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

PRESENT: PART

Index Number : 114187/2004

PALAMAR, NELSON C.

VS

CITY OF NEW YORK

Sequence Number : 004

COMPEL DISCLOSURE

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this ~~motion~~

FILED
JUN 28 2007
COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/20/07

J.S.C.

JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 1]

Supreme Court of the State of New York
County of New York: Part 10

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NCP and FP, and PA and PJA[1], infants,
by their father and natural guardian, NCP,

Plaintiffs,

Decision/Order

-against-

Index# 114187/04

City of New York

Mot. Seq. #004

Defendant.

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City of New York,

Third-Party Plaintiff,

-against-

Index # 590820/05

George Campbell Painting Corporation,

Third-Party Defendant.

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Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Amended Notice of Motion, JOC affirm., KDG affirm., exhibits	1
Notice of Cross-motion, MR affirm., exhibits	2
Notice of Cross-Motion, KM affirm., NP affd., exhibits	3
MR affirm. In Opp to pl's cross-motion, exhibit	4
MR reply affirm., exhibits	5
KDG reply affirm	6

Gische, J.:

[1]The full names of the parties have been omitted to protect the identity and privacy of the two infant plaintiffs. See: Report of the Commission on Public Access to Court Records, February 2004, pp7.
www.nycourts.gov/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, the City of New York, ("NYC") moves to compel plaintiffs to either provide certain requested discovery and/or for Civil Practice Law & Rules ("CPLR") Article 31 sanctions based upon their failure to do so. Third Party Defendant, George Campbell Painting Corporation ("GCP"), cross-moves to have the complaint dismissed for the same reasons advanced by NYC and also based upon plaintiffs' failure to comply with other outstanding discovery requests. Plaintiffs cross-move to compel production of still other discovery and also for a protective order against the production of certain discovery sought by NYC and GCP.

Issues Common to Motion and Cross-Motions

The primary issue underlying the motion and cross-motions is whether defendants are entitled to the prenatal medical records of the plaintiff-mother and copies of her passport and/or travel documents from the period she became pregnant with her first child to the present. These documents are being sought by NYC and GCP in connection with claims of lead based contamination that plaintiffs have interposed on behalf of the plaintiff-children.

Plaintiffs NCP and FP (sometimes "mother") are respectively husband and wife. They are the parents of PA, born on September 7, 2001, and PJA, born on March 4, 2003 (collectively "children"). Insofar as relevant to the motions before the court, plaintiffs allege that while NCP was employed as a construction worker to professionally paint the Williamsburg Bridge in 2003 and 2004 ("Williamsburg Bridge Rehabilitation Project") , he was exposed to lead contamination insinuated itself into his clothing and onto his person.

Plaintiffs claim that NYC failed to provide NCP with proper personal protection equipment and/or showers at the job site. It is further alleged that, as a result, lead contamination was unknowingly transported by NCP and transmitted to his children when he came into regular contact with them, causing them to also suffer lead poisoning. The physical injuries claimed on behalf of the children include: elevated blood lead levels, brain injury, cognitive dysfunction, impaired neuro-behavioral development, decrease in stature and growth, damage to the central nervous system, decreased intellect and intelligence, hyperactivity, inattentiveness, attention deficit disorder secondary to lead paint contamination and confusion. FP is also an individually named plaintiff, but her personal claims are limited to loss of services.

NYC and GCP claim that the requested documentation is material and necessary to the defense of this action so they can prove that the children's claimed physical conditions were caused by something other than indirect exposure to lead paint used on the Williamsburg Bridge Rehabilitation Project. They claim that information about the prenatal blood lead levels of the mother and fetuses may show whether the lead exposure pre-dated the events alleged in the complaint and/or whether the children's medical conditions were caused by something other than high levels of lead in their blood.

NYC relies primarily upon the affidavit of Dr. Rosario R. Trifiletti, an Associate Professor of Neurology and Neuroscience at the University of Medicine and Dentistry in Newark, New Jersey, and official New York City publications regarding identification and medical management of lead poisoning in pregnant women. Dr. Trifiletti opines that:

> "Access to the prenatal care records of the infant plaintiffs' mother is necessary for the defense of this action for

> two main reasons: 1) there are many possible causes of the injuries alleged by the infant plaintiffs, and prenatal records can be crucial in determining whether such injuries could have arisen from lead exposure or not; 2) the prenatal lead levels of the mother and fetus and other prenatal tests may tend to show whether the lead exposure pre-dated the events alleged in the Complaint. Moreover, the mother's travel records are necessary because travel outside the Untied States, particularly to countries with lead controls less stringent in the unites States, is a risk for lead exposure."

Although Dr. Trifiletti does not refer to any scientific studies, NYC has provided the court with its own published information from the Department of Health and Mental Hygiene on guidelines for the prevention, identification and medical management of lead poisoning in pregnant women. The publication, citing to medical journals and studies, including the New England Journal of Medicine, represents that "scientific evidence over the past 40 years indicates that BLLs [Blood Lead Levels] of ≥ 10µg/dL in children are associated with adverse cognitive and behavioral effects." This science is the exact underpinning for plaintiffs' action and it is the also basis for the New York State Laws, passed in 1992, that provide in part for prenatal care providers to assess every pregnant woman for the risk of lead exposure. Public Health Law §§ 1370 et. seq. The Public Health Laws and the NYC published guidelines clearly target care of pregnant women to prevent them from passing lead contaminated blood in *utero* to the fetus.

The court rejects at the outset any argument that it already ordered the production of the mother's prenatal and travel documents. The blunderbuss consent orders made during court conferences did not waive plaintiffs' rights to object to the indicated materials. The court, therefore, considers the merits of the parties' arguments on whether such discovery production is warranted.

Article 31 of the CPLR permits liberal discovery of all matters that are material and necessary to the prosecution or defense of an action. CPLR §3101(a). It includes any facts bearing upon the controversy which will assist in trial preparation by sharpening issues and reducing delay and prolixity. The test is "usefulness and reason." Allen v. Crowell-Collier Publ. Co. 21 NY2d 403 (1968). The determination of what is "material and necessary" rests with the sound discretion of the trial court, which may weigh the need for discovery against any special burden to be borne by the opposing party. Andon v. 302-304 Mott Associates, 94 NY2d 740 (2000).

The court rules out any argument that physician-patient privilege, asserted by the plaintiff-mother, is a basis for denying discovery of the prenatal records. Where a child's medical condition is at issue, the courts have held that a mother's medical records pertaining to the period when the infant was *in utero* are discoverable on the ground that there can be no severance of the infant's prenatal history from the mother's medical history for that period of time. In re New York County DES litigation, 168 AD2d 44 (1st dept. 1991). This distinguishes prenatal records from all of the mother's other medical records, which are not generally discoverable in any action brought on behalf of the child.

Thus, the remaining issues for the court to consider in connection with the production of the mother's prenatal records are whether and to what extent the information sought may be relevant to the issues raised in the case and any special burden that will be borne by the parties who are opposed to production.

The seminal case of Andon v. 302-304 Mott Street Associates, *supra,* is the only Court of Appeals decision addressing discovery issues in lead poisoning cases brought on

behalf of infant children. The defendant therein sought to have the children's mother (who was also a plaintiff) submit to an intelligence quotient ("IQ") test. In support, defendants provided a doctor's affidavit opining that there is a causal connection between a parent's IQ and the cognitive function of his or her children. Although the trial court ordered the mother to take the IQ test, the Appellate Division reversed. The Court of Appeals affirmed, upholding the Appellate Division's exercise of discretion, based on the bare boned doctor's affidavit, the burden of IQ testing, the fact that the mother's mental condition was not an issue in the case and a conclusion that IQ testing results would raise too many collateral issues.

In upholding the Appellate Division decision as a matter of discretion, the Court of Appeals cited Anderson v. Seigel, (255 AD2d 409 [2nd dept. 1998]), a Second Department case that seemingly reached a contrary result. The Court of Appeals indicated that neither its decision nor that of the Appellate Division established a blanket rule prohibiting such discovery and that each lead poisoning case must be decided on a "case by case basis with due regard for the strong public policy supporting open disclosure." Thus, Andon, left open the possibility that discovery in a lead poisoning case could include production of information on possible alternative causes for the elevated blood lead levels in infants and/or other causes for the cognitive and developmental injuries claimed. See: Liberal Discovery of Non-Party Records: In Defense of the Defense, 7 Cardoza Women's L.J. 59 (Rosenthal, Melissa 2000); Scope of Disclosure After Andon, NY CLS CPLR §3101 (Horowitz, Paul).

In the aftermath of Andon the First Department decided Mendez v. Equities by

Marcy, (24 AD3d 138 [1st dept. 2005]) and the Second Department decided Lamy v. Pierre, (31 AD3d 613 [2nd dept. 2006]). In Mendez the First Department upheld the decision of the trial court which refused to compel the mother to answer questions at her deposition concerning her personal medical history and that of other family members. In so holding, the Appellate Division emphasized that the defendants had failed to offer any "expert evidence establishing a particularized need for inquiry into such matters not placed at issue by the complaint." In Lamy v. Pierre the Second Department reversed a lower court order of protection in an infant lead poisoning case and compelled the production of medical records relating to the infant plaintiff's period of gestation and birth.

Plaintiffs rely on Mendez, *supra*, to support their position that defendants have not shown that the prenatal documents are relevant; whereas NYC and GCP rely on Lamy, *supra*, to support the position that they documents they seek are material and necessary to the defense of this action. This court finds that defendants have established that the requested documents are material and necessary to their defense of this action. Lamy, *supra* is directly on point while Mendez, *supra*, is both legally and factually distinguishable.

In Mendez the defendants sought information about the mother and other family's member's medical histories. At bar, the only medical history sought is the mother's prenatal history while she was pregnant with each of the plaintiff children. NYC and GCP's request is limited in scope and consistent with prior case law recognizing that the mother's medical health care is indistinguishable from that of the children while they are in *utero*. [2]

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[2]This is also a basis for distinguishing the instant case from Ward v. City of Oneida ,19 AD3d 1108 (4th dept 2005), another recent case plaintiffs rely upon.

Moreover, in Mendez there was no expert affidavit, but here the motion is supported by the affidavit of Dr. Trifiletti. While plaintiffs attack the expert affidavit as being bare boned, defendants have also provided literature that references the science to support the doctor's opinions. NYC has provided the court with health related publications that clearly rely upon and cite to science that establishes a causal relationship between elevated levels of lead in the blood of infants with the mother's elevated blood lead levels during pregnancy.

Plaintiffs generally argue that the scientific support provided by defendants for the production of the prenatal information does not meet the standard of reliability set forth in Frye v. United States, 293 F. 1013 (CA DC 1923) [see also: People v. Wesley, 83 NY2d 417 (1994)]. Frye is not a discovery standard; rather it is a basis for an evidentiary objection. It is premature for the court to reach a Frye issue, if any, at this point in the litigation. Drago v. Tishman Construction Corporation, 4 Misc.3d 354 (NY Co. Sup. Ct. 2004); Adams v. Rizzo, 13 Misc3d 1235(A)(NY Co. Sup Ct. 2006). [3]

The court also takes into consideration that there is little, if any, undue burden on the plaintiff mother to produce these records. Unlike Andon, the discovery sought does not require that plaintiff mother submit to any testing or outside examination. The requested records already exist and can be easily produced.

With respect to the mother's passport or travel documents, a similar analysis ensues. Defendants argue that they have reason to believe that the mother lived with the children in Brazil for a significant amount of time. Dr. Trifiletti makes generalized

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[3]The court is not suggesting that any Frye hearing is necessary. Certainly the fact that New York State has passed laws for prenatal screening of the risk of lead exposure is a good indication of the acceptability of the science in this area.

statements that other countries have an increased risks of lead exposure. This statement is made without reference to any scientific data and without any specific knowledge, expert or otherwise, as to lead exposure Brazil. The literature submitted by NYC outlines a list of countries with higher risks of exposure to lead, but Brazil is not one of them.

Both plaintiffs and defendants, however, are relying upon the same undisputed science supporting a conclusion that elevated blood lead levels are the result of environmental exposure. For that reason alone, identification of the environments in which the children have lived or spent significant amounts of time is material and relevant to the issues raised in this action. Whether Brazil is a high lead risk country is not dispositive of this discovery request. Discovery of the mother's passport or travel documents, however, is relevant only to the extent that she may have been pregnant at the time of travel or when the children were actually traveling with her. The documents will yield material and relevant information about the children's environments and allow defendants to either establish or rule out defenses. The production of such records presents little, if any, burden to the plaintiff mother.

The court, therefore, orders that the mother's prenatal records from her pregnancies with both children be produced and that also that any passport and/or travel documents be produced for the period of time she was pregnant with PA until the present, but only for those times she was pregnant with either child or the children were traveling with her. Other information may be redacted from the documents. Such documents shall be produced within 30 days of the date of this decision.

Additional Outstanding Discovery Requests by GCP

GCP claims that other requested discovery is still outstanding and the complaint should be stricken as a result. Plaintiffs claim that they have had some difficulties in complying with the discovery requests which resulted in delays, but that they are now in compliance. In reply, GPS concedes that some of the requested discovery has been provided, but not all of it. Plaintiffs do not refute this contention.

The failure to provide the requested discovery was not willful. There still are, however, still outstanding requests. Consequently the court declines to strike the complaint, however plaintiffs are directed to provide the following previously requested discovery within 30 days of the date of this decision:

[1] any and all leases relative to the premises at which plaintiffs have resided;

[2] any and all social security cards issued to or obtained by plaintiff NCP;

[3] responses to the demand for medical costs and authorizations regarding claims by the plaintiff-children; and

[4] authorizations for any collateral sources that may have paid for the plaintiff-children's medical costs.

GCP also sought, by Notice to Admit (CPLR §3123), confirmation of the lack of documentation regarding PJA's level of lead in his blood. The response apparently was a claim of privilege. While a Notice to Admit can be used to establish the genuineness of documents, there is no basis to use the vehicle to establish the lack of documentary evidence, nor is there any record on this motion to determine the basis for any asserted privilege. The issue was first raised in GCP's reply. The court, therefore, makes no order with respect to this item. The order is without prejudice to GCP seeking the information

through another more appropriate discovery mode and plaintiffs' rights to assert any claim of privilege, which will be subject to court review. Similarly, this court makes no order compelling plaintiffs to produce additional authorizations to GCP since this is a new item of demanded discovery. It can be requested by GCP in a new discovery request, but will not be made part of an order predicated on non-compliance with outstanding requests.

Additional Outstanding Discovery Requests by Plaintiffs

Plaintiffs served a Notice for Discovery and Inspection ("D & I") dated May 12, 2006. They claim that neither defendant responded. GCP claims that it responded to the D & I on February 21, 2007. NYC claims that it provided all requested discovery even before this motion was brought. Plaintiffs have not challenged either NYC or GCP's contentions. Consequently, this branch of plaintiffs' motion must be denied as moot.

CONCLUSION

In accordance herewith it is hereby:

ORDERED that NYC's motion and GCP's cross motion for an order compelling production of discovery and other relief is granted to the extent that plaintiffs shall, within 30 days of the date of this order, provide authorizations for the prenatal medical records of FP for PA and PJA , and it is further

ORDERED that NYC's motion and GCP's cross motion for an order compelling production of discovery and other relief is further granted to the extent that plaintiffs shall, within 30 days of the date of this order, produce any and all passports and/or travel documents for the plaintiff mother which reflect travel by her while she was pregnant with either of the plaintiff children and while the children were actually traveling with her, and

it is further

ORDERED that GCP's cross-motion for an order compelling production of discovery and other relief is further granted to the extent that plaintiffs shall produce, within 30 days of the date of this order,: [1] any and all leases relative to the premises at which plaintiffs have resided; [2] any and all social security cards issued to or obtained by plaintiff NCP; [3] responses to the demand for medical costs and authorizations regarding claims by the plaintiff-children; and [4] authorizations for any collateral sources that may have paid for the plaintiff-children's medical costs otherwise denied, and it is further

ORDERED that GCP's cross-motion for an order compelling production of discovery and other relief is otherwise denied, and it is further

ORDERED that plaintiffs's cross-motion for an order of protection and to compel the production of further discovery and other relief is denied, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, New York
June 20, 2007

SO ORDERED:

J.G. J.S.C.