Arma v East Islip Union Free Sch. Dist.
2016 NY Slip Op 31823(U)
April 19, 2016
Supreme Court, Suffolk County
Docket Number: 12-35821
Judge: W. Gerard Asher
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX 12-35821

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE	10-29-13 (002)
MOTION DATE	11-12-13 (003)
MOTION DATE	2-21-14 (004)
MOTION DATE	4-11-14 (005)
ADJ. DATE	10-1-15
Mot. Seq. #002 - MG	#004 - MD
#003 - MD	#005 - MD

----------X

ALEXA ARMA,

Plaintiff,

- against -

EAST ISLIP UNION FREE SCHOOL DISTRICT, BOARD OF EDUCATION OF THE EAST ISLIP UNION FREE SCHOOL DISTRICT, EAST ISLIP UNION FREE SCHOOL DISTRICT PRINCIPAL WILLIAM BRENNEN, EAST ISLIP UNION FREE SCHOOLDISTRICT SECURITY DIRECTOR, JOHN E. FLYNN, EAST ISLIP UNION FREE SCHOOL DISTRICT ASSISTANT PRINCIPAL NICHOLAS BILOTTI, EAST ISLIP UNION FREE SCHOOL DISTRICT PHYSICAL EDUCATION TEACHER MARGUERITE GOMEZ, EAST ISLIP UNION FREE SCHOOL DISTRICT NURSE DEBBIE SIEBERT, SECURITY OFFICER JOHN CALLAGY, JOHN and JANE DOE DEFENDANTS (intended to be the persons whose duty it was to supervise and protect the plaintiff), COLLEEN COSTIGAN, DENNIS J. COSTIGAN, AS LEGAL GUARDIAN OF AND FOR COLLEEN COSTIGAN, AND MARIE C. SULLIVAN AS LEGAL GUARDIAN OF AND FOR COLLEEN COSTIGAN,

Defendants.

----------X

BARKET MARION EPSTEIN & KEARON
Attorney for Plaintiff
666 Old Country Road, 9th Floor
Garden City, New York 11530

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER
Attorney for Defendants East Islip UFSD
333 Earle Ovington Boulevard, Suite 502
Uniondale, New York 11553

PETER C. WALSH, ESQ.
Attorney for Defendants Costigan and Sullivan
407 East Main Street, Suite 8
Port Jefferson, New York 11777

Upon the following papers numbered 1 to 113 read on these motions for a protective order and to compel disclosure : Notice of Motion/ Order to Show Cause and supporting papers 1 - 41; 53 - 59; 69 - 79; ; Notice of Cross

Motion and supporting papers ____; Answering Affidavits ansupporting papers 42 - 50; 60 - 64; 80 - 87; 91 - 111 ; Replying Affidavits and supporting papers 51- 52; 65 - 68; 88 - 90 ; Other 112 - 113 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 002) by defendants East Islip Union Free School District, Board of Education of the East Islip Union Free School District, William Brennan, John Flynn, Nicholas Bilotti, Marguerite Gomez, Debbie Siebert, and John Callagy, the motion (seq. 003) by defendant Colleen Costigan, the motion (seq. 004) by plaintiff, and the motion (seq. 005) by defendants East Islip Union Free School District, Board of Education of the East Islip Union Free School District, William Brennan, John Flynn, Nicholas Bilotti, Marguerite Gomez, Debbie Siebert, and John Callagy are consolidated for purposes of this determination; and it is

ORDERED that the motion (seq. 002) by defendants East Islip Union Free School District, Board of Education of the East Islip Union Free School District, William Brennan, John Flynn, Nicholas Bilotti, Marguerite Gomez, Debbie Siebert, and John Callagy for a protective order with respect to deposition subpoenas served on certain nonparty witnesses is granted; and it is

ORDERED that the motion (seq. 003) by defendant Colleen Costigan, improperly denominated as a cross motion, for a protective order is denied, without prejudice to renewal; and it is

ORDERED that the motion (seq. 004) by plaintiff for an order compelling defendant Colleen Costigan to disclose certain information is denied, without prejudice to renewal; and it is

ORDERED that the motion (seq. 005) by defendants East Islip Union Free School District, Board of Education of the East Islip Union Free School District, William Brennan, John Flynn, Nicholas Bilotti, Marguerite Gomez, Debbie Siebert, and John Callagy for an order compelling plaintiff to disclose certain information is denied, without prejudice to renewal; and it is further

ORDERED that the parties' counsel shall appear before the undersigned at 9:30 a.m. on May 10, 2016 for a compliance conference.

