To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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MICHAEL CARAIANI, JR.,

Plaintiff,

-against-

PAUL E. BYRNE,

Defendant.

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DECISION & ORDER

Index No. 63244/2017
Motion Date: May 13, 2019
Seq. No. 1

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order compelling defendant to respond to deposition questions and to provide an authorization allowing plaintiff to obtain defendant's school records from SUNY Cortland and North Babylon High School, including but not limited to his disciplinary records and for such other and further relief as this court deems just and proper:

Order to Show Cause; Affidavit in Support; Affidavit of Good Faith; Exhibits 1-4;
Memorandum of Law in Support
Affirmation in Opposition; Exhibits A-D

Upon the foregoing papers and the proceedings held on May 13, 2019, the motion is decided as follows:

Plaintiff commenced this action on August 30, 2017, to recover damages for personal injuries he allegedly sustained when defendant assaulted plaintiff on November 16, 2016.[1] Plaintiff alleges one cause of action and seeks damages for past and present conscious pain and suffering, past and future lost wages, past and present loss of earning capacity, incurred and future medical and dental expenses, mental anguish and permanent physical injuries and disfigurement. Defendant interposed his answer and asserts one counterclaim wherein he asserts, inter alia, that plaintiff assaulted defendant causing him to sustain permanent injuries and scarring to his face.

[1] It is uncontroverted that defendant entered a guilty plea to assault in the third degree in connection with this occurrence.

Defendant appeared for his deposition on January 30, 2019. Plaintiff contends that during the course of defendant's deposition, defense counsel improperly directed his client not to answer in multiple instances. Plaintiff argues that the objections raised do not fall within the specifically enumerated grounds upon which a deponent can refuse to answer a question.

Defendant argues that the questions at issue were objected to because they were palpably improper and palpably irrelevant. Defendant argues that plaintiff's line of questions which seek to establish prior notice, pre-disposition, foreseeability, dangerous propensity is misplaced as this case involves an intentional act to which defendant has pleaded guilty, not negligence.

The Questions:

Line of inquiry #1:

Q. Have you used any prescription medication since 2016?
A. Not that I can recall.
Q. What about any non-prescription medication?
MR. TANGREDI: Objection. Don't answer. It's illegal. Go ahead.
Q. What about non-prescription medication?
MR. TANGREDI: Objection. Don't answer. (Tr. p. 6)

Line of inquiry #2:

Q. Are you currently employed?
MR. TANGREDI: Irrelevant. Go on to the next area.
Q. Are you currently employed?
MR. TANGREDI: Objection. Irrelevant. Go on to the next area. He's not answering it. No claim has being made for loss of earnings in his claim.(Tr. p. 8)

Line of inquiry #3:

Q. Why did it take you longer than four years to graduate college?
MR. TANGREDI: What does that have to do with the case?
THE WITNESS: It's irrelevant.
MR. TANGREDI: Hold up. What does that have to do with the case? What does that have to do with the case?
MR. HERMAN: I'm not going to debate with you. If you don't want him to answer the question --
MR. TANGREDI: Don't answer. (Tr. p. 8)

Line of inquiry #4:

Q. Did the fraternity engage in any hazing?
MR. TANGREDI: Objection. Don't answer. What difference does it make? What does it have to do with the case? Read your complaint. It has nothing to do with hazing. Don't answer.

Q. Did you haze anyone?
MR. TANGREDI: Objection. Don't answer.
Q. Did you haze Michael Caraiani?
MR. TANGREDI: Objection. Don't answer. (Tr. p.11)

Line of inquiry #5:

Q. While at Cortland, did you have any disciplinary problems?
MR. TANGREDI: Objection. Don't answer.
Q. Did you have any disciplinary problems in high school?
MR. TANGREDI: Don't answer.
Q. What middle school did you attend?
MR. TANGREDI: Irrelevant. Don't answer.
Q. Did you have any disciplinary problems in middle school?
MR. TANGREDI: Don't answer.
Q. What elementary school did you attend?
MR. TANGREDI: Don't answer.
Q. Did you have any disciplinary problems in elementary school?
MR. TANGREDI: Don't answer that either.(Tr. pp.11-12)

Line of inquiry #6:

Q. Have you ever been accused of engaging in criminal activity?
MR. TANGREDI: Objection. Don't answer.
MR. HERMAN: And the basis of your objection?
MR. TANGREDI: Being accused of a crime is irrelevant. Go ahead. (Tr. p12)

Line of inquiry #7:

Q. Have you ever been arrested?
MR. TANGREDI: Don't answer. (Tr. pp. 12-13)

Line of inquiry #8:

Q. Are you familiar with the term performance enhancing drugs?
A. Yes.
Q. Have you ever been prescribed any of these drugs?
A. No.
Q. Have you ever used any of these drugs without a prescription?
MR. TANGREDI: Don't answer. You're asking if he committed a crime. (Tr. p.14)

Line of inquiry #9:

Q. Have you ever used any illegal or recreational drugs?
MR. TANGREDI: Don't answer the question. (Tr. p.14)

Line of inquiry #10:

Q. Have you ever consulted with a mental health professional?
MR. TANGREDI: Objection. What does that have to do with this case? Don't answer it. He's not making any claim in our Bill of Particulars for any of that. (Tr. p. 14)

Line of inquiry #11:

Q. Have you ever engaged in a violent confrontation with anyone other than the Plaintiff?
MR. TANGREDI: Objection. Don't answer. (Tr. p.15)

Line of inquiry #12:

Q. Have you ever threatened, by word or act, any other person?
MR. TANGREDI: Objection.
Q. Have you ever threatened, either by word or act, any other person?
MR. TANGREDI: Don't answer. It's not contained in your pleadings, Counsel. You need to deal with your pleadings. Or mine. (Tr. p.33)

Line of inquiry #13:

Q. Would I be correct in saying you were out of control?
MR. TANGREDI: Object to the form. Don't answer. That's your characterization, Counsel. (Tr. p.34)

Line of inquiry #14:

Q. If you had to do it all over again, would you go looking for him?
MR. TANGREDI: Objection. Don't answer. (Tr. p.36)

Line of inquiry #15:

Q. Do you remember slapping Mr. Borman?
A. No. Yes. Yes.
Q. Can you tell me what happened?
MR. TANGREDI: Objection. It's not part of the lawsuit. Don't answer it. It's not part of your pleadings, Counsel. (Tr. p.66-67)

Additionally, Plaintiff seeks to compel the production of an authorization for defendant's high school and college disciplinary records. Plaintiff contends these records are relevant to plaintiff's claims that defendant asked plaintiff not to report the assault because defendant had prior disciplinary problems and any new claims would exacerbate those problems. Plaintiff also states that defendant has claimed that plaintiff by text messages was attempting to extort defendant and plaintiff claims that the disciplinary records will explain Plaintiff's delay in reporting the matter to the police. Plaintiff also argues that these records will be dispositive of defendant's alleged violent nature towards plaintiff and others and are relevant to rebut defendant's counterclaim that plaintiff attacked defendant.

Plaintiff also seeks the further deposition of defendant concerning his medical records. Plaintiff states he sought authorizations for defendant's medical records from VYTRA Health and Long Island Medical Care prior to the deposition but that the authorization for Long Island Medical Care was not provided until after the deposition on March 27, 2019.

ANALYSIS

Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of 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" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Part 221 of the Uniform Rules of the Trial Courts, also known as the Uniform Rules for the Conduct of Depositions was enacted in 2006. Part 221 was "designed to combat obstructive behavior during a deposition," (*Pedraza v New York City Tr. Auth.*, 2016 WL 270825 8 (Sup Ct, New York County [2016]).

