

**Burke v Rossi**

2019 NY Slip Op 33981(U)

May 23, 2019

Supreme Court, Sullivan County

Docket Number: 0128-2017

Judge: Michael F. McGuire

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF SULLIVAN

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David Burke,

Plaintiff,

-against-

Stephen Rossi and Mia Mazzaferro,

Defendant,

**Decision & Order**

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**Motion Return Date: February 11, 2019**

**RJI No.: 52-39618-2017**

**Index No.: 0128-2017**

**Appearances:**      **The Law Firm of  
 James R. McCarl & Associates  
 Attorneys for Defendant  
 18 Bridge Street  
 Montgomery, New York 12549  
 By: James R. McCarl, Esq.**

**Finkelstein & Partners, LLP  
 Attorneys for Plaintiff  
 1279 Route 300, P.O. Box 1111  
 Newburgh, New York 12551  
 By: Marie DuSault, Esq.**

**McGUIRE, J.,**

This matter comes before the Court by way of Defendants Stephen Rossi and Mia Mazzaferro's notice of motion seeking an Order pursuant to CPLR §3124 compelling the Plaintiff David Burke to provide an unrestricted authorization allowing Defendants to obtain medical records from his primary care physician, Livingston Manor Family Health. Plaintiff appears and opposes the requested relief.

In this personal injury action Plaintiff David Burke is seeking damages for injuries allegedly sustained on October 13, 2015, in a motor vehicle collision. It is alleged that Plaintiff was stopped at a red light when he was struck from behind by Defendants' motor vehicle at an intersection of Route 209 in Kehonkson, New York. Plaintiff alleges that as a result of the collision he sustained serious physical injuries including, *inter alia*, bilateral carpal tunnel syndrome and bulging discs of the cervical spine. Plaintiff additionally alleges that in December

of 2015, due to the injuries he sustained in the collision he was caused to fall and sustained, *inter alia*, a left ankle sprain. Simply stated Plaintiff is alleging injuries to both wrists, the cervical spine and left ankle.

During the discovery process, Plaintiff identified health care providers who treated him for his alleged injuries and provided authorizations to Defendants to obtain those medical records. After Plaintiff's deposition Defendants made a demand for an authorization for the medical records from Plaintiff's primary care physician. Plaintiff objected to production of the same upon the basis that Plaintiff did not testify that he treated with his primary care physician for injuries he sustained as a result of the collision on October 13, 2015, and Defendants responded reiterating their demand stating that Plaintiff testified he saw his primary care physician two weeks after the accident on November 6, 2015. Plaintiff again objected, noting that the testimony of Plaintiff was not clear as to whether he visited his primary care physician in November of 2015, as he testified he "may" have. Plaintiff further states in the letter that upon a review of the No Fault pay out log the primary care physician is not listed as a provider for treatment related to the collision. This issue was further discussed during a compliance conference with the Court and Defendants were granted permission to file the instant motion.

In support of their motion, Defendants note that Plaintiff testified during his deposition that his primary care physician was Livingston Manor Family Health Center, and that he has been treating there for five years, going for a yearly examination or if he needs medication checks. Defendants further note that Plaintiff testified that he has diabetes and takes medication for diabetes (Metformin). Defendants now seek the authorization based upon the Plaintiff's testimony that he may have treated with his primary care physician approximately two weeks after the collision and based upon his admission that he treated with his primary care physician for his diabetic condition.

Defendants further aver that subsequent to making the demands for the authorization Defendants received the report of Robert C. Hendler, M.D., an orthopedic surgeon, who conducted a physical examination upon Plaintiff, the report is appended to the motion. The report opined, *inter alia*, that diabetes is a well-known cause of carpal tunnel syndrome and that in his opinion the injuries alleged to the wrists were as a result of a pre-existing diabetic condition, and not as a result of the collision.

Based upon the foregoing Defendants argue that they are entitled to the Plaintiff's medical records from his primary care physician to explore any non-traumatic causes of plaintiff's carpal tunnel syndrome. Specifically, Defendants argue that the records may lead to evidence of prior carpal tunnel symptoms related to Plaintiff's diabetes.

Plaintiff opposes the motion upon the basis that there is nothing to demonstrate that Plaintiff treated with his primary care physician for the injuries sustained in the collision. Plaintiff argues that it is not claimed that there is now an inability to work, loss of enjoyment of life, or any broad allegations of injury in his bill of particulars. Plaintiff argues that Defendants demand for an unrestricted authorization for Plaintiff's entire medical record with his primary care physician is overly broad.

Pursuant to CPLR §3124 if a party (Plaintiff herein) fails to respond/comply with a demand, the party (Defendants herein) seeking disclosure may move to compel compliance or a response. Defendants seek an order compelling Plaintiff to provide an authorization for Plaintiff's medical records from his primary care physician, Livingston Manor Family Health.

This Court is mindful that the disclosure provisions are to be liberally construed (see *American Ass'n of Bioanalysts v. New York State Dept. of Health* 12 AD3d 868 [3<sup>rd</sup> Dept. 2004]). CPLR §3101[a] requires "[...] full disclosure of all matter material and necessary in the prosecution or defense [...]". "The words material and necessary as used in section 3101 must

be interpreted liberally 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 [internal citations and quotations marks omitted]" *Kapon v. Koch*, 23 NY3d 32, 38 [2014].

Nevertheless, the liberal disclosure provisions contained within CPLR §3101 do not circumscribe the scope of the physician-patient privilege, only the party protected by the privilege can waive it, this can be done either by express consent or by commencing a personal injury action which places the physical or mental condition in issue (see *Iseman v. Delmar Med.-Dental Bldg., Inc.*, 113 AD2d 276 [3<sup>rd</sup> Dept. 1985]). "It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR (see CPLR 3121, subd. [a]) when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue [internal citation omitted]." *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983].

In this personal injury action, the Plaintiff is claiming injuries, *inter alia*, to his hands/wrists, cervical spine and left ankle thus placing these physical conditions in issue. The Court notes that the scope of the waiver of physician-patient privilege is however limited, wholesale discovery of the Plaintiff's medical history is not permitted, and the waiver does not permit discovery of records involving unrelated illnesses or treatments to those asserted in Plaintiff's pleadings (see *Iseman, Supra*). Based upon the submissions of Defendants the Court is satisfied that Defendants have established their entitlement to Plaintiff's primary care physician records as discoverable in this matter upon the basis that an expert has opined that the injuries sustained to Plaintiff's wrists were caused by Plaintiff's diabetic condition, for which he was treated by Livingston Manor Family Health. At the time Plaintiff was deposed (August 21,

2018) he testified that he had been treating at Livingston Manor Family Health for approximately five years, and the accident occurred approximately three years before that, as such there is an inherent limitation placed upon the records that will be discoverable prior to the accident occurring.

Wherefore based upon the foregoing, it is hereby,

ORDERED Defendants motion is granted insomuch as Plaintiff is to provide the sought authorization, and it is further

ORDERED that Plaintiff shall provide an authorization for Defendants to obtain his medical records from Livingston Manor Family Health for treatment received there within twenty (20) days of the date of this Decision and Order, and it is further

ORDERED that the parties shall appear for a compliance conference on **June 10, 2019, at 10:00am.**

This shall constitute the Decision and Order of this Court.

All papers, including the original copy of this Decision and Order, are being forwarded to the Office of the Sullivan County Clerk for filing. Counsel are not relieved from the provisions of CPLR §2220 regarding service with notice of entry.

**Dated: Monticello, New York  
May 23, 2019**

**ENTER:**



**HON. MICHAEL F. MCGUIRE, A.J.S.C.**

**Papers Considered:**

1. Notice of Motion with Affirmation of James R. McCarl, Esq., dated January 23, 2019, with Exhibits "A" through "J".
2. Affirmation in Opposition of Marie DuSault, Esq., dated February 4, 2019, with Exhibits "A" through "C".