

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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AD3d

Submitted - May 19, 2020

RUTH C. BALKIN, J.P.
SYLVIA O. HINDS-RADIX
COLLEEN D. DUFFY
VALERIE BRATHWAITE NELSON, JJ.

2018-11769

DECISION & ORDER

Leonardo Gonzalez, respondent, v Red Hook
Container Terminal, LLC, appellant.

(Index No. 512988/16)

Betancourt, Van Hemmen, Greco & Kenyon LLC, New York, NY (Kristin K. Robbins and Jeanne-Marie D. Van Hemmen of counsel), for appellant.

Morgan Levine Dolan, P.C., New York, NY (Duane R. Morgan of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated August 16, 2018. The order, insofar as appealed from, in effect, denied that branch of the defendant's motion which was to exclude any third parties from observing the plaintiff's medical examination by the defendant's expert.

ORDERED that the order is affirmed insofar as appealed from, with costs.

In July 2016, the plaintiff commenced this action against the defendant, Red Hook Container Terminal, LLC, seeking to recover damages for injuries he alleges he sustained in July 2015 when he fell approximately 10 to 15 feet from machinery at the Red Hook Terminal, which is owned and operated by the defendant. The plaintiff alleges, inter alia, that he sustained permanent brain injuries from the accident. The defendant sought a neuropsychological medical examination of the plaintiff to assess the plaintiff's mental status and to evaluate the existence of any cognitive impairments. When the plaintiff appeared for the examination, he requested that an individual from IME Watchdog, Inc. (hereinafter the third-party observer), be permitted to observe the examination. The defendant's doctor did not allow the third-party observer to be present and thus the plaintiff refused to proceed with the examination. The defendant then moved, inter alia, for an order

compelling the plaintiff to undergo an examination without a third-party observer. In an order dated August 16, 2018, the Supreme Court, in effect, denied that branch of the defendant’s motion which was to exclude the presence of any third parties from observing the examination. In October 2018, the plaintiff underwent the examination and the third-party observer was present. The defendant now appeals the denial of that branch of its motion and seeks to conduct a second examination without the presence of the third-party observer.

A plaintiff is entitled to have his or her attorney or other legal representative present during an examination as long as that individual does not interfere with the conduct of the examination (see *Matter of Alexander L.*, 60 NY2d 329, 337; *Ponce v Health Ins. Plan of Greater N.Y.*, 100 AD2d 963, 964). In 2017, in *Henderson v Ross* (147 AD3d 915, 916), this Court determined that a plaintiff’s nonlegal representative may also be present during the examination, as long as that representative does not interfere with the conduct of the examination. The First and Fourth Departments also have permitted a plaintiff to have a third-party observer or watchdog, as well as other nonlegal representatives, be present during that plaintiff’s examination unless a defendant establishes a justification for excluding that third-party observer or nonlegal representative (see *Markel v Pure Power Boot Camp, Inc.*, 171 AD3d 28, 30; *Martinez v Pinard*, 160 AD3d 440, 440; *Santana v Johnson*, 154 AD3d 452, 452; *Marriott v Cappello*, 151 AD3d 1580, 1583).

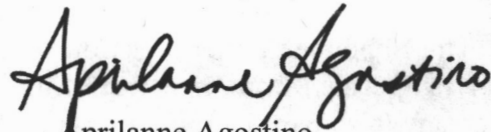
Here, we agree with the Supreme Court’s determination, in effect, denying that branch of the defendant’s motion which was to preclude the third-party observer from attending the plaintiff’s examination since the defendant failed to meet its burden of establishing that the third-party observer would interfere with the conduct of the plaintiff’s examination (see *Henderson v Ross*, 147 AD3d at 916; *Guerra v McBean*, 127 AD3d 462, 462).

The parties’ remaining contentions are without merit.

BALKIN, J.P., HINDS-RADIX, DUFFY and BRATHWAITE NELSON, JJ., concur.

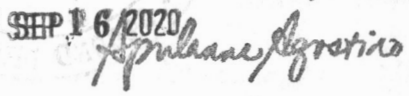
SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPT.

ENTER:



Aprilanne Agostino
Clerk of the Court

I, APRILANNE AGOSTINO, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on _____ and that this copy is a correct transcription of said original. **SEP 16 2020**
IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on **SEP 16 2020**



KINGS COUNTY CLERK
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