Cavaliere v Gelb
2016 NY Slip Op 31835(U)
September 26, 2016
Supreme Court, Suffolk County
Docket Number: 13-8659
Judge: Daniel Martin

SHORT FORM ORDER

INDEX No. 13-8659

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 10-20-15
ADJ. DATE 11-10-15
Mot. Seq. # 001 - MotD

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MARTHA M. CAVALIERE, Individually and as Administratrix of the Estate of TAYLOR ANN CAVALIERE, and RAYMOND G. CAVALIERE, Individually,

Plaintiffs,

- against -

ROBERT GELB, Individually, and as Father and Natural Guardian of ZACHARY GELB, an Infant, LORRI GELB, Individually and as Mother and Natural Guardian of ZACHARY GELB, and infant, ZACHARY GELB, 7-ELEVEN, INC., MOHAMMAD F. ELLAHI, PAUL KATZ, MATTHEW SINCLAIR, and ELIZABETH SINCLAIR,

Defendants.

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Upon the following papers numbered 1 to 23 read on this motion to compel; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 21 ; Replying Affidavits and supporting papers 22 - 23 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Paul Katz for an order pursuant to CPLR 3124 compelling the plaintiffs to produce certain discovery is granted to the extent set forth herein, and is otherwise denied.

This action was commenced as the result of an incident on April 17, 2011 where the plaintiffs' decedent, a pedestrian at the time, was struck and killed on the Northern State Parkway. The plaintiffs allege that their 16-year old daughter, Taylor Ann Cavaliere (Taylor), was intoxicated at the time of this incident due to the improper and/or illegal actions of certain of the defendants in providing her with alcohol. In their complaint, the plaintiffs set forth, among other things, causes of action based upon General Obligations Law § 11-101 (the Dram Shop Act), and a cause of action for Taylor's conscious pain and suffering.

In considering this motion, it is appropriate to set forth some background information regarding the parties' exchange of disclosure herein. This action was commenced by the filing of a summons and complaint on March 26, 2013. Simultaneously with the service of his answer dated May 20, 2013, the defendant Paul Katz (Katz) served a notice for discovery and inspection and a demand seeking, among other things, an authorization for the complete file of the Suffolk County Medical Examiner. Katz then served a demand for social media information, dated June 14, 2013, seeking access to Taylor's accounts with Facebook, Twitter, MySpace and LinkedIn. On or about February 15, 2015, Katz served a notice to produce for, among other things, an authorization enabling him to obtain Taylor's cell phone records. Finally, Katz served a demand for authorizations dated May 26, 2015 seeking, among other things, a HIPPA-compliant authorization enabling him to obtain the records of Taylor's pediatrician. Other than what is noted herein, it appears that the plaintiffs have provided appropriate responses to the other requests in the enumerated demands.

Katz now moves for an order compelling the plaintiffs to produce the outstanding discovery discussed above, as well as two additional items. In his affirmation in support of the motion, counsel for Katz indicates that discovery in this action has "resulted in the service of additional discovery demands, including those for ..." an authorization for the records of the Suffolk County Police Department and Crime Lab relating to a reference in the June 24, 2011 report of the investigating officer, and access to Taylor's computer for discovery and inspection. Despite counsel's statement, the submission does not include a demand, notice or other request for the enumerated items. CPLR 3124 provides that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." "Obviously, in a motion to compel disclosure, the moving party must prove that there was a demand or request for disclosure that has gone unanswered or that the respondent has refused to answer" (2 Modern New York Discovery § 29:8 [2d ed.]). Absent a showing that proper notice or demand for disclosure has been made, a motion to compel disclosure will not be granted (*see* ***Claybourne v City of New York***, 128 AD2d 667, 513 NYS2d 165 [2d Dept 1987]; ***Cavuoto v Smith***, 108 Misc2d 221, 437 NYS2d 234 [Sup Ct, Monroe County 1981]). Accordingly, those portions of Katz's motion to compel the plaintiffs to provide authorizations for the Suffolk County Police Department and Crime Lab records, and access to Taylor's computer are denied.

The Court now turns to Katz's remaining requests for discovery. Generally, the 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]). Thus, it has been held that a party is entitled to 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, 288 NYS2d 449, 452 [1968]; *see also* ***Hoenig v Westphal***, 52 NY2d 605, 439 NYS2d 831 [1981]; ***Yoshida v Hsueh-Chih Chin***, 111 AD3d 704, 974 NYS2d 580 [2d Dept 2013]). However, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see* ***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 e.g.* ***Geffner v Mercy Med. Ctr.***, *supra*; ***Gilman & Ciocia, Inc. v Walsh***, *supra*; ***Astudillo v St. Francis-Beacon Extended Care Facility, Inc.***, 12 AD3d 469, 784 NYS2d 645 [2d Dept 2004]).

