S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

CORY LEGNETTI,

Plaintiff,

- against -

CAMP AMERICA, CAMP CHIPINAW RECREATION CORP., CAMP CHIPINAW REALTY CO., LLC, CAMP CHIPINAW RECREATION CO., LLC, and PETER EVANS,

Defendants.

TRIAL / IAS PART 30
NASSAU COUNTY

Index No. 1113/09

Motion Sequence No. 004, 005

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2
Answering Affidavits .....
Replying Affidavits .....
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The plaintiff moves pursuant to CPLR 3124 and 3126 to compel the defendants to comply with the plaintiff's discovery demands in this personal injury action within 10 days. The case arises from allegations of Peter Evans improperly touching the plaintiff and whether the camp defendants are liable for negligent hiring and supervision. The plaintiff claims the defense failed to completely respond, and adds a meeting among the parties failed to resolve this dispute so this motion was commenced. The plaintiff contends the information sought is vital to the plaintiff's case and likely to lead to discovery of admissible evidence. The plaintiff asserts non-production will severely prejudice the plaintiff's case.

The defendants oppose the plaintiff's motion, and cross move for a protective order. The defense contends there is a question of whether the plaintiffs are entitled to production of documents identifying counselors and campers who were in Evans' bunk during 2001 through 2008, that is after the alleged improper contact ended. The defense asserts the post-incident documents the plaintiff seeks are irrelevant, and the plaintiff's discovery demands are overbroad and beyond the scope of discovery permitted by the CPLR. The defense maintains production of this information will permit a fishing expedition and delay discovery completion and the eventual disposition of this case.

The Court reviewed and considered the parties' papers. CPLR 3101 provides for full disclosure of all material and necessary evidence. The Second Department holds:

> Under CPLR 3101 (subd [a]), "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof". The term "evidence" has not been restrictively interpreted to mean that a party has no right to obtain information at a pretrial examination that might be inadmissible or might not be used as evidence at trial (***see Avila Fabrics v. 152 West 36th St. Corp.***, 22 AD2d 238; ***Baxter v. Orans***, 63 AD2d 875; ***Ribley v. Harsco Corp.***, 84 Misc 2d 744, ***affd*** 57 AD2d 228; ***Ball v. State of New York***, 101 Misc 2d 554; 3A Weinstein-Korn-Miller, NY Civ Prac, par 3101.04). Whereas under pre-CPLR disclosure, courts generally did not grant examinations to elicit inadmissible hearsay testimony (***see South Shore Thrift Corp. v. National Bank***, 255 App Div 859) or the opinions (***see Vaughn v. City of New York***, 132 NYS2d 919) and the conclusions of a witness (***see Metropolitan Life Ins. Co. v. Grant Drug Co.***, 140 NYS2d 798), admissibility is no longer the test to be applied in determining a motion for discovery. The ultimate decision of admissibility should be left to the trial court ***Abrams v. Vaughan & Bushnell Mfg. Co.***, 37 AD2d 833, 834; ***Ribley v. Harsco Corp.***, 84 Misc 2d 744, 745, ***affd*** 57 AD2d 228, ***supra***.)." Thus, there is permitted a pretrial disclosure of testimony or documents which, while themselves inadmissible, may lead to the disclosure of admissible proof (Wachtell, New York Practice Under the CPLR [4th ed.], pp. 251-252; 3A Weinstein-Korn-Miller, N.Y. Civ. Prac., pars. 3101.04, 3111.04)" (***Shutt v. Pooley, 43 AD2d 59, 60; see, also, Baxter v. Orans***, 63 AD2d 875, ***supra***.; ***Avila Fabrics v. 152 West 36th St. Corp.***, 22 AD2d 238, ***supra***.; ***Ball v. State***

of New York, 101 Misc 2d 554, 560, ***supra.***; ***Dunlop Tire & Rubber Corp. v. FMC Corp.***, 90 Misc 2d 876, 879)
Wiseman v. American Motors Sales Corp., 103 AD2d 230, 236-237.

The Court of Appeals held:

The words, "material and necessary", are, in our view, 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. CPLR 3101 (subd. [a]) should be construed, as the leading text on practice puts it, 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" (3 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 3101.07, p. 31-13). Even under former section 288 of the Civil Practice Act, the courts tended to follow this more liberal construction as pretrial examinations became "concerned more acutely with the preparation of the case than with the preservation of testimony." (***Southbridge Finishing Co. v. Golding***, 2 A D 2d 430, 434; ***see, also, Cornell v. Eaton***, 286 App. Div. 1124; ***Dorros, Inc. v. Dorros Bros.***, 274 App. Div. 11, 13-14.) And, since the enactment of CPLR 3101, the courts have continued "to enlarge the permissible use of pretrial procedure" begun under the former statute. (***Rios v. Donovan***, 21 A D 2d 409, 411 [1st Dept.] ***see, also, Matter of Comstock***, 21 A D 2d 843, 844 [4th Dept.] Nomako v. Ashton, 20 A D 2d 331, 332-333 [1st Dept.]; ***see, also***, Siegel, Disclosure under the CPLR: Taking Stock After Two Years, Eleventh Annual Report of Administration Board of Judicial Conference, 1965 [N. Y. Legis. Doc., 1966, No. 90], pp. 148, 185.) "The purpose of disclosure procedures", declared the Appellate Division for the

First Department in the ***Rios*** case (21 A D 2d, at p. 411), "is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits" and, in the ***Comstock*** case (21 A D 2d, at p. 844), the Appellate Division, Fourth Department, wrote that, "'[i]f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered "evidence material ... in the prosecution or defense"' (3 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 3101.07.)" ***Allen v. Crowell-Collier Publishing Co.***, 21 NY2d 403, 406-407.

This Court applied the case and statutory authority. The Court determines the plaintiff meets his burden of showing the information sought is material and necessary to the prosecution of his action.

Accordingly, the plaintiff's motion is granted, and the defense cross motion is denied. The defendants are directed to fully comply with the plaintiff's discovery demands within 10 days after service of a copy of this order with notice of entry upon the defense counsel.

So ordered.

Dated: **December 21, 2011**

ENTER:

J. S. C.

NON FINAL DISPOSITION