Rule 221.2 sets forth:

> [T]he limited context in which a deponent may refuse to answer a question posed at a deposition when an objection is made. It 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." Attorneys may not instruct a deponent not to answer unless CPLR 3115 or 22 NYCRR §221.2 provides a basis for doing so. When a deponent refuses to answer a question, or an attorney instructs a deponent not to answer, such refusal or instruction "shall be accompanied by a succinct and clear statement of the basis therefor" (22 NYCRR §221.2). Also, where a deponent does not answer a question, the deposition proceeds, and "the examining party shall have the right to complete the remainder of the deposition"(22 NYCRR §221.2.) CPLR 3115(b), (c), and (d) provide certain limited bases for making objections during depositions including errors which might be obviated if known promptly, disqualification of the person taking the deposition, and competency of witnesses or admissibility of testimony. However, despite its inclusion in Uniform Rule 221.2, CPLR 3115 does not provide any

> separate basis for refusing to answer questions or for an attorney to direct a deponent to not answer questions. Furthermore, Uniform Rule 221.1(a) provides that objections made at a deposition "shall be noted by the officer before whom the deposition is taken, *and the answer shall be given and the deposition shall proceed subject to the objections* and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR." (*Freidman v Fayenson,* 41 Misc 3d 1236(A) [Sup Ct, NY County 2013], affd sub nom. *Freidman v Yakov*, 138 AD3d 554 [1st Dept 2016]) (emphasis in the original).

The strong presumption of our law is that a "deponent shall answer all questions at a deposition," subject to the strictly limited number of enumerated exceptions contained in Rule 221.2."[G]enerally, the proper procedure is to allow a witness to answer all questions subject to objections which are reserved for trial in accordance with CPLR 3115" (*Walter Karl, Inc. v Wood,* 161 AD2d 704, 706 [2d Dept 1990]). Even where deposition questions do not seem reasonably calculated to lead to discoverable evidence, it is improper for deponent's counsel to block those questions (*Molinoff v Tanenbaum,* Sup Ct, Westchester County, March 31, 2014, Lefkowitz, J., 51064/2013).

It is against these standards that the objected to lines of inquiry must be considered. The court notes that although defense counsel has objected on more than one occasion on the grounds that the line of inquiry was palpably irrelevant, that is not the standard. The proper analysis is whether the inquiry was palpably improper.

The court finds that the following lines of inquiry were palpably improper and prejudicial 4, 6, 7, 8, 9,10, 12, 13,14 and that no further questioning is warranted. Although the court finds that lines of inquiry 1, 2, 3, 11, and 15 are unlikely to lead to discoverable evidence, Rule 221.2 does not allow a deponent to refuse to answer a deposition question merely because he believes it to lack a close nexus to the prosecution or defense of an action. With respect to line of inquiry 5, the court finds that the questions which seek the names of the schools defendant attended, although likely irrelevant, do not succumb to being palpably improper. However, with respect to whether defendant had any disciplinary problems at those schools, those questions are palpably improper except with respect to whether defendant had any disciplinary problems while at SUNY Cortland, which while also irrelevant is not palpably improper.

Although academic and school records may be discoverable upon a demonstration that they are relevant and material to an action (see *Graham v West Babylon Union Free School Dist.*, 262 AD2d 605 [2d Dept 1999]), plaintiff has failed to establish the relevancy of defendant's school records to plaintiff's claim or defendant's counterclaim. With respect to plaintiff's request to compel a further deposition of defendant concerning his medical records, the court notes that although defendant has now provided all relevant medical authorizations the authorizations were executed after defendant's deposition occurred. Plaintiff is entitled to depose defendant with respect to his medical records.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this court, notwithstanding the specific absence of reference thereto.

In light of the foregoing it is:

ORDERED that plaintiff's motion is granted to the following limited extent: that on or before June 3, 2019 defendant shall appear for a further deposition with respect to the lines of inquiry identified herein as 1, 2, 3, 11, and 15, as well as line of inquiry 5 limited to the names of the schools defendant attended as well whether defendant had any disciplinary problems while at SUNY Cortland, and concerning the medical records produced pursuant to the authorizations provided by defendant; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order, with notice of entry, upon defendant within five days of entry; and it is further,

ORDERED that all parties appear for a conference in the Compliance Part, Room 800 on June 11, 2019, at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
May 13, 2019

HON. JOAN B. LEFKOWITZ, J.S.C.

Service upon all counsel via NYSCEF
cc: Compliance Part Clerk