Demand Seeking Authorization for the Complete File of the Suffolk County Medical Examiner

In his demand dated May 20, 2013, Katz requested an authorization for the "Office of Medical Examiner's complete records regarding investigation of death of Taylor Ann Cavaliere including autopsy report, autopsy notes, laboratory records, photos, correspondence, memos, notes and emails." In opposition to the motion, counsel for the plaintiffs attaches a copy of the plaintiffs' response dated July 24, 2013 to the demand, which includes an authorization for the subject records permitting release of the "entire medical record." Also attached is correspondence from counsel for the plaintiff's dated October 2, 2013 which includes a second authorization granting release of the entire record of the Medical Examiner. In reply, counsel for Katz does not dispute that the subject authorizations were produced, but contends that the records were "heavily redacted," and that Katz is "entitled to the complete and unredacted files." Here, Katz has failed to establish that the plaintiffs' have failed to comply with his requests. In addition, Katz has failed to establish the method by which anyone, including the plaintiffs or the defendants herein, could obtain the "complete and unredacted" records of the Suffolk County Medical Examiner. Accordingly, that portion of the subject motion which seeks another authorization for the subject "complete file" is denied.

Demand For Social Media Information

In his demand dated June 14, 2013, Katz requested authorizations for Facebook, Twitter, MySpace and LinkedIn permitting "the release and complete copies of said accounts, including, but not limited to: all records, information, photographs videos, comments, messages, and posting" for the period "one (1) year prior to the date of loss in this matter to the present." In support of his application, Katz submits an exchanged copy of the investigation conducted by the New York State Police (NYSP) regarding this incident. The redacted NYSP report indicates that its investigators obtained a consent to search Taylor's Facebook pages which indicated, along with other evidence, that Taylor allegedly committed suicide by running into traffic on the Northern State Parkway. Katz also submits his affidavit wherein he swears that Taylor informed him "within weeks" before her death that she had been sexually abused. Katz contends that he seeks to obtain the requested "social media content to learn of all documents and supporting information that lead to the determination of the cause and manner of Taylor's death and to refute plaintiff's (*sic*) allegations in this case."

The parties have not included a copy of the plaintiffs' response to the subject demand. However, at a conference before the undersigned on August 4, 2015 where Katz was granted permission to make this motion, and in their opposition herein, the plaintiffs object to Katz's demand on the ground, among other things, that the request is overbroad. A disclosure request will be considered palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case, is vague, or is overly broad and burdensome (*see* ***Accent Collections, Inc. v Cappelli Enters., Inc.***, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; ***Velez v South Nine Realty Corp.***, 32 AD3d 1017, 822 NYS2d 86 [2d Dept 2006]).

Social media information is discoverable whenever defendants "establish a factual predicate for their request by identifying relevant information in plaintiff's [social media] account--that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims" (***Tapp v New York State Urban Development. Corp.***, 102 AD3d 620, 620, 958 NYS2d 392, 393 [1st Dept 2013], quoting ***Patterson v Turner Constr. Co.***, 88 AD3d 617, 618, 931 NYS2d 311, 311 [1st Dept 2011]). The required factual predicate "stands as a check against parties conducting 'fishing expeditions' based on mere speculation (***Forman v Henkin***, 134 AD3d 529, 532, 22 NYS3d 178, 182 [1st Dept 2015][citations omitted]). Thus, "[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (***Forman v Henkin***, 134 AD3d at 530, 22 NYS3d at 180; citing ***Vyas v Campbell***, 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004], quoting ***Crazytown Furniture v Brooklyn Union Gas Co.***, 150 AD2d 420, 541 NYS2d 30 [2d Dept 1989]). The failure to establish a factual predicate for the disclosure of the entire contents, including post-accident postings, of social media internet accounts maintained by or on behalf of the plaintiff results in the request being deemed overbroad (*see* ***Spearin v Linmar, L.P.***, 129 AD3d 528, 11 NYS3d 156 [1st Dept 2015]; ***Kregg v Maldonado***, 98 AD3d 1289, 951 NYS2d 301 [4th Dept 2012]).