On December 12, 2011, plaintiff Alexa Arma, who at the time was a senior at East Islip High School, allegedly sustained a head injury and hearing loss as a result of a physical altercation with defendant Colleen Costigan. The altercation occurred in a hallway of the high school during school hours, when students were changing classes, allegedly in the presence of defendant Marguerite Gomez, a teacher, and defendant John Callagy, a school security guard. Plaintiff alleges that prior to the fight Colleen Costigan, who had been a friend, was bullying her in school, posting derogatory comments about her on Facebook, and sending offensive and threatening text message to her cell phone. Plaintiff admits that she responded to the alleged harassment by sending offensive text messages to Colleen and posting offensive comments about her on Facebook, and that she and Colleen were screaming at each other in the hallway before the altercation on December 12 turned violent.

Subsequently, in November 2012, plaintiff commenced the instant action seeking damages for the physical and emotional injuries she allegedly suffered due to the December 2011 altercation. In addition to asserting a cause of action for assault and battery against Colleen Costigan and her parents, defendants Dennis Costigan and Marie Sullivan, plaintiff asserted various causes of action for negligence against defendants East Islip Union Free School District, the Board of Education of the East Islip Union Free School District, William Brennan, John Flynn, Nicholas Bilotti, Marguerite Gomez, Debbie Siebert, John Callagy (hereinafter the School District defendants). A cause of action for intentional infliction of emotional distress also was interposed against all defendants. By her bills of particulars, plaintiff alleges, in relevant part, that the School District defendants were negligent in failing to supervise the students in their custody, in failing to prevent Colleen from attacking plaintiff, and in ignoring complaints that Colleen had threatened to harm plaintiff.

Thereafter, on April 30, 2013, a preliminary conference stipulation was executed by the parties' counsel and so-ordered by the Court (Baisley, J.). Approximately ten days before the preliminary conference, the School District defendants served a disclosure demand on plaintiff, dated April 19, 2013, seeking an authorization permitting access to her Facebook account, as well as plaintiff's Facebook password and e-mail address. The demand also sought copies of any Facebook postings generated or received by plaintiff during the period June 1, 2011 through December 12, 2012 relating to Colleen Costigan, "each and every text message" received by plaintiff from Colleen or from "any other source the subject of which was Colleen Costigan and/or derogatory remarks made by Colleen regarding plaintiff, and "all text messages generated by plaintiff" during the period from June 1, 2011 through December 12, 2012 regarding Colleen or plaintiff's relationship with Colleen. A response to such demand, dated January 28, 2014, was served by plaintiff on the School District defendants.

On July 2, 2013, plaintiff served a notice of discovery and inspection on Colleen Costigan and Marie Sullivan. Plaintiff demanded, in part, that such defendants produce "[a]ny and all . . . records filed reflecting the history of any formal discipline, remediation or punishment against defendant Costigan," including records from the East Islip and Bay Shore school districts, a list of any criminal convictions and traffic infractions involving Colleen Costigan, and "[a]ny and all statements made on any internet website or application pertaining to plaintiff in general or to the underlying complaint in particular, including but not limited to posts on blogs, Twitter, Facebook or any other social network, regardless of whether such posts remain online or have since been deleted." In October 2013, Colleen Costigan and Marie Sullivan served a response to plaintiff's discovery demand. Although they complied with some of the demands contained in plaintiff's discovery notice, Colleen Costigan asserted certain demands were ambiguous, overly broad and burdensome, and that certain records were protected by the Family Educational Rights and Privacy Act of 1973, the attorney-client privilege or sealed.

