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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

ABEL CASTILLO,

Plaintiff(s),

MOTION DATE: 1/16/09
INDEX No.: 18603/07
MOTION SEQUENCE NO: 1

-against-

CAL. NO.:

MILDRED D. SORGEN, SERGIO O. CHIRIBOGA
and CARLOS CARRILLO,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Answering Affidavits.....	4,5
Replying Affidavits.....	
Briefs:	

Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 3126(a) compelling defendant Sorgen to produce a response to plaintiff's notice for discovery & inspection dated June 2, 2008 is denied.

This is an action to recover money damages for personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident which occurred on September 20, 2007, at approximately 2:30 p.m., on Glen Cove Road at or near its intersection with Jerome Avenue in Nassau County, New York.

This action was commenced on October 17, 2007. An examination before trial of the defendant was held on June 2, 2008, at which defendant testified that her eye prescription was currently in the process of being changed and that she had taken medication at least twenty-four hours before the accident. The plaintiff, based on this testimony, served a notice for discovery & inspection requesting authorizations for defendant's eye doctor's records for three years prior to the accident, defendant's eye prescription on the date of accident, and a list of all medications consumed by

defendant on the date of the accident. Defendant refused to comply with the demand stating that the defendant's medical condition was not at issue. Consequently, plaintiff moved to compel the defendant to comply with the demand alleging that she had waived her physician-patient privilege with respect to these records. Defendant, in opposition, argues that her physical condition is not in controversy and that she had not waived her physician-patient privilege with respect to the records.

It is well settled that "a party seeking discovery of a defendant's medical records is required to demonstrate that the defendant's physical or mental condition is 'in controversy' within the meaning of CPLR 3121(a). The burden then shifts to the defendant to show that the information sought by the plaintiff is subject to the physician-patient privilege. If the information sought falls within the privilege, discovery can only be compelled if the privilege has been waived" (Kivlehan v Waltner, 36 AD3d 597; see also Dillenbeck v Hess, 73 NY2d 278; Lombardi v Hall, 5 AD3d 739; Neferis v DeStefano, 265 AD2d 464).

"A waiver of the privilege occurs when, in bringing or defending a personal injury action, a litigant affirmatively places his or her mental or physical condition in issue. This waiver does not occur whenever a party is forced to defend an action in which his or her mental or physical condition is in controversy. Rather, in order to effect a waiver, a defendant 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'" (Lombardi v Hall, supra; see also Dillenbeck v Hess, supra; Koump v Smith, 25 NY2d 287).

In the case at bar, plaintiff failed to demonstrate that defendant's eye condition was in controversy at the time of the accident. Specifically, defendant's deposition did not reveal that she suffered from any visual impairment at the time of the accident. Defendant testified that she was wearing her glasses at the time of the accident and her prescription was in the process of changing only at the time of her deposition. Furthermore, the fact that defendant testified that she only saw one car and not other cars before she made the left turn off Glen Cove Road does not place her eyesight into controversy. There is also no evidence that the defendant affirmatively asserted the eye condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff (Lombardi v Hall, supra; see also Dillenbeck v Hess,

