

## Edwina Rance & Westchester Residential Opportunities v. Jefferson Vill. Condo. No. 5

United States District Court for the Southern District of New York

September 23, 2019, Decided; September 23, 2019, Filed

18 Civ. 6923 (JCM)

### Reporter

2019 U.S. Dist. LEXIS 238432 \*; 2019 WL 12373336

EDWINA RANCE and WESTCHESTER RESIDENTIAL OPPORTUNITIES, INC., Plaintiffs, -against- JEFFERSON VILLAGE CONDOMINIUM NO. 5, and McGRATH MANAGEMENT SERVICES INC., Defendants.

North Bellmore, NY.

**Judges:** JUDITH C. McCARTHY, United States Magistrate Judge.

**Opinion by:** JUDITH C. McCARTHY [\*2]

### Core Terms

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anxiety disorder, good cause, emotional distress, mental condition, disability, garden variety, conditions, emotional, attend, discrimination claim, court reporter, deposition, impairment, questioned

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For Edwina Rance, Counter Defendant: James E. Bahamonde, Law Offices of James E. Bahamonde PC,

### Opinion

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#### ORDER

#### I. BACKGROUND

Plaintiffs Edwina Rance and Westchester Residential Opportunities, Inc. (hereinafter "Plaintiffs") allege that Jefferson Village Condominium No. 5 and McGrath Management Services (hereinafter "Defendants") discriminated against her on the basis of her disability in violation of the Fair Housing Act ("FHA"), *inter alia*, by failing to provide her with a reasonable housing accommodation. (Docket No. 1, ¶ 28). Specifically, Plaintiffs assert that Ms. Rance was entitled to have her son, a person under the age of fifty-five years old, live in her condominium unit, despite the condominium rule disallowing persons under age fifty-five to live in the residences. (Docket No. 1, ¶ 40). Plaintiffs requested this accommodation because of Ms. Rance's alleged anxiety disorder, which she states impairs her cognition, ability to make rational decisions, sleep, care for herself, and interact with others. (Docket No. 1, ¶ 38). Plaintiffs further maintain that Ms. Rance "suffered and continues to suffer mental anguish and severe emotional distress, including . . . panic attacks, depression, humiliation, stomach ache[s], digestive disorder, embarrassment, loss of self-esteem and self-confidence, and emotional [\*3] pain and suffering" as a result of the Defendants' alleged discrimination. (Docket No. 1, ¶ 38).

Presently before the **Court** is Defendants' motion to compel an independent **medical examination** ("IME") of Ms. Rance pursuant to [Federal Rule of Civil Procedure 35](#) (hereinafter "[Rule 35](#)"), relating to her alleged anxiety disorder and emotional injuries. (Docket No. 50). Plaintiffs opposed the motion, (Docket No. 52), and Defendants replied, (Docket No. 53).<sup>1</sup> However, should the **Court** grant the IME, Plaintiffs propose several limitations and modifications to Defendants' request relating to the site of the **examination**, precluding attorneys, allowing a **court** reporter, identifying anyone assisting the expert prior to the **examination**, and limiting the time and scope of the **examination**. *Id.* Finally, Plaintiffs assert that the Defendants must revise and resubmit their motion to specify the "manner and conditions" of the IME. *Id.*<sup>2</sup>

## II. DISCUSSION

### A. Legal Standard

[Rule 35](#) provides in pertinent part that a **court** "may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental **examination** by a suitably licensed or certified examiner." [FED.R.CIV. P. 35\(a\)](#). It further requires that "[t]he order may be made only on [\*4] motion for good cause shown and . . . shall specify the time, place, manner, conditions, and scope of the **examination** and the person or persons by whom it is to be made." *Id.* Thus, the moving party must show that the subject matter of the proposed **examination** is "in controversy" and that "good cause" exists. [Schlagenhauf v. Holder](#), 379 U.S. 104, 118, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964). Further, the "in controversy" and "good cause" requirements "are necessarily related." *Id.* at 118-19; see also [Large v. Our Lady of Mercy Med. Ctr.](#), 1998 U.S. Dist. LEXIS 1702, 1998 WL 65995, \*6 (S.D.N.Y.

<sup>1</sup> In addition, Plaintiffs seek leave to file a *sur* reply, (Docket No. 54), which the Defendants oppose, (Docket No. 55). The application itself is 29 pages long, including exhibits. (Docket No. 54). The **Court** will consider Plaintiffs' substantive arguments within their application to file a *sur* reply, as well as Defendants' response. However, the **Court** denies Plaintiffs' request to file a formal *sur* reply.

<sup>2</sup> Plaintiff also requests that Defendants provide her a copy of Dr. Siegert's report. (Docket No. 52, at 7). Plaintiff's request is required by [Federal Rule of Civil Procedure 35\(b\)\(1\)](#) and is accordingly granted. See [FED.R.CIV. P. 35\(b\)](#).

[Feb. 17, 1998](#)) (holding that good cause usually exists where a party has placed a mental condition in controversy); [Duncan v. Upjohn Co.](#), 155 F.R.D. 23, 25 (D.Conn. 1994) ("By claiming ongoing psychiatric harm cause[d] by . . . defendant, [] the plaintiff has placed his mental state in controversy, which in turn constitutes good cause for ordering a psychiatric **examination**. . .").

A condition is "clearly in controversy" and good cause exists to determine the existence and extent of the alleged condition if establishing the presence or absence of a mental condition is necessary to the underlying case. See [Schlagenhauf](#), 379 U.S. at 119. Furthermore, **courts** "adjudicating [Rule 35](#) motions have often turned to the persuasive analysis set forth in [Turner v. Imperial Stores](#)" to determine whether the party has placed his mental state at issue. [Jarrar v. Harris](#), 2008 U.S. Dist. LEXIS 57307, 2008 WL 2946000, at \*3 (E.D.N.Y. July 25, 2008) (citing [Turner v. Imperial Stores](#), 161 F.R.D. 89, 95 (S.D. Cal 1995)). Under [Turner](#), a plaintiff has placed [\*5] his mental condition "in controversy" within the meaning of [Rule 35](#) if one or more of the following factors is present:

- (1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff's offer of expert testimony to support a claim of emotional distress; and/or (5) plaintiff's concession that his or her mental condition is 'in controversy' within the meaning of [Rule 35\(a\)](#).

[Turner](#), 161 F.R.D. at 95. The Second Circuit draws a distinction between claims where the plaintiff alleges "garden variety" emotional distress and claims for more severe emotional distress. [Thorsen v. County of Nassau](#), 722 F.Supp. 2d 277, 292 (E.D.N.Y. 2010). In garden variety mental distress claims, the evidence of mental suffering adduced by the plaintiff is generally limited to the testimony of the plaintiff "who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury." [Thorsen](#), 722 F. Supp. 2d at 292. Such claims typically lack extraordinary **circumstances** and are not supported by any **medical** corroboration. *Id.* Therefore, a [Rule 35 examination](#) is not warranted in these types of cases. [O'Quinn v. New York Univ. Med. Ctr.](#), 163 F.R.D. 226, 228 (S.D.N.Y. 1995); 10A FED.PROC. § 26:631 (L. ed. 2017) ("Although [\*6] mental **examinations** may not be appropriate in every case where a defendant alleges the physical or mental condition of a plaintiff is in controversy, there [is]

authority which states or implies that 'garden-variety' physical or mental conditions attendant to the injury and the process of recovery therefrom are insufficient.") In contrast, severe emotional distress claims are based on more substantial harm or more offensive conduct, and are sometimes supported by **medical** testimony and evidence, evidence of treatment by a healthcare professional, and testimony from other corroborating witnesses. [Thorsen, 722 F.Supp. 2d at 292.](#)

## **B. Defendants' Motion to Compel a [Rule 35 Examination](#)**

### **1. Ms. Rance's Anxiety Disorder is in Controversy and Good Cause Exists**

Plaintiffs allege disability discrimination in violation of the FHA. (Docket No. 1, ¶ 28). The FHA makes it illegal to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." [42 U.S.C. § 3604\(f\)\(1\)](#). As a threshold matter, to establish a disability for purposes of the FHA, a claimant must show: (1) a physical or mental impairment which substantially limits one or more major life activities, (2) a record of having such [\*7] an impairment, or (3) that they are regarded as having such an impairment. [42 U.S.C. § 3602\(h\)](#).

