

**Dovberg v Laubach**

2009 NY Slip Op 33342(U)

May 19, 2009

Supreme Court, Suffolk County

Docket Number: 01329-02

Judge: Peter Fox Cohalan

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INDEX # 01329-02  
RETURN DATE: 1-28-09 (011)  
2-18-09 (012)  
MOT. SEQ. # 011 & 012

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN

**PUBLISH**

-----x  
MINDI DOVBERG,  
  
Plaintiff,  
  
-agaisnt-  
  
STEVEN LAUBACH, WHEELS, INC., SCOTT  
RAMUNNI, MATTHEW DOOLEY and BRUNO'S  
AUTOMOTIVE, INC.,  
  
Defendants.  
-----x

CALENDAR DATE: May 13, 2009  
MNEMONIC: Mot D; Mot D.  
  
PLTF'S/PET'S ATTORNEY:  
  
Edelman, Krasin & Jaye PLLC  
1 Old Country Road  
Carle Place, NY11514  
  
DEFT'S/RESP ATTORNEY:  
  
Costello, Shea & Gaffney LLP  
Kamara Shade, Esq.  
44 Wall St.  
New York, NY 10005

Upon the following papers numbered 1 to 75 read on these motions for discovery and dismissal ;  
Notice of Motion/Order to Show Cause and supporting papers 1-24; 43-64 ; Notice of Cross-Motion and  
supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 25-35; 65-71 ; Replying  
Affidavits and supporting papers 36-42; 72-75 ; Other \_\_\_\_\_; and after hearing counsel in support of and  
opposed to the motion it is,

**ORDERED** that the motion (#011) by the defendants to dismiss plaintiff's  
complaint pursuant to CPLR §3126 for intentional obstruction of the plaintiff's supplemental  
deposition and/or to compel a further deposition of the plaintiff and the motion (#012) seeking  
to compel the plaintiff to provide passwords and access to her internet accounts on  
"Facebook" and "MySpace" or for authorizations for a complete copy of the records of such  
entries is hereby decided as follows.

The plaintiff Mindi Dovberg (hereinafter plaintiff) instituted this lawsuit seeking  
personal injuries allegedly sustained in a four motor vehicle chain reaction accident occurring  
on September 11, 2001 in the eastbound lanes of the Long Island Expressway (Route 495) in  
Central Islip, Suffolk County on Long Island, New York. The plaintiff alleges she sustained  
injuries to her right and left knees as a result of the accident. The plaintiff further alleges that  
the defendant Steven Laubach was the operator and the defendant Wheels, Inc. was the  
owner of the last vehicle in the chain which precipitated the accident and which struck the  
Scott Ramunni vehicle which was stopped, which then was propelled into and struck the  
stopped Mindi Dovberg motor vehicle causing it to strike the first vehicle in the chain, owned  
by the defendant Bruno's Automotive, Inc. and operated by the defendant Matthew Dooley.  
The plaintiff was granted summary judgment on the issue of liability on August 30, 2004 by  
order of Mr. Justice Patrick Henry as against the defendants Steven Laubach and Wheels,  
Inc. Mr. Justice Henry's decision and order also dismissed the plaintiff's action as against  
Bruno's Automotive, Inc., and Matthew Dooley. There are still outstanding discovery issues  
involving the plaintiff's medical condition to be resolved. These have been the subject of

numerous supplemental bills of particular as to injuries and requests by defendants for an additional deposition as to the plaintiff's new injuries. As can be seen by the 2002 index number, this case has generated multiple motion practice and delay for a motor vehicle accident in which liability has been resolved against the defendants.

However, the plaintiff's multiple supplemental bills of particular alleging injuries and medical procedures have required a re-review of her damage claims especially in light of her supplemental bills, which now amount to eight, including claims of injuries involving psychological issues of post traumatic stress disorder, anxiety, fear of driving and physical injuries designated in her latest supplemental bill, dated May 8, 2008, as "complex regional pain syndrome" and "lumbar disc disease with lumbago." This Court, in a prior discovery order, dated November 28, 2007, directed a limited deposition as to the injuries and damages alleged in the newest supplemental bill. This deposition was conducted by the defendants' new attorneys but this motion practice has resulted from the defendants' claims that the plaintiff's attorney obstructed the plaintiff's deposition with continual objections of asked and answered or reference to prior depositions of which the defendants were not privy. The defendants also make additional claims that the plaintiff maintained web site accounts with MySpace and Facebook with regard to postings on such sites as to her medical condition. The defendants argue that these entries or postings are relevant to this case because of the alleged psychological injuries which, the plaintiff claims, cause her to suffer from depression, anxiety and post traumatic stress from the accident, yet her internet sites send the message of "Loving Life."

The defendants now move for a dismissal of the plaintiff's complaint pursuant to CPLR §3126 on the grounds of obstruction of the deposition as to the plaintiff's medical condition and/or compelling a further deposition of the plaintiff (seq. #011) and a second motion (seq. #012) seeking to compel the plaintiff to divulge the passwords to the internet web site and/or provide for review a complete copy and or authorizations for the documents or materials presented on MySpace and Facebook. The plaintiff opposes the requested discovery.

The Courts have held that the trial court's discretion in supervising discovery is broad because it is most familiar with the action before it and the exercise of its discretion should not be disturbed on appeal, unless improvidently exercised. Cabellero v. City of New York, 48 AD3d 727, 852 NYS2d 165 (2<sup>nd</sup> Dept. 2008). The penalty of dismissing a pleading for failure to disclose is extreme and should only be imposed where the failure has been wilful, contumacious or in bad faith. Sisca v. City of Yonkers, 24 AD3d 531, 806 NYS2d 234 (2<sup>nd</sup> Dept. 2005). Thus the question of penalties or remedies for discovery violations is generally left to the sound discretion of the trial court [Brennan v. McCarthy, 255 AD2d 477, 680 NYS2d 638 (2<sup>nd</sup> Dept. 1998)].

For those reasons, the defendants' motion to dismiss is denied. However, a review of this action including the additional claims for damages, the incompleteness of discovery, the extensive need to review the plaintiff's life experiences because of the claims of post traumatic distress, depression and anxiety and the need to ensure timely cooperation between counsel and to complete the discovery process in an expedited manner, leads the Court to appoint a referee to supervise disclosure and bring the discovery phase to a conclusion. It is important to finish discovery and certify this case for trial on damages without further delay.

The Court hereby appoints William F. Andes Jr., Esq. with an office at 224 Griffing Avenue (directly across from the courthouse) in Riverhead, New York, [tele # 631-727-5780] as referee pursuant to CPLR §4301 and §3104 to supervise the disclosure now required by order of this Court and to resolve all issues as stated herein. The Court will provide to the referee appointed a copy of the motion papers on which this order was made as well as a copy of the Court's order so that the referee may familiarize and appraise himself of the issues and claims between the parties as to the deposition and web sites upon which he may be required to rule. The Court directs that the plaintiff make herself available for a continued deposition as to her injuries claimed to have resulted from this accident at a date, time and place convenient to the parties and the referee. The defendants' attorneys are not privy to the extent that prior depositions explored fully the plaintiff's injuries as they relate to subsequent claims of psychological and physical injuries more recently suffered and so the referee shall provide defendants' attorneys with a wide latitude in their exploration of plaintiff's injuries as a result of this accident. The plaintiff's attorney's objections to any question as having been asked and answered at a previous deposition must be accompanied by proof of the deposition to the referee showing that the exact question was asked and answered for the objection to be sustained. The referee will rule expeditiously on each such objection raised during the deposition and will move the parties to complete the deposition in a timely manner. The defendants' attorneys will be presented with the opportunity to question and complete a deposition of the plaintiff on all matters concerning injuries alleged to have been sustained by the plaintiff as a result of this accident and the manner in which the injuries relate to each other so that this case can be certified for trial and brought to a conclusion.

The Court does not mean to intimate that the plaintiff has been uncooperative or obstructionist in the plaintiff's depositions, but there is a need to allow complete exploration of the plaintiff's physical and psychological injuries as claimed in the eight (8) prior supplemental bills of particular so as to resolve all discovery issues and to certify this 2002 case for trial. The referee will direct the parties to this action to conduct and complete discovery with all deliberate speed by the compliance date set by the Court for September 23, 2009. The defendants are directed to serve a copy of this order on the referee, William F. Andes Jr., Esq. heretofore appointed and upon the Court's Calender Clerk to ensure proper calender entry for September 23, 2009. All issues involving the discovery required with regard to the deposition shall be ruled upon by the referee assigned and the deposition shall continue day to day until completed unless the referee determines otherwise.

The defendant also seeks the internet web site passwords and access to the documentation of the MySpace and Facebook sites in their quest to defend against the psychological injuries allegedly sustained in the accident. The defendants' request seems overbroad and intrusive; however the allegations of psychological injuries and the plaintiff's mental health are relevant factors as to her postings and material included on her internet web sites. In this regard, the plaintiff will make available to the referee access to her web site portals and passwords for the referee to conduct an "*in camera*" review of the documentation, materials and postings of the plaintiff to determine the relevancy of any of this material to her alleged physical or psychological claims of injuries.

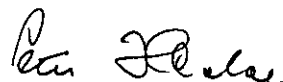
The Court requests that the parties cooperate with the referee in expediting the deposition, examination of the internet web sites and documentation requested so that the discovery can be concluded and the matter certified for trial. The referee has been granted broad authority to review and rule on the discovery issues to conclude this matter in a timely expedited fashion in order to bring the discovery to an end and to certify this case for trial. The referee's fees will be borne equally by both sides between the plaintiff and the defendants and, in the event of a dispute as to the billing, upon application to the Court and after hearing all sides, the Court will determine said fees if the parties can not agree. See CPLR §3104 (e).

Accordingly, the defendants' motion to dismiss is denied (seq. #011) and the requested deposition shall continue under the supervision and direction of the referee appointed. The defendants' motion for access to the plaintiff's passwords and internet sites of MySpace and Facebook are denied except to the extent that the referee appointed will conduct an *in camera* review of the sites , accounts and documentation and provide any relevant material to the defendants, including access to such sites if they are found to contain relevant information as to plaintiff's alleged claims of injuries.

Under the Uniform Rules for Trial Courts, §202.43 (d) it is further ordered that if the trial or hearing of the issue(s) or action hereby referred is not begun within sixty (60) days from the date of this order, or before such later date as the referee may fix upon good cause shown, so much of this order as appointed William F. Andes, Jr. Esq., as referee to hear, supervise and rule on the discovery issues heretofore stated, shall be cancelled and revoked and shall be remitted by the referee to the Court from which it was issued, and the matter hereby referred shall immediately be returned to the court for trial, hearing or disposition.

The foregoing constitutes the decision of the Court.

Dated: May 19, 2009

  
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J.S.C.