SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRAVIS SCHMIDT,

Plaintiff,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, OFFICER DERRICK REVANDER, Individually and in his official capacity as an MTA Police Officer, and OFFICER ANDRE OLIPHANT, Individually and in his official capacity as an MTA Police Officer,

Defendants.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 605614/14
Motion Seq. No.: 01
Motion Date: 03/28/17

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmations and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation and Exhibits	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3216, for an order striking plaintiff's Verified Complaint for failure to comply with discovery, or move, in the alternative, pursuant to CPLR § 3214, for an order compelling plaintiff to provide discovery. Plaintiff opposes the motion.

Counsel for defendants asserts that, "[p]laintiff claims that the police officers [defendants] violated his civil rights and used excessive force, among other things, resulting in **permanent injuries to his neck, back, knees and head.**" Counsel for defendants proceeds to

list the various injuries and/or medical treatment plaintiff has allegedly received prior to the date of incident in the subject action. Counsel adds that, "[a]dditionally, at some point in time prior to the police incident, plaintiff began receiving Methadone treatment, but refuses to provide the records. This is despite the fact that plaintiff claims that **as a result of the police incident, he is completely disabled and cannot work.** It is respectfully submitted that plaintiff has placed his medical history in issue and the defendants should be entitled to complete discovery of plaintiff's medical past, especially records concerning his drug addiction and treatment as they certainly would have a bearing o his ability to maintain employment, psychiatric treatment as that also would have a bearing on his ability to maintain employment, as well as the fact that he was having a panic attack at the time of the police incident, and his orthopedic treatment for the various prior injuries."

Counsel for defendants argues that plaintiff's conduct has been "wilful and contumacious in refusing to disclose."

Counsel for defendants further contends that, "[p]laintiff has certainly placed not only his physical health, but his mental health an (*sic*) issue. The Bill of Particulars (page 7) alleges emotional distress, trauma and pain; post-traumatic stress and fear; psychological impairment and distress; sleep disturbances and impairment; and goes onto (*sic*) allege that there was an exacerbation of all such prior injuries or symptoms that may have been previously asymptomatic. It is also alleged that there is permanent residual damage and side effects to plaintiff's person both mental and physical including cognitive functioning." *See* Defendants' Affirmation in Support Exhibit D.

In counsel for defendants' reply papers, counsel indicates that, "[t]he parties have conferred, in good faith, in an attempt to resolve all of the issues contained in this motion. The parties have resolved some of the issues, but not all of them...." *See* Defendants' Reply Affirmation Exhibits A and B.

The Court notes that the discovery issues that remain outstanding include:

1. Defendants' Demand for a Bill of Particulars Demand 11, "[s]et forth all statutes, ordinances, codes, orders, rules, regulations and/or requirements of the federal, state, county, village, town or city governments, or of any and all of their departments, divisions, agencies and bureaus, or by any duly constituted professional society and/or organization, or by contract, agreement, duty or other obligation, which any party claims defendants violated and the manner in which same occurred." (*See* Defendants' Affirmation in Support Exhibits B and D).

2. Defendants' Demand for a Bill of Particulars Demands 6 and 7. Counsel for defendants has requested that "[p]laintiff will supplement items 6 and 7 concerning lost earnings and special damages to the extent that plaintiff intends to prove same at the time of trial." (*See* Defendants' Affirmation in Support Exhibit D).

3. Expert Disclosure concerning plaintiff's expert, Earl Kean, as demanded in defendants' November 4, 2016 Notice for Discovery And Inspection ¶¶ 1-3. (*See* Defendants' Affirmation in Support Exhibit F).

4. Outstanding or Improper Authorizations.

See Defendants' Reply Affirmation Exhibits A and B.

The Court will individually address each of the outstanding items and each counsel's arguments with respect to same.

With respect to defendants' Demand for a Bill of Particulars Demand 11, as detailed above, counsel for defendants submits that, "[t]he last three lines of the plaintiff's response to item 3 concerning the defendants' negligent conduct (page 5) reads as follows: 'otherwise failing to operate and control the train station in a safe and controlled manner and **according to all New York state laws, rules, regulations, codes, or the like...'** In response to item 11 demanding particulars as to those laws, rules, regulations, codes, etc. violated, plaintiff states that this is an improper demand and the court will take judicial notice, although plaintiff does allege violations of the US Constitution and Civil Rights Code. As set forth in our 2/13/17 good faith letter, item 3, we requested further particularization as to those laws, etc., violated, citing a Second Department case called *Kim v. A&K*, [citation omitted], which is directly on point and states that at the close of discovery plaintiff must provide particularization and can not (*sic*) simply say that the court will take judicial notice. Despite this, annexed hereto as Exhibit E is plaintiff's discovery response dated February 6, 2017, wherein item 5 responds 'improper demand.'" *See* Defendants' Affirmation in Support Exhibits B, D and E.

In opposition to this demand, counsel for plaintiff asserts, "[p]laintiff has stated various statutes violated, specifically, the United States Constitution, including the 1st, 4th, 5th and 14th Amendments, 42 U.S.C. §§ 1983, 1985, 1986 and 1988. Those statutes, and the fact that Plaintiff has specifically asserted that he claims that Defendants falsely arrested him, threw him to the ground, banged his head on the ground, placed their knee on his spine, shoulder, etc. should be sufficient to give the Defendants due notice of what is being claimed. There are no secrets about what Plaintiff is claiming and as such no prejudice to the Defendants. Defendants cite Kim v. A&K Plastic Prods., [citation omitted] which they assert is directly on point and 'states that at the close of discovery plaintiff must provide particularization and can not (*sic*) simply say that the

court will take judicial notice.' ... Assuming, *arguendo*, that Kim is directly on point, which it is not, in Kim the Second Department states as follows: We would note, however, that ***if***, after discovery *is completed*, the plaintiff ascertains that there have been such violations he shall, within 30 days, serve a further bill of particulars...' (Emphasis added) The Second Department's decision therefore required that Mr. Kim only provide such particularization *after* all discovery is completed and only **if** he ascertains such violations. There is no order of preclusion mentioned.... [I]t appears that the rule with respect to particularizing statutes, rules, etc. is that in certain types of cases, the plaintiff is required to provide notice to defendants of any statutes, laws, etc. violated by defendants upon which plaintiff intends to rely at trial. There are no cases which state that prior to filing a note of issue, the plaintiff is required to locate and provide notice to defendants of the particular statutes, laws, etc. or be precluded. I have located no cases involving false arrest, imprisonment, assault and battery and other claims made in Plaintiff's Complaint which require such particularization and Defendants have cited no such cases. Given that the Defendants are the operators of a police force and police officers, they are or should be well aware of those statutes which prevent violation of civil rights, unnecessary use of force, excessive use of force, assault, battery, false imprisonment, false arrest, and the other claims made by Plaintiff herein. Rather, the Defendants appear to be attempting to preclude Plaintiff in order to prevent Plaintiff from asserting valid claims against them. This type of gamesmanship is sanctioned by neither case law nor CPLR 4511."

In a negligence action, a request in a demand for a bill of particulars that the plaintiff specify the statute or statutes that the complaint claims the defendant violated is proper. *See Liga v. Long Island Railroad*, 129 A.D.2d 566, 514 N.Y.S.2d 61 (2d Dept. 1987). Furthermore, it has been recognized that since courts are required to take judicial notice, without request, of the

public statutes of every state, particularization of the statutes of New York and of sister states may not be required. It has also been held that the plaintiff may not defer providing particulars as to violations of statutes or ordinances by requesting that the trial court take judicial notice of any applicable statutes. Although the court is required to take judicial notice of laws, requiring a plaintiff to set forth those statutes or regulations allegedly violated serves the additional useful purpose of giving the court early notice of those laws of which judicial notice should be taken. *See* CPLR § 4511(a); *Kwang Sik Kim v. A&K Plastic Products, Inc.*, 133 A.D.2d 219, 519 N.Y.S.2d 24 (2d Dept. 1987).

Based upon the above, the Court hereby **ORDERS** that, to the extent plaintiff will claim at the time of trial a violation of an statute or other item demanded in Demand 11 of Defendants' Demand for a Bill of Particulars, if not previously particularized, plaintiff shall provide a list of said statutes, etc. within thirty (30) days from the date of this Decision and Order.

With respect to defendants' Demand for a Bill of Particulars Demands 6 and 7 whereby counsel for defendants has requested that "[p]laintiff will supplement items 6 and 7 concerning lost earnings and special damages to the extent that plaintiff intends to prove same at the time of trial," counsel for plaintiff asserts that "[p]laintiff is willing to provide any further proofs of lost earnings that he may have or acquire, but as stated, he was not working at the time of the assault. Plaintiff presently does not have such additional records. Plaintiff reserves his right to hire an economist and/or a vocational rehabilitation expert. Should Plaintiff hire either or both such experts, he will provide defendants with any records not previously exchanged upon which such experts rely in preparing their opinions. Plaintiff will also provide the normal 3101(d) response should experts be retained in accordance with the requirements of the CPLR. Regarding special damages, Plaintiff has provided such records as he has and is attempting to locate a few

additional records. The only additional records which Plaintiff thinks will be produced are records of money paid to Dr. Rafiy for treatment. Many receipts for those payments were already provided to defendant with Plaintiff's opposition to the motion. Plaintiff has repeatedly asked Dr. Rafiy's office to prepare a printed list or printout of payments received from Plaintiff directly as opposed to via insurance. As soon as such a list of provided it will be provided to defendants." *See* Defendant's Reply Affirmation Exhibit B. Based upon this response, counsel for defendants requests "leave to have plaintiff examined by their own vocational expert within forty-five days after plaintiff makes any such disclosure concerning lost earnings."

Based upon the above, the Court hereby **ORDERS** that plaintiff shall provide any further proofs of lost earnings that he may have or acquire. Plaintiff has the right to hire an economist and/or a vocational rehabilitation expert. Should plaintiff hire either or both such experts, he shall provide defendants with any records not previously exchanged upon which such experts rely in preparing their opinions. Plaintiff shall also provide the normal CPLR § 3101(d) response should experts be retained. Defendants shall have leave to have plaintiff examined by their own vocational expert within forty-five (45) days after plaintiff makes any such disclosure concerning lost earnings.

With respect to defendants' request for Expert Disclosure concerning plaintiff's expert, Earl Kean, as demanded in defendants' November 4, 2016 Notice for Discovery And Inspection ¶¶ 1-3, counsel for plaintiff submits that, "[p]laintiff agrees to provide 3101(d) disclosure of Mr. Kean at least 30 days prior to jury selection, if Plaintiff retains him and intends to call him as an expert." *See* Defendants' RePly Affirmation Exhibit B. Based upon this response, counsel for defendants asserts that "[p]laintiff demanded to bring this 'expert' to the depositions of the two MTA police officers, and same was consented to rather than delay the depositions. During the

depositions, the 'expert' was seen making his own notes and passing other notes to plaintiff's attorney. Exhibit F of (*sic*) original motion papers requests disclosure concerning this 'expert' pursuant to the CPLR and a copy of his curriculum vitae or resume and that the notes be preserved for discoverability and admissibility. In response, plaintiff proposes that he will provide disclosure pursuant to the CPLR at least thirty (30) days prior to trial is he intends to call this expert. That is fine, however, he should also be compelled to provide a copy of his notes and curriculum vitae." *See* Defendants' Affirmation in Support Exhibit F.

Based upon the above, the Court hereby **ORDERS** that, if plaintiff retains Earl Kean and intends to call him as an expert witness at trial, plaintiff shall provide CPLR § 3101(d) disclosure with respect to Earl Kean at least thirty (30) days prior to jury selection. Said disclosure shall include a copy of Earl Kean's curriculum vitae or resume and that the notes Earl Kean took during the depositions of defendants.

With respect to defendants' request for "Outstanding or Improper Authorizations," counsel for plaintiff submits that plaintiff will provide "Employment authorizations for FTS, but will not agree to provide the following authorizations: "a. Social Security Disability authorization; b. Medicare and Medicaid authorizations; ... d. Mary Immaculata Hospital for methadone treatment; e. St. Joseph's Hospital for methadone treatment; f. NUMC, unlimited as to time, with the alcohol and mental health boxes checked; g. Blaise Wolfrum (psychiatrist) with alcohol and mental health boxes check (*sic*); h. Health Plus (upon information and belief, a collateral source, and possibly health care provider) with alcohol and mental health boxes checked; and, i. John J. Mather Hospital, unlimited as to time, with the alcohol and mental health boxes checked." *See* Defendants' Reply Affirmation Exhibit B. Based upon this response, counsel for defendants asserts that "[y]our affirmant is withdrawing his request for plaintiff's

Methadone treatment records. Furthermore, your affirmant is withdrawing his request to have 'alcohol/drug treatment' box checked in outstanding medical records. However, plaintiff owes certain authorizations which should have the 'mental health information' checked. On February 7, 2017, your affirmant appeared with plaintiff's attorney for a bench conference with Judge Sher, wherein the judge was advised that certain discovery was outstanding and the parties were admonished to try and work things out. Plaintiff's attorney specifically represented in front of the judge that he would provide an unlimited authorization for plaintiff's treatment at Nassau University Medical Center (NUMC) with all three (3) boxes checked (alcohol, mental health, and HIV). However, despite this representation in open court, plaintiff has refused to provide this authorization. In a good faith effort to resolve this, your affirmant is willing to accept an unlimited authorization (unlimited as to time) for NUMC, provided the 'mental health information' box is checked. Both plaintiff and the police officers testified that when plaintiff was taken to NUMC, the people in the emergency room recognized him. Plaintiff claims it was because he was in a bus accident the year before and went to the emergency room. The defendants believed that plaintiff was in the midst of a 'panic attack' when they had to subdue him and he was taken to NUMC (plaintiff alleges false arrest, excessive force, etc.). The defendants further believe that plaintiff has a history of panic attacks and other mental health issues that either pre-existed his claim and/or they support the position that he was prone to having panic attacks.... Plaintiff has specifically put his mental health in issue. The Court is referred to page 7 of plaintiff's Bill of Particulars ... and near the bottom it states: 'emotional distress, trauma and pain, post traumatic stress and fear; psychological impairment and distress; sleep disturbances and impairment.' The Bill of Particulars goes on to state that if there were any pre-existing injuries, this incident exacerbated the condition. Plaintiff goes on to allege

permanent residual damage 'both **mental** and physical functioning, including cognitive functioning, as a result of said injuries.' Clearly, plaintiff has put his mental health at issue and the defendants should be entitled to plaintiff's prior mental health records on this issue. Moreover, plaintiff has specifically denied that he had any mental health treatment at NUMC, however, plaintiff has demonstrated a number of times that his credibility is not to be trusted .... For example, plaintiff injured his neck and back in the bus accident the year prior to this incident, but he claims that he no longer had problems and had stopped treating as a result of the bus accident, but the records clearly show otherwise. Moreover, annexed hereto as Exhibit C is one-page of plaintiff's pharmacy records. On 2/20/13, Dr. Ronke Babalola prescribed Hydroxyzine - an anti anxiety drug. According to the internet, Dr. Babalola is a psychiatrist at NUMC. Thus, there is evidence that plaintiff did have prior mental health treatment at NUMC. It is the public policy of the State of New York to allow liberal discovery. If plaintiff has had mental health treatment at the NUMC, then the defendants are certainly entitled to obtain these records (not to mention any other accidents he may have been involved in seeking similar treatment, etc.). If medical records are disclosed that are not relevant to plaintiff's claims herein, they will not be used a trial and I have already represented to plaintiff's attorney that if he provides me with the disclosure requested, I will not disclose it outside the confines of this litigation, so plaintiff's privacy will remain intact. For the same reason, plaintiff should be compelled to provide an unlimited authorization for psychiatrist Blaise Wolfrum with the mental health box checked. Additionally, it was recently learned that plaintiff went to John J. Mather Hospital after he was involved in a car accident where he suffered injuries to his neck and back and we have requested an authorization for the Mather Hospital records. Lastly, plaintiff refuses to provide authorizations for Medicare and Medicaid a potential collateral source depending on the nature of

their payments. Indeed, after the Medicare, Medicaid and Schipp Extension Act of 2007 was passed, there has been routine disclosure concerning Medicare and Medicaid particularly since defendants and their insurers can be held liable is they do not follow certain disclosure requirements." *See* Defendants' Affirmation in Support Exhibit D; Defendants' Reply Affirmation Exhibit C.

In plaintiff's opposition papers, counsel for plaintiff submits that, "[p]laintiff does not oppose providing Social Security Disability Authorization. Previously Plaintiff provided an authorization ... to the NYS Office of Temporary & Disability Assistance which authorized Defendants' counsel to obtain 'application and Decisions for Disability, Social Security 1-1-10 to Present.' This authorization was provided in Plaintiff's February 6, 2017 Response to Various Further Notices for Inspection and Discovery. In addition, at a prior conference defense counsel stated that he would prepare this authorization and I advised that the Plaintiff would sign it. Defendant provided some prepared authorizations, but did not provide one for Social Security Disability. Nevertheless, Plaintiff will sign one upon presentment of the appropriate form. Defendants have not provided any basis for Plaintiff to provide all Medicare and Medicaid records. Why are these records necessary? In addition, the authorization which Defendants tended states that all HIV/AIDS, Mental Health and Alcohol and Substance Abuse records will be provided per that authorization. Plaintiff does not agree that all such records are relevant or necessary.... Defendants are not entitled to drug and alcohol and similar records. Plaintiff did already provide an authorization to Dr. Diana Kornnreich with the box for mental health records initialed by Plaintiff. Similarly, Plaintiff provided an authorization for the Estate of Dr. Goldberg, going back to 2007 to present, with mental health box initialed. Plaintiff has provided these authorizations in an effort to move discovery along, but did not waive objections. For another

psychiatrist, Dr. Siegal, Plaintiff provided an authorization with mental health checked and produced a narrative report. This was apparently not sufficient for Defendants, who improperly subpoenaed Dr. Siegel and Dr. Goldberg's Estate without providing notice of that subpoena to my office, I wrote to Mr. Mehary [counsel for defendants] regarding this via email on 3/16/17 and he responded advising that subpoenas had been sent to Drs. Siegal and Bashenheimer, Marian Ortho and others. No notice was provided to my office of these subpoenas in violation of CPLR § 3120(3) until after I found out about his from the attorney for Dr. Goldberg's Estate." *See* Plaintiff's Affirmation in Opposition Exhibits A and C.

CPLR § 3101(1) provides for "full disclosure of all matters material and necessary for the prosecution and defense of an action...." The discovery of any information or material reasonably related to the issues which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity are encouraged. The test is one of usefulness and reason. *See Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968).

Indeed, "the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is 'material and necessary' as that phrase is used in CPLR 3101(a)." *Auerbach v. Klein*, 30 A.D.3d 451, 816 N.Y.S.2d 376 (2d Dept. 2006). *See also Stone v. Zinoukhova*, 119 A.D.3d 928, 990 N.Y.S.2d 567 (2d Dept. 2014); *Edwards v. Prescott Cab Corp.*, 110 A.D.3d 671, 972 N.Y.S.2d 629 (2d Dept. 2013); *Ural v. Encompass Ins. Co. of Am.*, 97 A.D.3d 562, 948 N.Y.S.2d 621 (2d Dept. 2012). Ultimately, "'[i]t is incumbent on the party seeking disclosure 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.'" *Gomez v. State of New York*, 106 A.D.3d 870, 965 N.Y.S.2d 542 (2d Dept. 2013) *quoting Vyas v. Campbell*, 4 A.D.3d 417, 775

N.Y.S.2d 375 (2d Dept. 2004).

New York has long favored "open and far-reaching pretrial discovery." *Kavanagh v. Ogden Alliance Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998) *quoting DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992) *cert. den. sub. nom. Poole v. Consolidated Rail Corp.*, 510 U.S. 816 (1993). Furthermore, pursuant to CPLR § 3124, disclosure provisions are to be liberally construed.

CPLR § 3126 provides the "[p]enalties for refusal to comply with order or to disclose." It reads, "[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: 1. An order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

The nature and degree of the sanction to be imposed on a motion pursuant to CPLR § 3126 is a matter reserved to the sound discretion of the trial court. *See Dokaj v. Ruxton Tower Ltd. Partnership*, 91 A.D.3d 812, 938 N.Y.S.2d 101 (2d Dept. 2012). To invoke the drastic

remedy of preclusion, the Court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate and contumacious conduct or its equivalent. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept. 2012); *Zakhidov v. Boulevard Tenants Corp.*, 96 A.D.3d 737, 945 N.Y.S.2d 756 (2d Dept. 2012); *MacKenzie v. City of New York*, 125 A.D.3d 821, 1 N.Y.S.3d 840 (2d Dept. 2015); *6 Harbor Park Drive, LLC v. Town of North Hempstead*, 127 A.D.3d 1065, 5 N.Y.S.3d 887 (2d Dept. 2015);*Crystal Clear Development, LLC v. Devon Architects of New York, P.C.*, 127 A.D.3d 911, 7 N.Y.S.3d 361 (2d Dept. 2015); *De Leo v. State-Whitehall Co.*, 126 A.D.3d 750, 5 N.Y.S.3d 227 (2d Dept. 2015); *Pirro Group, LLC v. One Point St., Inc.*, 71 A.D.3d 654, 896 N.Y.S.2d 152 (2d Dept. 2010); *Assael v. Metropolitan Tr. Auth.*, 4 A.D.3d 443, 772 N.Y.S.2d 364 (2d Dept. 2004). Willful and contumacious conduct can be inferred from repeated non-compliance with court orders, *inter alia*, directing depositions, coupled with either no excuses, or inadequate excuses; or a failure to comply with court ordered discovery over an extended period of time. *See Prappas v. Papadatos*, 38 A.D.3d 871, 833 N.Y.S.2d 156 (2d Dept. 2007).

As previously stated, it is well settled that trial courts have broad discretion in supervising disclosure. *See Alberto v. Jackson*, 118 A.D.3d 733, 987 N.Y.S.2d 218 (2d Dept. 2014); *Caro v. Marsh USA, Inc.*, 101 A.D.3d 1068, 956 N.Y.S.2d 575 (2d Dept. 2012). The determination whether to strike a pleading or to preclude evidence for failure to comply with court-ordered disclosure lies within the sound discretion of the court. *See Palmieri v. Piano Exch., Inc.*, 124 A.D.3d 611, 1 N.Y.S.3d 315 (2d Dept. 2015); *6 Harbor Park Drive, LLC v. Town of North Hempstead, supra*; *Crystal Clear Development, LLC v. Devon Architects of New York, P.C., supra.*

Although the Court has broad discretion in determining the appropriate sanction pursuant to CPLR § 3126, the "general rule is that a court should only impose a sanction commensurate with the particular disobedience it is designed to punish and go no further." *See Rossal-Daub v. Walter*, 58 A.D.3d 992, 871 N.Y.S.2d 751 (3d Dept. 2009) *citing Landrigen v. Landrigen*, 173 A.D.2d 1011, 569 N.Y.S.2d 843 (3d Dept. 1991).

"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." *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 470 N.Y.S.2d 122 (1983); *Lombardi v. Hall*, 5 A.D.3d 739, 774 N.Y.s.2d 560 (2d Dept. 2004); *Syron v. Paolelli*, 238 A.D.2d 710, 656 N.Y.S.2d 419 (3d Dept. 1997). However, the principle of "full disclosure" does not give a party the right to uncontrolled and unfettered disclosure. *See Farrell v. E.W. Howell Co., LLC*, 103 A.D.3d 772, 959 N.Y.S.2d 735 (2d Dept. 2013).

The Court finds that plaintiff has indeed affirmatively put his physical and mental condition in issue in the instant action. *See* Defendants' Affirmation in Support Exhibit D. Accordingly, plaintiff has waived the physician-patient privilege with respect to the records demanded by defendants.

Therefore, it is hereby **ORDERED** that plaintiff shall provide the following authorizations: 1. Medicare and Medicaid authorizations. 2. Nassau University Medical Center, unlimited as to time, with the mental health box checked. 3. Blaise Wolfrum (psychiatrist) with mental health box checked.4. Health Plus (upon information and belief, a collateral source, and possibly health care provider) with mental health box checked. 5. John J. Mather Hospital,

unlimited as to time, with the mental health box checked. Said authorizations must be provided within thirty (30) days of the date of this Decision and Order.

Additionally, it is hereby **ORDERED** that plaintiff shall provide Social Security Disability Authorization as said request was unopposed.

Accordingly, based upon the above, the branch of defendants' motion, pursuant to CPLR § 3216, for an order striking plaintiff's Verified Complaint for failure to comply with discovery, is hereby **DENIED**. The record does not clearly establish a pattern of wilfulness or contumacious conduct necessary to justify dismissal of plaintiff's' Verified Complaint. *See Warner v. Orange County Regional Medical Center*, 126 A.D.3d 887, 6 N.Y.S.3d 83 (2d Dept. 2015); *De Leo v. State-Whitehall Co.*, *supra* at 752; *Chong v. Chaparro*, 94 A.D.3d 800, 941 N.Y.S.2d 709 (2d Dept. 2012); *Hillside Equities, LLC v. UFH Apartments, Inc.*, 297 A.D.2d 704, 747 N.Y.S.2d 541 (2d Dept. 2002).

The branch of defendants' motion, pursuant to CPLR § 3214, for an order compelling plaintiff to provide discovery, is hereby **GRANTED to the extent as detailed above**.

This constitutes the Decision and Order of this Court.

ENTERED

JUN 27 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
June 26, 2017