Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

MADALENA MOREIRA,

Plaintiff,

-against-

M.K. TRAVEL AND TRANSPORT, INC. and THEODORE KILAKOS,

Defendants.

Index No. 12428/11

Motion Date May 15, 2012

Motion Cal. No. 17

Motion Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by plaintiff for an order pursuant to CPLR 3212 granting the plaintiff, Madelena Moreira summary judgment against the defendants on liability is hereby denied.

This is an action for personal injuries to plaintiff when the motor vehicle owned by defendant, M.K. Travel and Transport, Inc. and operated by defendant, Theodore Kilakos, came into contact with the pedestrian plaintiff, Madelena Moreira on April 13, 2011.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be

construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Plaintiff established a prima facie case that there are no triable issues of fact. In support of the motion, plaintiff presents, inter alia, the examination before trial transcript testimony of plaintiff herself, plaintiff's own affidavit, the examination before trial transcript of defendant, Theodore Kilakos himself, and a copy of the Police Report. "Plaintiff[] made a prima facie showing of [her] entitlement to judgment as a matter of law by demonstrating [she was] crossing the street, within the crosswalk, with the light in [her] favor, when [she was] struck by defendant's vehicle" (*Beamud v. Gray*, 45 AD3d 257 [1st Dept 2007]).

In opposition to the motion, defendants present a triable issue of fact. In opposition, defendants present, inter alia, the examination before trial transcript testimony of defendant, Theodore Kilakos, who testified that: as he began to make the left turn, he had a green light in his favor and the pedestrian crossing signal was a blinking red palm as he began to turn.

"T]he general rule is that the question of whether a pedestrian exercised due care in crossing a street is ordinarily one for the jury" (*Rodriguez v. Robert*, 47 AD2d 548 [2d Dept 1975]).

As there are conflicting versions of how the accident happened, there are triable issues of fact as to, inter alia,

whether the defendant was negligent, whether any negligence on the defendant's part was the proximate cause of the accident, and whether the plaintiff was comparatively negligent. As such, a trial is necessary and plaintiff's motion is denied.

Defendants' cross motion pursuant to CPLR 3124 seeking to compel the production of duly executed authorizations permitting the defendants to inspect the mental health records of plaintiff as requested in the Defendants' Notice for Discovery and Inspection dated December 15, 2011 is granted.

In the instant action, plaintiff alleges via her Verified Bill of Particulars and Supplemental Verified Bill of Particulars injuries of a femur fracture and tear of the right knee. Additionally, in her Verified Bill of Particulars and Supplemental Verified Bill of Particulars, plaintiff alleges: "anxiety and mental anguish, all of which substantially prevents this Plaintiff from enjoying the normal fruits of activities (social, educational and economical) and Plaintiff's enjoyment of life has been permanently impaired, impeded and/or destroyed".

It is well-established law that under CPLR 3101(a), the parties may engage in liberal discovery of evidence that is "material and necessary" for the preparation of trial (*see, Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). "The words 'material and necessary' as used in the statute are to be interpreted liberally, to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial" (*Anonymous v. High School for Environmental Studies et. al.*, 820 NYS2d 573, 578 [1st Dept 2006]) (citations omitted). The Court is given broad discretion to supervise discovery (*Lewis v. Jones et. al.*, 182 AD2d 904 [3d Dept 1992]). "The test is one of usefulness and reason. CPLR 3101(subd[a]) should be construed . . .to permit discovery of testimony 'which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable (Weinstein-Korn-Miller, NY Civ Prac., par. 3101.07, p. 31-13)" (*Allen, supra*). It is immaterial that the material sought may not be admissible at trial as "pretrial discovery extends not only to proof that is admissible but also to matters that may lead to disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp v. Hunter Ambulance Inc.*, 226 AD2d 175 [1st Dept 1996]; *Polygram Holding, Inc. v. Cafaro*, 42 AD3d 339 [1st Dept 2007] ["disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof, including materials which may be used in cross-examination"]). The CPLR directs full disclosure of all relevant material. The test is one of

usefulness and reason (CPLR 3101[a]; *Allen, supra; Andon v. 302-304 Mott Street Assocs.*, 94 NY2d 740 [2000]; *Hoenig v. Westphal*, 52 NY2d 605 [1981] [pre-trial discovery is to be encouraged, limited only by the test of *materiality of "usefulness and reason"*]; *Spectrum Sys. Int'l. Corp. v. Chemical Bank*, 78 NY2d 371, 376 [1991]). With respect to discovery, in order to withstand a challenge to the disclosure request, the party seeking disclosure must satisfy the threshold requirement that the disclosure sought is "material and necessary" (*Kooper v. Kooper*, 74 AD3d 6 [2d Dept 2010]). Moreover the adequacy and circumstances and reasons for the disclosure will ultimately be determined by the trial court, and the "determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court, which must balance competing interests" (*Id.*; *Santariga v. McCann*, 161 AD2d 320 [1st Dept 1990] [the scope and supervision of disclosure is a matter within the sound discretion of the court in which the action is pending]).

"It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR . . . when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue". Here, the plaintiff affirmatively placed her entire medical condition in controversy through the broad allegations of physical injury and mental anguish contained in her bill of particulars. In addition, the nature and severity of the plaintiff's previous injuries and medical conditions are material and necessary to the issue of damages, if any, recoverable for a claimed loss of enjoyment of life due to her current . . . injury" (*Diamond v. Ross Orthopedic Group, P.C.*, 41 AD3d 768 [2d Dept 2007][internal citations omitted]; *see also*, *Azznara v. Strauss*, 81 Ad3d 578 [2d Dept 2011][wherein the Court held that plaintiff's alcohol and drug abuse records were material and necessary where plaintiff claimed damages of loss of enjoyment of life resulting from chiropractic malpractice]; *Vanalst v. City of New York*, 276 AD2d 789 [2d Dept 2000][wherein the Court held that records relating to plaintiff's previous back injuries were discoverable because they may have an impact on his claimed loss of enjoyment of life because of his current knee injury]).

The Court finds that the medical records sought are "material and necessary." As such, plaintiff is directed to provide defendants with all outstanding HIPAA compliant medical authorizations requested in the Defendants' Notice for Discovery and Inspection dated December 15, 2011 within thirty (30) days

from the date of service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: July 13, 2012

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Howard G. Lane, J.S.C.