

SEBASTIAO ROCCHA DO NASCIMENTO,
 Plaintiffs,
 v.
 K JOHNSON ENTERPRISES, LLC K JOHNSON INDUSTRIES LIMITED LIABILITY COMPANY; TEAM CAMPUS PHAS II LLC; IMC CONSTRUCTION CONTRACTORS LLC; BEN-MAR CONSTRUCTION CO., INC.; NEWVIEW MMXIX LLC; NEW VIEW GENERAL CONTRCTING LLC; NEWVIEW CONSTRUCTION LLC; NEWVIEW CONSSTRUCTION MASONRY; RISK CONTROL ASSOCIATES LLC; EZ DISTRIBUTING INSTALLATION, LLC; EZ DISTRIBUTING, INC.; EZ SCAFFOLD CORP.; EZ SCAFFOLD DISTRIBUTION, INC.; JOHN DOES 1-10; and ABC CORP. 1-10,
 Defendants.

SUPERIOR COURT OF NEW JERSEY
 LAW DIVISION
 ESSEX COUNTY
 DOCKET NO. ESX-L-8976-20

~~PROPOSED~~ ORDER

ORDER

This matter having been opened to the Court on the application of Post and Schell, P.C., attorneys for Defendants, International Management Corporation d/b/a IMC Construction (improperly named as “IMC Construction LLC” and “IMC Construction Contractors LLC”); K Johnson Enterprises LLC; K Johnson Industries Limited Liability Company; and, Team Campus Phase II, LLC (hereinafter “Moving Defendants”), upon a Notice of Motion returnable on May 24, 2024, and this matter having been submitted to the Court for ruling on the papers, pursuant to Rule 1:6-2; and good cause having been shown:

It is on this 7th day of June 2024, ORDERED that Moving Defendants’ motion to compel is ~~GRANTED~~, and: **DENIED** *

*See attached Statement of Reasons.

1) ~~Plaintiff, Sebastiao Rocha Do Nascimento shall appear for neuropsychological testing with Defense expert, Dr. Kenneth Kutner, on a mutually agreeable date and time, and submit to such testing outside the presence of a third party;~~

2) ~~The presence of an interpreter during such testing is permitted; and,~~

2) ~~The neuropsychological testing shall be conducted outside the presence of audio and/or video recording.~~

This Order shall be served in accordance with Rule 1:5-2
Cynthia D. Santomauro

Cynthia D. Santomauro, J.S.C.

 X Opposed

 Unopposed

The movant has shown no compelling reason to prevent a third party from attending the defense exam.

STATEMENT OF REASONS

Defendant IMC Construction (“defendant”) has filed this Motion to Compel plaintiff, Sebastiao Rocha Do Nascimento (“plaintiff”) to submit to neuropsychological testing without the presence of a third party, which plaintiff opposes.

On March 19, 2024, defendant noticed a defense medical examination with a neuropsychologist, Dr. Kenneth Kutner for April 17, 2024. On April 2, 2024, plaintiff’s counsel sent correspondence via electronic mail to defendant’s counsel advising:

Please be advised, that Plaintiff reserves the right to audio tape and/or video tape the complete examination including questioning by the doctor and/or his staff. Plaintiff further reserves the right to have a third person accompany [him] to the examination. This person may also record the exam by audio and/or note taking, however the person will in no way obstruct, interfere, or participate in the examination.

Defendants did not object to the terms of this letter and on April 17, 2024, plaintiff and a third-party observer appeared for the examination ready to proceed. Dr. Kutner conducted an interview with plaintiff with a third-party nurse, a second doctor from Dr. Kutner’s office, and an interpreter present. When it came to the neuropsychological testing portion of the examination, Dr. Kutner advised plaintiff’s third-party observer that they were not allowed to be present and/or make an audio-visual recording of the examination. Therefore, the exam was terminated.

Plaintiff, a non-English speaking laborer with an alleged brain injury and cognitive limitations, claims he should not be compelled to attend a neuropsychological examination with a doctor hired and paid for by the defense without a third-party observer present. The New Jersey Supreme Court, in DiFiore v. Pezic, 254 N.J. 212 (2023), overturned key points of the Appellate Division decision and allowed the plaintiff therein to have a third-party present to observe and/or make an audiovisual recording. The Court expressly “decline[d] to place the burden on the plaintiff to show special reasons why third-party observation or recording should be permitted in each case.” Id. at 220. Rather, the Court stated defendant should “move for a protective order under R. 4:10-3 seeking to prevent the exam from being recorded, or to prevent a neutral third-party observer from attending.” Ibid. “Factors including a plaintiff’s cognitive limitations, psychological impairments, language barriers, age, and inexperience with the legal system may weigh in favor of allowing unobtrusive recording and the presence of a neutral third-party observer. Ibid.”

Furthermore, the Supreme Court agreed that “video or audio recording, or a third-party observer...may in some circumstances be vital to preserving evidence of a DME.” Id. at 232. The Court found “a defense expert’s written report is the only evidence of the exam. And the report may, of course, include observations and findings...that are inaccurate.” Id.

The Supreme Court held fairness of the civil justice system should place the burden on defendants to show why a third-party should not be present as well given the dangers of a DME:

We conclude that placing the burden on defendants to show why a neutral third-party observer or an unobtrusive recording should not be permitted in a particular case best comports with the realities of DMEs and the text of R. 4:19 and R. 4:10-3. It also ensures fairness in our civil justice system.

Id. at 233-234.

Here, defendant seeks to circumvent DiFiore and do exactly what the Supreme Court says defense experts are not permitted to do: have their doctor dictate the terms of the DME. Under the factors set forth in DiFiore, every factor, with the exception of possibly “age,” weighs in favor of having a third-party present for the examination. Id. at 220.

Dr. Kutner is a board-certified neuropsychologist. The examination Dr. Kutner has been hired by the defense to perform is not for purposes of treatment or care. The examination is an adversarial proceeding and the only check on the validity of the examination is the presence of a third-party observer and or audio/visual recording of the examination.

It is the burden of defendants to show why a neutral third-party observer should not be permitted and preserving of the truth should not occur. Defendant has not met their burden of excluding a third-party observer and audio-visual recording of the examination.

Defendant’s Motion is denied.