

<b>Rosenberg v Judlau Contr., Inc.</b>
2019 NY Slip Op 33779(U)
December 30, 2019
Supreme Court, New York County
Docket Number: 159248/2016
Judge: Julio Rodriguez, III
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. JULIO RODRIGUEZ III PART 62

*Justice*

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ARLENE ROSENBERG,

Plaintiff,

- v -

JUDLAU CONTRACTING, INC., OHL USA, INC., WELSBACH ELECTRIC CORP., SAM SCHWARTZ PEDESTRIAN TRAFFIC MANAGEMENT SERVICES, INC., SAM SCHWARTZ ENGINEERING, D.P.C., SAM SCHWARTZ CONSULTING, LLC, J. STAR TRUCKING, LLC, J. STAR TRUCKING, INC., ROBINSON CUBA, SAFEWAY CONSTRUCTION ENTERPRISES LLC, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, PARSONS BRINCKERHOFF AMERICAS, P.C., PARSONS BRINCKERHOFF INTERNATIONAL, LLC, PARSONS BRINCKERHOFF, INC., PB AMERICAS, INC.

Defendant.

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INDEX NO. 159248/2016  
MOTION DATE 09/05/2019  
MOTION SEQ. NO. 008

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 257, 258, 259, 260, 261, 262, 263, 264, 266, 267, 270, 271, 272, 273, 275, 276, 277, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288

were read on this motion to/for COMPEL/ VACATE NOTE OF ISSUE

Plaintiff commenced this action seeking damages for personal injuries sustained on October 14, 2016, when she was run over by a truck driven by co-defendant Robinson Cuba and then owned by J. Star Trucking<sup>1</sup> as the truck was backing up against traffic in a northerly direction on southbound 2<sup>nd</sup> avenue in the vicinity of 73<sup>rd</sup> Street, New York, NY. Defendants Judlau Contracting Inc., OHL USA Inc., Sam Schwartz Pedestrian, Traffic Management Services Inc, Sam Schwartz Engineering DPC, Same Schwartz Consulting LLC; New York City Transit Authority, Metropolitan Transportation Authority, MTA Capital Construction Company, Parsons Brinckerhoff Americas PC, Parsons Brinckerhoff International LLC, and Parsons Brinckerhoff, formerly known as PB Americas Inc, (collectively "moving defendants") now move (1) to compel co-defendant Robinson Cuba ("Mr. Cuba") to provide medical authorizations to obtain

<sup>1</sup> By Stipulation dated July 31, 2019, plaintiff discontinued this action as against J. Star Trucking and Robinson Cuba; however, the cross-claims against said parties still remain.

records of his vision exam(s) last before and first after the accident at issue, (2) to strike plaintiff's note of issue on the ground that there is outstanding discovery, and (3) extending the time to serve and file a motion for summary judgment. Co-defendant Safeway Construction Enterprises ("Safeway") and co-defendant City of New York ("City") join the moving defendants in the motion. Co-defendant J. Star Trucking and Robinson Cuba ("Mr. Cuba") oppose the motion. Plaintiff also opposes the motion.

#### Parties' Positions

The moving defendants argue that Mr. Cuba has placed his vision in controversy and waived the physician-patient privilege. In support of their argument, the moving defendants cite to the following deposition testimony of Mr. Cuba, in relevant part, given on December 6, 2018, when being questioned by plaintiff's counsel, Mr. Buchsbaum:

Q: This is the photograph that was taken by the Police Department after the accident? Do you see the number 17 on the truck?

A: No.

Q: Let me see. I'm pointing to it at the top of the truck.

A: My vision isn't very good. I could see something there.

Q: Ok. Does that look like the truck you were driving on the date of the accident.

A: Yes.

The following answers were given by Mr. Cuba when questioned by Mr. Pinter, counsel for co-defendant Safeway:

Q: Do you go for regularly eye exams currently?

A: Yes.

Q: When was the last time you had one?

A: Ten days ago.

Q: And do you wear any lenses, contacts or glasses?

A: No.

Q: Did you wear any type of corrective lenses back in October of 2016?

A: No.

The following answers were given by Mr. Cuba when questioned by his attorney, Ms. Garcia:

Q: Do you need corrective lenses?

A: Yes.

Q: For what?

A: To read and write.

Mr. Pinter then followed up and asked:

Q: When you said earlier in the deposition that your vision was not so good, did you mean with respect to reading and writing?

A: For reading and writing.

In further support of its motion, the moving defendants note that Mr. Cuba has asserted cross-claims and affirmative defenses including an allegation that plaintiff was comparatively at fault.

In opposition, Mr. Cuba argues that the moving defendants failed to show that Mr. Cuba's eyesight, at the time of the accident, is in controversy and that he waived the physician-patient privilege. He avers that the deposition testimony relied by the moving defendants are related to Mr. Cuba's vision on the day of the deposition, and not the date of the accident. As such, there is no relevance to Mr. Cuba's visual abilities on the day of the accident.

Plaintiff, in opposition, first argues that her note of issue should not be stricken because she has complied with all her discovery demands. Thus, it would be unjust and prejudicial to plaintiff if the note of issue were stricken. Further, plaintiff argues that the moving defendants are not entitled to Mr. Cuba's eyesight records because (1) they are "palpably irrelevant" and (2) Mr. Cuba has not waived the physician-patient privilege. Plaintiff alleges that Mr. Cuba, who was operating a dump truck at the time of the accident, was prevented from seeing directly behind him due to the Second Avenue Subway construction project that was going on in the area, and therefore it is plaintiff's position that Mr. Cuba's vision is irrelevant.

### Discussion

The physician-patient privilege is presently found in CPLR 4504. In analyzing CPLR 4504, the Court of Appeals in *Koump v Smith*, 25 NY2d 287, 294 [1969] stated that "a plaintiff or a defendant, who affirmatively asserts a mental or physical condition, must eventually waive the [physician-patient] privilege to prove his case or his defense. To uphold the privilege would allow a party to use it as a sword rather than a shield. A party should not be permitted to assert a mental or physical condition in seeking damages or in seeking to absolve himself from liability and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition." However, the Court of Appeals in *Koump* further noted that said rule "is limited to cases in which a defendant affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff." The initial burden of proving that a party's physical condition is "in controversy" is on the party seeking the information. (*Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]).

A review of the record here reveals that Mr. Cuba has made no affirmative assertion regarding his vision on the day of the accident by way of counterclaim or to excuse the conduct complained of by plaintiff. As correctly pointed out by Mr. Cuba in opposition, in his Verified Answer, Mr. Cuba merely denies the allegations of the complaint and makes no contention that his vision either absolves him of liability or somehow shifts liability to co-defendants. At no

point has Mr. Cuba claimed that his vision played any role in the accident. As indicated above, during his deposition, Mr. Cuba did make mention of his vision when he was asked to look at a photograph. However, Mr. Cuba made clear that the statement that his "vision isn't very good" was with respect to reading and writing. Therefore, this Court finds the statement irrelevant insofar as it did not relate to driving. Additionally, the Court notes that the commentary regarding his vision was related to his vision on the day of the deposition and not on the day of the accident. Therefore, this Court finds that the moving defendants have failed to show that Mr. Cuba's physical condition was "in controversy" at the time of the accident. Accordingly, it is

ORDERED, that the moving defendants' motion to compel Mr. Cuba to provide medical authorizations to obtain ophthalmological/vision records is denied; it is further

ORDERED, that the moving defendants' motion to strike plaintiff's note of issue is denied; it is further

ORDERED, that the moving defendants' motion to extend the time to serve and file a motion for summary judgment is granted to the extent that any such motion must be served and filed by February 21, 2019; and it is further

ORDERED, that counsel for Mr. Cuba shall serve a copy of this order with notice of entry upon all parties within 30 days.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

December 30, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE