

Xiao Mang Ye v City of New York

2025 NY Slip Op 35282(U)

May 1, 2025

Supreme Court, Queens County

Docket Number: Index No. 700746/20

Judge: Timothy J. Dufficy

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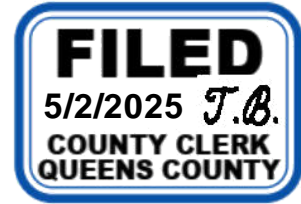
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35



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XIAO MANG YE,

Plaintiff,

-against-

Index No.: 700746/20

Mot. Date: 1/28/25

**THE CITY OF NEW YORK, NEW YORK CITY
BOARD OF EDUCATION, , NEW YORK CITY
DEPARTMENT OF EDUCATION, HOYT
TRANSPORTATION CORP. and LYDIA Y.
UTLEY,**

Mot. Seq: 11

Defendants.

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The following papers were read on this motion by defendants Hoyt Transportation Corp. and Lydia Y. Utley for an order, *inter alia*, vacating the Note of Issue, compelling the plaintiff to appear for a neuropsychological medical examinations and amending the caption to reflect the dismissal of the New York City defendants.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	EF 306-322
Affirmation in Opposition-Exhibits.....	EF 323-325
Reply Affirmation.....	EF 326

Upon the foregoing papers, it is ordered that the motion by defendants Hoyt Transportation Corp. and Lydia Y. Utley (moving defendants) is granted, in part and denied, in part, as set forth below.

This is an action for personal injuries arising out of a motor vehicle accident, that occurred on February 26, 2019. Plaintiff, a pedestrian, alleges that she sustained injuries when she was struck by a vehicle owned and operated by the moving defendants.

The court file reflects that this matter was previously assigned to the Hon. Kevin J. Kerrigan.

In an Order, entered on April 25, 2023 (NYSCEF Doc. No. 217), Justice Kerrigan granted a motion by defendants City of New York, New York City Board of Education and New York City Department of Education (New York City defendants), finding that, as the New York City defendants had no duty of care to the plaintiff as a matter of law, the action and all cross claims against them was dismissed. As such, the branch of the motion to amend the caption, striking said defendants is granted. The Court notes that the court record reflects that a Notice of Appeal was filed, but an appeal was never perfected.

According to moving defendants' papers, on October 29, 2020, the plaintiff served a bill of particulars, which alleged, *inter alia*, "neurosurgery recommendation for Traumatic Brain Injury." On April 25, 2024, the plaintiff served a supplemental bill of particulars, which alleged, *inter alia*, that the plaintiff had sustained cognitive impairment, depression and traumatic brain injury. On June 3, 2024, the plaintiff served another supplemental bill of particulars, which alleged that the plaintiff had sustained traumatic brain injury, due to skull and brain fracture; permanent neurological deficits and chronic migraines.

Moving defendants further state that, on or about October 9, 2024, both parties executed a certification order, wherein the parties agreed that all discovery was complete, which was emailed to the compliance conference part. In said Order, signed by the Hon. Joseph J. Esposito (NYSCEF Doc. No. 302), the plaintiff was ordered to file the Note of Issue, by December 13, 2024. Counsel for moving defendants affirms, and the plaintiff does not dispute that, prior to October 9, 2024, the plaintiff had not exchanged any discovery as to the plaintiff's treatment or any expert opinion in support of the claim of traumatic brain injury.

The record reflects that, on October 11, 2024, after the certification order had been signed and executed, counsel for plaintiff exchanged via NYSCEF, the previously undisclosed report of a psychological expert, who had examined the plaintiff and had conducted an evaluation on August 9, 2022 that consisted of six hours of interviewing and test taking (*see* NYSCEF Doc, No. 300).

On December 10, 2024, the plaintiff filed the Note of Issue

Moving defendants bring the instant motion, contending, in sum and substance, that had they known about the expert disclosure, they would not have consented to the certification order until the defendants had an opportunity to have their own neuropsychologist evaluate the plaintiff. They argue, emphasizing that while they were aware of the claim of traumatic brain injury at the time they executed the certification order, as of that time, the plaintiff had not exchanged any expert opinion in support of that claim. They also argue that since the extensive examination by the plaintiff's expert had taken place, on August 9, 2022 (over two years before the certification order was executed), the expert disclosure should have been done earlier.

Plaintiff opposes the motion contending that the defendants were on notice, since October, 2020, that the plaintiff was claiming traumatic brain injury and neuropsychological issues, yet signed a stipulation, in October of 2024, that all discovery was complete.

[A] trial court is given broad discretion to oversee the discovery process.” *Cioffi v S.M. Foods*, 142 AD3d 520 [2d Dept 2016]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]. “The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court, and, absent an improvident exercise of that discretion, its determination will not be disturbed” (*Berkowitz v 29 Woodmere Blvd. Owners Corp.*, 135 AD3d 798, 799 [2d Dept 2016]).

A trial court may grant leave to conduct additional discovery after the filing of the Note of Issue to prevent substantial prejudice, where the moving party demonstrates that “unusual or unanticipated circumstances” developed subsequent to the filing that requires additional pretrial proceedings. (*Singh v 244 W. 39th St. Realty, Inc.*, 65 AD3d 1325, 1325 [2d Dept 2009], quoting 22 NYCRR § 202.21[d]). The Court has the discretion to decline to vacate a note of issue and direct a plaintiff to provide all outstanding discovery by a date certain (*see Encarnacion v Monier*, 81 AD3d 875 [2d Dept 2011]; *Joseph v Propst*, 306 AD2d 246 [2d Dept 2003]).

Here, it is clear that the moving defendants have been on notice that the plaintiff was claiming traumatic brain injury and neuropsychological issues, yet failed to conduct their own neuropsychological examination of the plaintiff prior to signing the certification order. However, the Court finds the fact that the plaintiff did not disclose her

neuropsychological expert's report, until October 11, 2024, after the certification order was executed, and over two years after the expert had examined the plaintiff, constitutes unusual and unanticipated circumstances warranting further discovery.

Accordingly, it is

ORDERED that the motion by moving defendants Hoyt Transportation Corp. and Lydia Y. Utley is granted, in part and denied, in part, in that: it is

ORDERED that the branch of the motion to compel the plaintiff to appear for an examination by a neuropsychologist, designated by the moving defendants, is granted; and it is further

ORDERED that moving defendants shall designate a neuropsychologist to examine and conduct testing of the plaintiff, within forty-five (45) days of the date that this Order appears in the minutes of the Queens County Clerk-NYSCEF system; and it is further

ORDERED that the plaintiff is to appear for an examination by the neuropsychologist, designated by the moving defendants, within sixty (60) days of designation; and it is further

ORDERED that the moving defendants are to exchange the report of the neuropsychologist rehabilitation expert, within forty-five (45) days after the completion of the examination; and it is further

ORDERED that if the plaintiff does not appear for the examination by the neuropsychologist, the plaintiff may be subject to preclusion and/or vacating of the Note of Issue, upon further motion; and it is further

ORDERED that the branch of the motion to vacate the Note of Issue is denied, without prejudice; and it is further

ORDERED that the branch of the motion to amend the caption to reflect the dismissal of the New York City defendants is granted; and it is further

ORDERED that the caption is amended to read, as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

-----X
XIAO MANG YE,

Plaintiff,

Index No. 700746/20

- against-

**HOYT TRANSPORTATION CORP. and
LYDIA Y. UTLEY**

Defendants.

-----X
; and it is further

ORDERED that counsel for moving defendants shall serve this Order upon all parties with Notice of Entry, and upon the Queens County Clerk, who upon notice, pursuant to CPLR 8019 (c), is directed to amend the caption; and it is further

ORDERED that any arguments or requests for relief not addressed herein have been considered by the Court and are denied

Dated: May 1, 2025



TIMOTHY J. DUFFICY, J.S.C.

