

Peterson v Jensen

2018 NY Slip Op 34326(U)

February 26, 2018

Supreme Court, Westchester County

Docket Number: Index No. 57174/2016

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

-----X
JANET PETERSON, as administratrix of the
ESTATE OF SEAN M. PETERSON, deceased, and
JANET PETERSON, individually,

Plaintiffs,

-against-

RONALD H. JENSEN,

Defendant.
-----X

DECISION and ORDER

Index No. 57174/2016

Motion Date: Feb. 26, 2018

Seq. No. 2

LEFKOWITZ, J.

The following papers were read on defendant’s motion for a protective order pursuant to CPLR 3103 striking plaintiffs’ notice of discovery and inspection dated September 20, 2017, and denying disclosure of defendant’s medical records relating to his prior and subsequent eye care treatment and cataract surgery.

Order to Show Cause dated December 28, 2017; Affirmation in Support; Exhibits A-F
Affirmation in Opposition; Exhibits A-C

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

This is a negligence and wrongful death action arising from a motor vehicle accident that occurred on December 12, 2015, when, according to the complaint, defendant’s motor vehicle collided with the motorcycle of plaintiffs’ decedent, resulting in his death. In his complaint defendant denies the allegations in the complaint and asserts, among others, the affirmative defenses of comparative negligence and the failure of plaintiffs’ decedent to wear a helmet or other protective devices.

Defendant provided a supporting deposition to the Mount Pleasant Police Department shortly after the accident (Exhibit B appended to defendant’s motion papers). It stated, in defendant’s handwriting, “I saw no oncoming vehicles.”

Tim Travis also provided a supporting deposition to the Mount Pleasant Police

Department shortly after the accident (Exhibit C appended to defendant's motion papers). He stated that he was about to make a right turn from Skyline Drive onto Route 9A. A car on Route 9A was slowing down in the right lane. The light was changing to green for Travis. Travis saw a "bike" pull out from behind the car that was slowing down. The driver of the car did not stop on Route 9A as it had a yellow light. The motorcycle then "excelerated," moved to the left lane of Route 9A and passed the car. Travis pulled out onto Route 9A north, proceeded a few yards and found a car accident. The car was sideways and the motorcycle was in front of it, lying down. Defendant told him, "I did not see him."

Defendant testified at a New York State Department of Motor Vehicles (hereinafter "DMV") hearing on January 27, 2017 (Exhibit A appended to plaintiffs' motion papers). He testified that he was at a distance of 336 feet from a traffic light that governed Route 9A and Skyline Drive. He was at a stop and decided to wait until the light turned red before turning left. When the light turned red he looked again and turned. There was a terrible noise on the right side of his car. He saw a motorcycle on the ground but not a motorcyclist (6-7). Defendant testified that he did not see the motorcyclist prior to the accident and had no idea what occurred (8).

Defendant was deposed in this case on August 23, 2017 (see Exhibit F appended to defendant's motion papers). He testified that when he reviewed the DMV transcript, he did not see anything there that he believed was incorrect or inaccurate (79). He again testified that he brought his car to a stop because although the light south of where the accident occurred was initially green, he wanted to wait until the light changed to red to make sure there was no oncoming traffic. The traffic light was at the intersection of Route 9A and Skyline Drive (98-99). Defendant further testified that before the accident and while he was making his left hand turn after the light turned red, he did not see any vehicle coming from the other direction (102-03). He stated that there were no obstructions to his view (154). He also testified that he did not see the motorcyclist prior to the accident and he "had no idea what happened" (120). Defendant also testified that when the police arrived to the scene he told them that he did not see anything coming, that he was making a left-hand turn (152). Defendant testified that the accident occurred between 4:30 and 5 p.m. and the road that day was dry (65).

Defendant further testified that he was born in 1939 and at the time of the accident he was 76 or 77 (14-15). At the time of the accident he was taking Lumigan (eye drops to control eye pressure) (30-31). In 2015 he was under the care of Dr. Lungrin, an ophthalmologist (31). Defendant also testified that he had cataract surgery in one eye in July, and in the other eye in August, of 2016 (32). The surgeries were performed by Dr. Tostanoski (32). His symptoms prior to the cataract surgery included seeing a halo around lights and words, like on a sign, appearing in duplicate (32-33). Defendant stated that he had worn corrective lenses since high school and is nearsighted (34). Defendant testified that he treated with several ophthalmologists: Dr. Lugrin (from 2011-15); Dr. Fleischman (from 2015-16); and Dr. Sussman (1988-2011)(35-36).

Plaintiffs served a post deposition notice for discovery and inspection dated September 20, 2017. Among other things they sought HIPAA compliant authorizations for defendant's ophthalmological records for Dr. Lungrin, Dr. Tostanoski, Dr. Fleischmann, and Dr. Sussman. In his response dated November 30, 2017, defendant objected to the demands for these authorizations on the grounds that there was no objective evidence that would necessitate this disclosure.

Presently defendant seeks a protective order regarding plaintiffs' demands for his medical records. He asserts that they are protected by the physician-patient privilege and are not discoverable. Defendant states that in this case, plaintiffs have alleged negligence, carelessness and recklessness on his part and that he has simply denied the allegations and asserted affirmative defenses of culpable conduct and comparative negligence against plaintiffs' decedent. Defendant states that he did not offer any of his eye treatments, before or after the subsequent accident, as an excuse, nor did he affirmatively assert any medical or eye condition to excuse the conduct complained of by plaintiffs. Defendant asserts that although he testified that he regularly saw his ophthalmologist before and after the subject accident, this does not operate as a waiver of the physician-patient privilege.

Plaintiffs oppose this motion. They assert that defendant placed his visual perception into controversy with his own statements and testimony and thereby has waived any applicable physician-patient privilege. Plaintiffs note that in his responses to their post-deposition notice defendant did not claim physician-patient privilege as his basis for the objection. They also note that he did not provide a reason for his untimely response to their notice. Plaintiffs assert that defendant's testimony places his visual acuity and health into controversy. Plaintiffs note that under dark, but clear road conditions, defendant failed to see plaintiffs' decedent's motorcycle, crashed into him, and caused his death.

Full disclosure of all evidence that is material and necessary in the prosecution or defense of an action is mandated by CPLR 3101. Consequently, where the physical condition of a party is in controversy, a notice may be served pursuant to CPLR 3121(a) requiring that the party make available for inspection relevant medical records. The guidepost for determining whether a plaintiff may obtain discovery of a defendant's medical records is found in *Dillenbeck v Hess*, 73 NY2d 278 (1984). *Dillenbeck* stated that the initial burden of proving that a party's physical condition is in controversy is on the party seeking the information and it is only after such an evidentiary showing that discovery may proceed under the statute. Once this burden is satisfied, discovery still may be precluded if the requested information is privileged and thus exempt from disclosure. However, a litigant will be deemed to have waived the privilege when, in bringing or defending a personal injury action that person has affirmatively placed his or her physical condition in issue (*Dillenbeck v Hess*, 73 NY2d, at 287).

A review of the evidence submitted in opposition to this motion demonstrates that plaintiffs satisfied their threshold burden of demonstrating that defendant's eyesight at the time of the subject accident is in controversy. Plaintiffs point out that in his report to the police

immediately following the accident, at his hearing at the DMV, and at his deposition, defendant stated he did not see any oncoming cars at the time of the subject accident. Furthermore, defendant testified at his deposition that he was nearsighted, and that he was taking eye medication and treating with an ophthalmologist at the time of the accident.

The information sought by plaintiffs, HIPAA compliant authorizations to obtain defendant's ophthalmological records, is indisputably privileged, falling within the physician-patient privilege. A defendant cannot be said to have waived the privilege simply by denying the allegations in the complaint or raising the affirmative defenses such as comparative negligence (*Dillenbeck v Hess*, 73 NY2d, at 289). In his answer defendant simply denied the allegations and raised affirmative defenses of comparative negligence and the failure of plaintiffs' decedent to wear a helmet and other protective devices. However, at his deposition, upon direct examination without any objection from his counsel, defendant testified that he did not see anything at the time of the accident, that he suffered from poor eyesight, and that he was under ophthalmological care. He further testified that he saw halos and saw things in duplicate. By so testifying, defendant waived the privilege (*see Ritter v Good Samaritan Hosp.*, 11 AD3d 667 [2d Dept 2004; plaintiff waived the physician-patient privilege with respect to her care and treatment for seizures by responding to deposition questions regarding that issue]; *Rosenthal v Dykman*, 233 AD2d 313 [2d Dept 1996; plaintiff waived his right to assert the physician-patient privilege by affirmatively and voluntarily placing his medical condition in controversy by, among other things, testifying at his deposition on direct examination about his medical history]).

In opposition to this motion plaintiffs convincingly rely on the case of *Palma v Harnick*, 31 AD3d 406 (2d Dept 2006). Similarly to the case at bar, *Palma* involved an action to recover for injuries sustained by plaintiff when she was struck by a vehicle operated by defendant. Plaintiff moved for an order compelling defendant to comply with her demand for defendant's ophthalmological records. The court found that plaintiff established that defendant's eye condition was in controversy through defendant's own testimony at her deposition that she had limited vision in her right eye. The court found that defendant waived her right to assert the physician-patient privilege with respect to medical records concerning that condition. The court noted that defendant had testified as to her eye condition, without objection.

In light of the foregoing it is:

ORDERED that defendant's motion for a protective order is granted only to the limited extent that defendant is directed to provide to plaintiffs, on or before March 5, 2018, HIPAA compliant authorizations permitting the release of all of defendant's ophthalmological records from December 12, 2013, to August 31, 2016, only; and it is further,

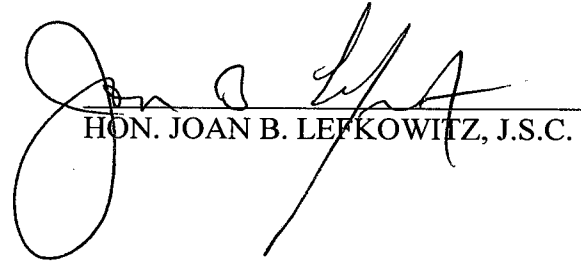
ORDERED that defendant's counsel is directed to serve a copy of this order with notice of entry upon plaintiffs within seven days of entry; and it is further

ORDERED that counsel for all parties are directed to appear in the Compliance

Conference Part, Room 800, on March 8, 2016, as they previously were directed to do so.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
February 26, 2018



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

To:

Mark A. Campbell, Esq.
Grant & Lonngworth, L.L.P.
Plaintiffs' Attorneys
377 Ashford Avenue
Dobbs Ferry, New York 10522
By NYSCEF

Jordan Masiakos, Esq.
The DiPippo Law Group, L.L.C.
Defendant's Attorneys
401 Franklin Avenue, Suite 208
Garden City, New York 11530
By NYSCEF

cc: Compliance Part Clerk