Marshall v Salahuddeen
2019 NY Slip Op 32687(U)
September 10, 2019
Supreme Court, New York County
Docket Number: 160234/2017
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 22**

Justice

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DWAYNE MARSHALL,	**INDEX NO.**	160234/2017
Plaintiff,	**MOTION DATE**	05/29/2019
- v -	**MOTION SEQ. NO.**	002
SAADIA SALAHUDDEEN, MALIK SALAHUDDEEN, JOHN JANE DOE		
Defendant.		

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is ordered that defendants' motion for discovery is granted for the reasons set forth below.

Here, defendants seek to compel plaintiff to provide the contents of plaintiff's social media accounts which depict physical activity, the approximate dates of production of the music videos he has been involved with, and an affidavit from plaintiff identifying the approximate dates of filing/production of any music video filmed after the subject accident. In opposition, plaintiff proffers an attorney's affirmation arguing that the defendants' demands were responded to with objections.

In support of the motion, defendants cite to the Court of Appeals case *Forman v Henkin*, 30 NY3d 656 (2018). The Court of Appeals in *Forman* explicitly specified a two-prong test for "courts addressing disputes over the scope of a social media discovery". *Id.* at 665. The Court of Appeals held that:

> courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether

> relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific 'privacy' or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials."

Id. Furthermore, the Court of Appeals found that "[a] party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary' " *Id.* at 661.

Here, defendants have met their initial burden. A review of plaintiff's deposition testimony reveals that plaintiff testified that he could no longer engage in physical activities such as pull-ups and pushups, and further testified that he had a facebook account that was deactivated prior to the accident. However, defendant Malik Salahuddeen testified that he followed plaintiff on Instagram and saw a post in which plaintiff was doing pull-ups. Thus, defendants have met the threshold requirement of establishing that their request was reasonably calculated to yield relevant information. Defendants limited the requested discovery to eliminate material that would be irrelevant to the instant action, and are seeking only the social media information which depicts plaintiff engaging in physical activity. Furthermore, defendants' request regarding the publicly available music videos, in which plaintiff is involved, is narrowly tailored to elicit information relevant to defendant's defense in this action. Defendants have established that in the publicly available music videos plaintiff can be seen performing physical acts which contradict his testimony of physical limitation.

In opposition, plaintiff argues that his Instagram account is primarily used for business and that there was no good faith basis for seeking social media information in this action. As for the music videos, plaintiff argues that such music videos are available online through YouTube and are not password protected such that plaintiff need not produce such videos. Plaintiff further

argues that, as the videos are publicly available, an affidavit from plaintiff seeking his business connections are not necessary. Plaintiff argues that he is not claiming lost wages and there is no evidence that the videos are income producing for plaintiff. According to plaintiff, the information sought regarding the music videos is proprietary business information and is not reasonably calculated to lead to discoverable information.

The Court of Appeals in *Forman* explicitly held that "[t]he right to disclosure, although broad, is not unlimited." *Id.* at 661. The *Forman* Court "rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable…[, and went on to state that d]irecting disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation – such an order would be likely to yield far more nonrelevant than relevant information.". *Forman v Henkin* 30 NY3d at 664-665. Here, defendants are not requesting plaintiff's entire social media account, and have not made a blanket request for all of plaintiff's social media information. Rather, defendants' demands are tailored to limit the request to only the information relevant to this action which include plaintiff's alleged physical limitations and physical activities. As for defendants' request for an affidavit from plaintiff identifying the approximate dates of filming and production of the music videos, such request is tailored to obtain information relevant to defendants' defense in that the music videos, if made following the accident, could contradict plaintiff's testimony regarding physical limitations. Plaintiff's argument that the music video information is sought as a pretext to intimidate plaintiff and his business contacts is a bald allegation unsubstantiated by any evidence. In fact, defendant's demand does not seek plaintiff's business contacts at all. Defendants' request merely demands the dates of production of the

music videos following the date of the subject accident.

As defendants have met their initial threshold burden of demonstrating that the discovery demanded was reasonably calculated to yield material and necessary information, and have further satisfied the two-prong test in *Forman* stated above, defendants' motion is granted in its entirety, and plaintiff is ordered to produce the discovery requested in defendants' discovery request dated January 11, 2019.

Accordingly, it is

ORDERED that defendants' motion to compel is granted; and it is further

ORDERED that plaintiff shall produce the discovery requested in defendants' discovery request, dated January 11, 2019, within 45 days; and it is further

ORDERED that the parties shall appear on October 21, 2019 at 9:30am, in room 106 of 80 Centre Street, New York, NY, for a previously scheduled compliance conference; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

9/10/2019		ADAM SILVERA, J.S.C.
DATE		

CHECK ONE:	☐	CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE