Texeira v Aponte
2015 NY Slip Op 31550(U)
July 16, 2015
Supreme Court, Bronx County
Docket Number: 21358/2011
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK   Index No.: 21358/2011
COUNTY OF BRONX
PART 11

Nilda Texeira

                              Plaintiff,

          -against-

Elisa Aponte, Terence McLaurin, and Jamal
Khandaker

                          Defendants.

DECISION/ ORDER
Present:
Hon. Laura G. Douglas
Justice, Supreme Court

Cross- Papers	Numbered
Notice of Motion and Affidavits Annexed	1 - 2
Answering Affidavits	3
Replying Affidavits	4
Exhibits: as annexed to the moving papers	
Other:...	

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Plaintiff's cross motion[1] to preclude defendant Elisa Aponte's (Aponte) testimony at trial for failing to provide the discovery as outlined in plaintiff's Notice for Discovery and Inspection dated July 17, 2013 is denied for the reasons set forth below.

Plaintiff commenced this personal injury as a result of a motor vehicle accident that occurred on June 16, 2011, when plaintiff who was standing at the curb on East Fordham Road, Bronx, New York, was struck by a vehicle driven by defendant Aponte. Defendant Aponte contends that her vehicle was initially rear ended by an unknown vehicle and as a

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[1] By decision/order dated January 27, 2014, Justice Mark Friedlander granted defendants' Terence Mclaurin and Jamal Khandaker motions for summary judgment on liability and denied plaintiff's cross motion seeking the same relief on the grounds that defendant Aponte's testimony that her vehicle was initially rear ended by an unknown vehicle causing the chain of accidents raised an issue of fact. That branch of plaintiff's cross motion to preclude was respectfully referred to the assigned Justice of the Discovery Part 11-DCM.

result of the impact, her vehicle collided with another vehicle. Defendant Aponte claims that as a result of said collision, she lost consciousness and cannot recall the subsequent events including striking the plaintiff. After issue was joined, the parties entered into a preliminary conference order which outlined the schedule to complete discovery. On December 6, 2012, the parties entered into a compliance conference order which indicated that issues regarding disclosure of defendant Aponte's medical records pertaining to her loss of consciousness at the time of the accident was to be resolved after completion of the parties' deposition. After the depositions, plaintiff served a demand for discovery and inspection dated July 17, 2013 which defendant Aponte timely objected. Plaintiff now moves to preclude defendant Aponte's testimony or in the alternative for defendant Aponte to provide the items listed in plaintiffs' post-deposition demand dated July 17, 2013.

On June 12, 2013, defendant Aponte testified that she was traveling on Fordham Road when her vehicle was rear ended by another vehicle which caused her vehicle to swerve to the opposite lane of traffic contact another vehicle and at that point she lost consciousness. She further testified that she has no recollection if her head struck the windshield or something else and as a result of the accident she suffered head trauma which has affected her ability to easily remember. According to defendant Aponte for the last ten years, she has been disabled due to a bipolar disorder and takes a number of medications for said condition which are the same medications she took on the day of the subject accident. This Court notes that no further testimony was elicited from defendant Aponte by any other parties regarding

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the effects if any of these medications on her ability to drive or remember events.
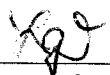
A defendant's medical records are immune from discovery unless defendant places his or her physical condition in controversy (*Dillenbeck v Hess*, 73 NY2d 278 [1984]), thus waiving the confidentiality of the phsycian-patient relationship (CPLR 4504). A defendant's physical or mental condition may be considered to be in controversy upon an admission of having taken certain medication (*Neferis v DeStefano*, 265 AD2d 464 [2nd Dept 1999]) and upon admission by a defendant regarding his or her own medical condition. *Klein v Levin*, 242 AD2d 682 (2nd Dept 1997). However, a defendant must do more than simply deny the allegations, but rather must assert the medical condition by way of counterclaim or to excuse one's conduct *(Dillenbeck v Hess, supra* at 287 - 288; cf., *Lombardi v Hall*, 5 AD3d 739 [2d Dept 2004]) as when a defendant asserts a lack of memory as a defense (*Lopez v Oquendo*, 222 AD2d 24 [1st Dept 1999]). An inability to recall events based on amnesia has been held not to place a defendant's condition in controversy. *Casimino v Thayer*, 217 AD2d 951 (4th Dept 1995). The initial burden of proving that a defendant's physical condition is "in controversy" is on the plaintiff and it is only after such an evidentiary showing that the burden is passed to the defendant to demonstrate that the information is privileged. Once the privilege is validly asserted, plaintiff must then demonstrate that it has been waived. *Dillenbeck v Hess,* at 280, 286-287.

Applying these standards to this case, the testimony by Aponte that she takes medication for her bipolar disorder and the fact that she did not recall striking the plaintiff

after the second collision does not place her medical condition in controversy. At no time has defendant Aponte indicated that such medication or her disorder caused her unconsciousness or lack of memory of the accident and she has not asserted the same as an excuse or defense for her conduct. Plaintiff has failed to meet her initial burden to show that defendant placed the issue of her physical condition in controversy by her interposition of a general denial to the complaint. Therefore, plaintiff's motion to preclude is denied.

This constitutes the decision of this Court.

Dated: Bronx, New York
        July 16, 2015

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Hon. Laura G. Douglas
Justice, Supreme Court