To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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JAMES GODETTE AND SAMANTHA GODETTE,

Plaintiffs,

-against-

DANIEL FRANK MILLER also known as FRANK GOULD and METROPOLITAN TRUCKING, INC.,

Defendants.

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DECISION & ORDER

Index No. 60286/2016
Motion Date: March 26, 2018

Seq. No. 2

LEFKOWITZ, J.

The following papers were read on this motion by defendants Daniel Frank Miller, also known as Frank Gould, and Metropolitan Trucking, Inc. (hereinafter "defendants") for: (1) a so-ordered subpoena directing nonparty New York State Thruway Authority (hereinafter "Thruway Authority") to provide plaintiff James Godette's personnel file; or (2) in the alternative, an in camera inspection by the Court to determine if the documents in plaintiff's personnel file are material and necessary to the defense of this action; and (3) such other and further relief as this Court may deem just, proper and equitable.

Order to Show Cause – Affirmation of Daniel M. Lee, Esq., in Support – Exhibits A-H – Proof of Service – Amended Proof of Service
Affirmation of Anthony V. Barbiero, Esq., in Opposition – Statement of Authorization for Electronic Filing – Amended Affirmation in Opposition

Upon the foregoing papers and the proceedings held on March 26, 2018, this motion is decided as follows:

In this action commenced on or about July 27, 2016, plaintiff James Godette (hereinafter "plaintiff") seeks to recover monetary damages for injuries he allegedly sustained during a motor vehicle accident that occurred on August 18, 2014, on I-287 near White Plains (Defendants' Exhibit B). At the time, plaintiff, an employee of the Thruway Authority, was operating a Thruway Authority truck equipped with an attenuator barrier to protect another Thruway Authority vehicle equipped with a sweeper that was cleaning the east bound center median of I-287 (Defendants' Exhibit A). Plaintiff alleges that defendant Daniel Frank Miller, an employee of defendant Metropolitan Trucking, Inc., was operating a tractor trailer that struck the rear of plaintiff's truck (Defendants'

Exhibits A and B). Issue was joined on or about January 19, 2017, by service of a verified answer denying all material allegations and asserting affirmative defenses (Defendants' Exhibit C).

Plaintiff was deposed on August 30, 2017 (Defendants' Exhibit E). During his deposition, plaintiff testified that he had been involved in a prior accident a few years prior to the current accident. Specifically, plaintiff testified as follows:

> Q. Were you ever involved in any accidents before this accident?
> A. I was.
> Q. When was that?
> A. This was a few years – a few years before the accident, before this accident.
> Q. Where did it happen?
> A. On 287.
> Q. What happened?
> A. I was in the middle of a snowstorm and I was advised to pull over to the right shoulder by Exit 5 because I had to wait for my supervisor, and a car spun out of control during the blizzard and slammed into the truck.
> Q. You were working for the thruway at the time?
> A. Yes.
> Q. Any injuries to you at the time?
> A. No.

(Defendants' Exhibit E, Tr. at pages 146-147).

On December 4, 2017, nonparty witness Edward T. Roper, an employee of the Thruway Authority who had been operating the sweeper truck at the time of the accident, was deposed and was questioned regarding whether, after the plaintiff's accident, the Thruway Authority changed or clarified its safety procedures (Defendants' Exhibit F, Tr. at 50-51). Specifically, Roper testified:

> Q. After this accident was there any change or clarification of the procedures with regard to crossing the roads or anything like that at all, do you recall?
> A. It wasn't no change of that procedure because that's not the procedure of the way we operate, to go from the shoulder to the mall. That's not the safe way to do it. The way he did it was unsafe.
> Q. Was it just a matter of reminding people, hey, this is the way we're supposed to do it?
> A. Yes. I'm not sure – anytime that the Thruway have an accident they do give you a refresher course on a way of how to prevent that from happening.

(Defendants' Exhibit F, Tr. at 50-51).

Thereafter, defendants requested a copy of plaintiff's personnel file and sought to have a subpoena directed to nonparty Thruway Authority so-ordered by the Court. The proposed subpoena duces tecum requests that the Thruway Authority produce "the New York State Thruway personnel file pertaining to the plaintiff in this action" (Defendants' Exhibit H). At the compliance conference held on January 16, 2018, a briefing schedule was issued to defendants for the filing of the instant motion.

The Instant Motion

By this motion, defendants seek a so-ordered subpoena, pursuant to CPLR §3104(2), directing nonparty Thruway Authority to provide plaintiff's personnel file or, in the alternative, an in camera inspection by the Court to determine if the personnel documents are material and necessary to the defense of this action. Defendants seek plaintiff's personnel records for information relating to plaintiff's prior accident, plaintiff's driving record and training, and any assessments of plaintiff's compliance with safe driving procedures. First, defendants assert that during his deposition, plaintiff stated that he had been in a prior accident that occurred under similar circumstances to the current accident (*citing* Defendants' Exhibit E, Tr. at page 146, lines 8-23). Defendants contend that plaintiff's testimony has led them "to believe that there are records contained in the plaintiff's personnel file that are material and necessary to their defense." Additionally, defendants assert that nonparty witness Edward Roper also testified that plaintiff drove unsafely at the time of the accident (*citing* Defendants' Exhibit F, Tr. at page 51, lines 3-15) and that those statements were supported by a report filed with the Thruway Authority by plaintiff's supervisor (*citing* Defendants' Exhibit G). Defendants note that in the report, plaintiff's supervisor indicated that: (i) in his opinion the accident "may have happened as a result of speed and/or lane changes;" (ii) he "discussed the incident with the employee [plaintiff] ...he advised me that he felt he was making safe lane changes;" and (iii) his suggestion was "if drivers have any doubts about changing lanes, to turn around at the next exit" (*citing* Defendants' Exhibit G). Defendants argue that Mr. Roper's statements, coupled with the supervisor's report, indicate that plaintiff's failure to follow safe driving procedures was the cause of the accident and that plaintiff's personnel file would contain records related thereto.

Next, defendants note that plaintiff had also testified that he held a commercial driver's license (CDL) and that he had received CDL training through his employer, the Thruway Authority (Defendants' Exhibit E, Tr. at pages 56, 150). Defendants contend that they are entitled to information regarding plaintiff's CDL training in order to establish that he was both aware of, and failed to follow, the proper safety procedures for CDL drivers.[1]

In opposition to the motion, plaintiffs argue that the requested employment records are protected from disclosure under Section 87(2)(b) of the New York Public Officers Law[2], absent a compelling reason to permit such disclosure. Plaintiffs assert that the reasons presented by defendants for disclosure are patently insufficient. First, plaintiffs contend that any investigation

[1]Defendants also assert that plaintiffs lack standing to challenge the subpoena. The Court observes that this is not a motion to quash a subpoena. Rather, defendants are seeking to obtain a subpoena in the first instance, in order to access records pertaining to plaintiff.

[2] The Court notes that Section 87 of the New York Public Officers Law governs requests for records pursuant the Freedom of Information Law, as opposed to disclosure sought pursuant to CPLR Article 31.

regarding plaintiff's prior accident would not be part of his personnel file and that, in any event, such evidence would not be admissible in this action. Plaintiffs note that "evidence on the part of a driver on other occasions, no matter how closely connected in point of time with the subject accident, is inadmissible and no inference of negligence on the occasion of this accident can be legally drawn from other prior claimed negligent acts." Additionally, plaintiffs argue that defendants need not obtain an entire employment file in order to obtain copies of training materials and can simply request copies of those training materials from the Thruway Authority. Finally, plaintiffs assert that the subpoena is overbroad as the subpoena is a blanket request for plaintiff's employment records for the five years prior to the August 18, 2014 accident, through the present time (a period of nearly ten years).

Analysis

CPLR 3101 (a) provides that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. The phrase "material and necessary" is to be interpreted liberally to require disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]; *D'Ambrosio v Racanelli*, 101 AD3d 1069 [2d Dept 2012]; *Friel v Papa*, 87 AD3d 1108 [2d Dept 2011]). The Supreme Court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). Further, a party seeking disclosure from a nonparty pursuant to CPLR 3101[a][4] must demonstrate the nonparty discovery sought is material and necessary so long as the nonparty is advised of the circumstances or reasons warranting the disclosure (*Matter of Kapon v Koch*, 23 NY3d 32, 36 [2014]; *Bianchi v Galster Management Corp.*, 131 AD3d 558 [2d Dept 2015]). Defendants have not met their burden.

At bar, defendants have not demonstrated that the discovery sought is material and necessary. First, defendants seek plaintiff's personnel records for information regarding a prior accident that occurred on I-287, contending that the prior accident occurred under similar circumstances as the instant accident.[3] However, it is well settled that evidence of prior similar acts of negligent conduct may generally not be introduced to establish negligence in the case at trial (*Lukas v Trump*, 281 AD2d 400 [2d Dept 2001] [evidence of prior difficulties and accidents experienced by plaintiff while using crutches was not admissible to show negligence on his part in subsequent slip-and-fall]; *Bowers v Johnson*, 26 AD2d 552 [2d Dept 1966] [proof of plaintiff's prior accidents is inadmissible to show negligence in the instant case]).

In addition, defendants seek plaintiff's personnel records for evidence of the CDL training plaintiff received from the Thruway Authority, statements by nonparty witness Roper and any information contained therein that plaintiff's failure to follow safe driving procedures was the cause of the accident. However, as noted during oral argument on this motion, the Court

[3] The Court notes that the record does not support defendants' contention. Here, plaintiff testified that the prior accident involved a car which spun out of control during a blizzard and struck plaintiff's Thruway Authority truck, which was pulled over onto the shoulder, whereas in the subject accident, a tractor trailer struck the rear of plaintiff's truck, which was located near the center median.

previously so-ordered a subpoena on November 6, 2017, directed to the Thruway Authority for the production of an investigation report pertaining to the motor vehicle accident at issue, including but not limited to any and all reports generated regarding an investigation conducted of the incident, accident reports, statements obtained, photographs taken, and any other records. Thus, any statements or records regarding the motor vehicle accident at issue should have already been provided to defendants pursuant to that subpoena. Further, the Court notes that in its November 1, 2017 compliance conference order, defendants were directed to submit a proposed subpoena to be so-ordered by November 6, 2017, and were advised that the deadline would not be extended. The subpoena submitted by defendants did not seek information regarding plaintiff's CDL training and defendants failed to provide a satisfactory reason for this oversight during oral argument. In any event, defendants have not established that the information regarding plaintiff's CDL training is relevant and material to their defense of the action. Accordingly, defendants' motion is denied.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this Court, notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

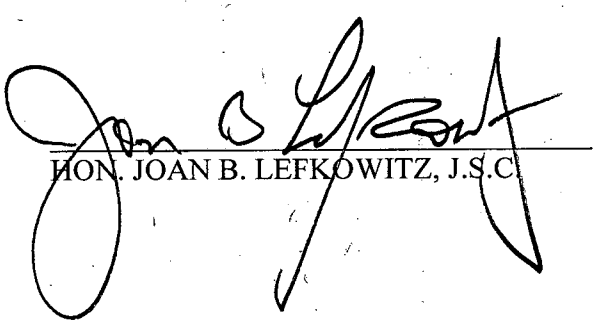
ORDERED that the motion by defendants Daniel Frank Miller, also known as Frank Gould, and Metropolitan Trucking, Inc. for a so-ordered subpoena, pursuant to CPLR §3104(2), directing nonparty New York State Thruway Authority to provide plaintiff James Godette's personnel file or, in the alternative, for an in camera inspection by the Court to determine if the documents are material and necessary in the defense of this action is denied; and it is further

ORDERED that counsel for the parties are directed to appear for a compliance conference in the Compliance Part, Courtroom 800, on April 25, 2018, at 9:30 AM, at which time it is contemplated that the action will be certified as ready for trial; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon defendant and nonparty New York State Thruway Authority within ten (10) days of entry and shall file proof of service on the NYSCEF website within five (5) days of service.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 17, 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

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