Colon v Phi Kappa Psi Fraternity
2018 NY Slip Op 33825(U)
January 16, 2018
Supreme Court, Onondaga County
Docket Number: 2016 EF 3852
Judge: Gregory R. Gilbert

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

BRANDON COLON,

Plaintiff,

vs.

PHI KAPPA PSI FRATERNITY, NEW YORK BETA CHAPTER OF Syracuse UNIVERSITY, PHI KAPPA PSI FRATERNITY, INC., HOME ASSOCIATION OF NEW YORK BETA OF PHI KAPPA PSI and ESTATE OF HUNTER BROOKS WATSON, deceased,

Defendant.

DECISION & ORDER

Index No.: 2016 EF 3852
RJI No.: 33-17-1093

HON. G. GILBERT, J.S.C.

This matter involves an alleged assault and battery upon plaintiff by a member of Phi Kappa Psi, Watson, occurring in the early morning hours of April 10, 2016 near the fraternity house. A disclosure motion resulted in an Order on August 23, 2017 to compel production of google chats between the local and national fraternity or preclude the defense of the matter by the fraternity defendants. When the disclosure was not forthcoming in timely fashion, plaintiff filed a further motion to strike the pleadings of the fraternity defendants. The defendant estate also filed a cross-motion to compel disclosure. The motions, heard on November 30, 2017, were reserved for decision.

Facts

The Court makes special note of the substantial effort of counsel for the fraternity defendants to address the outstanding disclosure. All of the google chats between the local and national fraternity have been disclosed in compliance with the previous order, although timeliness may have been an issue. The motion by plaintiff and the extreme relief sought had no legitimate basis on this point. The Court has not found any undisclosed google chats between the local and national fraternity.

The issue that remains are google chats between members of the local fraternity. In an attempt to respond to plaintiff's disclosure demand there are 4,935 pages of google chats that were produced by counsel for the fraternity defendants which are subject to objection logs, a procedure expressly permitted by the Court. While the timeliness of the disclosure was an issue, counsel for the fraternity generally informed all involved of his progress and the difficulties being encountered. The motion in this matter was not warranted and the relief sought by plaintiff had no basis. Counsel was so informed before the motion was even filed.

The 4,935 pages of google chats have been produced for in camera inspection by the Court together with the objection logs. Responses and replies to the objections interposed have also been invited, submitted and reviewed. The google chats have been generally reviewed and are little

more than electronic conversations shared by and between various members of the local fraternity. The fraternity raises ten objections with the first two objections being that the pages do not involve the national fraternity or the home association. This reflects little more than counsel's compliance with the conditional order of preclusion previously entered in this matter.

Upon a review of the objection logs, plaintiff withdrew his demand for disclosure of 1,931 pages of chats. The estate defendant has stated no objection to this. Accordingly, the 1,931 pages referenced by plaintiff are to be returned to counsel for the fraternity.

Relevant to the issues to be considered is plaintiff's theory of the case that the local fraternity generally promoted drinking, including underage alcohol consumption, regularly purchased alcohol with chapter dues, encouraged fighting or aggressive behavior, skirted fraternity and university policies and generally failed to exercise proper control over its premises. Plaintiff asserts and the estate generally agrees that any pages referring to alcohol, drugs, possible criminal activity, hazing activity, parties, supervision and "the general state of the fraternity" are material and relevant and should be disclosed.

The estate would restrict disclosure to the period from February 22, 2016 to May 31, 2016. Plaintiff has demanded disclosure from August 1, 2015 to the present.

Analysis

CPLR 3101(a) provides that there shall be full disclosure of all matters material and necessary in the prosecution or defense of any action. The determination of whether information sought should be subject to disclosure is a test of reason and usefulness. Allen v. Crowell-Collier Publishing Co., 21 NY2d 403 (1968). It is incumbent upon the party that seeks disclosure to demonstrate that the method of discovery sought has the end result of disclosing or leading to the disclosure of information relating to the claims at issue. Vyas v. Campbell, 4 AD3d 417 (2nd Dept 2004). Demands based on mere speculation that responses might lead to something material or necessary are improper. Budano v. Gurdon, 97 AD3d 497 (1st Dept 2012).

These principles apply in the context of disclosure seeking social media information. Tapp v. New York State Urban Development Corp., 102 AD3d 620 (1st Dept 2013); Pecile v. Titan Capital Group, LLC, 113 AD3d 526 (1st Dept 2014); Abrams v. Pecile, 83 AD3d 527 (1st Dept 2011); and Richards v. Hertz Corp., 100 AD3d 728 (2nd Dept 2012). See in particular, McCann v. Harleysville Insurance Company of New York, 78 AD3d 1524 (4th Dept 2010) in which it was held that the mere fact of use of social media (in that case Facebook) was not sufficient to justify disclosure except as to those materials a disclosing party might intend to

use at trial.

Before turning to the various remaining objections made by the fraternity, it is observed that the demand for disclosure as to "the general state of the fraternity" is palpably improper as based on mere speculation that the response might possibly lead to something useful. Moreover, the demand fails to describe with reasonable particularity, as required by CPLR 3120, what is actually being requested.

Insofar as the disclosure requested seeks material not directly related to Watson, plaintiff or the incident and circumstances of the April 10, 2016 incident, it is seen as seeking information relating to custom or habit. The same is not generally relevant or admissible at trial [Levine v. Shell Oil Co., 28 NY2d 205 (1971)] although, in this case, the habit or custom asserted is said to involve deliberate and repetitive practices that may be material and necessary for disclosure [Holloran v. Virginia Chemicals, Inc., 41 NY2d 386 (1977)].

Any documents relating to plaintiff, Watson or the incident and circumstances surrounding it are material and necessary items for disclosure regardless of when they were created or by whom. However, information relating to custom and habit is a matter of a different sort and reasonably should be restricted in time frame to the start of the new school year on 8/18/16 as sought by the fraternity. It is noted that the estate does not disagree with this objection but would actually restrict

the disclosure to 5/31/16 with the end of the school year. The actions or inactions of the fraternity with the start of the new school year have no bearing on plaintiff's injuries or Watson's conduct.

The remaining objections by the fraternity center on relevance, embarrassment or prejudice and a "reasonable expectation of privacy". The Court's assessment is that google chats was in use as an electronic billboard and no "reasonable expectation of privacy" attached. These were not one on one or private conversations with an expectation of privacy as in Forman v. Henkin, 134 AD3d 529 (1st Dept 2915) and Melissa G. v North Babylon Union Free School District, 48 Misc3d 389 (Suffolk County 2015).

The relevance objection is seen as a claim that some google chats will not be admissible at trial but the disclosure obligation is not tied to what may be subject to trial admissibility. 44 NYJur2d, Disclosure §4. A claim of prejudice and embarrassment is not normally sufficient to prevent disclosure although the same are grounds for protective relief. 44 NYJur 2d, Disclosure §415.

The Court determines that counsel for the fraternity defendants has operated in good faith in these proceedings as to disclosure to date and has every expectation that he will continue to proceed in a forthright fashion. In camera inspection in disclosure matters is and should be the

exception rather than the rule under the circumstances presented here. Melissa G. v North Babylon Union Free School District, 48 Misc3d 389 (Suffolk County 2015).

Decision and Order

Based on all of the foregoing and having reviewed all of the materials and arguments submitted, it is

ORDERED, that plaintiff's motion to strike fraternity defendants' pleadings and other relief is denied;

ORDERED, that the cross-motion to compel disclosure filed by the estate is denied;

ORDERED, that all objections to disclosure by the fraternity defendants as to any google chats between August 1, 2015 and August 18, 2016 are denied and the same will be disclosed to counsel for plaintiff and the estate not later than January 30, 2018;

ORDERED, that the objection to disclosure of google chats on and after August 18, 2016 not making direct reference to plaintiff, Watson, the incident, party before the incident or the circumstances surrounding the incident or the party or the litigation, suspension or any action taken by the university or the fraternity on any level in regard to these enumerated materials is granted.

ORDERED, that the materials enumerated in the preceding

paragraph, if any, will be disclosed to counsel for the plaintiff and the estate not later than January 30, 2018; and it is

ORDERED, that all google chats disclosed in this action shall be held confidential by counsel herein for use solely within this litigation and shall not be subject to public dissemination nor shall the same be filed in the within action without further order of this Court.

Dated: January 16, 2018
Syracuse, New York

Gregory R. Gilbert

HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE