any restrictions on what notes can be taken in order to represent his client. Plaintiff contends that notetaking does not interfere with the examination and is allowed under the applicable precedent.

Discussion

“It is well established that a plaintiff is entitled to have a representative of her choice present during the IME, provided the individual does not interfere with the IME or prevent the defendant's doctor from conducting ‘a meaningful examination’” (*Markel v Pure Power Boot Camp Inc.*, 171 AD3d 28, 29, 96 NYS3d 187 [1st Dept 2019] [finding that an IME observer's notes were not discoverable as they were prepared in anticipation of litigation]).

However, that does not mean that a plaintiff can take audio or video recordings at an IME (*Bermejo v New York City Health and Hospitals Corp.*, 135 AD3d 116, 144, 21 NYS3d 78 [2d Dept 2015] [“The denial of requests for permission to videotape physical examinations has been upheld by various appellate courts in this State”]; *see also Savarese v Yonkers Motors Corp.*, 205 AD2d 463, 614 NYS2d 4 [1st Dept 1994] [finding it was not an abuse of discretion to “deny plaintiff's request to videotape or audiotape the ordered psychiatric examination in light of the fact that counsel will be present during the examination to protect plaintiff's interests”]; *Cooper v McInnes*, 112 AD3d 1120, 977 NYS2d 767 [3d Dept 2013] [finding that the Supreme Court acted within its discretion to bar video or audio recording of psychological IME]). And video or

audio recordings of IMEs are only permitted upon a showing of special and unusual circumstances (*Bermejo*, 135 AD3d at 144).

The Court finds that plaintiff's counsel may take any notes he wishes during an IME. The caselaw cited above clearly provides that although a Court may disallow audio or video recording of an IME, a plaintiff (or his representative) may take notes at an IME. That is exactly what plaintiff's counsel seeks to do here—take notes during the IME.

While the Court recognizes that CLDN is concerned about copyright issues, the Court observes that an IME is an inherently adversarial situation. The entire purpose of an IME is to allow the defendant the chance to have a doctor of its choosing examine a plaintiff with the intent to have the doctor testify at trial. If a defendant or the doctor performing the IME are concerned about violating a copyright, then a different test should be used. Put another way, because an IME is used solely for litigation purposes, the Court cannot limit the ability of plaintiff's counsel (or a representative) to take notes in order to zealously represent his or her client.

The Court also observes that defendant has not established that allowing the notetaker to record the questions constitutes a copyright violation by the doctor—there are no affidavits from the entity whose copyright might be violated submitted in this record. Defendant and the doctor simply theorize that it might violate copyright law.

Moreover, the rule suggested by CLDN is unworkable. CLDN agrees to permit plaintiff to take notes during the IME about everything except the questions. How could such a rule be enforced? Because notes taken by the plaintiff at an IME are not discoverable (*Markel*, 171 AD3d at 29), a defendant (or the doctor) would not be able to review plaintiff's notes during or after the IME. Even if it does violate copyright rules, any dispute about the contents of these

notes would require the Court to perform an *in camera* review to ensure compliance. The Court sees no justification for that type of intervention especially given the frequency with which it would likely arise. Under CLDN's rule, a defendant could conceivably demand that the Court review notes taken after every IME in order to protect the IME doctor from violating the copyright. Again, if the IME doctor is worried about violating a copyright, then he or she should use a different test during adversarial IMEs.

The Court grants CLDN's motion only to the extent that plaintiff must appear for another neuro IME. At that IME, counsel for plaintiff (or a representative) may take any notes he or she wishes to take.

Accordingly, it is hereby

ORDERED that the motion by CLDN NY LLC is granted only to the extent that plaintiff must appear for a further neuropsychological IME on or before November 26, 2019 and any notes may be taken at this IME; and it is further

ORDERED that the cross-motion by plaintiff is denied.

Next Conference: December 17, 2019 at 2:15 p.m.

10.7.19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: