

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

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JOCELYN NOEL,

Plaintiff,

-against-

MIRIAN JIMENEZ, THE CITY OF NEW YORK and NYC  
POLICE DEPARTMENT,

Defendant.

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**AFFIRMATION IN  
OPPOSITION**

Index No.:158582/12

*Return date: 3/3/17*

**ANDREA M. ARRIGO**, an attorney duly admitted to practice law in the State of New

York, hereby affirms and states the following under the penalty of perjury:

1. I am associated with **WILLIAM SCHWITZER & ASSOCIATES, P.C.**, the attorneys for the plaintiff, **JOCELYN NOEL**, and as such I am fully familiar with the facts and circumstances herein.

2. I make this affirmation in opposition to the motion of the defendants, which seeks an order (a) vacating the Plaintiff's Note of issue and Certificate of Readiness for Trial ("NOI"); (b) compelling plaintiff to appear for an independent medical examination; and (c) for other relief as this Court deems just and proper. As will be demonstrated herein the motion should be denied in its entirety.

3. This is a negligence action to recover damages for serious injuries sustained by plaintiff as a result of an accident which occurred on September 8, 2011.

4. In the first instance it should be noted that plaintiff did not erroneously represent that discovery was completed or waived in the NOI. In fact, it should be noted **plaintiff specifically noted that said physicals were "waived" by the defendants**. (See plaintiff's NOI annexed to the moving papers as *Exhibit "F"*). In this regard, the defendants have **never**

designated a doctor to examine the plaintiff. While it is true that our office mistakenly thought the physical was held and advised the defendant of same during the June 22, 2016 court appearance, the defendant still had the opportunity to review their file and contact the plaintiff should they require a physical examination within 20 days of said date. Defendant never designated a doctor after said Court date. (A copy of the June 22, 2016 Order is annexed to the moving papers as *Exhibit "G"*).

5. Thereafter, the parties appeared before the Court again on October 5, 2016 and the City was "to designate IME within 30 days from today to extend not already done" (See October 5, 2016 Order annexed to moving papers as *Exhibit "I"*). Following said Order, the defendants never designated a doctor(s) to examine the plaintiff. Based on said fact, your affirmant filed the NOI and indicated "waived" in the section of the NOI regarding physical examinations. As the defendants never designated a doctor pursuant to the October 5, 2016 Order, it is your affirmant's good faith belief that same was, in fact waived. New York courts have consistently held that the defendants' failure to arrange for physical examinations of the injured plaintiff within a set time period decided by order is deemed waiver (see James v. NYCTA, 742 N.Y.S.2d 855, 855 (2d Dept. 2002) 294 A.D.2d 471; Schenk v. Maloney, 266 A.D.2d, 199, 200, 697 N.Y.S.2d 332 (2d Dept. 1999); Gill v. United Parcel Serv., 249 A.D.2d 265, 266, 670 N.Y.S.2d 890 (2d Dept. 1998); Mayo v. Lincoln Triangle Assocs., 248 A.D.2d 362, 363, 669 N.Y.S.2d 635 (2d Dept. 1998)). Certainly plaintiff's filing of the NOI in this regard was not in error and plaintiff should not be prejudiced by the defendants' failures to adhere to prior court orders and designate a doctor to examine the plaintiff. Additionally, permission to conduct additional discovery after the filing of a note of issue and certificate of readiness may be granted only where the defendant demonstrates that "unusual or unanticipated

circumstances” developed subsequent to the filing. 22 NYSCR 202.21[d]; see Schenk v. Maloney, supra at 200; Audiovox Corp. v. Benyamini, 265 A.D.2d 135, 140 707 N.Y.S.2d 137 (2d Dept. 2000); Mayo v. Lincoln Triangle Assocs., supra at 363, 669 N.Y.S.2d 635. In the case at bar, the defendants cannot offer any justification for their failure to conduct timely physical examinations. As such, plaintiff’s filing of the NOI with the indication that the physicals were “waived” is proper.

6. Notwithstanding same, it should be noted that following the filing of the NOI, I spoke with Christina Knorr, attorney on behalf the defendants, on November 22, 2016, and advised that I filed the NOI because they never designated a doctor in accordance with the prior orders. She indicated that she would be forced to make a motion for same and I advised that I would agree to produce the plaintiff for a physical once she actually designated a doctor so long as the case could remain on the trial calendar. Thereafter, defendants made the within motion. On December 14, 2016, I again spoke with Ms. Knorr who agreed to adjourn the within motion while she designated a doctor to examine the plaintiff, in hopes that said physical would be scheduled and held prior to the return date of the motion so that the motion could just be withdrawn. A copy of said stipulation is annexed hereto as Exhibit “A”. As such, the motion was adjourned until February 3, 2017.

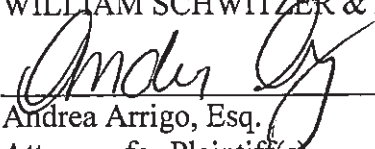
7. As of January 5, 2017, our office still had not received a designation from the defendants and as such I emailed Ms. Knorr regarding same. I received an auto-response indicating she was no longer employed by defense counsel. As such, on January 12, 2017, I called Alana Sisnett, attorney for the defendants who is now handling the case and discussed the within matter. I advised her that we still had not received any designation from the defendants. In light of the fact that the defendants had still not designated, we agreed to adjourn the within

motion again until March 3, 2017, so that the defendants could designate a doctor to examine the plaintiff. A copy of said stipulation is annexed hereto as Exhibit "B". On February 1, 2017, I contacted Ms. Sisnett again indicating that we still had not received a designation. She indicated that her records demonstrated that the physical had been scheduled for January 26, 2017. I advised her that our office never received any documentation regarding any such date and as such we were unaware of same. I confirmed with counsel that she had our proper address and she indicated that she did and that she would re-designate a doctor. To date, I still have yet to receive a designation letter from the defendants.

8. In light of the fact that the physical examinations of the plaintiff were waived and plaintiff was filing the Court's directives in filing the NOI, the defendant's motion should be denied in its entirety. However, it should be noted that our office has indicated that the plaintiff will appear for a physical examination so long as the defendants actually designate a doctor by a date certain and that this matter remain on the calendar while said physical takes place. Certainly the plaintiff should not be prejudiced by the defendants' failure to designate a doctor and as such it is respectfully requested that this Court permit plaintiff's case to remain on the trial calendar and direct that the defendant designate a doctor by a date certain or deem same waived.

WHEREFORE, it is respectfully requested that this Court issue an Order denying defendant's motion in its entirety, and for such other and further relief as this Court deems just and proper.

Dated: New York, New York  
February 9, 2017

Yours, etc.,  
WILLIAM SCHWITZER & ASSOCIATES, P.C.  
By:   
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