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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK,
Acting Supreme Court Justice

NEAL J. GARTENBERG,

Plaintiff,

-against-

WESLER CANDIO, DARLINE ST. LEGER, JOHN TINIAKOS, RYDER TRUCK RENTAL, INC., THOMAS KRUPKA, HUB TRUCK RENTAL and WILLIAM DISPENZA,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 6453-2010

MOTION SUBMISSION
DATE: 2-1-12

MOTION SEQUENCE
NO. 2 and NO. 3

The following papers read on this motion:

Notice of Motion, Affirmation in Support, Memorandum of Law, and Exhibits	X
Notice of Cross Motion	X
Affirmation in Opposition	XX
Reply Affirmation	XX

Defendant, William Dispenza, moves pursuant to CPLR § 3124, for an order directing that plaintiff supply the discovery requested in defendant's post deposition notice to produce, which requested HIPAA compliant authorizations for the records of healthcare providers that treated plaintiff for his left eye condition. Plaintiff cross moves pursuant to CPLR § 3212 for summary judgment on the issue of liability, alleging that plaintiff's vehicle was struck in the rear by defendant's vehicle and that no issue of fact exists as to liability.

This action arises from three separate motor vehicle accidents that occurred on November 4, 2009, November 10, 2009 and November 12, 2009. Plaintiff, Neal

Gartenberg, commenced the subject litigation with the service of a Summons and Complaint on April 10, 2010. The issue was joined as to defendant William Dispenza regarding the accident that occurred on November 12, 2009, on January 4, 2011. Co-defendants Tiniakos, Ryder Truck Rental, Inc., Thomas Krupka and HUB Truck Rental, involved in the accident on November 10, 2009, have settled the action with plaintiff. The remaining plaintiff's do not presently have a motion before the court.

Counsel for defendant, William Dispenza, received medical records from 72nd Street Medical Associates pursuant to a HIPAA compliant authorization regarding the treatment of Neal Gartenberg. Contained in the medical records was a radiology report from Next Generation radiology dated August 4, 2008 for an MRA head and neck film without contrast. The report notes "history of a loss of vision left side". In addition, there was a radiology report from Next Generation radiology dated August 1, 2008 for a Doppler neck cartoid procedure. The report notes the plaintiff suffered from "loss of sight in left eye occlusion of vein". Additionally, within the 72nd Street Medical Associates records there were three progress notes dated December 17, 2008, May 21, 2009, and July 27, 2009 from Dr. Khadem of Retina Specialists, P.C. to Dr. Melissa Carr of Gruen Eye which were follow up notes for visits for the treatment of vein occlusion OS. The December 17, 2008 progress note indicates that Mr. Gartenberg "was seen for vein occlusion OS... we re-injected him today and suggested a follow-up in about one month." The May 21, 2009 progress note to Dr. Carr indicated "we have considered the idea of discontinuing the injections, however whenever we stop, he suffers a recurrence of the edema". The July 27, 2009 progress note documents that

Mr. Gartenberg "was complaining of increasing blur, I re-injected him with Avastin today and suggested a return in one month, or sooner should there be any changes in her [sic] symptoms".

Plaintiff argues defendant is not entitled to an authorization for plaintiff's eye specialist's records because no claim has been made regarding any injury to the eye and that the defendant seeking this information, in fact, rear-ended the plaintiff. While the physician-patient privilege is generally waived in personal injury actions, the scope of the waiver is generally limited to the conditions affirmatively based in controversy and does not permit discovery of information involving unrelated illnesses and treatments (*see Paliouras v. Donohue*, 89 AD3d 1070 [2nd Dept. 2011]). A party or parties seeking to inspect a plaintiff's medical records must first demonstrate that the plaintiff's physical or mental condition is "in controversy" within the meaning of CPLR § 3121 (a), only after such a showing may discovery proceed (*see Dillenbeck v. Hess*, 73 NY2d 278, 287 [1989]; *Koump v. Smith*, 25 NY2d 287, 294 [1969]; *Neferis v. DeStefano*, 265 AD2d 464 [1999]). The burden of proof regarding whether a party's mental or physical condition is in controversy is on the party seeking the records. The affidavits must contain evidentiary matter sworn to by a person with knowledge of the facts and by other available proof and not mere conclusory statements. "The affidavits must be sworn to by a person having knowledge of the facts, an affidavit of an attorney should be disregarded unless he happens to have personal knowledge of the facts" (*Koump v. Smith*, 25 NY2d at 299).

Even where the preliminary burden has been met, discovery may still be

precluded where the information requested is privileged and, thus exempt from disclosure pursuant to CPLR § 3101 (b) (*see Dillenbeck v. Hess,* 73 NY2d at 287; *Lombardi v. Hall*, 5 AD3d 739, 740 [2004]; *Navedo v. Nichols*, 233 AD2d 378, 379 [1996]). Once a litigant has asserted the privilege, it must be recognized and the information sought may not be disclosed unless it is demonstrated that the privilege has been waived (*see* CPLR § 3101 [b]; 4504 [a]; *Dillenbeck v. Hess*, 73 NY2d at 287; *Koump v. Smith*, 25 NY2d at 294).

In the instant matter the defendant has failed to sustain the initial burden of demonstrating that the plaintiff's physical or mental condition is "in controversy" in this action. (*see Koump v. Smith*, 25 NY2d at 297; *McConnell v. Santana*, 30 AD3d 481, 482 [2006]; *Lombardi v. Hall*, 5 AD3d at 740; *Navedo v. Nichols*, 233 AD2d at 379). The plaintiff has validly asserted a physician-patient privilege, which is not waived by the denial of the allegations of the complaint or by asserting his affirmative defenses (*see Navedo v. Nichols*, 233 at 379). He has not affirmatively placed his eye condition in issue in this action nor did he testify that he could not see at the time of the accident (*see Koump v. Smith*, 25 NY2d at 297; *McConnell v. Santana*, 30 AD3d at 482; *Lombardi v. Hall*, 5 AD3d at 740; *Navedo v. Nichols*, 233 AD2d at 379).

In fact, after reviewing the testimony of the plaintiff at the deposition, highlighted in the defendant's motion, it is clear the plaintiff did not testify that he could not see, rather the most favorable testimony cited by the defense simply consists of a number of answers where the plaintiff stated he did not recall the make and model of the vehicle ahead of him, he did not recall if he had seen brake lights, he did not recall where his

foot was five seconds before the crash and that he first knew he had been in an accident when he felt the impact. These answers, taken as a whole are simply insufficient to place the condition of the plaintiff's eye sight in controversy.

Accordingly, defendant's motion to compel discovery of a HIPAA compliant authorization for records related to the plaintiff's eye condition is denied.

Moving to the cross motion, it is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 5557 (1980); *Alvarez V. Prospect Hospital,* 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center,* 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York, supra.* The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy,* 35 NY2d 361 (1974).

It is well established that a rear-end collision is sufficient to establish a prima

facie case of liability against the operator of the offending vehicle and imposes a duty upon said operator to rebut the inference of negligence by providing a sufficient explanation. *Young v. City of New York,* 113 AD2d 844 (2nd Dept. 1985). *Benyarko v. Avis Rent A Car System, Inc.,* 162 AD2d 572 (2nd Dept. 1990); *Ayach v. Ghazal*, 25 AD3d 742 (2nd Dept. 2006); *Connors v. Flaherty*, 32 AD3d 891 (2nd Dept. 2006). Additionally, in a rear end collision situation, the rear driver bears a duty to maintain a safe distance between their vehicle and the vehicle ahead. Failure to do so will establish a *prima facie* case of negligence, as a matter of law (*Lifshitz v. Variety Polbans*, 278 AD2d 372 [2nd Dept. 2000]; *Pena v. Allen*, 272 AD2d 311 [2nd Dept. 2000]; *Hernandez v. Burkitt*, 271 AD2d 648 [2nd Dept. 2000]). "Vehicle stops which are forseable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain the safe distance between his or her car and the car ahead" (*Sharma v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2nd Dept. 2001]).

In the instant matter, plaintiff has established a prima facie case of liability against defendant, William Dispenza. The plaintiff has provided this court with the affidavit of Neal Gartenberg dated November 8, 2011 which that he was traveling five to ten miles an hour on the Cross Island Parkway when he was struck in the rear by defendant, William Dispenza's vehicle. The defendant has provided this court with portions of the defendant's deposition testimony which is consistent with the plaintiff's account of the accident to the extent that the accident happened in slow moving rush hour traffic and that the defendant hit the plaintiff's vehicle in the rear. There exists no

question of fact as to whether the vehicle operated by plaintiff Neal Gartenberg was in slow moving traffic and was rear-ended by defendant's vehicle, nor is there any question of fact that the plaintiff could have avoided the accident or was negligent in any way given the fact that he was struck in the rear after slowing down and stopping because the traffic around him was stopping. Thus, plaintiff has established a prima facie showing of entitlement to summary judgment, which has not been rebutted by Defendants.

Accordingly, plaintiff's cross motion which seeks summary judgment on the issue of liability as to defendant William Dispenza is granted.

This constitutes the Decision and Order of the Court.

Dated: February 14, 2012

JAMES P. McCORMACK, A.J.S.C.