

Acciavatti v Staropoli
2017 NY Slip Op 33505(U)
January 30, 2017
Supreme Court, Westchester County
Docket Number: Index No. 62180/2015
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----x
PETER J. ACCIAVATTI,

Plaintiff,

-against-

DECISION and ORDER
Index No. 62180/2015
Motion Date: Jan. 30, 2017
Seq. No. 1

JEREMY M. STAROPOLI,

Defendant.

-----x
LEFKOWITZ, J.

The following papers were read on defendant's motion for a protective order pursuant to CPLR 3103(a) prohibiting the exchange, disclosure and release of his cell phone records.

Order to Show Cause dated December 14, 2016: Affirmation in Support; Exhibits A-E
Affirmation in Opposition; Exhibits 1-6

Upon the foregoing papers and proceedings held on January 30, 2017, this motion is determined as follows:

This is an action to recover for serious injuries allegedly sustained by plaintiff arising from a motor vehicle accident that occurred on June 19, 2013, at about 12:15 p.m. The police accident report prepared within minutes of the incident states that plaintiff's motor vehicle was stopped at a traffic light when it was struck by defendant's motor vehicle.

Defendant was deposed on October 26, 2016 (deposition transcript is attached to defendant's moving papers as exhibit C and to plaintiff's opposition papers as exhibit 4). Among other things defendant testified that as of the day of the accident he owned a cell phone. Defendant testified that after he got into his vehicle he did not use the cell phone. He testified that he does not use his cell phone when driving (15-16). He could not recall when he used the cell phone before getting into the car. Plaintiff's counsel then requested the production of the cell phone records (16). Defendant further testified that he has a blue tooth headset but that it does not work in the receiver. Defendant could not remember if he had it on and/or if he had it on his ear, on the day of the accident (38). Defendant testified that he did not use the phone very much in the car so that it may have been in his pocket or in the glove compartment. He stated, "I wasn't on the phone at the time of the accident" (39).

Plaintiff was deposed on May 19, 2016 (deposition transcript is attached to defendant's

moving papers as exhibit D and to plaintiff's opposition papers as exhibit 3). The only two motor vehicles involved in the subject incident were his and defendant's. Plaintiff testified he felt a large impact when his motor vehicle was hit from behind. He was stopped at a light and looking forward (45). After the impact, he did not immediately exit his vehicle. Defendant got out of his car and flagged him to go into a shopping center which he did. After he got to the shopping center, he exited his car (49-50). The police arrived in a couple of minutes after the accident (51).

At the compliance conference held on November 29, 2016, plaintiff again requested defendant's cell phone records.

Presently, defendant seeks a protective order prohibiting the production of his cell phone records. Defendant states that plaintiff did not make a written request for the production of the cell phone records but rather, made only an oral application at the last compliance conference. Defendant asserts that insofar as the record in this matter is devoid of direct and circumstantial evidence regarding his speaking on his cell phone immediately prior to the accident, the discovery should not be compelled.

Plaintiff opposes this motion and seeks an order compelling defendant to provide authorizations for his complete cell phone records from 11:00 a.m. to 1:00 p.m. on the date of the accident. Plaintiff asserts that the requested cell phone records are required to ascertain whether defendant's inattentiveness was caused by use of a cell phone or texting at the time of the accident. Plaintiff further asserts that these cell phone records are relevant to the issues of negligence and violation of the Vehicle and Traffic Law. Plaintiff also asserts that the issue of defendant's privacy regarding the cell phone records can be addressed by limiting the cell phone records to one hour before the accident, to one hour after the accident, and by an in camera review of those records.

In his affidavit dated January 4, 2017, submitted with his opposition papers on this motion, plaintiff states that after the accident, when defendant walked over to his car for the first time, defendant had a cell phone in his hand. Plaintiff states that his first thought at that time was that defendant was either texting on his phone or on his phone at the time of the accident. Plaintiff stated, "I believe that the cell phone was in defendant's hand at the time of the accident and that it was used immediately before the accident while the defendant was driving."

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "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" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Karanikolas v Elias Taverna*, 128 AD3d 905 [2d Dept 2015]; *Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]).

Accordingly, the standard to be applied in determining the discoverability of information

regarding a party's cell phone is whether the information is "material and necessary," (*Morano v Slattery Skanska, Inc.*, 18 Misc3d 464, 474 [Sup Ct, Queens County, 2007]), which "really amounts to whether they are relevant" (*Page v Napier*, 2009 WL 434607 [Sup Ct, Nassau County, January 30, 2009]). Sections 1225-c and 1225-d of the Vehicle and Traffic Law, respectively, prohibit the use of hand held cell phones and portable electronic devices, including two-way messaging devices, while operating a motor vehicle which is in motion. The unexcused failure to observe the standard imposed by the statute constitutes negligence (*Reina-Hudson v Michael & Sons Nursery*, 2010 WL 3392837 [Sup Ct, Westchester County, May 3, 2010]; *Morano* at 474). However, in order to protect a party's privacy, discovery of cellular telephone records will only be directed where there is evidence that the cellular telephone was being used immediately prior to or at the time of the motor vehicle accident (*Reina-Hudson* at *1; *Morano* at 475). "[T]he mere fact that a defendant was in the possession of a cell phone at the time of an accident, without any witness testimony as to it being used at that time, would not entitle the plaintiff to said defendant's cell phone records, since such a discovery request would amount to nothing more than a fishing expedition" (*Morano* at 475; see *Carpio v Leahy Mechanical Corp.*, 30 AD3d 554 [2d Dept 2006] [defendant's conclusory assertions that plaintiff may have been using her cellular telephone and may have had time to take evasive action were completely speculative]).

For a protective order to be issued, the party seeking it must make a factual showing of unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice (CPLR 3103[a]). Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery which discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind (*Cascardo v Cascardo*, 136 AD3d 729 [2d Dept 2016]).

Courts have directed that cell phone records be produced in several automobile negligence cases. In these cases there was direct or circumstantial evidence suggesting the driver's cell phone use at or about the time of the incident. In *D'Alessandro v Nassau Health Care Corp.*, 14 Misc3d 1210(A) (Sup Ct, Nassau County, 2014), the representative of the estate of the pedestrian brought a wrongful death action against, among others, the defendant driver, whose vehicle struck and killed the pedestrian. Plaintiff sought, among other things, authorizations for that defendant's cell phone records. In support of her motion plaintiff submitted two expert affidavits. The one expert specialized in accident analysis and reconstruction. He performed a visibility study concluding that this defendant would have been able to see the pedestrian in the roadway for over five seconds prior to the impact. The second expert, a licensed engineer, concluded that based upon his analysis, defendant driver was inattentive or distracted. Although the trial court denied the branch of plaintiff's motion seeking authorizations for cell phone records on the basis of the lack of direct evidence, the appellate court modified and granted that branch of plaintiff's motion (*D'Alessandro v Nassau Health Care Corp.*, 137 AD3d 1195 [2d Dept 2016]).

In *Detraglia v Grant*, 68 AD3d 1307 (3rd Dept 2009), plaintiff sought defendant driver's records for his cell phones and his company used laptop computer. Defendant driver had testified at his deposition that he was not using any of the devices when the accident occurred. However, a tow truck driver who arrived at the scene submitted an affidavit that he saw the

laptop on the vehicle's computer desk, with the screen flipped up and turned on, indicating recent use. The court found that this evidence raised questions as to whether defendant driver used any technological devices while driving, rendering the sought-after records, for the three cell phones defendant had in his vehicle and the records for the laptop, relevant to the question of negligence.

In *Morano v Slattery Skanska, Inc.*, 18 Misc3d 464 (Sup Ct, Queens County, 2007) plaintiff sought defendant's cell phone records. At his deposition plaintiff gave no testimony whatsoever regarding defendant's alleged use of a cell phone at the time of the accident and defendant testified at her deposition that she was not using a cell phone at the time of the collision. However, in support of his motion to enforce a subpoena to the cell phone company for production of defendant's cell phone records, plaintiff submitted his affidavit stating that immediately before the accident while defendant was stopped in the middle of the roadway, he observed defendant in her car with what he believed to be a cell phone talking or possibly retrieving messages.

This court has also had occasion to consider the issue of whether cell phone records should be provided. In *Tillstrand v Ruggiero* (Index Number 59769/2013) the court granted plaintiff's motion to compel defendants to disclose cell phone records for cell phones owned and used by the defendant driver. There, the defendant driver testified during her deposition that she replied to a text message just prior to the subject accident and acknowledged that a text had been sent in response. In *Fernandez v Castle Provisions, Inc.* (Index Number 55250/2011) the court granted plaintiff's motion to compel disclosure of the defendant driver's cell phone records. At his deposition the defendant driver denied using his cell phone at or about the time of the accident and he testified that the cell phone was in a bag on the floor of his box truck and that it was still there after the accident. However, a photograph taken by the police at the accident site depicted defendant driver's cell phone on the ground in the roadway outside the truck on the passenger's side. The court stated that it was unlikely that a careful extrication of a potentially injured person involved in a serious head on collision through the passenger side of a box truck would force a cell phone located in a bag on the floor of the truck to become dislodged so as to end up in an open position on the roadway. In *Reina-Hudson v Michael & Sons Nursery* (2010 WL 3392837 [Sup Ct, Westchester County, May 3, 2010]), defendants sought an order, inter alia, directing plaintiff to provide them with authorizations for her cell phone records. There, defendant driver testified at his deposition that just prior to the accident he observed plaintiff talking on her cell phone while operating her motor vehicle. The court found this evidence sufficient to warrant an in camera review of plaintiff's cell phone records.

Dissimilarly to the cases herein above discussed, in the present case there is neither direct nor circumstantial evidence to warrant defendant's disclosure of his cell phone records. Nothing in the record on this motion suggests that defendant was using his cell phone at the time of the subject accident. Defendant testified at his deposition that he was not on his cell phone at the time of the accident and that he does not use his cell phone when he drives. The police report issued minutes after the subject accident makes no mention of the presence of a cell phone at the scene of the subject accident. In his self-serving affidavit submitted to support his opposition to this motion plaintiff states only that he saw the cell phone in defendant's hand following the accident and that he "believed" defendant held the cell phone at the time of the accident. Plaintiff did not state at his deposition or in his affidavit that he "saw" defendant using a cell

phone at or about the time of the accident. It is unlikely that as the driver of the front vehicle in a rear end collision, who was looking forward at the time of impact (as he testified to at his deposition), plaintiff would have seen defendant using and/or holding a cell phone at or about the time of the impact. Furthermore, there are no eyewitnesses, photographs, expert analyses or other evidence suggesting defendant's cell phone use at the relevant time.

In light of the foregoing it is:

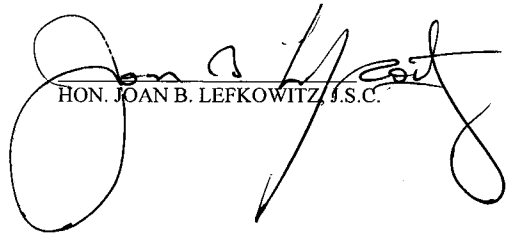
ORDERED that defendant's motion for a protective order against the exchange, disclosure and/or release of his cell phone records is granted; and it is further,

ORDERED that the parties are directed to appear in the Compliance Conference Part, Room 800, on February 7, 2017, at 9:30 a.m.; and it is further,

ORDERED that defendant's counsel serve a copy of this decision and order, with notice of entry, upon plaintiff within five days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
January 30, 2017


HON. JOAN B. LEFKOWITZ, J.S.C.

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