Here, Katz's request for authorization to view Taylor's social media accounts for one year prior to this incident and post-accident is overbroad. In addition, Katz has not submitted any evidence that would indicate that Taylor had a social media account with any provider other than Facebook. Accordingly, that portion of the subject motion which seeks an authorization for Taylor's social media information is denied.

Demand For Cell Phone Records

In his notice to produce dated February 15, 2015, Katz requested an authorization enabling him to obtain cell phone records "relating to the cell phone in the possession of [Taylor] on the night of the alleged occurrence, for the period of one month prior to and including the date of the alleged occurrence, including all records which relate to photographs, telephone calls and text messages." In support of his application, Katz again refers to the NYSP investigative report wherein an investigator indicates that a "more comprehensive review" of Taylor's text messages was conducted and "documented onto a spreadsheet" kept within the case file. In addition, counsel for Katz contends "it appears that the Police Department had enough evidence to warrant investigation into whether Taylor had been the victim of sexual assault prior to the subject incident," based upon an indication that the NYSP collected a sexual offense evidence collection kit from the Suffolk County Crime Lab. Counsel further contends that

information whether Taylor was sexually assaulted weeks prior to this incident is "material and relevant to the issue of the decedent's state of mind and the determination whether she committed suicide."

In their response dated April 2, 2015, the plaintiffs object to Katz's demand for an authorization to obtain Taylor's cell phone records as overbroad, seeking protected private information, and lacking a foundation. Said response also includes a spreadsheet of Taylor's incoming and outgoing text messages on the day of this incident, and a transcript of text messages between Taylor and a nonparty to this action. The parties have not indicated whether the attached spreadsheet is the document referred to in the NYSP investigative report. In opposition to the motion, counsel for the plaintiffs asserts that the "post mortem sexual assault kit" referred to by Katz was "applied" to Taylor "in the normal course of investigating the cause of decedent's death."

It has been held that a discovery demand for authorizations to obtain a party's entire cell phone and text message records is overbroad (***Pecile v Titan Capital Group, LLC***, 113 AD3d 526, 979 NYS2d 303 [1st Dept 2014]). In addition, due to privacy concern issues, the courts generally require that the party requesting disclosure limit their request to a narrow time frame regarding the relevant event (*see e.g.* ***D'Alessandro v Nassau Health Care Corp.***, 137 AD3d 1195, 29 NYS3d 382 [2d Dept 2016] [two hour time frame]; ***Detraglia v Grant***, 68 AD3d 1307, 890 NYS2d 696 [3d Dept 2009][one hour time frame]).

Here, Katz request for authorization to view Taylor's cell phone records for one month prior to this incident is overbroad. Katz has not submitted any information or evidence other than his self-serving statement that would indicate that Taylor was sexually assaulted prior to this incident. In addition, the record reveals that the plaintiffs have exchanged the names of 31 witnesses regarding this incident, many if not all high school friends of Taylor, who should be able to establish whether there is any reasonable basis for the discovery requested herein and the applicable time frame for the alleged event. Katz has failed to demonstrate that the requested authorization "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (citations omitted). Accordingly, that portion of the subject motion which seeks an authorization for Taylor's cell phone records is denied.

Demand For Records of Taylor's Pediatrician

On May 20, 2013, Katz originally served a demand for authorization for Taylor's "[r]ecords of treating pediatricians since birth." An additional demand for authorizations dated May 26, 2015 requested a HIPPA-compliant authorization enabling Katz to "obtain copies of Plaintiff's medical records, reports, diagnostic testing and diagnostic films, from the deceased Plaintiff's pediatrician" unlimited in time.

On or about July 24, 2013, the plaintiff's responded to Katz's original demand stating "[a]uthorization for Taylor's treating pediatrician Dr. Gay Ezer is attached hereto," In opposition to this motion, the plaintiffs contend that the requested authorization has been provided and they submit a copy of an authorization dated July 24, 2013 directed to "Dr. Gay Ezer and/or Commack Pediatric Assoc." for the release of Taylor's entire medical records. The plaintiffs do not submit a copy of their response to

Katz's demand dated May 26, 2015. In reply, counsel for Katz affirms that "your affirmant's office has never received [said authorization] and is not in possession of the records of Dr. Ezer." Accordingly, counsel for the plaintiff is directed to deliver a duplicate original HIPPA-compliant authorization for Dr. Ezer's records within 15 days of the service of a copy of this order with notice of entry.

Counsel for Katz is directed to serve a copy of this order with notice of entry upon counsel for the plaintiffs.

Dated: SEPTEMBER 26, 2016

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION