

NOT FOR PUBLICATION

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

**STEDROY FRANCIS,
PLAINTIFF,**

v.

**HOVENSA L.L.C.,
DEFENDANT.**

SX-06-CV-372

ACTION FOR DAMAGES

Jury Trial Demanded

MEMORANDUM OPINION

THIS MATTER came before the Court upon Defendant HOVENSA, L.L.C.'S ("HOVENSA") 1) original Emergency Motion and Brief To Extend Time To Name Experts filed that had been filed on November 16, 2011, 2) Renewed Motion To Extend Time to Name Experts and Adjust Scheduling Accordingly, and 3) Emergency Motion For Physical Examination of Plaintiff At Plaintiff's Expense that was contemporaneously filed on January 13, 2012 with its renewed motion to extend time. For the following reasons, the Court will grant Defendant's Renewed Motion to Extend Time to Name Experts and Adjust Scheduling Accordingly. The Court will also grant Defendant's request for physical examination of Plaintiff, but deny Defendant's request that the physical examination be conducted at Plaintiff's expense.

FACTS AND PROCEDURAL HISTORY

In his Complaint filed on May 30, 2006, Plaintiff Stedroy Francis alleges that due to HOVENSA's negligence he was injured on or about January 31, 2006, while he was a business invitee on the HOVENSA premises. In his Deposition of August 24, 2010, Plaintiff explains that he was walking down steps at the HOVENSA refinery carrying two five-gallon water containers, when one side of the steps collapsed and he fell down the rest of the steps, severely injuring himself.¹ Plaintiff argues that "Dr. Gary Jett's diagnosis includes right ankle sprain, and lumbar strain and lumbar disc disease," which are all related to his injury at HOVENSA.² Plaintiff points out that the MRI records were produced to Defendant along with his medical records. On

¹ This is supported in Plaintiff's Opposition To Defendant's Renewed Motion to Extend Time by deposition testimony, which has been adduced as *Plaintiff's Exhibit, Deposition of Stedroy Francis, August 24, 2010*.

² This is supported in Plaintiff's Opposition To Defendant's Renewed Motion To Extend Time by *Plaintiff's Exhibit 2, Report of Dr. Jett, July 21, 2010*.

March 28, 2011, the Court signed the parties' Proposed Scheduling Order setting a deadline of November 30, 2010 for Defendant's expert disclosures.³

I. Defendant's Renewed Motion To Extend Time to Name Experts and Adjust Scheduling Accordingly

HOVENSA first filed its original Emergency Motion and Brief to Extend Time To Name Experts pursuant to Rule 7 of the Superior Court Rules and Rules 6(b), 16(b)(4) and 26(d) of the Federal Rules of Civil Procedure, and Rules 16.1(b) and 37.1 of the Local Rules of the District Court. In support of its motion, Defendant submits that on September 15, 2011, Plaintiff's Counsel requested Defendant's Counsel to agree to extend the deadlines and sent the defense a proposed Stipulation to Extend the Discovery Deadlines, which Defendant has adduced as ("Rohn Proposed Stipulation") *Exhibit B*. Rohn's Proposed Stipulation would have extended all discovery into 2012, including expert discovery. As demonstrated by *Defendant's Exhibit C*, the stipulation initiated by Plaintiff's Counsel was executed by Defense Counsel on September 19, 2011. Defendant points out in its motion, that although Plaintiff timely filed his expert disclosures prior to mediation, it was not until just prior to mediation that was held on November 15, 2011, that Defense Counsel realized in reviewing the file that Plaintiff's Counsel had neither returned the executed copy of the Rohn Proposed Stipulation nor filed it in Court. Defendant further indicates that in an attempt to amicably request Plaintiff's Counsel to agree to a short one month extension of the Defendant's discovery to allow Defense an opportunity to have Plaintiff undergo an independent medical evaluation (IME) and a vocational evaluation, Defense Counsel contacted Plaintiff's Counsel prior to filing the instant motion, but was unable to get the matter resolved.

Although the parties had agreed, at Defendant's expense, for Plaintiff to travel to Florida to submit to an IME on December 6, 2011, Plaintiff refused to submit to that portion of the examination involving the taking of cervical and lumbar spine x-rays. In order to have Plaintiff

³ The March 28, 2011 Stipulated Scheduling Order set the following deadlines:

October 28, 2011	Plaintiff's Expert Deadline
November 30, 2011	Defendant's Expert Deadline
December 30, 2011	Mediation
January 31, 2012	Expert Depositions
February 9, 2012	Dispositive Motions
April 5, 2012	Status Conference

submit to the x-rays by order of this Court, Defendant now seeks a greater extension than originally requested in its prior motion to extend the discovery deadlines. Defendant further requests that all subsequent deadlines be similarly extended.

