

**Tuzzolino v Consolidated Edison Co. of N.Y., Inc.**

2015 NY Slip Op 30872(U)

May 20, 2015

Sup Ct, New York County

Docket Number: 156755/2013

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

MICHAEL TUZZOLINO,  
Plaintiff,  
-against-

INDEX NO. 156755/2013  
MOTION DATE 04-29-2015  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC.,  
Defendant.

The following papers, numbered 1 to 9 were read on this motion to compel discovery, cross-motion to quash subpoenas and for a protective order.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3,</u>
Answering Affidavits — Exhibits _____	<u>4 - 5, 7 - 8</u>
Replying Affidavits _____	<u>9</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

Upon a reading of the foregoing cited papers, it is Ordered that defendant's motion compelling disclosure is granted, plaintiff's cross-motion to quash non-party subpoenas served on his treating physicians and for a protective order staying the depositions of his treating physicians is granted.

Plaintiff alleges that on July 19, 2013, while working for his employer, New York Heating & Plumbing (herein "Employer"), he fell from a ladder and sustained injuries. Employer entered into a contract with Consolidated Edison Company of New York, Inc. (herein "Con Ed") to perform work on a construction site owned by Con Ed and located at 31-01 20<sup>th</sup> Avenue, Queens, New York. The Complaint asserts causes of action for negligence and violations of Labor Law §§ 200, 240(1), and 241(6).

After joinder of issue, the parties proceeded with discovery. Plaintiff filed his Note of Issue on February 3, 2015. This Court vacated the Note of Issue in an Order dated February 5, 2015 because plaintiff owed Con Ed a significant amount of discovery.

Con Ed served plaintiff with a Demand for Social Media Information dated July 24, 2014 seeking authorizations for "all records, information, photographs, videos, comments, messages and posting on Facebook, Twitter, Myspace, and LinkedIn accounts" (see Moving Papers, Exhibit C). Plaintiff untimely objected to the production of the authorizations arguing that Con Ed has not established that plaintiff has an account with the social networks demanded and that Con Ed has not stated a basis for the authorizations (see Moving Papers, Exhibit F).

Con Ed now moves to compel discovery. Specifically, Con Ed seeks an Order compelling plaintiff to provide authorizations for full access to, and copies of, all of plaintiff's current and past Facebook account(s), from the date of the accident to the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

present. Con Ed claims that it viewed the public portion of plaintiff's Facebook account and that the account contained photographs of himself and his girlfriend attending a wedding two months after his accident. Con Ed also contends that various photograph albums were private and may present evidence with regard to the plaintiff's claim of anxiety, emotional distress, extreme pain and suffering and/or claims of total disability.

Plaintiff testified at his deposition held on October 28, 2014 that he had a Facebook account at the time of the accident; that he deleted the account a few months prior to his deposition; and that he did not recall whether he deleted posts or pictures from his Facebook account prior to deleting the account (see Plaintiff's EBT, Pg. 97). Con Ed presented plaintiff with a picture of him and his girlfriend at a social gathering. Plaintiff did not have a cane or any equipment to help him walk in the picture (see Plaintiff's EBT, Pg. 83). When asked if he had a cane plaintiff responded that the cane was "[s]itting on one of the couches, probably right next to me" (see Plaintiff's EBT, Pg. 88). Plaintiff also acknowledged that he attended two weddings with his girlfriend after his accident (see Plaintiff's EBT, Pg. 83 - 90).

CPLR § 3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." CPLR § 3124 grants the court the power to compel a party to provide discovery demanded. "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" (Kapon v. Koch, 23 N.Y.3d 32, 38, 11 N.E.3d 709, 988 N.Y.S.2d 559 [2014] citing to, Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 [1968]).

The "mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account's usage," (Tapp v. New York State Urban Dev. Corp., 102 A.D.3d 620, 958 N.Y.S.2d 392, 393 [1<sup>st</sup> Dept., 2013]). "To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account — that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims" (Id., citing to, Patterson v. Turner Constr. Co., 88 AD3d 617, 618, 931 NYS2d 311 [1<sup>st</sup> Dept., 2011]).

Con Ed states a basis for the Facebook authorizations. Con Ed conducted an internet search and found a picture posted on plaintiff's girlfriends' Facebook page of the couple at a social event. Con Ed asserts that its internet search also revealed two pictures of plaintiff at a party and out at a bar. These pictures contradict plaintiff's claim that since his accident he is unable to stand for more than twenty to thirty minutes without being in pain (see Plaintiff's EBT, Pg. 91) and/or that he cannot do anything for himself such as go grocery shopping, do laundry, and cook or clean (Id., Pg. 243).

Plaintiff cross-moves to quash non-party subpoenas served on his treating medical providers Dr. Andrew Merola, Dr. John S. Vlattas, and Geryl Pecora, and to stay non-party depositions. Con Ed opposes and argues that the depositions are necessary because of inconsistencies and contradictions found in the treating physicians' records, and contradictions between the treating physicians' records and plaintiff's deposition testimony.

Although the preferred time for healthcare providers' disclosures is prior to the filing of the note of issue (see *Shefer v. Tepper*, 73 A.D.3d 447, 899 N.Y.S.2d 610 [1<sup>st</sup> Dept., 2010]; *Arons v. Jutkowitz*, 9 NY3d 393, 880 NE2d 831, 850 NYS2d 345 [2007]), "[i]t is not the norm to seek the deposition of a treating physician, and it should not generally be directed unless necessary to prove a fact unrelated to diagnosis and treatment" (*Ramsey v. New York University Hosp. Center*, 14 A.D.3d 349, 350, 789 N.Y.S.2d 104 [1<sup>st</sup> Dept., 2005]). Further, a court should not compel the deposition of a treating physician when the information sought is available from another source, such as a physician's records (*In re New York City Asbestos Litigation*, 87 A.D.3d 467, 928 N.Y.S.2d 513 [1<sup>st</sup> Dept., 2011]).

Here, plaintiff has provided the authorizations entitling Con Ed to plaintiff's medical records from his treating physicians. To the extent that any authorizations provided by plaintiff are missing or defective, Con Ed is entitled to further authorizations, not to non-party depositions of plaintiff's treating physicians. The information sought by Con Ed is available within the treating physicians' records, and Con Ed has not sufficiently stated that the depositions are necessary to prove facts unrelated to plaintiff's diagnosis and treatment. Plaintiff's motion to quash non-party subpoenas served on his treating physicians and for a protective order staying said non-party depositions is granted.

Accordingly, it is ORDERED that defendant's motion to compel plaintiff to provide authorizations for full access to his Facebook account(s) is granted, and it is further,

ORDERED, that within 10 days from the date of service of a copy of this Order with Notice of Entry plaintiff provide defendants with authorizations permitting the release and completed copies of his Facebook account(s) including all records, information, photographs, videos, comments, messages and postings, and shall include the name, username, screen name and email account used to create the Facebook account(s), and address the authorizations to:

Facebook  
Attn: Security Department  
1601 South California Avenue  
Palo Alto, CA 94304

, and it is further,

ORDERED, that plaintiff's cross-motion quashing the non-party subpoenas and for a protective order is granted, and it is further,

ORDERED, that the non-party subpoenas served on Dr. Andrew Merola, Dr. John S. Vlattas, and Geryl Pecora are hereby quashed, and the non-party depositions of said healthcare providers are stayed, and it is further,

ORDERED, that the parties appear for a Status Conference on June 17, 2015 in IAS Part 13 located at 71 Thomas St., Room 210, New York, N.Y. at 9:30AM.

MANUEL J. MENDEZ  
J.S.C.

ENTER:

  
\_\_\_\_\_  
MANUEL J. MENDEZ  
J.S.C.

Dated: May 20, 2015

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST                       REFERENCE