Green v Brown
2018 NY Slip Op 34227(U)
September 26, 2018
Supreme Court, Westchester County
Docket Number: Index No. 58755/2017
Judge: Joan B. Lefkowitz
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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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SERRON GREEN,

Plaintiff,

-against-

THELMA M. BROWN,

Defendant.

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DECISION and ORDER
Index No. 58755/2017
Motion Date: Sep. 26, 2018
Seq. No. 1

LEFKOWITZ, J.

The following papers were read on plaintiff's motion for an order compelling defendant to respond to his post-deposition discovery demand dated May 1, 2018, and for such other and further relief as this court deems just and proper.

Order to Show Cause dated July 31, 2018; Affirmation in Support; Exhibits 1-8
Affirmation in Opposition; Exhibits A-C

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

In this personal injury action commenced on or about June 7, 2017, plaintiff seeks to recover damages for injuries allegedly sustained as a result of an accident that occurred on September 17, 2014, when he was struck by defendant's motor vehicle as he was riding his bicycle. Defendant joined issue on or about June 23, 2017. In her answer defendant denied the essential allegations asserted against her and asserted six affirmative defenses: plaintiff's comparative negligence; proper conduct in an emergency situation; collateral source payments to plaintiff; plaintiff's failure to mitigate damages; plaintiff's lack of a serious injury as defined in the Insurance Law; and, plaintiff's failure to use a safety device. Defendant did not assert any counterclaims.

Defendant was deposed on April 23, 2018. She testified that on the day of the subject incident she was driving home from work. It was about 7:45-7:50 p.m. and it was still light out (Plaintiff's Exhibit 4, deposition transcript, pages 12-14). She testified that she did not wear glasses (20). The following exchange ensued between plaintiff's counsel and defendant:

Q: Did you ever have cataracts or anything like that?
A: Yes, I had cataracts.
Q: Did you ever have cataracts surgery on any of your eyes?
A: Yes, I had.
Q: Do you recall when that might have been?
A: I don't.
Q: Was it before the accident or after the accident?
A: Before.
Q: As a result of that cataracts surgery, was it on one eye or both eyes?
A: I did it one at a time, so it's both eyes.
Q: I'm not clear. You did one before September 17, 2014, one surgery?
A: Yes.
Q: And then you do another surgery after that?
A: Like two week after–a couple.
Q: So, did you have to, for the eye that you hadn't had the surgery on, did you have to put eye drops in that at night?
A: No.
...
Q: Okay no problem. Did your doctor ever tell you in sum and substance...that because of the cataracts or cataract in at least the one eye that your vision might be blurry in the evening hours or twilight hours?
A: No, sir.
Q: Did he ever tell you anything about driving with the cataracts?
A: No, sir.
Q: Did the cataracts cause you to feel that your vision was blurred at all?
A: Never (20-21).

Plaintiff served a post-deposition demand for discovery dated May 1, 2018. Plaintiff sought the insurance policies in effect on the date of the subject accident for a second car owned by defendant and for the home in which she resided, and information, including HIPAA compliant authorizations, for the release of all medical information regarding defendant's eyes for the time period between January 1, 2009, to the present.

Defendant served a response dated May 30, 2018. She stated that information pertaining to applicable insurance policies had been provided already on or about October 2, 2017, and additionally provided the policy number of another State Farm Insurance Policy. Defendant objected to the demand for medical information asserting that it was protected by privilege and that because her medical condition was not an issue in this matter, nor had it been pleaded as an affirmative defense, the privilege was not waived.

Presently plaintiff seeks an order compelling defendant to provide the discovery requested in his post-deposition demand. He contends that the requested material is matter that is material and necessary to his prosecution of this action.

Defendant opposes the motion. She asserts that already she has provided all applicable insurance information. She further asserts that she has not pleaded a medical condition as an affirmative defense or as a counterclaim and therefore she has not made any medical condition a controversy warranting the disclosure of her medical records. She asserts that she did not attempt to excuse the conduct complained of by plaintiff based on any cataract surgery. She contends that, therefore, plaintiff is not entitled to her medical records.

Discovery and inspection of a defendant's mental or physical condition contained in his or her medical records is permitted only when the defendant's mental or physical condition has been placed "in controversy" (*see* CPLR 3121[a]; *Dillenbeck v Hess*, 73 NY2d 278, 286–287 [1989]; *Bongiorno v Livingston*, 20 AD3d 379 [2d Dept 2005]; *Lombardi v Hall*, 5 AD3d 739 [2d Dept 2004]). Even when this initial burden has been satisfied discovery may still be precluded where the information requested is subject to the physician-patient privilege (*see* CPLR 3101[b]; CPLR 4504[a]; *Dillenbeck v Hess*, 73 NY2d at 287; *Bongiorno v Livingston*, 20 AD3d at 381; *Lombardi v Hall*, 5 AD3d at 740). Although a defendant may waive this privilege when he or she affirmatively places his or her mental or physical condition in issue, to effect a waiver, a defendant must do more than simply deny the allegations in the complaint (*see Dillenbeck v Hess*, 73 NY2d at 288; *Koump v Smith*, 25 NY2d 287, 294; *Grafi v Solomon*, 274 AD2d 451). A defendant must affirmatively assert the condition "either by way of counterclaim or to excuse the conduct complained of by the plaintiff" (*Dillenbeck v Hess*, 73 NY2d at 288; *see Koump v Smith*, 25 NY2d at 294; *Lombardi v Hall*, 5 AD3d at 740; *see Grafi v Solomon*, 274 AD2d at 452).

At bar, plaintiff has not submitted any proof to meet his initial burden of demonstrating that defendant's medical condition at the time of the accident is in controversy. Moreover, the record is insufficient to establish that defendant waived his physician-patient privilege. Significantly, the physician-patient privilege is not waived based on allegations in plaintiff's complaint or bill of particulars demonstrating that a defendant's physical condition is in controversy (*see Dillenbeck v Hess*, 73 NY2d at 289). Additionally, defendant cannot be said to have waived the privilege simply by denying the allegations in the complaint or by asserting the defense of comparative negligence since neither seeks to excuse the conduct complained of by asserting defendant's physical condition (*see Dillenbeck v Hess*, 73 NY2d at 289 [defendant "cannot be said to have waived the privilege simply by denying the allegations in the complaint"]). Indeed, the record here is devoid of the assertion of any defense relating to the defendant's poor eyesight or any other medical condition. Nothing on the record demonstrates that defendant is attempting to excuse the conduct complained of by the plaintiff on the basis of her cataract surgery and/or poor eyesight.

Additionally, defendant's responses to the questions posed by plaintiff's counsel regarding her cataract surgery and her eyesight do not constitute a voluntary disclosure of privileged information so as to warrant plaintiff's entitlement to defendant's medical records (*see Wepy v. Shen*, 175 AD2d 124 [2d Dept 1991] [disclosure of "mere facts and incidents of medical history" was not waiver]]; *see also Brower v Beraka*, 12 Misc3d 1108 [Sup Ct NY County 2006]

[party's testimony as to whether he suffered from an arm impairment and was under treatment of physician for such condition would not constitute waiver]). Accordingly, defendant's medical records are not discoverable and their production will not be compelled.

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

In view of the foregoing, it is hereby,

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon defendant within seven days of entry; and it is further

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on October 15, 2018, at 9:30 A.M., at which time it is contemplated that all discovery will be completed and a trial readiness order will issue.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
September 26, 2018

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

To:

Gary Certain, Esq.
Certain & Zilberg, P.L.L.C.
Plaintiff's Attorneys
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Defendant's Attorneys

cc: Compliance Part Clerk