Here, a central issue in dispute is whether Ms. Rance has a mental disability substantially limiting one or more major life activities. (Docket No. 1, ¶; Docket No. 50, at 7). Plaintiffs allege that Ms. Rance has an anxiety disorder that substantially limits her ability to sleep, take care of herself, and interact with others. (Docket No. 1, ¶ 38). Further, Plaintiffs allege that beginning in the summer of 2015, Ms. Rance started suffering from severe panic attacks, excessive anxiety, worry, and phobias. (Docket No. 1, ¶ 56). Defendants challenge the authenticity and severity of Ms. Rance's alleged anxiety disorder as part of their defense to Plaintiffs' discrimination claims. (Docket No. 50, at 7). In support of their challenge, Defendants note that during Ms. Rance's deposition, she testified that she acts as a companion to other senior adults, is involved in social organizations, has a boyfriend, rarely uses a sedative to aid her sleep, and performs necessary tasks associated with daily living such as driving, laundering her clothes, dressing and feeding herself, and doing household chores. (*Id.*)

Plaintiffs [\*8] argue that, Richard Falcone, a corporate

witness for Jefferson Village, conceded the existence of Ms. Rance's anxiety disorder, rendering her mental condition not in controversy for purposes of [Rule 35](#). (See Docket No. 54, at 1). During his deposition, Falcone testified that he questioned the authenticity of two letters submitted by Ms. Rance's psychologist, Dr. Thomas Eustace, because they were written on different letterheads and he believed they were signed inconsistently. (Docket No. 54-3, at 91-92). Falcone stated:

The two documents were presented at the same time. [The board] looked at the two. We — what one said and what the other said was irrelevant as far as we were concerned because we didn't believe they were both from the same individual which we questioned through our attorney to her attorney.

(Docket No. 54-3, at 91-92). Plaintiffs argue that this language is proof that Defendants do not dispute Dr. Eustace's opinion that Ms. Rance had an anxiety disorder. (Docket No. 54, at 1).

Plaintiffs' argument is based on a mischaracterization of Falcone's deposition testimony. (See generally Docket No. 52; Docket No. 54-3). Falcone's deposition testimony, when read in its entirety, does [\*9] not concede to the veracity of the information contained in Dr. Eustace's letters. (See Docket No. 54-3). Instead, Falcone stated that he did not believe he was reading authentic letters, and thus did not consider their content in assessing Ms. Rance's request for an accommodation. (Docket No. 54-3, at 76-77). Furthermore, Defendants accurately assert that Plaintiffs placed Ms. Rance's mental condition in controversy by bringing disability discrimination claims which require her to establish a statutory handicap. (Docket No. 50 at 3). In addition, Defendants' motion is buttressed by inconsistencies between allegations in Plaintiffs' Complaint and testimony Ms. Rance gave during her July 17, 2019 deposition. (*Id.* at 4-5).

Moreover, to establish their discrimination claim under FHA, Plaintiffs must prove that Ms. Rance has an anxiety disorder substantially limiting one or more major life activities. See [42 U.S.C. § 3604\(f\)\(1\)](#). Defendants must have the opportunity to inquire into the authenticity and validity of her alleged anxiety disorder to properly defend Plaintiffs' claim. (See Docket No. 50, at 7). Accordingly, Ms. Rance's mental condition is "clearly in controversy" for purposes of [Rule 35](#). See [Schlagenhauf, 379 U.S. at 119](#); [Hodges, 145 F.R.D. at 335](#). Further, [\*10] since Ms. Rance's anxiety disorder "goes to the heart of Plaintiffs' claim," there is good

cause for an IME. [Hodges, 145 F.R.D. at 335.](#)

## 2. Plaintiffs Seek "Garden Variety" Emotional Distress Damages

Although the Complaint claims that Ms. Rance suffered severe, ongoing emotional distress, (Docket No. 1, ¶ 89, 97, 104, 119, and 136), Plaintiffs now seek only garden variety emotional distress damages. (See Docket No. 52 at 4). Moreover, at oral argument on September 12, 2019, Plaintiffs' counsel confirmed that Plaintiffs are only seeking damages for garden variety emotional distress. Additionally, Plaintiffs plan to prove their claim of emotional distress at trial "strictly through [Ms. Rance's] own testimony." (*Id.* at 3). Viewing Plaintiffs' claim of only garden variety emotional distress in light of the guidance in *Turner*, an IME is not necessary to ascertain the extent of her damages. See [Turner, 161 F.R.D. at 95](#); (Docket No. 52, at 4).

Accordingly, the Defendants' motion for a [Rule 35 examination](#) is granted in part and denied in part. The [examination](#) conducted by Dr. Siegert will be limited to ascertaining Ms. Rance's anxiety disorder for purposes of establishing her disability discrimination claims.