In support of the extension, Defendant argues that its delay in naming experts is due to expectations that Plaintiff and Plaintiff's Counsel would submit to the IME in good faith. Defendant also emphasizes "Plaintiff's failure and unwillingness to do so have compromised HOVENSA's ability to comply with the existing scheduling order" and "any alleged prejudice to Plaintiff by the extension must be considered in light of this fact." In sum, Defendant points out that Plaintiff's objection to an extension is unfair considering that 1) HOVENSA accommodated Plaintiff's request to mediate the case in November to accommodate Plaintiff's calendar, 2) HOVENSA used its resources toward settlement, rather than discovery that may have not been necessary had the case settled, 3) Plaintiff initiated the offer to extend the deadlines in the first instance, 4) Plaintiff previously identified witnesses out of time and was granted leave to do same because, in part, the Court found no prejudice considering a trial date had not yet been set, and 5) Plaintiff's Counsel's refusal to timely participate in the IME as agreed has triggered the need for this particular extension.

Plaintiff argues that Defendant's extension must be denied because: 1) Defendant has failed to articulate good cause for the requested extension; 2) Plaintiff previously submitted to a physical examination in Florida with HOVENSA's expert and HOVENSA failed to notify Plaintiff that x-rays would be taken as required by Fed. R. Civ. P. 35; 3) Defendant admits it failed to notify Plaintiff that its experts would take x-rays; 4) Plaintiff produced medical records that included an MRI of his lumbar spine, which Defendant could have given to its experts for his report, and can still do so; and 5) Defendant's expert does not state he needs new x-rays, only that he needs the imaging studies, i.e. copy or MRI films already done, which Defendant has access to and can provide to its expert.

ANALYSIS

Standard for Granting "Good Cause" Extension Under Rule 16(b)(4) of the Federal Rules of Civil Procedure

Defendant's request for extension of the deadlines set by the March 28, 2011-Stipulated Scheduling Order in order to have Plaintiff complete x-rays as part of the IME is governed by

Rule 16(b)(4) of the Federal Rules of Civil Procedure.⁴ It requires the moving party to demonstrate "good cause," before a Court may modify a scheduling order. Fed. R. Civ. P. 16(b)(4).

In *Joseph v. Hess Oil Virgin Islands Corp.*, 651 F.3d 348, 351-352 (3d Cir. 2011), wherein the applicable standard for "good cause" in the context of a party seeking more time to file a petition for a writ of certiorari was established, the Third Circuit instructs:

"Good cause" is understood to mean "[a] legally sufficient reason," and it reflects "the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused." *Black's Law Dictionary* 251 (9th ed.2009). Of course, a proffered reason or "cause" that may be legally sufficient in one context may not be so in another. Federal practice is replete with rules that require a moving party to show "good cause," but determining whether the showing made will justify granting the relief sought can be accomplished only by considering the specific nature and purpose of the rule at issue.

In *Darrah v. Virgin Islands ex. Rel. Juan Luis Hosp.*, Slip Op. 2011 WL 618352 at *3 (D.V.I. Dec. 13, 2011), the District Court points out "[t]he rationale for the 'good cause' requirement for modification of a court's scheduling order is that 'scheduling orders are at the heart of case management. If they can be disregarded without a specific showing of good cause, their utility will be severely impaired.'" *Id.* (quoting *Unlimited Holdings, Inc. v. Bertram Yacht, Inc.*, 2008 WL 4642191, at *6 (D.V.I. Oct. 15, 2008) (quoting *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir.1986))). The "good cause" inquiry "focuses on the moving party's burden to show due diligence." *Id.* (citing *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 84 (3d Cir.2010)). "To establish good cause under Rule 16, the party seeking the extension must show that the deadlines set forth in the scheduling order cannot reasonably be met despite the diligence of the party seeking the extension." *Id.* (citing *Bell v. Lockheed Martin Corp.*, 2011 WL 1467365, at *4 (D.N.J. Apr. 18, 2011)).

Applying the applicable good cause standard under Rule 16(b)(4) to the facts at hand, the Court finds—in the exercise of its discretion—that Defendant has met its burden to show that it cannot reasonably meet the deadlines set forth in the March 28, 2011-Stipulated Scheduling Order despite its due diligence. In so ruling, the Court takes consideration of the fact that Defendant initially sought this Court's permission to briefly extend the Defendant's Expert

⁴ Rule 7 of the Superior Court Rules makes the Federal Rules of Civil Procedure applicable to the practice and procedures of the Superior Court to the extent not inconsistent therewith.

Disclosures without disrupting the other set deadlines. Critically, the Court finds that the record sufficiently supports that but for 1) Defendant's reasonable reliance on Plaintiff's written request for discovery extensions and Proposed Stipulated Scheduling Order in September 15, 2011 that would have extended Defendant's Expert Disclosures to June 29, 2012 and 2) Plaintiff's subsequent refusal to undergo the x-rays in Florida on December 6, 2011 during the previously agreed upon IME—even though Plaintiff's allegations of injury in his Complaint and Deposition reasonably suggest the relevance of an IME, including x-rays for the Defense—Defendant would have most likely been able to meet the deadlines set forth in the March 28, 2011-Stipulated Scheduling Order or at the very least only required a brief extension of the Defendant's Expert Disclosures. This being the case, the Court finds that under the circumstances Plaintiff's objection and claim of prejudice do not appear to be submitted in good faith. Finally, the Court finds that in light of the fact that the matter will not be set for trial until the earliest in November 2012, that a brief extension of the deadlines to allow the Defendant an opportunity to have Plaintiff complete the x-rays will not unduly prejudice Plaintiff or the Court's management of the docket.

II. Defendant's Motion for Physical Examination of Plaintiff At Plaintiff's Expense

Defendant also moved this Court for an order compelling Plaintiff to submit to a physical examination, including the taking of x-rays, pursuant to Rule 35(a)(1)-(2) of the Rules of Civil Procedure and to bear the costs associated therewith. As grounds, Defendant essentially propounds that Plaintiff has filed this action for damages claiming that he suffered physical injuries as a result of a fall at HOVENSA's refinery and that in support of his claim produced reports from Dr. Gary Jett, in which the Plaintiff's physical condition is linked to his fall at the refinery. Defendant further proposes that he engaged the services of Dr. Richard Strain to review Plaintiff's expert reports and that Plaintiff had agreed to travel, at Defendant's expense, to Florida to submit to physical examination with Dr. Strain on December 6, 2011. Defendant states further that on that date, Plaintiff was requested by Dr. Strain to submit to cervical and lumbar spine x-ray and at the express direction of Plaintiff's Counsel, Plaintiff refused to submit to the x-ray. Defendant points out that Dr. Strain has prepared a draft report but concluded that without a cervical spine x-ray showing flexion and extension views along with obliques, as well as a lumbar spine x-ray which includes AP lateral, obliques and a coned-down L5-S1 view, all of

which are less than six months old, he was unable to render a definitive conclusion as to Francis' alleged injuries, evidenced by *Exhibit E and F*, Dr. Strain's reports dated December 6, 2011 and January 6, 2012 respectively.

In opposition, Plaintiff argues that Defendant's motion seeking a second physical examination and x-rays at Plaintiff's cost must be denied because: 1) Plaintiff previously submitted to a physical examination in Florida with HOVENSA's expert and HOVENSA failed to notify Plaintiff that its expert would take x-rays, 2) Defendant admits it failed to notify Plaintiff that its expert would take x-rays, 3) Plaintiff produced medical records that included an MRI of his lumbar spine, which Defendant could have given to its expert for his report, 4) Defendant has failed to offer a valid reason why Plaintiff should pay for x-rays and 5) Defendant's expert does not state he needs new x-rays, only that he needs the imaging studies, i.e., copy of x-rays or MRI films already done, which Defendant has access to and can provide to its expert. In addition, Plaintiff points out that the case law cited by Defendant is not supportive of HOVENSA's position. In the alternative, Plaintiff urges this Court to deny HOVENSA's request for Plaintiff to pay the cost of the x-rays.

ANALYSIS

Standard for Rule 35 of the Rules of Civil Procedure

Rule 35(a) of the Federal Rules of Civil Procedure provides that in action that is pending, the court may order a party whose mental or physical condition including blood group is in controversy. Fed. R. Civ. P. 35(a)(1). It further instructs that the order may be made only on motion for good cause and on notice to all parties and the person to be examined; and must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. Fed. R. Civ. P. 35(a)(2). Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause,' which requirements, as the Court of Appeals in this case itself recognized, are necessarily related. *Schlagenhauf v. Holder*, 379 U.S. 104, 119, 85 S.Ct. 234 (1964). (internal citation omitted). There are situations, however, where the pleadings alone may be sufficient to meet these requirements. *Id.* This is the case in a negligence action where a plaintiff who asserts mental or physical injury, places that mental or physical injury clearly in controversy and

provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. *Id.* (internal citations omitted).

