

Walter v Walch

2012 NY Slip Op 33067(U)

July 2, 2012

Sup Ct, Suffolk County

Docket Number: 28382-2007

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.
-----X
JAMILYN WALTER and JOHN WALTER,

INDEX NO.: 28382-2007
CALENDAR NO.: 200901583MV
MOTION DATE: 6/25/2012
MOTION SEQ. NO.:003 MD

Plaintiffs,

INDEX NO.: 6169-2008
CALENDAR NO.: 200901474MV
MOTION DATE: 6/6/2012
MOTION SEQ. NO.: 004 MD

-against-

ROBERT WALCH and DIANA WALCH,

**PLAINTIFFS' ATTORNEY ACTION
1: LINDENBAUM & SILBER, PLLC
419 Park Avenue South, 2nd Floor
New York, New York 10016**

Defendants.

Action # 1 (Index # 28382-2007)

-----X
JOHN P. WALTER, as Parent and Natural Guardian
of PAIGE GILDARD, an Infant Under the age of 18
years,

**PLAINTIFFS' ATTORNEY ACTION
2: SHULMAN KESSLER LLP
510 Broadhollow Road, Suite 110
Melville, New York 11747**

Plaintiff,

- against-

ROBERT WALCH and DIANA F. WALCH,

**DEFENDANTS' ATTORNEYS:
BAXTER SMITH & SHAPIRO, P.C.
99 North Broadway
Hicksville, NY 11801**

Defendants.

Action # 2 (Index # 6169-2008)

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Upon the following papers numbered 1 to 27 read on these motions seeking an order compelling discovery and an order of severance: Notice of Motion/ Order to Show Cause and supporting papers 1- 13 ; Notice of Cross Motion/Order to Show Cause and supporting papers 14-19 ; Answering Affidavits and supporting papers 20-25 & 26-27 ; Replying Affidavits and supporting papers ____; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants Robert Walch and Diana F. Walch (Walch) brought on by Order to Show Cause dated May 15, 2012 seeking an order directing the plaintiff in Action # 2 (Index # 6169-2008) Paige Gildard (Gildard) to provide an authorization permitting defendants access to Gildard's Facebook account and staying the trial of the action pending plaintiff's compliance is granted; and it is further

ORDERED that within 20 days from the date of service of a copy of this order, as directed below, plaintiff Gildard shall deliver to counsel for the defendants a properly executed consent and authorization as may be required by the operators of Facebook, permitting the defendants to gain access to the plaintiff's Facebook records, including any records previously deleted or archived by

said operators; and it is further

ORDERED that defendants' counsel is directed to serve a copy of this order with notice of entry upon counsel for all parties and non-party Facebook within twenty days of the entry date of this order by the Suffolk County Clerk; and it is further

ORDERED that the related motion by plaintiffs in Action # 1 (Index # 28382-2007) Jamilyn Walter and John Walter (Walter) brought on by Order to Show Cause dated June 21, 2012 seeking an order severing Action # 1 (Index # 28382-2007) from Action # 2 (Index # 6169-2008) and, upon such severance, permitting the trial of Action # 1 to commence with jury selection on July 9, 2012 is granted; and it is further

ORDERED that these actions are hereby severed and Action # 2 (Index # 6169-2008) is stayed pending the completion of the discovery related to the production of plaintiff Gildard's Facebook account records; and it is further

ORDERED that jury selection for Action # 1 (Index # 28382-2007) shall proceed on July 9, 2012. The parties are directed to appear at CCP on July 9, 2012 at 9:30 a.m. for the calendar call of the SS/SR calendar.

Both actions involve personal injuries sustained in a motor vehicle accident which occurred on October 31, 2005. Plaintiff Jamilyn Walter was operating a motor vehicle which was struck by a vehicle operated by defendant Robert Walch. The plaintiff's daughter, Paige Gildard, was a passenger in the Walters' vehicle. By short form Order (Rebolini, J.) dated December 19, 2008 the defendants Walters' motion seeking an order consolidating both actions was granted to the extent that the actions were joined. By short form Order (Rebolini, J.) dated September 20, 2010 the plaintiffs' (Walters') motion in Action #1 (Index # 28382-2009) seeking an order granting partial summary judgment against the defendants with respect to the issue of liability was granted.

A note of issue was filed in Action #1 on July 31, 2009; a note of issue was filed in Action #2 on July 27, 2009. Court records indicate that both actions have appeared numerous times on the Calendar Control Part calendar and both actions are presently scheduled for jury selection on July 9, 2012 having been previously adjourned on four separate dates since March 2, 2012.

Defendants Walchs' motion seeks an order compelling the plaintiff Gildard in Action # 2 (Index # 6169-2008) to provide authorizations to permit the defendants to obtain Gildard's private portion of the plaintiff's social networking Facebook account information. Defendants claim that they are entitled to the records since they are material and relevant and will likely provide admissible evidence to contradict the plaintiff's loss of enjoyment of life claims. Defendants contend that Gildard alleges that she is in constant pain and that her overall quality of life and sense of well-being has been severely impacted as a result of the injuries sustained in the accident. It is the defendants' position that records sought are discoverable based upon the plaintiff's loss of enjoyment of life claims.

In opposition to the defendants Walchs' motion, plaintiff Gildard submits an attorney's affirmation and claims that the defendants' motion must be denied since the public profile section of Gildard's Facebook account does not provide any information which contradicts her loss of enjoyment of life claims. The plaintiff asserts that her public profile page has a single photograph of Gildard smiling and no other information. It is the plaintiff's contention that absent some factual predicate on the website's public page which raises an issue contradicting Gildard's loss of enjoyment of life claims, no basis exists to permit the defendants to obtain access to Gildard's private Facebook account.

Plaintiff's Walters' motion seeks an order severing the actions claiming that they will be severely prejudiced by any further delay in the damages' trial scheduled for July 9, 2012. Plaintiff's contend that discovery issues must still be resolved in Action # 2 and that the issues concerning the damages sustained by Jamilyn Walters differ from the injuries sustained by the plaintiff Gildard in the companion action. Plaintiff's also claim that they have compensated a doctor to testify during the damages trial and that they will be prejudiced if the trial is again adjourned.

In opposition the defendants submit an attorney's affirmation and claim that no basis exists to sever the actions since common factual and legal issues exist which warrant a single trial. Defendants also claim that the plaintiffs have failed to demonstrate substantial prejudice if the damages trial is adjourned for a minimal period of time to complete discovery.

CPLR Section 3101(a)(4) provides:

Scope of disclosure.

(a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

The Court of Appeals in *Allen v. Crowell-Collier Publishing Company*, 21 NY2d 403, 288 NYS2d 449 (1968) held:

"The words "material and necessary" are, in our view to 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. The test is one of usefulness and reason (CPLR Section 3101(a)), and should be construed... to permit discovery of testimony "which is sufficiently related to issues in litigation to make the effort to obtain it in preparation for trial reasonable" (ID at 406 citing 3 *Weinstein-Korn-Miller*, New York Civil Practice, para. 3101.7)).

Moreover plaintiffs who place their physical and mental condition in controversy may not shield themselves from disclosure material which is necessary to the defense of the action (*Hoenig v. Westphal*, 52 NY2d 605, 439 NYS2d 831 (1981)). Discovery is generally permitted with respect to materials that may be relevant to the issue of damages and the extent of a plaintiff's personal injuries

including a plaintiff's claim for loss of enjoyment of life (*Orlando v. Richmond Precast Inc.*, 53 AD3d 534, 861 NYS2d 765 (2nd Dept., 2008)).

The defendants have made a sufficient showing that the material sought from the private profile section of Gildard's Facebook account is both material and necessary to the defense of the action and/or could lead to admissible evidence related to plaintiff's loss of enjoyment of life claims. Accordingly the defendants motion for an order compelling the plaintiff Gildard to provide authorizations for the Facebook account records must be granted.

CPLR Section 603 provides:

Severance and separate trials.

In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claims, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

The decision to order severance is discretionary and should not be exercised unless the failure to sever will place some substantial right in jeopardy (*Meczkowski v. E.W. Howell Co., Inc.*, 63 AD3d 803, 880 NYS2d 507 (2nd Dept., 2009); *Pellegrino v. Walker Theatre Inc.*, 127 AD2d 574, 511 NYS2d 372 (2nd Dept., 1987); *Karama Supermarket Inc. v. Frawley Plaza Associates*, 200 Ad2d 355, 606 NYS2d 177 (1st Dept., 1994)).

The record shows that the plaintiffs' action has been repeatedly adjourned preventing the prompt prosecution of the Walters' damages only trial. Moreover given the fact that the damages sustained by Jamilyn Walter in the accident must be the subject of proof which is not related to the damages sustained by Gildard, a severance to prevent further delay on Action # 1 is warranted particularly since discovery issues remain to be resolved in the companion action. Plaintiffs' motion seeking an order of severance pursuant to CPLR Section 603 must therefore be granted.

Dated: July 2, 2012

PAUL J. BAISLEY, JR.
J.S.C.