### C. Plaintiffs' Requested Limitations to [\*11] the [Rule 35 Examination](#)

Plaintiffs request that the [Court](#) place certain modifications and conditions on her IME.<sup>3</sup> (Docket No. 52, at 7). [Rule 35](#) "permits the [court](#) to include in its order such protective conditions as are deemed appropriate," and is guided by the requirements of [Rule 26\(c\) of the Federal Rule of Civil Procedure](#). [Hirschheimer v. Assoc. Metals & Minerals Corp., 1995 U.S. Dist. LEXIS 18378, 1995 WL 736901, at \\*2 \(S.D.N.Y. Dec. 12, 1995\)](#); [Tirado v. Erosa, 158 F.R.D. 294, 297 \(S.D.N.Y. 1994\)](#). [Rule 26\(c\)](#) allows a [court](#) to issue a protective order to "relieve a party or person from annoyance, embarrassment, oppression, or undue burden or expense." [FED.R.CIV. P. 26\(c\)](#). This provision also "confers broad discretion on the trial [court](#) to decide when a protective order is appropriate and what

degree of protection is required." [Seattle Times Co., v. Rhinehart, 467 U.S. 20, 36, 104 S. Ct. 2199, 81 L. Ed. 2d 17 \(1984\)](#).

Although psychological [examinations](#) are by their nature intrusive and implicate sensitive matters, the party moving for a protective order must prove that good cause exists for the [court](#) to intervene in the administration of the [examination](#). [Hirschheimer, 1995 U.S. Dist. LEXIS 18378, 1995 WL 736901 at \\*3](#). Broad allegations of harm unsubstantiated by specific examples will not suffice to show good cause. *Id.*

### 1. Request to Have the [Examination](#) Transcribed by a [Court Reporter](#)

Plaintiffs request that Ms. Rance's entire IME be transcribed by a [court](#) reporter. (Docket No. 52, at 7). Although some [courts](#) have permitted a third-party to [attend a Rule 35 examination](#), the party seeking the attendance [\*12] bears the burden of showing [special circumstances](#) necessitating such attendance. [Reyes v. City of New York, 2000 U.S. Dist. LEXIS 15078, 2000 WL 1528239, at \\*3 \(S.D.N.Y. Oct. 16, 2000\)](#). Moreover, there is a presumption against the presence of third persons. [Baba-Ali v. City of N.Y., 1995 U.S. Dist. LEXIS 18883, 1995 WL 753904, at \\*2 \(S.D.N.Y. Dec. 19, 1995\)](#). This presumption rests on the [special](#) nature of an IME, "which relies upon unimpeded one-on-one communication between doctor and patient." [Di Bari v. Incaica Cia Armadora, 126 F.R.D. 12, 13 \(E.D.N.Y. 1989\)](#). Further, an observer may cause a distraction during the IME and diminish its accuracy. [Favale v. Roman Catholic Diocese of Bridgeport, 235 F.R.D 553, 557 \(D. Conn. 2016\)](#).

Here, Plaintiffs have not articulated any [circumstances](#) necessitating the presence of a [court](#) reporter at Ms. Rance's [examination](#). (See Docket No. 52, at 7). Thus, they have not established good cause for their request. See [FED.R.CIV. P. 26\(c\)](#). Accordingly, Plaintiffs' request to have the [examination](#) transcribed in its entirety by a [court](#) reporter is denied.

### 2. Request that the [Examination](#) Take Place Outside the Presence of Attorneys

Plaintiffs further request that the IME take place without the presence of any attorney. (Docket No. 52, at 7). Generally, attorneys are not permitted to [attend a Rule 35 examination](#) without a showing of [special](#)

<sup>3</sup> Plaintiff requests that the [examination](#) take place at the Office of Diamond Reporting, located at 50 Main Street, White Plains, NY. (Docket No. 52, at 7). The [Court](#) makes no ruling on this request and advises the parties to meet and confer on a reasonable location to conduct the [examination](#).

**circumstances** requiring their presence. *Tirado*, 158 F.R.D. at 295; *Di Bari*, 126 F.R.D. at 14. The presence of an attorney at the **examination** frustrates its purpose by impairing its effectiveness and rendering it adversarial. *Hirschheimer*, 1995 U.S. Dist. LEXIS 18378, 1995 WL 736901 at \*3. Moreover, an attorney [\*13] who is present at an **examination** becomes a potential witness in the client's trial, raising conflict of interest problems. *Id.* Since neither party is seeking the presence of an attorney at the IME, nor are attorneys generally permitted, Plaintiffs' request is granted and the **Court** directs that no attorneys **attend** the IME.

### 3. Request to Limit the Scope of the IME

Plaintiffs want the **Court** to limit Dr. Siegert's inquiries into Ms. Rance's oral history to the past five years, arguing that Ms. Rance did not begin receiving psychotherapy until 2015.<sup>4</sup> (Docket No. 52, at 7). During **Rule 35 examinations**, a physician must be allowed to ask the examinee questions that are reasonably necessary to form an opinion about the condition at issue. See *Gade v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 193122, 2015 WL 12964613, at \*4 (D. Vt. Jan. 2, 2015). Accordingly, **courts** refrain from limiting the manner in which an **examination** is conducted, or the questions asked absent good cause. *Id.* Furthermore, reviewing an examinee's **medical** history is routine during a **Rule 35 examination** and assists the physician in his or her evaluation. *Id.*

Plaintiffs have not established good cause to limit Dr. Siegert's **examination** to Ms. Rance's oral history for the past five years. See *FED.R.CIV. P. 26(c)*; *Gade*, 2015 U.S. Dist. LEXIS 193122, 2015 WL 12964613 at \*4. Limiting Dr. Siegert's **examination** to the past [\*14] five years would impede his ability to assess Ms. Rance's overall emotional health and the extent that her anxiety disorder interferes with one or more substantial life activities. See *Gade*, 2015 U.S. Dist. LEXIS 193122, 2015 WL 12964613 at \*4. Moreover, Plaintiffs' request essentially asks the **Court** to determine what is necessary for an independent expert to analyze their claims. *Id.* Such a request subverts the truth finding

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<sup>4</sup> Plaintiffs also want the names of all persons assisting Dr. Siegert in his **examination** disclosed before the **exam.** (Docket No 52, at 7). If Dr. Siegert intends to have staff present during Ms. Rance's **examination**, the **Court** directs Defendants to disclose the names of those staff prior to the **examination**.

function inherent in a **Rule 35 examination**. *Id.* Accordingly, Plaintiffs' request to limit the scope of Dr. Siegert's questioning is denied.

### 4. Request to Limit the Total Time of the Examination and Testing

Plaintiffs seek to limit the total time of the **examination** and testing to four hours. (Docket No. 52, at 7). **Courts** generally do not limit the amount of time an **examining** physician will have to conduct the **examination**. *Gade*, 2015 U.S. Dist. LEXIS 193122, 2015 WL 12964613 at \*4. Moreover, Plaintiffs have not proffered any reason to limit the duration of the **examination**. (See Docket No. 52, at 7). In *Gavenda v. Orleans County*, the **court** declined to impose a time parameter on a **Rule 35 examination** where the plaintiff failed to articulate a basis for such a limit. 174 F.R.D. 272, 274 (W.D.N.Y. 1996). Accordingly, Plaintiffs' request to limit the IME and testing to four hours is denied.

### 5. Plaintiffs' Request for Defendants to [\*15] Revise Their Application

Finally, Plaintiffs assert that the "Defendants' application fails to comply with **Rule 35's** requirement to specify the manner and conditions of the **examination**," citing to "**Rule 35(2) (B)**." (Docket No. 52, at 6). Plaintiffs seem to be referring to **Rule 35's** provision concerning the contents of a **court** order compelling a party to submit a person for **examination**. See *FED.R.CIV. P. 35(a)(2)(B)*. **Rule 35(a)(2)(B)** mandates that a **court** order compelling an IME, not a party's motion asking for such relief, "must specify the time, place, manner, conditions, and scope of the **examination** . . ." *Id.* Thus, Plaintiffs' request for the Defendants to "revise their application" is denied. (See Docket No. 52, at 7).

## III. CONCLUSION

For the foregoing reasons, Defendants' motion is granted in part and denied in part. The **examination** conducted by Dr. Siegert will be limited to Ms. Rance's anxiety disorder related to her disability discrimination claims. Plaintiffs' requests to have the **examination** transcribed, limit the oral history provided to Dr. Siegert to the past five years, and limit the time of the **examination** and testing are denied. Plaintiffs' requests to have the Defendants identify all persons assisting Dr. Siegert in the **examination** and [\*16] for the

examination to take place without any attorneys present are granted.

The Clerk is respectfully requested to terminate the pending motions. (Docket Nos. 48, 54).

Dated: September 23, 2019

White Plains, New York

**SO ORDERED:**

/s/ Judith C. McCarthy

JUDITH C. McCARTHY

United States Magistrate Judge

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