SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART**

Justice

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RENEE POLLACK,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY

Defendant.

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INDEX NO. 155263/2016

MOTION DATE 01/31/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 127, 128, 129, 130, 131, 132 were read on this motion to/for DISCOVERY.

Upon the foregoing documents, and after oral arguments, it is ordered that plaintiff's motion for discovery is granted for the reasons set forth below.

Here, plaintiff seeks, *inter alia*, to compel defendants New York City Transit Authority and Metropolitan Transportation Authority to provide outstanding discovery including responses to numbers 18, 19, 20, and 32 of Plaintiff's Second Set of Combined Demands, and to preclude defendants should they fail to respond to such discovery. In opposition, defendants argue that the plaintiff's proper demands were responded to, but the demands that were overly broad, improper, or unduly burdensome were objected to.

CPLR §3101(a)(4) states that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." The Court of Appeals has held that:

> "[t]he words 'material and necessary' as used in section 3103 must 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. Section CPLR 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." *Matter of Kapon v Koch*, 23 NY3d 32, 38 (2014)(internal citations and quotations omitted).

Here, plaintiff has met its initial burden in establishing that the requested information is material and necessary. The Court notes that the instant accident happened when plaintiff was boarding the 4 or 5 train at Grand Central Terminal and her left foot fell into the gap between the train and the platform. In opposition, defendants argue that each gap is unique due to, *inter alia*, station design, location, and train equipment. Thus, defendants argue that plaintiff's demands are improper and overly broad. In reply, plaintiff argues that the information regarding the potentially dangerous condition is clearly relevant herein.

At this juncture, during discovery, material and relevant information is discoverable. Whether such discovery is ultimately admissible at trial is a separate standard to be addressed at the time of trial. "[T]he rules governing disclosure differ from those concerning admissibility, and questions of admissibility are to be reserved for the trial court". *Suzuki Performance of Huntington, Ltd. v Utica Mut. Ins. Co.*, 121 AD2d 520 (2nd Dep't 1986). As plaintiff has met her initial threshold burden of demonstrating that the discovery demanded was calculated to yield material and necessary information, and is relevant herein, plaintiff's motion is granted and defendants are ordered to produce the discovery requested in numbers 18, 19, 20, and 32 of plaintiff's Second Set of Combined Demands dated October 2, 2017 within 60 days. Failure to produce such documents will result in the preclusion of defendants from denying at trial that the lists of gap accidents obtained from defendants through FOIL are not substantially similar to the gap which caused plaintiff's fall.

Plaintiff further seeks to preclude defendants from asserting the defense of qualified immunity. Plaintiff argues that prior defense counsel agreed not to assert the defense of qualified immunity, and that defendant's bill of particulars for affirmative defenses does not include such defense or in their answer. In opposition, defendants argue that any agreement by counsel is not binding as it was not memorialized in writing. Defendants further argue that they need not assert qualified immunity in its answer. In support of such argument, defendants proffer a case from the Appellate Division, Second Department. In reply, plaintiff argues that prior defense counsel represented in open court via a Teams' meeting with Honorable Suzanne Adams that it would not assert the defense of qualified immunity. Plaintiff further argues that following the virtual court conference, prior defense counsel sent a proposed order in which they agreed not to assert qualified immunity as a defense. The proposed order was not so ordered. However, it is undisputed that prior counsel made such an agreement during a court conference with Judge Adams. According to plaintiff, qualified immunity must be plead.

Here, the Appellate Division, First Department, has held that "[q]ualified immunity is…an issue of law which the court should decide at the earliest possible stage of the litigation." *Liu v New York City Police Dep't*, 216 AD2d 67, 69 (1st Dep't 1995). The instant action was commenced nearly seven (7) years ago and defendants Verified Answer was served over six and a half years ago. Plaintiff correctly argues that defendants should be precluded in this instance as this action has been litigated for close to 7 years and the defense of qualified immunity was never pled. Thus, plaintiff's motion is granted and defendants are precluded from asserting the defense of qualified immunity.

Accordingly, it is

ORDERED that plaintiff's motion to compel is granted; and it is further

ORDERED that defendants shall produce the discovery requested in in numbers 18, 19, 20, and 32 of plaintiff's Second Set of Combined Demands dated October 2, 2017, within 45 days; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

6/5/2023
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE