Evans v Roman
2018 NY Slip Op 33970(U)
April 6, 2018
Supreme Court, Bronx County
Docket Number: 22765/2014E
Judge: George J. Silver

FILED: BRONX COUNTY CLERK 04/11/2018 04:20 PM INDEX NO. 22765/2014E
NYSCEF DOC. NO. 85 RECEIVED NYSCEF: 04/11/2018

SUPREME COURT OF THE STATE OF NEW YORK —BRONX COUNTY

PRESENT: GEORGE J. SILVER Part 11
Justice

CRYSTAL EVANS

MOTION INDEX NO. 22765/2014E

MOTION DATE

- v -

MOTION SEQ. NO. 003 and 004

DR. HENRY ROMAN, M.D., NOAKITA ALLEN, R.N., AND SPLIT ROCK REHABILITATION AND HEALTH CARE CENTER, LLC, *et al.*

Cross-Motion: ☐ Yes ■ No

Defendants NOAKITA ALLEN, R.N., SPLIT ROCK REHABILITATION AND HEALTHCARE CENTER, LLC, SPLIT ROCK MULTI-CARE CENTER LLC, and RLD MEDICAL SERVICES P.C. (collectively "defendants"), move for an order pursuant to CPLR §§ 3124 and 3126, striking plaintiff's complaint for failure to provide responses to discovery, or alternatively compelling plaintiff to provide responses to discovery requested and to include a self-effectuating order of preclusion. Plaintiff CRYSTAL EVANS ("plaintiff") opposes the application.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

BACKGROUND

This action is premised upon claims of alleged sexual assault and battery perpetrated by defendant DR. HENRY ROMAN ("Roman") against plaintiff. At issue in this motion (Seq. 003 and 004) is plaintiff's failure to provide authorizations for plaintiff's cell phone records and an inspection of plaintiff's cell phone, which defendants assert is critical evidence of Roman's interactions with plaintiff. Plaintiff's cell phone has previously been produced to the district attorney's office in connection with a criminal investigation of Roman's interactions with plaintiff. Moreover, plaintiff has already turned over a video retrieved from plaintiff's cell phone to defendants that depicts Roman's interactions with plaintiff.

On March 22, 2017, a preliminary conference was held. The order that ensued directed plaintiff to respond to defendants' outstanding discovery requests within 45 days, including defendants' requests for plaintiff's cell phone records and an opportunity to inspect plaintiff's cell phone. Plaintiff served defendants with responses dated April 24, 2017, but plaintiff failed to provide an authorization for her cell phone records, or her cell

phone for inspection. However, plaintiff assured defendants that a mutually agreeable date would be scheduled to facilitate inspection plaintiff's cell phone.

Prior to the first scheduled date for plaintiff's deposition (June 26, 2017), defendants assert that plaintiff's counsel was contacted to arrange a mutually agreeable time to inspect plaintiff's cell phone. At that time, plaintiff's counsel indicated that he was working with a technician to retrieve data from plaintiff's cell phone, and that once this issue was worked out, all parties would be contacted to coordinate the cell phone inspection. To date, defendants assert that plaintiff has not contacted defendants to schedule any such cell phone inspection. Thereafter, on July 14, 2017, defendants served a demand for a supplemental bill of particulars including specific demands for information regarding the district attorney's office investigation into the contents of plaintiff's cell phone.

On November 15, 2017, a compliance conference was held. At that conference, plaintiff was ordered to respond to defendants' July 14, 2017 demand for a supplemental bill of particulars, and to provide an authorization for plaintiff's cell phone records (over objection). To date, defendants contend that plaintiff has failed to provide a supplemental bill of particulars regarding the district attorney's investigation into the relationship between plaintiff and Roman, and has also failed to provide an authorization for plaintiff's cell phone records. Defendants further assert that plaintiff has continued to fail to schedule an inspection of plaintiff's cell phone after allegedly consulting with a technician. Plaintiff's deposition was scheduled for January 30, 2018, but did not go forward on that date in light of the disputed discovery at issue in this motion. Defendants argue that they cannot properly question plaintiff regarding her interactions with Roman without the opportunity to review her cell phone, her cell phone records, and the criminal investigation of Roman by the district attorney's office. Therefore, defendants make the instant application based upon plaintiff's alleged repeated failure to comply with defendants' discovery demands, and the orders of this court.