Meanwhile, in September 2013, plaintiff's counsel served deposition subpoenas on 19 alleged nonparty witnesses, many of whom allegedly are eyewitnesses to the altercation between plaintiff and Colleen Costigan. Each of the subpoenas state on its face that the named witness "has personal knowledge of the facts and circumstances surrounding the events that transpired at the East Islip High School on December 12, 2011," and that such information "is material and necessary for the prosecution of plaintiff's claims and defenses to the defendants' claims in this

action." The deposition subpoenas direct the alleged nonparty witnesses to appear at plaintiff's counsel's office in Garden City on dates in October and November of 2013.

The School District defendants now move by order to show cause for a protective order quashing the nonparty subpoenas served by plaintiff on the grounds the subpoenas are facially defective, premature, and improperly schedule the deposition in Nassau County. In addition, they argue seven of the subpoenaed witnesses, in fact, are not nonparty witnesses, but school employees. The Court notes that the order to show cause stayed all nonparty discovery, "including but not limited to the depositions of the [nonparty witnesses]," pending a determination of such motion. Plaintiff opposes the motion for a protective order, arguing the subpoenaed witnesses have knowledge of material issues, such as the alleged threat to plaintiff and the School District's response to such threat, and that there are "no independent sources" from which she can get such eyewitness information.

Colleen Costigan also moves for a protective order "limiting plaintiff's third-party disclosure to an examination of Nicole Winter," who was a friend and student at East Islip High School at the time of the fight. It is undisputed that despite the provision in the order to show cause staying nonparty disclosure, plaintiff's counsel had a conversation with Nicole Winter at his office on the day she was scheduled to appear for a deposition. Plaintiff opposes the motion, arguing, in part, that the "informal meeting" with Nicole Winter was not planned or under oath, and that it did not violate the stay, "because the order's prohibition was limited to nonparty discovery on the record, rather than off the record." She further moves for an order compelling Colleen Costigan to comply with the demands for access to her social media accounts, her records related to a youthful offender adjudication, and her school disciplinary records contained in the July 2, 2013 discovery notice.

In opposition to plaintiff's motion, Colleen Costigan argues, among other things, that the application to unseal court records must be made to the sealing court, and that her school disciplinary records are irrelevant to the instant controversy. Colleen Costigan further asserts plaintiff's demand for full access to her Facebook account is overly broad, is not supported by evidence showing the account contains information relevant to this action, and is made in bad faith, as she admittedly deleted offensive messages she posted on her own Facebook account which she believed cast her in a negative light. The Court notes that printouts of certain Facebook posting have been disclosed by Colleen Costigan, and that Costigan deactivated the Facebook account she maintained around the time of the altercation and opened a new account.

In addition, the School District defendants move for an order compelling plaintiff to comply with the demands contained in their April 19, 2013 notice, particularly the demand for access to plaintiff's Facebook account, including the postings in the deactivated account and on her private pages and "any and all deleted messages about which she testified at her depositions." In support of their motion to compel, the School District defendants assert "[j]ust as plaintiff seeks to compel co-defendant Costigan to provide such access, she, too, should be compelled to produce the same. Plaintiff's limited public postings furnished so far, coupled with her admissions at deposition that she had posted equally offensive responses to Ms. Costigan and thereafter destroyed same prior to the subject incident likely suggests that her private pages may contain further admissible evidence."

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist [the parties'] preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material * * * in the prosecution or defense'" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 407, 228 NYS2d 449, *quoting* ***Matter of Comstock***, 21 AD2d 843, 844, 250 NYS2d 753 [4th Dept 1964]). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see* ***Breytman v Olinville Realty, LLC***, 99 AD3d 651, 952 NYS2d 205 [2d Dept 2012]; ***Geffner v Mercy Med. Ctr.***, 83 AD3d 998, 922 NYS2d 470 [2d Dept 2011]; ***Foster v Herbert Slepoy Corp.***, 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]; ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531, 845 NYS2d 124 [2d Dept 2007]), and a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see* ***Ural v Encompass Ins. Co. of Am.***, 97 AD3d 562, 948 NYS2d 621 [2d Dept 2012]; ***Accent Collections, Inc. v Cappelli Enters., Inc.***, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; ***Crazytown Furniture v Brooklyn Union Gas Co.***, 150 AD2d 420 [2d Dept 1989]).

Furthermore, a party's freedom of choice with respect to the available disclosure devices is subject to judicial intervention by way of a protective order if the disclosure process is being abused (*see* CPLR 3103 [a]; ***Barouh Eaton Allen Corp. v International Bus. Machs. Corp.***, 76 AD2d 873, 429 NYS2d 33 [2d Dept 1980]; *cf.* ***Samide v Roman Catholic Diocese of Brooklyn***, 16 AD3d 482, 791 NYS2d 643 [2d Dept 2005]). "When the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper" (***Barouh Eaton Allen Corp. v International Bus. Machs. Corp.***, 76 AD2d 873, 874, 429 NYS2d 33).

As to the School District defendants' motion for a protective order, discovery may be obtained from a nonparty witness in possession of material and necessary information provided such witness is apprised of the circumstances or reasons for requiring disclosure (CPLR 3101 [a][4]; ***Matter of Kapon v Koch***, 23 NY3d 32, 36, 988 NYS2d 559 [2014]; ***Bianchi v Galster Mgt. Corp.***, 131 AD3d 558, 559, 15 NYS3d 189 [2d Dept 2015]). The notice requirement of CPLR 3101 (a)(4) obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, the circumstances or reasons disclosure is sought from the nonparty (***Matter of Kapon v Koch***, 23 NY3d 32, 39, 988 NYS2d 559; *see* ***Ferolito v Arizona Beverages USA, LLC***, 119 AD3d 642, 990 NYS2d 218 [2d Dept 2014]). A subpoena served on a nonparty witness is facially defective and unenforceable if it neither contains nor is accompanied by a notice stating the reasons the requested disclosure is sought or required (*see* ***Needleman v Tornheim***, 88 AD3d 773, 930 NYS2d 896 [2d Dept 2011]; ***Matter of American Express Prop. Cas. Co. v Vinci***, 63 AD3d 1055, 881 NYS2d 484 [2d Dept 2009]; ***Velez v Hunts Point Multi-Serv. Ctr., Inc.***, 29 AD3d 104, 811 NYS2d 5 [1st Dept 2006]; ***Knitworks Prods. Corp. v Helfat***, 234 AD2d 345, 651 NYS2d 99 [2d Dept 1996]). Moreover, a deposition subpoena, also known as a subpoena ad testificandum, or a subpoena duces tecum must be served on a nonparty witness in the same manner as a summons (CPLR 2303[a]; *see* ***Jaggars v Scholeno***, 6 AD3d 1130, 776

NYS2d 684 [4th Dept 2004]). The party serving the subpoena also must serve a copy of such subpoena on the other parties to the action "promptly" after service on the subpoenaed person or entity (CPLR 2303 [a]).

Here, plaintiff's counsel admittedly failed to serve the deposition subpoenas on the nonparty witnesses in accordance with CPLR 308; rather, the subpoenas were mailed to the respective residences of the nonparty witnesses. As personal jurisdiction is acquired by the service of a summons (***Muslusky v Lehigh Val. Coal Co.***, 225 NY 584, 587, 122 NE 461 [1919]), so service of a subpoena in the same manner as a summons is necessary for the court to acquire jurisdiction over a nonparty witness. "[A] court has no power to grant relief against [a person] not named as a party and not properly summoned before the court" (***Weiner v Weiner***, 107 AD3d 976, 966 NYS2d 895 [2d Dept 2013]). Therefore, as the jurisdictional requirement for seeking discovery against the nonparty witnesses was not met by simply mailing the subpoenas to such nonparty witnesses (*see* ***Jaggars v Scholeno***, 6 AD3d 1130, 776 NYS2d 684), the motion by the East Islip defendants for a protective order quashing the deposition subpoenas at issue is granted.

The motion by defendant Colleen Costigan for a protective order enjoining plaintiff from deposing any nonparty witnesses other than Nicole Winter, however, is denied, without prejudice. The Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Courts [22 NYCRR] § 202.7 [c]). Here, Colleen Costigan's attorney failed to submit an affirmation showing that a good faith effort was made to resolve the alleged dispute with plaintiff's attorney regarding the deposition of the nonparty witnesses who alleged were present at the time of her altercation with plaintiff (*see* ***Perez v Stonehill***, 121 AD3d 960, 993 NYS2d 920 [2d Dept 2014]; ***30-40 E. Main St. Bayshore, Inc. v Republic Franklin Ins. Co.***, 115 AD3d 737, 981 NYS2d 616 [2d Dept 2014]; ***Matter of Greenfield v Board of Assessment Review for Town of Babylon***, 106 AD3d 908, 965 NYS2d 555 [2d Dept 2013]; ***Quiroz v Beitia***, 68 AD3d 957, 893 NYS2d 70 [2d Dept 2009]).

Likewise, plaintiff's motion to compel Colleen Costigan to comply with the demands for access to her social media accounts, her school disciplinary records, and the sealed records related to the youthful offender adjudication is denied, as plaintiff's counsel failed to include an affirmation of good faith with the moving papers (*see* ***Perez v Stonehill***, 121 AD3d 960, 993 NYS2d 920; ***30-40 E. Main St. Bayshore, Inc. v Republic Franklin Ins. Co.***, 115 AD3d 737, 981 NYS2d 616; ***Matter of Greenfield v Board of Assessment Review for Town of Babylon***, 106 AD3d 908, 965 NYS2d 555). The Court notes that even if a proper affirmation of good faith had been submitted, plaintiff's demand for "[a]ny and all statements made on any internet website or application pertaining to the plaintiff in general or to the underlying complaint in particular" is vague, overbroad, unduly burdensome, and seeks irrelevant information (*see* ***Jordan v City of New York***, 137 AD3d 1084, 2016 NY Slip Op 02058 [2d Dept 2016]; ***Montalvo v CVS Pharm., Inc.***, 102 AD3d 842, 958 NYS2d 459 [2d Dept 2013]; ***Astudillo v St. Francis-Beacon Extended Care Facility, Inc.***, 12 AD3d 469, 784 NYS2d 645 [2d Dept 2004]).

Further, while not protected by any privilege, school records are not discoverable unless their relevance and materiality to the action are established (*see* ***Graham v West Babylon Union Free School Dist.***, 262 AD2d 605, 692 NYS2d 460 [2d Dept 1999]; ***Davis v Elandem Realty Co.***, 226 AD2d 419, 641 NYS2d 72 [2d Dept 1996]; ***Moores v City of Newburgh School Dist.***, 213 AD2d 527, 623 NYS2d 911 [2d Dept 1995]). Plaintiff did not proffer any evidence that Colleen Costigan had a history of violent or abusive behavior at school, or that Marie Sullivan was aware prior to the altercation that she had violent tendencies (*see* ***Whitfeld v Board of Educ. of City of Mount Vernon***, 14 AD3d 551, 789 NYS2d 187 [2d Dept 2005]). In addition, as to the demand for disclosure of information related to a youthful offender adjudication against Colleen Costigan, youthful offender records are sealed for most purposes (*see* CPL 720.35 [2]). Although a court may, in certain limited situations, unseal such records, an application for such relief must be made to the court which rendered the youthful offender adjudication (***Matter of Gannett Suburban Newspapers v Clerk of County Ct. of County of Putnam***, 230 AD2d 741, 646 NYS2d 58 [2d Dept 1996]).

Finally, the School District defendants' motion to compel is denied, without prejudice. Here, defense counsel failed to submit an affirmation showing that a good faith effort was made to resolve the alleged dispute with plaintiff regarding the demands set forth in the April 19, 2013 notice for access to plaintiff's Facebook account and for copies of text messages related to Colleen Costigan and Facebook postings "generated or received by plaintiff during the period from June 1, 2011 to December 12, 2012" (*see* ***Murphy v County of Suffolk***, 115 AD3d 820, 982 NYS2d 380 [2d Dept 2014]; ***Deutsch v Grunwald***, 110 AD3d 949, 973 NYS2d 335 [2d Dept 2013]; ***Mironer v City of New York***, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]; ***Natoli v Milazzo***, 65 AD3d 1309, 886 NYS2d 205 [2d Dept 2009]). Rather, the purported affirmation of good faith simply states "the issue of disclosure of plaintiff's Facebook records was discussed [at the preliminary conference] in a good faith effort to resolve the issues raised by the within motion."

Dated: April 19, 2016

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**