In the instant case, the Court finds that Plaintiff has in his Complaint and by the discovery he has propounded thus far, clearly placed his physical injury in controversy and provides HOVENSA with good cause for an examination—including x-rays—to determine the existence and extent of the injuries alleged by Plaintiff with the aid of Plaintiff's expert, Dr. Jett. The Court finds, additionally, that the Plaintiff's suggestion that the cervical and lumbar spine x-rays requested by Defendant are not shown to be necessary is not supported by the record. Defendant has adduced Defendant's *Exhibits E and F*, Dr. Strain's reports, which plainly indicate that the x-rays are necessary because Dr. Strain explained that he did not have any of the imaging studies to review and there are no x-rays less than six months old. Plaintiff has not produced any convincing evidence to refute Dr. Strain's reports. Plaintiff instead appears to argue that Defendant's failure to notify Plaintiff when it scheduled the December 6, 2011 physical examination with Dr. Strain in Florida that the examination included x-rays, now should preclude Defendant from obtaining a court order under Rule 35(a) at this juncture. The Court does not agree.

The Court finds, however, that Defendant's request that the examination, including x-rays, should be ordered at Plaintiff's expense as a sanction for his refusal to undergo the x-rays on December 6, 2011 is not sufficiently supported by the record. In support of the proposed sanction, Defendant cites to *Washington v. Hovensa, L.L.C.*, 2009 U.S. Dist. LEXIS 72096, *3-4 (D.V.I.). However, the Court finds the facts in this case to be sufficiently distinguishable from those in *Washington* before the district court. Plaintiff, herein, travelled to Florida and was examined by Dr. Strain, but refused to submit to the x-ray examinations, on the basis that he was not notified that the x-rays would be part of the physical examination with Dr. Strain prior to his arrival in Florida. In *Washington*, the plaintiff not only *cancelled* the *entire* physical examination only a few hours before the appointment with the first doctor subjecting the defendant to a cancellation fee, but *additionally* refused to submit to x-rays with a *second* doctor that had been *explicitly* ordered under Rule 35(a) by the district court.

It is also important to emphasize that if Plaintiff in this case had submitted to the x-rays in Florida, Defendant would have paid for the expense of the x-rays. Therefore, the Court finds

MEMORANDUM OPINION Defendant's Emergency Motion and Brief to Extend Time to Name Experts, Renewed Motion To Extend Time to Name Experts and Adjust Schedule to Preclude Testimony From Witnesses and Emergency Motion for Physical Examination of Plaintiff at Plaintiff's Expense

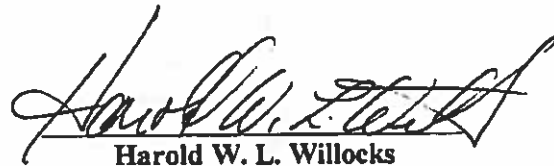
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that where Defendant's notice⁵ of the examinations plainly failed to specify the scope of examination with Dr. Strain—something which Defendant had control over and could have prevented—it would be unjust for this Court to now make Plaintiff responsible for Defendant's Counsel's failure to describe the scope of the examination by Dr. Strain on December 6, 2011 in his notice to Plaintiff prior to the examination. This is further supported by the email communication dated December 6, 2011⁶, wherein Defense Counsel admitted to Plaintiff's Counsel that he himself did not realize that x-rays were going to be requested by the doctor *or he would have brought it up*. In light of these circumstances, the Court will not sanction the Plaintiff.

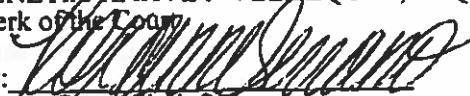
CONCLUSION

For the foregoing reasons, the Court will grant Defendant's Renewed Motion to Extend Time to Name Experts and Adjust Scheduling Accordingly. The Court will also grant Defendant's request for physical examination of Plaintiff, but deny Defendant's request that the physical examination be conducted at Plaintiff's expense. An order consistent with this opinion will follow.

Dated: 5/7/12


Harold W. L. Willocks
Judge of the Superior Court

ATTEST:
VENETIA HARVEY-VELAZQUEZ, ESQ.
Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 5/10/12

⁵ Defense Counsel Letter to Plaintiff's Counsel dated November 30, 2011, adduced as *Plaintiff's Exhibit 3*.

⁶ Email communication dated December 6, 2011 between Plaintiff's Counsel and Defense Counsel as *Plaintiff's Exhibit 4*.