Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
**Justice**

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SANTOS PADILLA,
Plaintiff,

-against-

THE NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

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Index No. 9402/06

Motion Dates April 15, 2008 - Cal. No. 12

April 29, 2008 - Cal. No. 9

April 29, 2008 - Cal. No. 10

Motion Sequence Nos. 6; 7; 8

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Upon the foregoing papers it is ordered that these motions are determined as follows:

These are separate motions[1] by defendants The New York City Transit Authority, Metropolitan Transportation Authority, Halmar Construction Company, Inc., Granite Construction Company and Granite Halmar Construction Company, Inc. (hereinafter collectively referred to as "defendants") returnable on April 29, 2007 for an order pursuant to CPLR 3124 and 3120(b) compelling Dr. Daniel Kuhn to release the plaintiff's medical records, and returnable on April 15, 2008 for an order pursuant to CPLR 3121 and 3124 compelling the plaintiff Santos Padilla to attend a neuropsychology independent medical exam with Dr. Wayne Gordon and/or in the alternative to preclude the plaintiff from introducing into evidence or mentioning at the time of trial, the results of the battery of cognitive testing performed by Dr. Daniel Kuhn in December of 2007 and the results of the Intercog Neuro tests that were conducted on May 25, 2006 and February 13, 2007. These two motions are joined in this Decision and Order for purposes of disposition.

## I. PROCEDURAL HISTORY

This is a personal injury action commenced by the service of a summons and complaint on or about April 20, 2006. The plaintiff alleges that he was working as a plumber for Aztec Plumbing on February 1, 2006, when he was struck on the head by a large cast iron pipe. The plaintiff claims to have sustained severe and permanent injuries, *inter alia*, a loss of consciousness, a traumatic brain injury and cognitive defects, as well as certain neuropsychological, neurological and orthopedic deficits.

Issue was joined by the service of a Verified Answer on behalf of defendants on or about May 15, 2006. A Bill of Particulars and Amended Bill of Particulars were served by plaintiff on May 31, 2006 and January 22, 2007. On January 18,

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[1]The Court notes that this decision and order addresses three motions that have been filed by defendants. The first Notice of Motion is dated February 21, 2008, noticed for April 1, 2008 and returnable on April 15, 2008. The second motion is dated April 7, 2008, noticed and returnable on April 29, 2008. The third motion titled "Amended Notice of Motion" is dated April 10, 2008, is also noticed and returnable April 29, 2008. Both the second and third motions seek identical relief. Accordingly, the Court consolidates the second and third motions for purposes of disposition.

2007 plaintiff filed the Note of Issue and Certificate of Readiness.

On January 10, 2008, the plaintiff served a Notice of Medical Exchange which had enclosed a comprehensive neuropsychiatric evaluation report dated January 4, 2008. Attached to the comprehensive neuropsychiatric evaluation report was a brain electro-neurophysiological testing battery dated December 6, 2007. The plaintiff underwent testing on December 6, 2007 which included EEG, quantitative EEG, and evoked potential testing, visual evoked potentials, brain stem auditory evoked potentials, and brain stem somatosensory evoked potentials. According to Dr. Kuhn's summary of findings and conclusions, this is an abnormal record and "the findings support the diagnosis of a traumatic brain injury and post concussion syndrome, which has affected multiple regions, and inter-relationship between regions as indicated in the report and test scores". Dr. Kuhn's January 4, 2008 evaluation report indicates that the plaintiff underwent Intercog Neuro testing on May 25, 2006 and February 13, 2007.

The Notice of Medical Exchange was served by plaintiff seven (7) days prior to the scheduled commencement of the trial on January 17, 2008. (The trial and jury selection did not actually commence until January 22, 2008).

On January 31, 2008, this Court disbanded the jury to allow for completion of all discovery and set a date of May 19, 2008 as a control date for a continuance of the case.

A Notice of Supplemental Physical Examination was served by the defendants on or about February 1, 2008. The plaintiff rejected the Notice of Supplemental Physical Examination in correspondences dated February 4 and February 5, 2008.

In or about February 5, 2008, defendants served on plaintiff a disclosure demand dated February 5, 2008, seeking certain disclosure including duly executed, original, HIPAA compliant authorizations to obtain medical records from Dr. Daniel Kuhn.

On February 28, 2008, plaintiff served defendants the authorization to obtain the records from Dr. Kuhn. Thereafter, on March 4, 2008, defendant mailed the authorization to Dr. Kuhn's office. On March 7, 2008, Dr. Kuhn forwarded an invoice in the amount of $107.25 to defendant for copying expenses related to medical records requested. On March 10, 2008, defendant tendered a check in the amount of $107.25 for said expenses to Dr. Kuhn's office. On March 25, 2008, Dr. Kuhn's

office confirmed receipt of the check.

Thereafter, defendants filed the instant motions returnable on April 15, 2008 seeking an order compelling Dr. Daniel Kuhn to release the plaintiff's medical records and on April 29, 2008 seeking an order directing plaintiff to submit to an independent neuropsychological medical examination.

On April 24, 2008, defendants' counsel received from Dr. Daniel Kuhn the response to defendants' disclosure demand.

## II. DISCUSSION

### A. Motion to Compel Nonparty Dr. Daniel Kuhn to Release the Plaintiff's Medical Records

Defendants' motion for an order pursuant to CPLR 3124 and 3120(b) compelling nonparty Dr. Daniel Kuhn to release the plaintiff's medical records is denied.

Pursuant to CPLR 3120 the proper procedure for discovery from a nonparty is the service of a subpoena duces tecum, instead of a mere notice, with a copy of the subpoena to be served on each of the other parties. The subpoena duces tecum must be served on the nonparty in the same manner as a summons (CPLR 2303[a]). If the nonparty fails to comply, or otherwise move for a protective order, the seeking party may move to hold the nonparty in contempt. Here movant has failed to submit any evidence that it properly followed the procedure for discovery from nonparty Dr. Daniel Kuhn by the service of a subpoena duces tecum. As movant has not followed the proper procedure, the motion is denied.

### B. Motion to Compel Plaintiff to Attend an Independent Medical Exam

Defendants' motion for an order pursuant to CPLR 3121 and 3124 compelling the plaintiff Santos Padilla to attend a neuropsychology independent medical exam with Dr. Wayne Gordon and/or in the alternative to preclude the plaintiff from introducing into evidence or mentioning at the time of trial, the results of the battery of cognitive testing performed by Dr. Daniel Kuhn in December 2007 and the results of Neurocog tests that were conducted on May 25, 2006 and February 13, 2007, is granted only to the following extent:

CPLR 3101(a) permits '...full disclosure of all matter

material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' In determining whether the material sought through discovery is 'material and necessary', the court must determine if the demanded material has any bearing on the issues raised in the case and whether the demanded documents will '...sharpen the issues and reduce delay and prolixity.' The test is one of usefulness and reason (*Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]). The demanded material must be produced if it can be used as evidence in chief, for rebuttal or for cross-examination. Id.; and *Wind v. Eli Lilly & Co.*, 164 AD2d 885 [2nd Dept 1990]).

Discovery is permitted of material and documents that may not be admissible in evidence provided that the production of such information may lead to the disclosure of admissible evidence *(Southampton Taxpayers Against Reassessment v. Assessor of the Village of Southampton*, 176 AD2d 795 [2nd Dept 1991]; *Fell v. Presbyterian Hosp. in the City of New York*, 98 AD2d 624 [1st Dept 1983]).

The party seeking discovery has the burden of establishing that the demanded material may lead to the discovery of admissible evidence while the party opposing the production has the burden of establishing that the material is irrelevant, privileged or confidential *(Crazytown Furniture, Inc. v. Brooklyn Union Gas*, 150 AD2d 420 [2nd Dept 1989]; and *Herbst v. Bruhn*, 106 AD2d 546 [2nd Dept 1984]).

While there is no restriction under CPLR 3121(a) on the number of examinations to which a party may be subjected, an additional examination is permissible only where the party seeking the examination demonstrates the need for it. In addition, to justify an additional examination after the Note of Issue has been filed, the demanding party must demonstrate that unusual and unanticipated circumstances developed subsequent to the filing of the note of issue (*Schissler v. Brookdale Hosp. Ctr.*, 289 AD2d 469 [2d Dept 2001]) or sufficient reason for the delay (*Urena v. Bruprat Realty Corp.*, 179 AD2d 505 [1st Dept 1992]).

However, where, as in the instant case, the requesting party establishes a need for the examination, a reason for the delay and that no prejudice would result, a party may be permitted to conduct such examination (*Dominguez v. MBSTOA*, 168 AD2d 376 [1st Dept 1990]).

Here, plaintiff did not serve defendants with the Notice of Medical Exchange until seven (7) days prior to the scheduled commencement of the trial on January 17, 2008. Attached to the Notice are Dr. Kuhn's September 19, 2006 narrative notes that indicate plaintiff suffered a "brain concussion" that required brain function tests, and a report from Dr. Kuhn that indicates that certain neuropsychiatric tests were performed December 6, 2007 and February 13, 2007, fifteen (15) months later and eleven (11) months after the filing of plaintiff's Note of Issue and Certificate of Readiness on January 18, 2007. Hence, the actual test results were not exchanged until January 10, 2008, seven (7) days before the scheduled trial date of January 17, 2008.

It is axiomatic that obtaining as much information about an opposing party's claim in advance of trial is crucial to the demanding party's proper and adequate preparation for trial. Disclosure obtained only a few weeks, or days as is here, before trial is of limited utility if inadequate time is afforded on the eve of trial to evaluate, test or challenge the information. Indeed, it was for this reason, in part, that this Court disbanded the jury on January 31, 2008 in order for defendants to complete discovery.

The instant record clearly establishes the need for an independent neuropsychological medical examination of plaintiff in light of plaintiff's treating physician's report and examination, post-note of issue. Defendants are entitled to have their own expert opinions.

Also, to be noted is that plaintiff's failure to provide the defendants with authorizations to obtain records of plaintiff's treating physicians and belated service of the Notice of Medical Exchange on the eve of trial contributed to the delay. Further, plaintiff has not shown any prejudice by submitting to the independent neuropsychological medical examination, as the Court directs that this matter shall remain on the trial calendar.

Accordingly, it is

ORDERED, that plaintiff is directed to submit to an independent neuropsychological medical examination on behalf of defendants. The examination of plaintiff by the defendants shall proceed expeditiously at a time and place to be fixed in a written notice of not less than ten (10) days to be given by defendants, or at such time and place as the parties may agree, but no later than thirty (30) days from the date of service of a copy of this decision and order with notice of entry.

A courtesy copy of this order is being mailed to counsel for the respective parties.

The foregoing constitutes the decision and order of this Court.

Dated: June 16, 2008

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**Howard G. Lane, J.S.C.**