

**Kapsis v Duch**

2017 NY Slip Op 32944(U)

December 6, 2017

Supreme Court, Queens County

Docket Number: 4727/2016

Judge: Denis J. Butler

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QUEENS COUNTY

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part: 12  
Justice

-----x  
ANTONIOS PHILIP KAPSIS,  
Plaintiff(s),

Index  
Number: 4727/2016

-against-

JAN DUCH,  
Defendant(s).  
-----x

Motion Date:  
October 6, 2017

Motion Seq. No.: 2

The following papers numbered 1 to 20 were read on this motion by defendant for an order dismissing plaintiff complaint or precluding plaintiff from offering any evidence on the issue of liability, pursuant to CPLR §3126 or in the alternative an order compelling plaintiff with material, relevant, and necessary information for the issues of liability and damages in this matter.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Affidavit and Exhibits.....	1-12
Affirmation In Opposition, Affidavit, Exhibits.....	13-16
Affirmation In Reply, Affidavit, Exhibits.....	17-20

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant moves for an order dismissing Plaintiff's complaint or precluding Plaintiff from testifying at trial, due to Plaintiff's alleged failure to provide several categories of requested discovery. In the alternative, Defendant moves for an order compelling the Plaintiff to produce the requested discovery. Plaintiff opposes the motion.

As an initial matter, the Court finds merit in Defendant's argument that, due to Plaintiff's failure to object timely to the

Defendant's discovery demands, Plaintiff has waived objection to those demands except to the extent that they are "palpably improper." (*Bell v Cobble Hill Health Center, Inc.*, 22 AC3d 620 [2d Dept 2005].) Demands may be palpably improper if they, for example, "are overbroad, lack specificity, or seek irrelevant or confidential information," (*id.*), or seek "information of a confidential and private nature that is not relevant to the issues in th[e] case." (*Otto v Triangle Aviation Servs, Inc.*, 258 AD2d 448 [2d Dept 1999].) With these standards in mind, the Court turns to each category of outstanding discovery:

- 1) "The name of plaintiff's health insurance carrier, as well as duly executed, current and acknowledged HIPAA Compliant Authorizations enabling MENDOLIA & STENZ to obtain the plaintiff's emergency room records, hospital records, medical records, physical therapy records, acupuncture records, MIR's, X-rays, Cat Scans, Intra-operative photos (if applicable) and any other diagnostic test from said insurance carrier."

Plaintiff objects to this request solely to the extent that Defendant seeks the name of Plaintiff's health insurance carrier, as there is "nothing in the record that even suggests that plaintiff used his health insurance for any injuries sustained in his accident or for any similar injuries." Defendant notes that Plaintiff testified he had health insurance through his mother at the time of the accident. It is undisputed that Plaintiff has affirmatively placed his medical condition in issue in this litigation. (*Gutierrez v Trillium USA, LLC*, 111 AE3d 669 [2d Dept 2013].) In light of this, Plaintiff has not demonstrated that Defendant's request for information relating to his health insurance at the time of the accident is "palpably improper."

The branch of Defendant's motion seeking an order compelling Plaintiff to produce the discovery requested in item #1 above is GRANTED, and Plaintiff is directed to respond fully, to the extent he has not already done so, within 30 days of the date of this order.

- 2) "Duly executed, current and acknowledged HIPAA Compliant authorizations enabling MENDOLIA & STENZ to obtain the the plaintiff's high school records from William Cullen Bryant, including but not limited to attendance records, physicians' records, school nurse records, and permission slips to play competitive football."
- 3) "Duly executed, current and acknowledged HIPAA Compliant authorizations enabling MENDOLIA & STENZ to obtain the

the plaintiff's college records from Feather River College in California, including but not limited to attendance records, physicians' records, school nurse records, and permission slips to play competitive football."

Plaintiff testified that he had a prior problem with his back that was exacerbated by the subject motor vehicle accident. Plaintiff further testified that, during the time period after he first developed back pain but before the subject accident, he played football in high school and college and engaged in rigorous workouts as part of his training. These facts alone, however, fail to justify such broadly-worded discovery into Plaintiff's school files, which may contain material of a personal nature. Plaintiff's testimony as to his sports involvement speaks for itself, and Defendant fails to articulate any information that might be contained in Defendant's school records that may reasonably lead to relevant evidence. The branch of Defendant's motion seeking to compel discovery of Plaintiff's high school and college records is DENIED.

- 4) "Duly executed, current and acknowledged authorizations enabling MENDOLIA & STENZ to obtain the GPS Records for the plaintiffs' 2010 Nissan Maxima that was involved in the accident that is the subject of the within lawsuit. Said authorizations are limited to the GPS records for the date of the loss."

Plaintiff has not demonstrated that the above request is "palpably improper," particularly in light of the facts that the request is narrowly tailored to the date of the accident, Plaintiff testified that he used the GPS in his vehicle on the date of the accident, and the issue of liability for the accident remains in dispute. The branch of Defendant's motion seeking an order compelling Plaintiff to produce the discovery requested in item #4 above is GRANTED, and Plaintiff is directed to respond fully, to the extent he has not already done so, within 30 days of the date of this order.

- 5) "All color photos of the plaintiff from his trip to Greenport, NY after the accident that is the subject of the within lawsuit."
- 6) "All photographs, e-mails, status posts, and comments posted to the plaintiff's Facebook account from the date of the accident that is the subject of this lawsuit to the present."

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- 7) "Duly executed, current and acknowledged authorizations for full access to, and copies of the plaintiff's current historical records/information for his Facebook account. The authorizations must include the email address linked to this account, along with all other required identifying information."

"[M]ere 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 Devel. Corp.*, 102 AD3d 620, 620 [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." (*Id.*; accord *Richards v Hertz Corp.*, 100 AD3d 728 [2d Dept 2012]; *McCann v Harleystown Ins. Co. of NY*, 78 AD3d 1524 [4<sup>th</sup> Dept 2010].) Defendant has laid no such factual predicate here. In the circumstances present here, Defendant's attempted "fishing expedition" (*Tapp*, 102 AD3d at 621) into Plaintiff's social media postings is palpably improper. Similarly, Defendant's request for personal photographs from a vacation Plaintiff took with his mother is palpably improper. The branch of Defendant's motion seeking to compel discovery of items 5, 6, and 7 above is therefore DENIED.

It appears from Plaintiff's opposition papers and Defendant's reply papers that the remaining categories of discovery set forth in Defendant's motion appear to have been resolved prior to submission of this motion.

Defendant's motion is **GRANTED solely to the extent** that Plaintiff is directed to produce the discovery requested in items #1 and #4 within forty-five (45) days of the date of this order.

All other requested relief is hereby DENIED.

This constitutes the Decision and Order of the Court.

The clerk is directed to fax and mail a copy of this decision and order to all parties.

Dated: December 6, 2017

  
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 Denis J. Butler, J.S.C.

**FILED**  
 DEC 08 2017  
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