SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **32**

Justice

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BRIAN KIERNAN,

Plaintiff,

- v -

UNITED STATES TENNIS ASSOCIATION INCORPORATED, HUNT CONSTRUCTION GROUP, INC.,

Defendant.

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INDEX NO. 154113/2016

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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UNITED STATES TENNIS ASSOCIATION INCORPORATED, HUNT CONSTRUCTION GROUP, INC.

Plaintiff,

-against-

ASR ELECTRICAL CONTRACTING, INC.

Defendant.

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And a second third-party action.

Third-Party
Index No. 595570/2017

The following e-filed documents, listed by NYSCEF document number (Motion 002) 86, 87, 88, 89, 90, 91, 92, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, the motion and cross-motions are determined as follows:

Plaintiff commenced this action to recover for personal injuries sustained on May 5, 2016, while working at a construction site. He claims the incident occurred when debris caused him to slip or trip and fall. In the complaint, Plaintiff pled claims under Labor Law §§241[6], 240, 200, and common-law negligence. In his bills of particulars, Plaintiff claims he sustained injuries to his cervical, thoracic and lumbar spine as well as aggravation and/or exacerbation of asymptomatic conditions.

Now, Defendants United States Tennis Association Incorporated ("USTA"), Hunt Construction Group, Inc. ("Hunt") as well as Second Third-Party Defendant the Manhattan Company of NY, LLC ("Manhattan") move for a protective order quashing a notice to admit dated July 5, 2022, served by Third-Party Defendant/Second Third-Party Plaintiff KND Licensed Electrical Contracting & Services Corp.'s ("KND") on Manhattan. Plaintiff cross-moves for a

protective order quashing a notice to admit, also served by KND, dated November 29, 2021. KND opposes the motion and cross-motion and cross-moves to disqualify counsel for USTA, Hunt and Manhattan based upon an alleged conflict of interest, to compel Plaintiff to appear for a defense medical exam and to respond to its notice to admit. Defendants and Plaintiff oppose KND's cross motion.

In civil litigation in New York, "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (see CPLR §3101[a]; *Forman v Henkin*, 30 NY3d 656 [2018]). "The phrase 'material and necessary' should 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]; *see also Andon v 302-304 Mott St Assoc.*, 94 NY2d 740, 746, [2000]).

This does not mean disclosure is limitless and courts are empowered to oversee discovery and set reasonable terms for its exchange (*see generally Diako v Yunga*, 148 AD3d 438 [1st Dept 2017]; *Elmore v 2720 Concourse Associates, L.P.*, 50 AD3d 493 [1st Dept 2008]). A court's discretion to regulate disclosure is wide (*see* CPLR §3126; *Forman v Henkin*, supra) and includes the power to "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" (CPLR §3103).

Regarding the propriety of a notice to admit generally, that device is not intended to reap discovery in the traditional sense (*see Hodes v City of New York*, 165 AD2d 168, 170 [1st Dept 1991]; *City of New York v National Fire Ins. Co. of Hartford & Gandhi Eng'g, Inc.*, Misc3d ___, 2012 NY Slip Op 32359(U) [Sup Ct NY Cty 2012]) and "it may not be used to obtain information in lieu of other disclosure devices", like a deposition (*Fetahu v New Jersey Tr. Corp.*, 167 AD3d 514, 515 [1st Dept 2018]). Its use is strictly limited to requests for admissions of fact to which there could be no substantial dispute at trial (*see* CPLR 3123[a]; *Kimmel v Paul Weiss et al.*, 214 AD2d 453 [1st Dept 1995]). It is not intended to obtain admissions to ultimate or conclusory facts nor information within the unique knowledge of a third party (*Nat'l Union Fire Ins. Co. v. Allen,* 232 AD2d 80, 85 [1st Dept 1997]; *see also Fetahu v New Jersey Tr. Corp.*, supra).

In KND's notice to admit dated July 25, 2022, it sought to elicit five admissions concerning the duties of Manhattan and all other subcontractors regarding debris as well as an acknowledgement regarding a portion of testimony elicited from Samule LaForte, an employee of Defendant Hunt. Although a there is authority supporting that a notice to admit can be used to probe a party's understanding of his own duties under law (*see Villa v NY City Hous. Auth.*, 107 AD2d 619, 620 [1st Dept 1985]), the Court finds the requests are patently improper as they seek admissions and concessions that are related to the "heart of the matter at issue" (*see Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500 [1st Dept 2014]). Further, KND's notice to admit served on Manhattan was impermissibly "employed as a substitute for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories" (*Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]).

In the notice to admit served on Plaintiff, dated November 29, 2021, KND sought an admission "[t]hat the "Raceway Conduit" depicted in the photographs annexed hereto as Exhibit "A" is the conduit to which plaintiff was referring at page 164 of his deposition". Plaintiff served a response which stated "Improper for a Notice to Admit. To the extent the Court would consider this paper, Plaintiff does not know whether the conduit depicted in exhibit "A" is the conduit involved in the accident or not.

The admission sought from Plaintiff was not an improper subject for a notice to admit (*see Smith v Brown,* 61 Misc. 3d 681 [Sup Ct Bx Cty 2018]). Nevertheless, the phrasing of the requested admission and the nature of the question propounded of Plaintiff at the deposition renders the inquiry pointless. Plaintiff was asked regarding the photograph whether it depicted conduit "similar to the conduit over which you tripped". In response Plaintiff acknowledged, referring to the photograph, "that electrical conduit there looks to be similar size".

Defendant KND also seeks to compel Plaintiff to appear for a defense medical exam by a physician with a specialty in physical medicine and rehabilitation. Plaintiff counters that such an exam is unwarranted as Plaintiff was previously examined by an orthopedist designated by Defendants. "Where a plaintiff puts [their] physical condition at issue, the defendants may require a plaintiff to submit to an IME by a physician retained by defendant for that purpose" (*Markel v Pure Power Boot Camp, Inc.*, 171 AD3d 28, 29 [1st Dept 2019]). "In the case of serious injury, it is perfectly proper to require a plaintiff to submit to more than one examination" (*Goldman v Linkoff*, 45 AD2d 709, 710 [2d Dept 1980]). Under the circumstances where Plaintiff is claiming he sustained multiple herniated discs in his spine along with "extensive medical care and physical therapy", a further exam with the requested specialist is warranted.

KND seeks to disqualify Lewis Brisbois Bisgaard & Smith LLP ("Lewis Brisbois") from representing any parties in this matter. It posits that Defendants, USTA and Hunt on one hand, and Manhattan on the other, have divergent interests and Lewis Brisbois' continued representation represents a conflict of interest.
"Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice" (*S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). This valued right to counsel of one's own selection is not absolute and may be overridden where the party seeking disqualification meets a heavy burden subject to careful scrutiny (*see Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 5 [1st Dept 2015]). "Whether to disqualify an attorney is a matter which lies within the sound discretion of the court" (*Matter of Madris v Oliviera*, 97 AD3d 823, 825 [2d Dept 2012]).

Concerning conflicts of interests between current clients, Rule 1.7 of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that, except under certain conditions, a lawyer shall not represent a client where "the representation will involve the lawyer in representing differing interests" or where "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected." Here, KND's assertion of the existence of divergent interests between USTA and Hunt, as owner and construction manager, and Manhattan, as a subcontractor, failed to demonstrate "any substantial public interest which

would preclude defendants from exercising their right to representation by an attorney of their choice" (*Rowe v De Jesus*, 106 AD2d 284 [1st Dept 1984]). Indeed, "[i]t is certainly inappropriate for [KND] to impose, over defendants' objections and in the absence of any overriding public interest, a substitution of defense counsel simply because there are certain potential hazards involved in joint representation" (*id.*; *see also Masiello v 21 E. 79th St. Corp.*, 126 AD3d 596, 597 [1st Dept 2015]).

Accordingly, it is

ORDERED that the motion by Defendants USTA, Hunt and Manhattan for a protective order quashing a KND's notice to admit dated July 5, 2022, is granted, and it is

ORDERED that the cross-motion by KND is granted only to the extent that Plaintiff shall appear for a further defense medical exam with KND's designated physical medicine and rehabilitation specialist within 30 days of the date of efiling of this order, but otherwise denied, and it is

ORDERED that Plaintiff's cross-motion is granted only to the extent that the branch seeking a protective order quashing a KND's notice to admit dated November 29, 2021, is granted and the remainder of the motion is denied, and it is

ORDERED that all parties shall appear for a status conference on **June 27, 2023, at 10:00am** in Courtroom 1127[b] of the Courthouse located at 111 Centre Street.

5/5/2023
DATE

FRANCIS KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE