SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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FELICIA WELLS,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY and LAFAYETTE F. LENHAM,

Defendant.

---X

Index No. 160432/2014

Mot. Seq. 2

DECISION AND ORDER

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYSCEF #
Plaintiff's Motion / Affirmation	1	75-83
Defendant's Affirmation in Opposition	2	87-99
Plaintiff's Reply Affirmation	3	100-103

LISA A. SOKOLOFF, J.

This action was commenced by Plaintiff Felicia Wells to recover damages for personal injuries sustained on February 11, 2014 when her automobile was struck by a bus owned by Defendant New York City Transit Authority and driven by Defendant Lafayette F. Lenham. Plaintiff now moves for an order, pursuant to CPLR §§ 3124 and 3126, striking the answer of Defendants for their refusal to answer questions at deposition, refusal to produce Lenham's medical records for treatment of a sleep apnea condition and failure to provide items of discovery including but not limited to "black box" and/or similar electronic data for the bus involved in the collision.

Plaintiff argues that Defendant Lenham placed his medical condition in controversy when he admitted to operating the bus while being treated for sleep apnea

and waived his physician-patient privilege by disclosing the medical condition to Plaintiff's counsel.

At his deposition, held on October 26, 2017 and June 5, 2018, Plaintiff admitted that he was diagnosed with sleep apnea in 2008 and was required by Transit to take a two-month leave of absence because of that medical condition. During that time, Plaintiff was required to take a sleep awareness test and sleep with a sleep apnea machine, known as CPAP (continuous positive airway pressure), which he used through the date of the accident, including the night before the accident.

With respect to specific treatment, Plaintiff contends that Lenham was deliberately evasive:

> Q: Have you ever been treated at a clinic or sleep disorder facility at any time?
> Counsel: Objection. You can answer over my objection.
> A: Yes, I have.
>
> Q: Where was that?
> A: Somewhere out in Long Island. I don't remember exactly where it was at.
>
> Q: Was it before 2014
> A: Yes
>
> Q: Did you go to any other doctor or medical facility with respect to a sleep disorder since that time?
> A: Since 2008?
>
> Q: Correct.
> A: I believe I have. I can't remember what dates.

Plaintiff also maintains that Lenham's counsel unjustifiably refused to allow detailed inquiry into Plaintiff's sleep apnea condition:

> Q: Sir, you testified during the first deposition that you were diagnosed with sleep apnea. My question for you is: When, exactly, were you diagnosed?
>
> Counsel [Ms. Barrett]: Objection. Don't answer this question.

According to Plaintiff, Lenham should be obligated to produce his medical record regarding sleep apnea and relevant employee file because he has placed his medical condition in controversy and waived any privilege at his deposition.

Defendants oppose, maintaining that the physician-patient privilege was not waived simply by defending this personal injury action or by denying the allegations. Defendants also claim that Plaintiff's order to show cause should be denied because Plaintiff's counsel failed to provide an affirmation of good faith as required by Uniform Rules Part 202.7, as well as for raising discovery issues beyond the scope of a September 13, 2018 so-ordered stipulation that permitted Plaintiff to serve a motion limited to Lenham's sleep apnea and black box/ECM (engine control modules) data related to the bus accident without first seeking the court's permission as required by the court's rules.

A party moving to strike a pleading pursuant to CPLR § 3126 is required to submit an affirmation that counsel for the moving party has made "a good faith effort to resolve the issues raised by the motion" with opposing party's counsel (Uniform Rules for Trial Courts [22 NYCRR] 202.7; *241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470 [1st Dept 2013). To be deemed sufficient, the affirmation must state the nature of the efforts made by the moving party to reconcile with opposing counsel (22 NYCRR 202.7[c]). Although Plaintiff's motion is technically insufficient in that it is not supported by a good faith affirmation, Plaintiff's order to show cause is procedurally proper insofar as the September 2018 compliance conference order specifically permitted Plaintiff to move in connection with the bus operator's sleep apnea condition and black box/ECM data information, as the judge was satisfied that all efforts to resolve the controversy had been exhausted and motion practice was specifically anticipated.

CPLR § 3101(a) prescribes the broad scope of disclosure, allowing a party to obtain "all matter material and necessary in the prosecution or defense of an action." Discovery

determinations rest with the sound discretion of the motion court (*Gumbs v Flushing Town Center III, L.P.*, 114 AD3d 573 [1st Dept 2014]) and require evaluation on a case-by-case basis with due regard for the strong policy supporting open disclosure" (*Andon v 302-304 Mott St. Assoc*, 94 NY2d 740, 747 [2000]; *Brito v Gomez*, 168 AD3d 1 [1st Dept 2018]) unless the information sought is immunized" (*Koump v Smith*, 25 NY2d 287 [1969]).

Here, Lenham's inability to recall the specific doctors, clinics or facilities he visited for treatment in the ten years prior to his deposition is not so implausible as to support an inference that his conduct was willful or deliberately evasive. As Defendant points out, it is no different than Plaintiff's inability to recall the names or addresses of medical providers who treated her as a result of a 2004 motor vehicle accident.

A party seeking to inspect a defendant's medical records must first demonstrate that the defendant's physical or mental condition is "in controversy" within the meaning of CPLR § 3121(a). *Dillenbeck v Hess*, 73 NY2d 278, 286-287 [1989]). The burden of proving that a party's mental or physical condition is in controversy, for purposes of obtaining relevant hospital or physician's records, is on the party seeking the records (*Koump*, 25 NY2d at 300; *Budano v Gurdon*, 97 AD3d 497, 498 [1st Dept 2012]). A plaintiff sufficiently met her initial burden of proving that a defendant's eye condition is in controversy where the defendant admitted at her examination before trial that she had limited vision in her right eye and was not wearing any corrective lenses at the time of the accident. (*Palma v Harnick*, 31 AD3d 406 [2nd Dept 2006]). Yet even when this burden has been met, discovery may still be precluded if the requested information is subject to the physician-patient privilege (*Dillenbeck* at 287; CPLR §§ 3101[b], 4504). Once the privilege is asserted, a plaintiff must then demonstrate that the privilege has been waived (*Dillenbeck* at 280, 287).

The privilege is not waived when the plaintiff introduces evidence demonstrating

that the defendant's physical condition is genuinely 'in controversy' within the meaning of the statute permitting discovery of medical records (*Dillenbeck* at 280; CPLR § 3121[a]). Rather, the defendant must affirmatively assert the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff (*Dillenbeck v Hess*, 73 NY2d 278, 280 [1989] quoting *Koump v Smith*, 25 NY2d 287, 294 [1969]; *Schilling v Quiros*, 23 AD3d 243 [1st Dept 2005]). To effect a waiver, a defendant must do more than simply deny the allegations in the complaint (*Koump* at 294) or claim memory loss as to the accident (*Dillenbeck* at 289).

The *Dillenbeck* case illustrates how these principals operate. In *Dillenbeck*, the plaintiff's decedent was killed, and her son was seriously injured when their vehicle collided with a vehicle driven by the defendant Hess. The complaint charged the defendant's intoxication was a proximate cause of the accident and that the codefendants, owners and operators of a tavern where the defendant allegedly had been drinking throughout much of the afternoon and evening, negligently contributed to her intoxication by serving excess quantities of alcohol to her (*Dillenbeck* at 281). The defendant Hess was also injured and hospitalized where a blood alcohol test was performed for diagnostic purposes, though not at the direction of a police officer or pursuant to court order (*Id.*).

The *Dillenbeck* plaintiff sought to discover the defendant's hospital records, including the blood alcohol test results. In support of the motion, the plaintiff submitted "three affidavits of persons who claim to have been with defendant prior to the accident and to have observed her consume alcohol over approximately a seven-hour period. Plaintiffs also submitted excerpts from defendant's examination before trial wherein she claimed to have no memory of the events occurring prior to the accident except that she remembered being at the … [t]avern earlier in the day for a union meeting and having one drink while she was there" (*Dillenbeck* at 282). Although the Court of Appeals found that

the plaintiffs satisfied their threshold burden of demonstrating that defendant's physical condition at the time of the accident was in controversy (*Dillenbeck* at 288), it held that the defendant had not "waived the privilege simply by denying the allegations in the complaint or by testifying that she cannot remember any details of the accident where the fact of her memory loss is not being advanced to excuse her conduct" (*Dillenbeck* at 289).

In contrast, where a defendant asserted at a deposition that he recalled swerving to avoid another automobile, but blacked out after he his vehicle hit a wall and injured the plaintiffs, the defendant was found to have placed his physical condition (lack of memory) in controversy in such a way as to waive his privilege (*Lopez v Oquendo*, 262 AD2d 24 [1st Dept 1999]) because the memory loss was not asserted as an excuse for the conduct complained of by the plaintiff. Similarly, a defendant driver's deposition testimony that she ingested prescription medication just before she was served alcohol, coupled with her cross-claim for indemnification, "constitute[d] an affirmative assertion of her medical condition and a waiver of any doctor-patient privilege concerning her medical and prescription records" (*Maurice v Mahon*, 239 AD2d 188, 188 [1st Dept], *lv dismissed* 91 NY2d 866 [1997]).

In this action, Plaintiff has failed to satisfy the threshold burden of demonstrating that Defendant bus driver has affirmatively placed his physical condition in controversy within the meaning of CPLR § 3121[a]).

Although Lenham testified that he had been treated for the sleep apnea condition since 2008, six years before the subject accident, had taken a two-month leave of absence at that time as a result of the diagnosis, and used a CPAP machine including the night before the accident, the record does reflect a hint of evidence from either party that Lenham's sleep apnea played a role in the accident. Moreover, Lenham testified that he had stopped the bus before it was hit by Plaintiff's vehicle. Thus, contrary to her claim,

Lenham's medical records concerning his sleep apnea condition are not at issue or relevant to this action.

The physician-patient privilege protects only the "confidential communications" in the professional relationship, "not the mere facts and incidents of a person's medical history" *Williams v Roosevelt Hospital*, 66 NY2d 391, 396-97 (1985). Therefore, a person may not refuse to answer questions regarding matters of fact, such as whether he had any physical problems, whether he was in the care of a physician or taking medication during a certain period of time (*Id.* at 397). Accordingly, Plaintiff may not seize on Lenham's testimony to place his medical condition in controversy (*Dillenbeck* at 289).

Nor has Lenham waived his physician-patient privilege merely by acknowledging his medical condition at his deposition. A review of his deposition transcript shows that at no time did Lenham use his sleep apnea to excuse the conduct complained of by Plaintiff. Nor has Lenham waived the privilege by disputing Plaintiff's allegations or asserting the defenses of comparative negligence and the failure to wear seat belts (*Dillenbeck* at 289).

Because Plaintiff had not placed his sleep apnea condition in controversy and had not waived the physician-patient privilege, Defendant properly raised the privilege at deposition by objection to specific questions (*Carone v Venator Group, Inc.*, 289 AD2d 185 [1st Dept 2001]).

Plaintiff has also not shown that Defendant failed to respond to discovery demands, specifically the ECM data from the event recorder or "black box" on the bus. As Defendant points out, at the time Plaintiff's counsel made this demand, he was in possession of an e-mail from Defendant confirming that Defendant did not possess any ECM data for the subject bus and would provide an affidavit to that effect. A party may not be compelled to produce or sanctioned for failing to produce information which he does not possess (*Sagiv v Gamache*, 26 AD3d 368 [2nd Dept 2006]). Absent non-

compliance with a discovery request that is willful, contumacious, deliberate or in bad faith, the drastic remedy of striking an answer should not be imposed (CPLR 3126; *Magrabi v City of New York*, 211 AD2d 422 [1st Dept 1995]). Defendant's substantial compliance with Plaintiff's discovery demands does not warranting the striking of Defendants' answer.

Accordingly, it is

ORDERED, that Plaintiff's order to show cause to strike Defendant's answer for his refusal to answer questions at deposition, refusal to produce Lenham's medical records, and failure to provide the electronic data for Defendant's bus, is **denied** in its entirety.

This constitutes the decision, order and judgment of the Court. Any other requested relief not expressly granted is denied.

Dated: May 15, 2019
New York, New York

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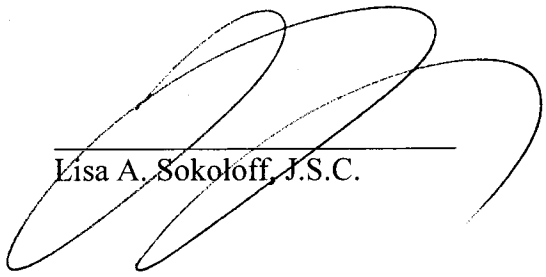

Lisa A. Sokoloff, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
APPLICATION:		GRANTED	X DENIED		GRANTED IN PART		OTHER
		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE