

Brown v City of New York

2009 NY Slip Op 31004(U)

May 6, 2009

Supreme Court, New York County

Docket Number: 101644/01

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

PART Part 5

Index Number : 101644/2001

BROWN, ERIC

INDEX NO. _____

vs

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 006

MOTION SEQ. NO. _____

COMPEL

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2, 3

Answering Affidavits — Exhibits _____

4, 5, 6

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/6/09



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
ERIC BROWN, Index No. 101644/01

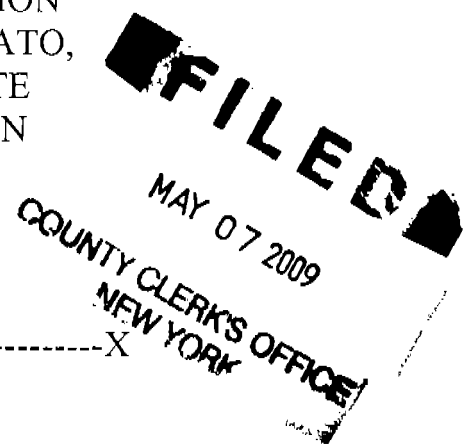
Plaintiff, DECISION and ORDER

-against-

Mot. Seq. 006

CITY OF NEW YORK, TROCOM CONSTRUCTION
CORP., ANTHONY SANTORO, JOSEPH TRAVATO,
FELIX EQUITIES, INC., URBITRAN ASSOCIATE
ENGINEERS, P.C., URBITRAN CONSTRUCTION
and MANAGMENT CORP., JOHN COELLO and
ROBERT COELLO,

Respondent.



-----X
HON. EILEEN A. RAKOWER:

Plaintiff Eric Brown ("Plaintiff") brings this action for personal injuries allegedly sustained on the afternoon of November 6, 1999, when a car in which he was a passenger came into contact with a guardrail and/or an air compressor on the southbound Henry Hudson Parkway in the vicinity of 103rd Street in New York, NY ("the accident"). Defendant Robert Coello ("Coello") was the driver of the automobile at the time of the accident.

Presently before the court is Defendant City of New York's ("the City") motion, pursuant to CPLR §3124, to compel Coello to provide an authorization permitting the City to obtain a copy of Coello's no-fault records. The City submits a Notice of Motion, an Affirmation of Good Faith, and an Affirmation in Support of its motion. Annexed to the affirmation as exhibits are a copy of Plaintiff's Amended Summons and Amended Verified Complaint; the City's Verified Answer; Defendants John and Robert Coello's Verified Answer; an Authorization signed by Coello permitting the City to obtain Coello's medical records from St. Luke's-Roosevelt Hospital; a compliance conference stipulation wherein Coello's counsel agreed to provide an authorization to obtain Coello's records from St. Luke's-Roosevelt; a document from Coello's St. Luke's-Roosevelt Hospital records containing the results of a blood test undergone by Coello after the accident; Coello's deposition transcript; a compliance conference stipulation wherein the

parties set forth deadlines for the instant motion to compel; and a portion of testimony by Coello at a DMV hearing on June 6, 2000.

Coello has cross-moved for a protective order pursuant to CPLR §§3103 and 3122, declaring that the information sought by the City is privileged under CPLR §4504. Coello has submitted a Notice of Cross-Motion and an Affirmation in Support. Annexed to the Affirmation as an exhibit is a copy of a compliance conference stipulation entered into at a compliance conference in which Coello did not appear, along with a cover letter from counsel for the City advising counsel for Coello of the stipulation.

In addition, Defendants Trocom Construction Company, Anthony Santoro, and Joseph Travato ("Trocom Defendants") cross-move in support of the City's motion to compel. The Trocom Defendants have submitted a Notice of Cross Motion, an Affirmation of Good Faith, and an Affidavit in Support. Annexed to the Affidavit as exhibits are the Trocom Defendants' Verified Answer; copies of compliance conference stipulations pertaining to the present dispute; and an Authorization for the release of Plaintiff's records from St. Luke's-Roosevelt Hospital.

The City has also submitted an Affirmation in Opposition to Coello's motion for a protective order.

Finally, Coello has submitted an Affirmation in Opposition to the Trocom Defendants' cross-motion.

CPLR §3101(a) states that "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." It is well settled that the language "material and necessary" is to be afforded a liberal construction "to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

Physician-patient communications, privileged under CPLR 4504, may... be shielded from discovery and when it has been established that the requested information is subject to discovery under CPLR 3121(a), the burden shifts to the person claiming the privilege to assert it by

seeking a protective order pursuant to CPLR 3122 (*Koump v. Smith*, 25 NY2d, at 294, *supra*; *see, Bloodgood v. Lynch*, 293 NY 308, 314). Once the privilege is validly asserted, it must be recognized and the sought-after information may not be disclosed unless it is demonstrated that the privilege has been waived (CPLR 4504(a); *see Koump v. Smith*, 25 NY2d, at 294, *supra*; 5 Weinstein-Korn-Miller, NY Civ Prac para 4504.19; Fisch, NY Evidence § 554 [2d ed]).

(*Dillenbeck v. Hess*, 73 N.Y.2d 278, 287 [1989]).

[A] party does not waive the privilege whenever forced to defend an action in which his or her mental or physical condition is in controversy. In order to effect a waiver, the party must do more than simply deny the allegations in the complaint -- he or she must affirmatively assert the condition 'either by way of counterclaim or to excuse the conduct complained of by the plaintiff'

(*id.* at 287-88) (citing *Koump* at 294).

Coello asserts that his physical or mental condition is not in controversy and, in any event, the records sought by the City and the Trocom Defendants are immune from disclosure pursuant to the physician-patient privilege. However, Coello's condition at the time of the accident is clearly in controversy¹, and courts have held that full disclosure of a party's no-fault records is warranted where the records are material and necessary to the defense of an action (*see Scott v. Albord*, 289 A.D.2d 389 [2nd Dept. 2001]). The issue then is whether Coello has waived the physician-patient privilege. The City argues that Coello has waived the privilege because (1) he has affirmatively placed his physical condition at issue; and because (2) Coello has already provided authorizations to counsel for his medical records from St. Luke's-Roosevelt Hospital. In addition, the Trocom Defendants assert that Coello has waived the physician-patient privilege because

¹The City and the Trocom Defendants point to hospital records indicating the presence of alcohol in Coello's system, while Coello in his deposition denied consuming alcohol in the twenty-four hour period leading up to the accident.

he has already stipulated that he would provide the records in controversy in several compliance conferences.

The City first argues that Coello placed his physical condition at issue by denying that he had consumed alcohol in the twenty-four hours leading up to the accident, which is purportedly contradicted by Plaintiff's hospital records. However, as noted above, Coello's denial of allegations that he was under the influence of drugs and/or alcohol at the time of the accident does not amount to his placing his physical condition in controversy (*see Dillenbeck* at 287-88).

The City next argues that Coello placed his physical condition at issue when he asserted a memory of events which were sufficient to excuse his actions, while claiming a lack of memory as to his own operation of the vehicle at the time of the accident. In so arguing, the City relies upon *Lopez v. Oquendo*, 262 A.D.2d 24 [1st Dept. 1999]. *Lopez*, like the instant action, involved a lawsuit for personal injuries arising from an automobile accident in which the defendant driver was allegedly intoxicated - an allegation denied by the defendant. In upholding the decision of the Supreme Court, which ordered the production of the defendant's medical and hospital records for *in camera* inspection, the First Department observed that the defendant "asserted at a deposition that he had a memory of events sufficient to excuse his actions (swerving to avoid another automobile), but that his memory failed upon being held to account for the operation of his own automobile..." (*id.* at 25). Based on the foregoing, the Court distinguished the case from *Dillenbeck* (where the defendant asserted a total lack of memory surrounding the automobile accident and therefore did not place her medical condition in issue) and found that "defendant *has* asserted his physical condition, i.e., a lack of memory, in defense of his actions." (*Lopez* at 25).

The court finds that Coello has placed his physical condition at issue by asserting a lack of memory in defense of his actions. Coello in his deposition asserted a lack of memory as to most of the events immediately preceding the car accident that is the subject of the present action, but was able to recall that he was cut off by another automobile shortly prior to the accident.² Accordingly, *Lopez* is controlling.

²This testimony is consistent with prior testimony given by Coello at a June 6, 2000 administrative hearing before the New York State Department of Motor Vehicles, in which Coello testified that an automobile cut him off, causing him to swerve and hit the curb, at which point he lost control of the automobile.

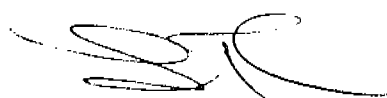
Moreover, Coello has waived the privilege by supplying the parties an authorization to obtain his medical records from St. Luke's-Roosevelt Hospital. While Coello now states that he was merely complying with so-ordered stipulation from the October 7, 2007 compliance conference in which Coello was not present, Coello complied with the stipulation rather than objecting to its validity for lack of his presence at the conference.

Wherefore, it is hereby

ORDERED that Coello shall provide an authorization for the release of his no-fault records and other medical records pertaining to the subject accident not previously disclosed within 10 days of receipt of a copy of this order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 6, 2009



EILEEN A. RAKOWER, J.S.C.

FILED
MAY 07 2009
COUNTY CLERK'S OFFICE
NEW YORK