

Page v Napier

2008 NY Slip Op 32654(U)

September 22, 2008

Supreme Court, Nassau County

Docket Number: 1563/07

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

ELIZABETH C. PAGE,

Plaintiff,

- against -

DIANA L. NAPIER and HENRY J. NAPIER,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 1563/07

Motion Sequence No. 001

The following papers having been read on this motion:

| | |
|--|-------------------|
| Notice of Motion, Affidavits, & Exhibits | <u>1</u> |
| Answering Affidavits | <u>2</u> |
| Replying Affidavits | <u>3</u> |
| Briefs: Plaintiff's / Petitioner's | <u> </u> |
| Defendant's / Respondent's | <u> </u> |

The plaintiff moves for an order of preclusion pursuant to CPLR 3104, 3124, and 3126. The underlying personal injury action arises from a motor vehicle accident on January 26, 2004, on Bellmore Avenue, at the intersection of Natta Boulevard, in the Town of Hempstead, County of Nassau, in the State of New York. The plaintiff's attorney states, in a supporting affirmation dated June 20, 2008, the defendant Diane L. Napier, the driver of the other car, testified, at a deposition on April 24, 2008, being on an anti-depressant medication or medications, and now refusing to identify those medications. The plaintiff's attorney points to a preliminary conference order dated

September 7, 2007, where “all parties shall provide upon request of another party additional authorizations for the production of records maintained by health care providers and/or facilities.” The plaintiff’s attorney asserts, although the plaintiff’s demand for an authorization of the defendant’s no-fault file was responded to as “previously provided,” in fact, it has never been provided.” The plaintiff’s attorney avers a supplemental discovery demand was served on April 30, 2008, for information elicited at the April 24, 2008 deposition, yet the defendant served a minimal and non-responsive answer on June 8, 2008. The plaintiff’s attorney claims the defendant is frustrating the plaintiff’s attempt to obtain the defendant’s pharmacy records, and the doctor the defendant visited the date of the accident by repeating the phrase “improper demand” without elaboration or justification; refusing to supply cell phone information; and claiming lack of recall and non-possession of requested information.

The defendants oppose this motion on the grounds the supplemental demand for discovery and inspection served by the plaintiff’s counsel on April 30, 2008, is overly broad, and requests improper and privileged information; and the defendant has provided a complete response to the remainder of the plaintiff’s demands. The defense attorney states, in an opposing affirmation dated June 25, 2008, the defendants request, if the Court grants any part of the plaintiff’s motion, the Court direct the records be placed under seal, and examined by the Court *in camera* prior to allowing the plaintiff to see any portion of those records.

The plaintiff's attorney states, in a reply affirmation dated July 7, 2008, the defendant Diane L. Napier's psychiatric and medical condition is an issue in this litigation for three reasons: (1) the defendant made it an issue when this defendant claimed against the plaintiff for injuries, thus waiving HIPAA privacy rights; (2) the defendant made it an issue when the defense counsel provided the plaintiff with an authorization to obtain the entire legal contents of the defendant's underinsurance claim, and then proceeded to withhold and suppress those records; and (3) the defendant made it an issue by being non-responsive and evasive about which medications the defendant was under the influence at the time of the accident. The plaintiff's attorney asserts the defendant Diane L. Napier was a claimant against the plaintiff's insurance carrier in *Napier v. State Farm Insurance Co.*, Island Arbitration Mediation docket number 2509, and that claim dissipated any right of privacy to these records of the defendant. The plaintiff's attorney notes the defendant Diane L. Napier received \$75,000.00 for injuries. The plaintiff's attorney avers the defendant Diane L. Napier also commenced an underinsurance (SUM) claim against State Farm Insurance Co. in the Supreme Court, Nassau County under index number 15150/04, and by so doing already waived a right to privacy of medical, pharmacy and insurance records. The plaintiff's attorney contends the plaintiff is entitled to a copy of the defendant's 2005 deposition, emergency room and ambulance medical records which comprised the defendant's underinsurance claim.

This Court has reviewed and considered all of the papers submitted with respect to

this motion. The Court of Appeals stated:

We hold, therefore, that by bringing or defending a personal injury action in which mental or physical condition is affirmatively put in issue, a party waives the privilege. As a practical matter, a plaintiff or a defendant, who affirmatively asserts a mental or physical condition, must eventually waive the 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
Koump v. Smith, 25 N.Y.2d 287, 294, 303 N.Y.S.2d 858 [1969].

The Second Department has clarified this legal precept as follows:

A party seeking discovery of a defendant's medical records is required to demonstrate that the defendant's physical or mental condition is "in controversy" within the meaning of CPLR 3121(a) (*see Dillenbeck v. Hess*, 73 N.Y.2d 278, 287, 539 N.Y.S.2d 707, 536 N.E.2d 1126; *Koump v. Smith*, 25 N.Y.2d 287, 303 N.Y.S.2d 858, 250 N.E.2d 857; *Lombardi v. Hall*, 5 A.D.3d 739, 774 N.Y.S.2d 560; *Neferis v. DeStefano*, 265 A.D.2d 464, 697 N.Y.S.2d 108). The burden then shifts to the defendant to show that the information sought by the plaintiff is subject to the physician-patient privilege (*Lombardi v. Hall, supra; Neferis v. DeStefano, supra*). If the information sought falls within the privilege, discovery can only be compelled if the privilege has been waived (*see CPLR 3101[b], 4504[a]; Dillenbeck v. Hess, supra* at 287, 539 N.Y.S.2d 707, 536 N.E.2d 1126; *Lombardi v. Hall, supra; Neferis v. DeStefano, supra*)
Kivlehan v. Waltner, 36 A.D.3d 597, 827 N.Y.S.2d 290 [2nd Dept., 2007].

The Second Department has elucidated further:

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 N.Y.2d 278, 286-287, 539 N.Y.S.2d 707, 536 N.E.2d 1126; *Lombardi v. Hall*, 5 A.D.3d 739, 739-740, 774 N.Y.S.2d 560). Even when this preliminary 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, supra* at 287, 539 N.Y.S.2d 707, 536 N.E.2d 1126; *Lombardi v. Hall, supra* at 740, 774 N.Y.S.2d 560; *Neferis v. DeStefano*, 265 A.D.2d 464, 465, 697 N.Y.S.2d 108). 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, supra* at 288, 539 N.Y.S.2d 707, 536 N.E.2d 1126; *Koump v. Smith*, 25 N.Y.S.2d 287, 294, 303 N.Y.S.2d 858, 250 N.E.2d 857; *Grafi v. Solomon*, 274 A.D.2d 451, 452, 711 N.Y.S.2d 905). He or she must affirmatively assert the condition “either by way of counterclaim or to excuse the conduct complained of by the plaintiff” (*Dillenbeck v. Hess, supra* at 288, 539 N.Y.S.2d 707, 536 N.E.2d 1126; *see Koump v. Smith, supra; Lombardi v. Hall, supra*) *Bongiorno v. Livingston*, 20 A.D.3d 379, 799 N.Y.S.2d 98 [2nd Dept., 2005].

This Court determines the plaintiff has demonstrate that the defendant’s physical or mental condition is “in controversy” within the meaning of CPLR 3121(a). The Court of Appeals states:

a litigant is “deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue” (*Dillenbeck v. Hess*, 73 N.Y.2d 278, 287, 539 N.Y.S.2d 707, 536 N.E.2d 1126 [1989], *citing Koump v. Smith*, 25 N.Y.2d 287, 294, 303 N.Y.S.2d 858, 250 N.E.2d 857 [1969]; *see also Hoenig v. Westphal*, 52 N.Y.2d 605, 439 N.Y.S.2d 831, 422 N.E.2d 491 [1981] [physician-patient privilege waived by commencement of personal injury lawsuit]). This waiver is called for as a matter of basic fairness: “[A] party should not be permitted to affirmatively assert a medical condition in seeking damages or **838 ***352 in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim” (*Dillenbeck* at 287, 539 N.Y.S.2d 707, 536 N.E.2d 1126) *Arons v. Jutkowitz*, 9 N.Y.3d 393, 409, 850 N.Y.S.2d 345 [2007].

The Court also finds this defendant waived privilege when affirmatively places mental or

physical condition in issue.

Accordingly, the motion is granted unless the defendant within 30 days of service of a copy of this order with notice of entry complies with the plaintiff's supplemental demand for discovery and inspection dated April 30, 2008.

So ordered.

Dated: **September 22, 2008**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED
SEP 26 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE