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SHORT FORM ORDER

INDEX No. 11-13553

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-29-12 (#001)
MOTION DATE 12-18-12 (#002)
ADJ. DATE 1-29-13
Mot. Seq. # 001 - MotD
002 - MG

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PATRICK O'CONNOR,

Plaintiff,

- against -

JUDITH LEWIS,

Defendant.

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SIEGEL & COONERTY LLP
Attorney for Plaintiff
419 Park Avenue South, Suite 700
New York, New York 10016

PEREZ & VARVARO
Attorney for Defendant
333 Earle Ovington Building, P.O. Box 9372
Uniondale, New York 11553

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated November 4, 2012 , and supporting papers 1-11; (2) Notice of Cross Motion by the plaintiff, dated November 15, 2012, supporting papers 12-22; (3) Affirmation in Opposition by the defendant, dated December 13, 2012, and supporting papers 23-25; (4) Reply Affirmation by the , dated , and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (001) by defendant, Judith Lewis, pursuant to CPLR 3124 for an order directing the plaintiff to serve a sufficient response to defendant's discovery notices dated August 28, 2012 and November 5, 2012, is decided herein; and it is further

ORDERED motion (002) by the plaintiff, Patrick O'Connor, pursuant to CPLR 3212 for summary judgment on the issue of liability in his favor is granted, and the plaintiff is directed to file and serve a copy of this order with notice of entry upon the defendant and the Clerk of the Calendar Department, Supreme Court, Riverhead, within thirty days of the date of this order, and the Clerk is directed to schedule this matter for a trial on damages forthwith.

This negligence action arises out of an incident which occurred on April 8, 2011, on Old East Neck Road, Huntington, New York, wherein the plaintiff, Patrick O'Connor, while riding his bicycle, was struck by the motor vehicle operated by the defendant Judith Lewis. As a result of this incident, the plaintiff alleges that he sustained serious injury consisting of a crushing injury to his lower extremity requiring surgery and placement of hardware, that he suffers from a permanent shortening of his leg, permanent restriction of range of motion, strength and use, and a permanent antalgic gait. He also alleges to have suffered a cranial laceration requiring multiple sutures and staples, a closed head injury resulting in cognitive impairment with inability to concentrate for periods of more than two hours and significant impairment of long and short term memory.

In motion (001), the defendant seeks discovery in response to prior demands served on August 28, 2012 and November 5, 2012. Counsel for the defendant set forth in his supporting affirmation that he is specifically seeking the records of Dr. Wheeler and Dr. Schwartz for care and treatment received by the plaintiff prior to April, 8, 2011, and for a hospital admission record from Stony Brook University Hospital prior to the accident as well. Counsel contends that this discovery issue was not able to be resolved at a prior conference, and thus this motion has been submitted.

It is well settled that a party waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue, however, a party does not waive the privilege with respect to unrelated illnesses or treatments. Thus, courts have not permitted discovery of medical records relating to treatment for mental health issues or alcohol or substance abuse when a plaintiff either does not affirmatively put his mental condition in issue or withdraws claims relating to his mental condition (see ***Alford v City of New York***, 2012 NY Slip Op 32682(U) [Sup Ct, New York County]; ***Carden v Callocchio***, 100 AD2d 608, 473 NYS2d 562 [2d Dept 1984]).

The defendant asserts that prior to the accident on April 8, 2011, the plaintiff was under the care and treatment of Dr. Michael Schwartz, a psychiatrist, and Dr. Wheeler, a psychologist. Counsel for the plaintiff states that while medical records were requested of Dr. Schwartz for care and treatment rendered to the plaintiff after April 8, 2011, some notes prior to that date were also provided to him by Dr. Schwartz, although not authorized by the authorization provided by the plaintiff. Counsel now seeks Dr. Schwartz's and Dr. Wheeler's records concerning the plaintiffs care and treatment prior to April 8, 2011 on the basis that those unauthorized notes from Dr. Schwartz gave the diagnostic impression of "alcohol abuse." Counsel has not provided a copy of the inadvertent disclosure provided to him for this Court's inspection of the content therein. It is determined, based upon defendant's counsel's affirmation, that unauthorized notes were obtained from Dr. Schwartz by defendant's counsel who is now using the unauthorized medical record as a basis for this motion to obtain further discovery in contravention of Rule of Professional Conduct 4.4. (*see* ***New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis***, 300 AD2d 169 [1st Dept 2002]).

The New York Rules of Professional Conduct, subsection (b) to Rule 4.4, entitled "Respect for Rights of Third Persons," directs that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. " It is further noted that both the Association of the Bar of the City of New York, in an opinion of its Committee on Professional and Judicial Ethics, opinion number 2003-04,

2004 WL837937, and the New York County Lawyers Association, in an opinion of its Committee on Professional Ethics, opinion number 730, 2992 WL 31962702, have considered the issue of inadvertent disclosure. Both conclude that when receiving a communication or an e-mail which the lawyer knows or should reasonably know contains privileged material, the attorney is ***obligated*** to "promptly notify the sending attorney" thereof, to refrain from further review of the communication, and to return or destroy it as requested. Counsel should be aware of their obligations in these circumstances, and promptly adhere to them in order to avoid sanctions (*see* ***Galison v Greenberg***, 5 Misc3d 1025A [Sup Ct, NY County 2004]; ***People v Terry***, 1 Misc3d 475 [Monroe County Court 2003]). As set forth in ***57 Syracuse L. Rev. 1309***, the Committee on Professional Ethics based its opinion on the New York Ethical Code's support for an "ethical infrastructure." For example, the New York Code requires that a law firm "make reasonable efforts" to ensure that its lawyers are complying with the Code. The Code also requires that firms supervise lawyers within the firm, and apportion responsibilities between subordinate and supervisory lawyers within a firm. 22 NYCRR 130-1.1 permits the Court to exercise its discretion to impose costs and sanctions on an errant party. Sanctions are retributive, in that they punish past conduct (***Federal Home Loan Mortgage Corp. v Raia***, 2010 Misc Lexis 5704 [Nassau County Dist Ct 2010]).

Accordingly, that part of defendant's application for an authorization for plaintiff's medical records for care and treatment provided by Dr. Schwartz and Dr. Wheeler prior to April 8, 2011 is denied and the defendant is further precluded from using those records inadvertently obtained from Dr. Schwartz without authorization, and shall return those records to plaintiff's counsel forthwith, under the penalty of sanctions.

In motion (001) the defendant also seeks medical records for plaintiff's hospitalization for a panic attack at Stony Brook University Hospital in 2005. While the plaintiff did allege in his bill of particulars that he sustained certain neurological injury consisting of a closed head injury/cranial laceration as a result of this accident resulting in cognitive impairment and inability to concentrate for periods of more than two hours with impairment of long and short term memory, the plaintiff is not claiming that he suffers from panic attacks as a result of the subject accident or mental illness. He has not placed his mental health at issue by claiming certain neurological injury and has not waived his protection from discovery on this issue (see ***Zimmer v Cathedral School of St. May and St. Paul***, 204 AD2d 538, 611 NYS2d 911 [1994]).

Accordingly, that part of motion (001) which seeks plaintiff's medical records relating to his hospitalization at Stony Brook Hospital in 2005 for a panic attack is denied.

Counsel for the defendant has not set forth in his affirmation that the plaintiff failed to provide a copy of an authorization for employment records, or the opthamology and optometrist records.

Turning to motion (002), the plaintiff seeks summary judgment on the issue of liability on the basis that he bears no liability for the occurrence of the accident. In support of this application, he has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and the plaintiff's verified bill of particulars; unsigned copies of the examinations before trial of Judith Lewis and Patrick O'Connor each dated August 20, 2012. A signed copy of defendant's

examination before trial has been submitted by the defendant in opposition to plaintiff's motion. Plaintiff's unsigned copy of his examination before trial is considered as adopted as accurate by him (*see* ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]).

Patrick O'Connor testified to the extent that at the time of the accident he was riding his Schwinn, two-wheel, 24 gear bicycle, with brakes on the handlebars. He had been riding for about five to seven minutes when the accident occurred between Old East Neck Road and the T-intersection with Altessa Boulevard, Melville. He described Old East Neck Road as having two travel lanes, one in each direction, separated by double yellow lines. He was traveling on the right side of the road on the white line closest to the side of the road, or within two to three inches to the right of the line. It was his intention to continue riding on Old East Neck Road and to make a right turn onto Old Country Road ahead. During the approximate two to three minutes prior to the accident, his highest rate of speed was between ten and fifteen miles per hour. About thirty seconds before he arrived at the intersection of Old East Neck Road and Altessa Boulevard, Melville, he saw a vehicle traveling on Altessa to his right, moving towards Old East Neck Road. He did not have a traffic control device for his travel direction on Old East Neck Road. He did not know if that which he saw was the vehicle which struck him, or what speed it was traveling. He had ridden past the intersection with Altessa Boulevard and was about 10 meters past it, riding on the white line on the right side of the road, and last remembered feeling something from behind, feeling and hearing something close, and being struck. He woke up at Nassau Medical Center and was told he had been struck by a car.

Judith Lewis testified that at the time of the accident on April 8, 2011, she was operating a 2008 Mercedes ML 350 SUV. The weather was dry. She thought she was going to "maybe the card store." She did not know the name of the store, but stated it was located on Route 110. The accident occurred at the intersection of Altessa Boulevard and Old East Neck Road. She had been living on Altessa Boulevard for four years at the time. She described Altessa as being a two lane street which ends at Old East Neck Road at an island that divides inbound and outbound traffic. She stated that there is no traffic control device at that intersection, and that Old East Neck Road is the primary road, so that traffic entering from Altessa onto Old East Neck Road would wait until it was clear to enter. She traveled on

Altessa Road, about twenty-five to thirty miles per hour, and believed the speed limit to be twenty-five miles per hour. There were no vehicles in front of her. As she approached the intersection, no part of her vehicle entered into the intersection, but she began inching up into the intersection. She looked to her left once for a few seconds, she guessed, then looked straight ahead. She then brought her vehicle to a stop at the intersection for seconds, then stated it was probably more than one second, then stated it was a few seconds, then stated it was about five seconds, then stated that it was between two and five seconds. There was nothing obstructing her view, and she saw no vehicles traveling on Old East Neck Road. She then looked to her right. She stated that when she is about ten car lengths from the intersection that she can see down Old East Neck Road. As she inched up, she began making a right turn from Altessa onto Old East Neck Road. She did not see anything pass in front of her vehicle. Seconds passed from when she began inching up into the intersection, at about five to eight miles per hour, when the accident occurred. Prior to the impact, she did not honk her horn or apply her brake. At no time prior to the impact with the plaintiff did she see him or his bicycle. She was looking straight ahead. Her first indication that something happened was when she felt a thump, and then saw the top of the plaintiff's head. She thought the thump came from the front of her bumper, possibly closer to the driver's side. She then realized that she was in an accident with a bicyclist or pedestrian. She stopped her car, got out, and saw the plaintiff lying in the left lane, three inches from the front of her vehicle. Her vehicle was in the turn going into the left turn lane, and was completely turned into the left turn lane when the thump occurred. She did not know if her car struck the front or the back of the plaintiff's bicycle. She got out of her car and asked the plaintiff if he was ok, but he did not respond. His eyes were open. About twenty to thirty seconds following the accident, a woman, who stated she was a nurse, came to the scene. The defendant stated that during those 20 to 30 seconds following the accident, she called her insurance broker. She testified that her written statement to the police officers who arrived at the scene was accurate. In her signed witness statement dated April 8, 2011, Judith Lewis wrote that she never saw a man on a bike until that thud, and that she did not know where he came from.

Based upon the foregoing, it is determined that the plaintiff has established prima facie entitlement to summary judgment as a matter of law on the issue of liability in his favor, and that the defendant has failed to raise a triable issue of fact to preclude summary judgment.

The plaintiff has established that he was riding on Old East Neck Road, on the right side of the roadway along the white line on the side by the grassy area, and had just passed Altessa Boulevard when the front of the defendant's vehicle struck his bicycle from the rear. When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and to use reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]. The defendant failed to do so and has further failed to come forward with a non-negligent or reasonable explanation for the happening of the accident (*see* ***Rainford v Han***, supra; ***Thoman v Rivera***, supra; ***Power v Hupart,*** *supra*). In fact, she has admitted to causing the accident by failing to see the plaintiff on his bicycle on the roadway prior to striking him. The defendant has failed to raise a triable factual issue to preclude summary judgment on the issue of liability.

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Fillippazzo v Santiago,*** 277 AD2d 419, 716 NYS2d 710 [2000]). A

driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (***People of the State of New York v Anderson,*** 7 Misc3d 1022A, 801 NYS2d 238 [City Court, Ithaca 2005]). Here, it is patently clear from the defendant's testimony that she did not see the plaintiff or his bicycle prior to the impact. The defendant testified that she never saw the plaintiffs' vehicle prior to striking it in the rear with the front of her vehicle. The plaintiff testified that he had ridden about 10 meters past the intersection with Altessa Boulevard, riding on the white line on the right side of the road, and last remembered feeling something from behind, and feeling and hearing something close, and being struck. It is determined as a matter of law that the sole proximate cause of the accident was the failure of the defendant to observe the plaintiff lawfully riding on the roadway on his bicycle and to avoid colliding with him immediately after defendant made a right turn onto Old East Neck Road, striking the plaintiff from the rear.

Accordingly, motion (002) for summary judgment on the issue of liability is granted in favor of the plaintiff.

Dated: 7/19/13

Peter H. Mayer
PETER H. MAYER, J.S.C.