

**Pichardo v New York City Tr. Auth.**

2019 NY Slip Op 31186(U)

March 11, 2019

Supreme Court, Bronx County

Docket Number: 303212/2016


Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 3

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MODESTO PICHARDO,

Plaintiff, 

-against-

NEW YORK CITY TRANSIT AUTHORITY,  
MANHATTAN AND BRONX  
SURFACE TRANSIT OPERATING  
AUTHORITY, and TODD MOSS,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers  
were read on this Motion to Compel and for sanctions and Cross-  
Motion to Preclude

Papers Numbered

Notice of Motion, Affirmation in Support with Exhibits .....	1
Notice of Cross-motion, Affirmation in Support of Cross-motion and in Opposition to Motion with Exhibits .....	2
Reply Affirmation in Support of Motion and in Opposition to Cross-Motion .....	3
Reply Affirmation in Support of Cross-Motion .....	4

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

In this action, plaintiff seeks to recover for damages for personal injuries allegedly sustained on March 3, 2016 due to a motor vehicle accident in the Bronx. Plaintiff testified that the injuries resulting from the accident substantially impacted various aspects of his life, including his complete inability to ride a motorcycle since the date of the accident. Defendants contend that in the months following the accident, plaintiff uploaded various videos and photographs (“postings”) to the public portion of his Facebook account which appear to directly contradict his claims of injuries. Said postings include live-stream video clips of a motorcycle ride in which it appears that plaintiff is operating a motorcycle. On July 11, 2017, a preliminary conference order directed all parties to exchange opposing party “statements, and photographs.” On July 28, 2017 defense counsel conducted an online search which revealed plaintiff’s public Facebook account, including the

aforementioned postings. On November 9, 2017, plaintiff appeared for a deposition. During said deposition, defense counsel attempted to present the postings to plaintiff and question plaintiff regarding the same. Plaintiff's counsel objected to the line of questioning and advised plaintiff not to answer the same, on the basis that defendants had not exchanged the postings prior to the deposition. Plaintiff claims that defendants' failure to disclose was in violation of the preliminary conference order and in violation of CPLR §3101(i).

Defendants now move for an order compelling plaintiff to provide, "the private portions of his Facebook page" and compelling plaintiff to appear for a further deposition with regards to plaintiffs' "social media accounts." Defendants also seek an order sanctioning plaintiff for spoliation of evidence. Plaintiff cross-moves to preclude defendants from offering any videos from plaintiffs' Facebook account, on the basis that defendants failed to exchange the same prior to deposing plaintiff. The motion and cross-motion are resolved as follows.

Facebook accounts may be open to examination during litigation so long as the party seeking disclosure of the same makes a threshold showing that the examination of the Facebook account will result in the disclosure of relevant evidence bearing on the claims (*Flowers v. City of New York*, 151 A.D. 3d 590 [1<sup>st</sup> Dep't. 2017]). Private social media information can be discoverable to the extent it, "contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims" (*Patterson v. Turner Const. Co.*, 88 A.D.3d 617 [1<sup>st</sup> Dep't. 2017]). However, the First Department has recently held that the access to social media accounts must be appropriately limited in time, i.e., only to those items posted after the incident, and in subject matter, i.e. those items discussing or showing the party engaging in activities contradicting the party's claims" (*Vasquez-Santos v. Mathew*, 168 A.D. 3d 587 [1<sup>st</sup> Dep't., 2019]).

Here, plaintiff does not deny that the video submitted in support of defendants' motion, or the Facebook account referenced in the motion, belongs to him. Moreover, plaintiff does not contend that the information sought does not contradict his claims of loss. Instead, plaintiff opposes the motion solely on the basis that defendants failed to disclose the Facebook postings prior to plaintiff's deposition. Notwithstanding defendants' failure to disclose the postings (this issue is addressed hereinbelow) the Court finds that defendants have made a sufficient predicate showing to warrant the disclosure and examination of plaintiff's Facebook profile. Plaintiff fails to rebut said showing.

Defendants are also entitled to a further EBT of plaintiff to inquire as to the relevant Facebook postings.

Based on foregoing, plaintiff shall provide defendants with a properly executed consent and authorization, as may be required by the operators of Facebook, permitting defendants to gain access to plaintiff's Facebook private and public account, including any records previously deleted or archived by plaintiff or by Facebook operators. Said consent and authorization shall be limited to postings and records made or created after the date of the underlying motor vehicle accident (March 3, 2016). Moreover, said consent and authorization shall be limited to records created or posted by plaintiff relating to any operation of a motorcycle (as plaintiff testified he can no longer ride motorcycles). Additionally, plaintiff shall appear for a further deposition wherein defendants' questions shall be limited to the information retrieved as a result of the consent and authorization. Plaintiff shall provide said consent and authorization within 30 days of the entry date of this order. Once defendants receive the relevant records, the same shall be served upon plaintiff by defendants within 10 days of defendants' receipt of same. Along with the service of the records, defendants shall serve a notice of further deposition.

As for plaintiff's cross-motion, the Court notes that CPLR 3101(i) provides, in relevant part:

“In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use.”

§3101(a)(1) directs that: There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: a party...”

Plaintiff contends that defendants violated the above statute because they failed to disclose plaintiff's own Facebook postings. As a sanction, plaintiff seeks that defendants be precluded from offering the Facebook postings into evidence at trial. In doing so, plaintiff intrinsically urges this Court to apply this one discovery provision as both a sword and shield for plaintiff's own benefit. Indeed, one could read the §3101(i) as requiring plaintiff to provide his own Facebook postings that are contrary his claims because he is a “party” and the same could be deemed as material to the prosecution or defense of this action. However, in light of the specific case law concerning the

examination of social media accounts, the Court will not go so far as to provide dicta on an issue that is not squarely before it on this motion and cross-motion.

Additionally, the Court finds plaintiff's argument relating to defendants purported violation of the Preliminary Conference order to be lacking. Indeed, said order directed the parties to turn over any adverse statements. Plaintiff contends that the Facebook postings "may be considered" adverse statements. However, plaintiff offers no legal support for this contention. Further, any concern raised by plaintiff related to defendants' failure to disclose the Facebook postings prior to plaintiff's deposition is moot because plaintiff was not permitted to answer any questions in connection with the Facebook postings. Therefore, plaintiff's cross-motion to preclude is denied.

In addition, the portion of the defendants' motion seeking sanctions against plaintiff based upon an alleged spoliation of evidence, is denied, without prejudice to renew if defendants are so advised, after they receive the records responsive the consent and authorization as described hereinabove.

Defendants shall serve a copy of this order with notice of entry upon plaintiffs within 30 days of the entry date hereof.

This constitutes the decision and order of the Court.

Dated: 3/11/9  
Bronx, New York

  
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HON. MITCHELL J. DANZIGER, J.S.C.