In opposition, plaintiff contends that plaintiff responded to defendants' responses for cell phone records, the district attorney's file, and Medicare/Medicaid information. Plaintiff further contends that "[p]laintiff has signed the authorization for defendants to obtain the cell phone records set forth in the court orders" and "will have that authorization by Monday, March 4, 2018 at the latest." In spite of that assertion, plaintiff

did not provide defendants with the requested authorization on that date. Instead, at oral argument before the court on April 2, 2018, plaintiff argued that the disclosure of plaintiff's cell phone records was unwarranted in light of the Court of Appeals' decision in *Forman v. Henkin*, 30 NY3d 656 (2018).

DISCUSSION

CPLR § 3126 gives courts the discretion to impose penalties upon parties who willfully fail to disclose information which the court orders to be disclosed. Additionally, CPLR § 3124 permits a party seeking disclosure of certain materials to move to compel compliance if another party fails to respond to its request. Here, plaintiff's failure to provide discovery responses is in direct violation of the court's March 22, 2017 preliminary conference order and November 15, 2017 compliance conference order. Additionally, plaintiff has failed to adequately respond to defendants' July 14, 2017 demand for a supplemental bill of particulars.

While plaintiff initially conceded that plaintiff would provide defendants with an authorization for plaintiff's cell phone records to resolve the instant motion, plaintiff now argues that it did not provide defendants with said authorization because doing so would be improper. Plaintiff is incorrect. Indeed, discovery of relevant factual matters is an inherent right. To that end, CPLR § 3101(a) requires "full disclosure of all matters material and necessary in the prosecution or defense of an action." "Material and necessary information is that which is required to be disclosed because it bears upon the controversy at issue and will assist the requesting party in preparing for trial" (*M.C. v. Sylvia Marsh Equities, Inc.*, 103 AD3d 676, 678 [2d Dept. 2013]; *see Allen v. Crowell–Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). "Courts are to interpret discovery requests liberally in favor of disclosure" (*M.C. v. Sylvia Marsh Equities, Inc.*, 103 AD3d at 678, *supra*; *see Ural v. Encompass Ins. Co. of Am.*, 97 AD3d 562, 566 [2d Dept. 2012]).

It is inarguable that cell phones have upped the ante on information provided by phone records as such devices physically accompany their users almost everywhere. As such, disclosure of information elicited from cell phones must be dealt with delicately by courts. Manifestly though, the mere use of a cell phone cannot be employed as a sword to shield from disclosure information that would otherwise be deemed relevant and

therefore discoverable.

Here, a review of the record evinces that the basis for defendants' request for plaintiff's cell phone records stems from the fact that defendants are already in receipt of a video from plaintiff's cell phone that is "material and necessary" to the claims at issue in this case. Among other things, there is a basis to conclude that plaintiff's cell phone contains relevant information about the sexual assault and battery allegedly perpetrated by Roman. Moreover, applying the standards set forth in CPLR § 3101(a), plaintiff's damages claim here encompasses claims that she sustained severe nervous shock, metal anguish, and emotional pain, among other things. Insofar as plaintiff's damages encompass a broad array of injuries, the scope of relevant information subject to disclosure based on those alleged damages is incontrovertibly broad. Here, defendants have established that plaintiff's cell phone contains explicit video documenting relevant acts that she engaged in with Roman. That information is probative to her civil battery and negligence claims as well as her damages claims. Moreover, based on the information already in defendants possession, it is reasonable to believe that other portions of plaintiff's cell phone may contain further evidence relevant to the defense. As such, plaintiff's cell phone has been shown to be relevant to the prosecution or defense of this action, and therefore is "material and necessary." Thus, on this record, there is a basis to compel the disclosure of plaintiff's cell phone records inasmuch as on this record they are relevant.

Plaintiff's reliance on *Forman*, 30 NY3d 656 (2018), *supra*, in opposition to that principle is misplaced. Indeed, a close reading of *Forman* actually supports defendants' contention that plaintiff's cell phone records are discoverable. In *Forman*, 30 NY3d 656 (2018), *supra*, the plaintiff alleged that she sustained physical and cognitive injuries limiting her ability to participate in recreational and social activities after her fall from a horse owned by the defendant (*id.* at 659). The plaintiff testified at her deposition that prior to the accident she had posted to a Facebook account numerous photographs depicting her active lifestyle, but deactivated the account some six months after the accident (*id.*). The defendant sought an unlimited authorization to obtain the plaintiff's Facebook account, including her private postings (*id.* at 661). The defendant argued that these materials were relevant to plaintiff's injuries, her credibility, and her claims that she could no longer perform certain activities. The plaintiff failed to provide the authorization (*id.*).

The trial court granted the defendant's motion to compel, but only to the extent of directing the plaintiff to produce all privately posted photographs prior to the accident that she intended to introduce at trial, all photographs of herself privately posted after the accident that did not show nudity or romantic encounters, and an authorization for Facebook records showing every time after the accident that the plaintiff posted a private message and the number of characters or words in the messages (Lucy Billings, J.; op 2014 NY Slip Op 30679[U] [2014]).

The plaintiff appealed to the Appellate Division, which modified the trial court's order. In doing so, the Appellate Division limited disclosure to posted photos (whether before or after the accident) that the plaintiff intended to introduce at trial and eliminated the authorization to obtain post-accident message information (*see Forman v. Henkin*, 134 AD3d 529 [1st Dept. 2015]).

The Court of Appeals reversed the Appellate Division's determination. In doing so, the Court stated that disclosure' in all civil actions is governed by the "material and necessary" standard enunciated by CPLR § 3101(a), which requires that the discovery sought be relevant to the prosecution or defense of an action. Significantly, "[wjhile Facebook - and sites like it - offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rule's to resolve this dispute '" (*Forman*, 30 NY3d 656 (2018), *supra*, at 663). The Court rejected the Appellate Division's heightened standard for the production of social media, which required the defendant to establish "a factual predicate for their request by identifying relevant information in plaintiffs Facebook account - that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims" (*id.*). The Court found that such a threshold rule would permit the account holder to obstruct discovery "by manipulating 'privacy' settings or curating the materials on the public portion of the account" (*id.*). The Court stressed that New York law does not condition the receipt of discovery on a showing that the' items sought actually existed. Rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information.

Here, plaintiff argues that cell phones, particularly modern-day smart phones, have capacities so broad that much like social media accounts, they should be entitled to a

heightened standard for production. Contrary to plaintiff's argument, *Forman* stands for the opposite proposition. Applying that ruling to the facts of this case, defendants need not show that plaintiff's cell phone actually contains probative conversations between her and Roman. The mere fact that the video that has already been disclosed provides a predicate for the belief that defendants request is appropriately tailored and reasonably calculated to yield relevant information is sufficient.

Accordingly, it is hereby

ORDERED that defendants motion is GRANTED insofar as plaintiff is directed to provide responses to defendants outstanding discovery requests, including:

1.) defendants' demand for all cell phone data, texts, photos and videos in the possession of plaintiff; and

2.) defendants' demand for an authorization for plaintiff's cell phone records, and all of the information and documentation in plaintiff's possession regarding the district attorney's investigation into plaintiffs claims in this action; and

3.) defendants' request for an inspection of plaintiff's cell phone.

no later than May 11, 2018; and it is further

ORDERED that plaintiff's failure to comply with the above stated directives by said date may result in plaintiff's preclusion from presenting evidence as to those matters at the time of trial; and it is further

ORDERED that the parties are directed to appear for a compliance conference addressing additional outstanding discovery at Part 11 of the Bronx County Civil Courthouse located at 851 Grand Concourse on Wednesday May 16, 2018.

This constitutes the decision and order of the court.

Dated: April 6, 2018

George J. Silver

HON. GEORGE J. SILVER

1. Check one: ..... ☐ Case Disposed ■ Non-Final Disposition

2. Check as Appropriate: ..... Motion is: ■ Granted ☐ Denied ☐ Granted in Part