

**Kaur v Grant**

2019 NY Slip Op 34746(U)

May 15, 2019

Supreme Court, Nassau County

Docket Number: Index No. 608184/16

Judge: Jeffrey S. Brown

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE**

-----X **TRIAL/IAS PART 11**

**SURINDER KAUR,**  
**Plaintiff,**

**-against-**

**ROBERT GRANT,**  
**Defendant.**

-----X

**ROBERT GRANT**  
**Third Party-Plaintiff**

**-against-**

**GAGANDEEP SINGH and AVTAR SINGH,**  
**Third-Party Defendants.**

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Mot. Seq. 6  
Mot. Date 4.18.19  
Submit Date 5.10.19**

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The following papers were read on this motion:	Documents Numbered
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Plaintiff moves for an order compelling defendant to provide plaintiff’s counsel with a HIPPA trial authorization for his medical records at Zwanger Pesiri Radiology, and specifically, records concerning the scheduling and rescheduling of defendant’s appointments from February 25, 2015 to March 2, 2015.

Before this court is a personal injury action arising out of an accident on February 25, 2017. A note of issue was filed on or about March 16, 2018. On or about March 15, 2019 plaintiff served defendant with a Demand for a HIPPA Compliant Trial Authorization. No response was received from defendant. On April 4, 2019 a conversation was held between

counsel and defendant stated he was objecting to providing this authorization.

Defendant Grant testified at his July 25, 2017 deposition that he was coming from Zwanger Pesiri Radiology immediately before the accident. He testified that he injured his left shoulder a few days before the instant action in a work related accident. He was supposed to have an MRI but the radiological procedure did not take place on that date.

Plaintiff argues that this authorization is relevant in order to determine why defendant rescheduled the MRI and the circumstances regarding defendant's departure from the facility.

Defendant's counsel argues three reasons why this application should be denied: (1) defendant did not place his mental or physical condition in controversy within the meaning of CPLR 3121; (2) the defendant has never voluntarily waived his physician-patient privilege; and (3) even if not privileged, plaintiff failed to establish the relevance of this information to the issue of liability.

“[W]here the mental or physical condition of a party is in controversy, a notice may be served pursuant to CPLR 3121(a) requiring that the party submit to a medical examination or make available for inspection relevant hospital and medical records. 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 (*Koump v. Smith*, 25 NY2d, at 300, *supra*.)” (*Dillenbeck v. Hess*, 73 NY2d 278, 286–87 [1989]).

“Once this preliminary burden is satisfied, however, discovery still may be precluded if the requested information is privileged and thus exempted from disclosure (CPLR 3101[b]). The statutory scheme, by expressly providing an exception for privileged information, clearly contemplates that certain information, though otherwise material and relevant to a legal dispute, ‘shall not be obtainable’ where it is shown to be privileged (CPLR 3101[b]). Physician-patient communications, privileged under CPLR 4504, may therefore 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 N.Y.2d, at 294, *supra*; *see, Bloodgood v. Lynch*, 293 N.Y. 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, N.Y.Civ.Prac. ¶ 4504.19; Fisch, N.Y.Evidence § 554 [2d ed.]).

“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 mental or physical condition in issue (*Koump v. Smith*, 25 NY2d, at 294, *supra*). As we stated in *Koump*, this rule is necessary because, notwithstanding New York's strong policy in favor of the privilege, a party should not be permitted to affirmatively assert a medical condition in seeking damages or 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 (*id.*; *see*, 3A Weinstein–Korn–Miller, N.Y.Civ.Prac. ¶ 3121.01). Nevertheless, 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’ (*Koump v. Smith*, 25 NY2d, at 294, *supra*).”

*Dillenbeck v. Hess*, 73 NY2d 278, 287–88 [1989]).

Here, the plaintiff failed to sustain his initial burden of demonstrating that the defendant's physical condition at the time of the accident was in controversy (*see Lombardi v Hall*, 5 AD3d 739 [2d Dept. 2004]; *Navedo v Nichols*, 233 AD2d 378 [2d Dept.1996]). Further, simply because defendant was at a Zwanger Pesiri facility does not mean that a medical-radiological procedure occurred. The evidence proffered was that there was no medical treatment just before this accident. As a result, there is no basis for defendant to provide this authorization. Furthermore, the circumstances regarding the defendant's visit to the facility or why defendant left the facility without being examined have no relevance.

For all the aforesaid reasons, the application is **denied**.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
May 15, 2019

**ENTERED**  
MAY 16 2019  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

ENTER:

  
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