SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15____

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MOHAMADI ILBOUDO Index №. 31468/2017E

-against- Hon. MARY ANN BRIGANTTI

RIGO LIMO-AUTO CORP., et al. Justice Supreme Court

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The following papers numbered 1 to _____8____ were read on this motion (Seq. No. ___1_____) for _PRECLUDE____ noticed on ____October 5, 2018_____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2,
Answering Affidavit and Exhibits (Correspondence from Plaintiff Counsel)	No(s).	3,4
Replying Affidavit and Exhibits	No(s).	5,6,7

Upon the foregoing papers, the defendants Rigo Limo-Auto and Rigo-FL1 LLA ("Defendants") move for an order (1) precluding the plaintiff Mohamadi Ilboudo ("Plaintiff") from offering any evidence at the trial of this action, or in the alternative; (2) compelling Plaintiff to submit to a second examination before trial ("EBT") in compliance with NYS Uniform Civil Rules §221.2; (3) costs for Plaintiff and Plaintiff's counsel's non-compliance at the first EBT and any further EBT of Plaintiff, and (4) granting such other and further relief as the Court deems just and proper. Plaintiff opposes the motion and cross-moves for an order pursuant to CPLR 1002(b)granting him leave to file and serve an amended summons and verified amended complaint in the form annexed to the motion, adding Sherif Elshabba ("Elshabba") and Fast Track Leasing LLC ("FTL") as defendants; (3) amending the caption to reflect Elshabba as a party, and (4) for such other and further relief as the Court deems just and proper. Defendants oppose the cross-motion.

Motion is Respectfully Referred to Justice: _____
Dated: _____

(1) Defendants' Motion

New York has a "policy of liberal disclosure" (*see Kapon v. Koch*, 23 N.Y.3d 32, 38 [2014]). CPLR 3101(a) provides that a litigant is entitled to full disclosure of all items material and necessary in the prosecution or defense of a case, regardless of the burden of proof (*see* ; *Andon ex rel. Andon v. 302-304 Mott Street Assoc.*, 94 N.Y.2d 740, 746 [2000]). Information that is "material and necessary" "includes 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason'" (*id.*, quoting *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 [1968]). Trial courts possess wide discretion to decide that is "material and necessary to the prosecution or defense of an action" *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 403 [1st Dept. 2018], citing *Allen*, 21 N.Y.2d at 406).

The scope of an examination before trial "is broader than what may be admissible on trial" (*White v. Martins*, 100 A.D.2d 805, 805 [1st Dept. 1984]). 22 NYCRR 221.2 specifically provides that "[a] deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of

confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person." The rule goes on to state "[a]n attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision." Accordingly, "the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR §3115" (*White*, 100 A.D.2d at 805).

CPLR 3126 provides that "[i]f any party ... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just." Generally, where a party has failed to comply with discovery demands, it is "within the discretion of the motion court to determine the appropriate penalty to be imposed against an offending party" (*Spira v. Antoine*, 191 A.D.2d 219 [1st Dept. 1993]).

In this case, Plaintiff initially contends that Defendants' motion is not supported by a proper "good faith" affirmation as required by 22 NYCRR 202.7. However, a review of the affirmation in support of the motion papers, and the accompanying deposition transcript detailing what transpired, demonstrates that "[a]ny further attempt to resolve the dispute non-judicially would have been futile" (*Loeb v. Assara New York I L.P.*, 118 A.D.3d 457, 457-58 [1st Dept. 2014]; *see also Carrasquillo v. Netsloh Realty Corp.*, 279 A.D.2d 334 [1st Dept. 2001]). According Defendants' motion will be resolved on the merits.

This matter arises out of an accident that allegedly occurred between Defendants' vehicle and Plaintiff, who was riding a bicycle. At Plaintiff's examination before trial, his counsel directed him not to answer certain questions. To start, Plaintiff testified that that he had cataract surgery on his right eye in 2015, the year before this November 2016 accident. He testified that the surgery was successful and he had no more problems. Defendants' counsel requested the identification of the hospital where Plaintiff had the surgery, and indicated that he would follow up with a "D&I" request. Plaintiff was later asked: "before the surgery, was the cataract causing vision problems?" Counsel directed Plaintiff not to answer. Defendant indicated that he wanted an authorization for Plaintiff's eye surgery hospitalization. Defendant did not follow up in writing with a formal discovery demand seeking that authorization, and the moving papers do not show entitlement to such discovery at this juncture. However, by not allowing questioning concerning Plaintiff's eyesight, records that may be discoverable (*see, e.g., Schilling v. Quiros*, 23 A.D.3d 243 [1st Dept. 2005]), Plaintiff prevented Defendant from pursuing questioning that was designed to elicit information which was material and necessary to the defense of this action (*Parker v. Ollivierre*, 60 A.D.3d 1023 [2nd Dept. 2009], citing *Allen*, 21 N.Y.2d 403, 406-07).

Plaintiff was later asked if he was ever involved in any other lawsuit where he sought money for personal injuries. His counsel directed him not to answer. While counsel indicated defense counsel could ask about the back and knees, the line of questioning was objected to from the start, and defense counsel

could have received an answer to his initial question before narrowing the scope of later questions. Plaintiff's counsel also directed his client not to answer questions of (1) whether Plaintiff has ever made a workers' compensation claim for any on-the-job injury; (2) question - "since the accident, have you gone for a general physical exam?" and (3) whether he was ever involved in any other motor vehicle accidents. Again, the scope of an examination before trial is broader than what is admissible at trial (*White,* 100 A.D.2d at 805), and while Plaintiff would generally not be entitled to records and information regarding unrelated medical issues (see, e.g., *Brito v. Gomez*, 168 A.D.3d 1 [1st Dept. 2018]), this line of questioning involving Plaintiff's medical and accident history was clearly designed to elicit information material and necessary to the defense of this accident (*Parker*, 60 A.D.3d 1023).

Finally, Plaintiff asserted in his verified bill of particulars that he "missed significant time from employment" as a delivery driver due to his injuries, and he is also asserting that as a result of the accident he suffered a "90/180 day" category of injury under New York Insurance Law §5102(d). Plaintiff testified that he obtained his "TLC" license the year before his deposition, or 2017. When asked why he obtained the TLC license, Plaintiff was directed not to answer. However, in light of the fact that Plaintiff is alleging was unable to work for a significant amount of time after the accident, and that he was incapacitated for 90 out of the first 180 days following this November 2016 accident, which would carry over into 2017, Defendants were entitled to receive a response to the questions regarding Plaintiff's procuration of a TLC license.

The Court also notes that, while several of the objections were "marked for a ruling," no judicial rulings concerning the above issues were ever sought (CPLR 3115), and instead Plaintiff was directed not to answer, in contravention of 22 NYCRR 221.2. Accordingly, Defendants' motion is granted to the extent of directing a further EBT of Plaintiff limited to the items outlined above. Defendants' motion is otherwise denied.

(2) Plaintiff's Cross-Motion

Plaintiff's cross-motion for leave to serve a supplemental summons and amended complaint adding Elshabba and FTL as additional defendants in place and stead of "John Doe" is granted. Plaintiff provided testimony that the proposed defendants are the operator and owner of the motor vehicle that was involved in this accident, thus permissive joinder is appropriate (*see Global Liberty Ins. Co. v. Tyrell*, 172 A.D.3d 499 [1st Dept. 2019]). In addition, "[m]otions for leave to amend pleadings should be freely granted...absent prejudice or surprise resulting therefrom...unless the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v. Greystone & Co., Inc.,* 74 A.D.3d 499 [1st Dept. 2010]). Plaintiff also complied with the CPLR by annexing a copy of the proposed pleading to his moving papers (CPLR 3025[b]). Defendants' opposition fails to show that the proposed amendment is

without merit or will result in prejudice. The Court also notes that the motion to add the prospective parties is timely since it was made within three years after this November 2016 motor vehicle accident (CPLR 214[5]).

Accordingly, it is hereby

ORDERED, that Defendants' motion is granted only to the extent of directing a further EBT of Plaintiff, limited to the issues noted above, to take place within thirty (30) days after service of a copy of this Order with Notice of Entry, at a mutually agreed-upon time and location, and it is further,

ORDERED, that Plaintiff's cross-motion for leave to file and serve and amended summons and complaint, and to amend the caption accordingly, is granted, and it is further,

ORDERED, that the amended summons and complaint annexed to the moving papers is deemed filed, and Plaintiff is directed to serve the amended summons and complaint in accordance with the CPLR within thirty (30) days after service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that the parties are to appear for a previously-scheduled status conference on **October 15, 2019, at 9:30AM, IAS Part 15, Room 702,** and it is further,

ORDERED, that the caption is hereby amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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MOHAMADI ILBOUDO

Plaintiff,

-against-

RIGO LIMO-AUTO CORP., RIGO-FL1 LLC, FAST TRACK LEASING LLC, and SHERIF ELSHABBA,

Defendants.

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This constitutes the Decision and Order of this Court.

Dated: 8/27/19 **Hon.** Mary Ann Brigantti **J.S.C.**

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT