Chai v Barile
2019 NY Slip Op 34428(U)
July 25, 2019
Supreme Court, Westchester County
Docket Number: Index No. 63752/2017
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

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ISRAEL CHAI,

Plaintiff,

-against-

GEORGE BARILE and JAMES ANTONIOU NICHOLAS,

Defendants.

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DECISION and ORDER

Index No. 63752/2017
Motion Date: July 8, 2019

Motion Seq. No. 2

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order to compel disclosure, and for such other and further relief as to this court may deem just and proper.

Order to Show Cause - Attorney Affirmation in Support - Exhibits A-D
Affirmation in Opposition - Exhibit A

Upon the foregoing papers and the proceedings on July 8, 2019, this motion is determined as follows:

Plaintiff commenced the present action to recover damages for personal injuries arising from an automobile accident which occurred on May 13, 2016. According to the verified complaint, the accident occurred at the intersection of Coney Island Avenue and Park Circle, a public "traffic circle" located in Kings County, New York.

Plaintiff commenced this action by filing a summons and verified complaint on September 8, 2017. Defendants, represented by counsel, interposed an answer on October 6, 2017. A preliminary conference was held on or about June 19, 2018. This matter has been the subject of eight compliance conferences before the assigned Court Attorney-Referee from October 3, 2018 through April 29, 2019.

As pertinent to the instant application, Nicholas testified that he was the defendant driver at the time of the accident; he was unfamiliar with the area in which the accident occurred; he could not recall the route or street names of the route upon which he was traveling leading up to the accident; and he was using a satellite-based global positioning system ("GPS") software application on his cellular phone commonly known as WAZE to assist in his travels. Nicholas further testified

that on the date of the accident, he posted photographs of his various destination stops to his Facebook social media.[1]

Plaintiff served a post-deposition demand dated April 15, 2019 upon defense counsel requesting the following disclosures:

> "(1) Any photograph of any involved vehicle taken after the accident.
> (2) All bills, costs, invoices, receipt, payment, estimates file for any vehicle involved in the accident.
> (3) Complete and unredacted property damage file for any vehicle involved in the accident.
> (4) Defendant could not recall his route on the date of the accident. Defendant testified that a record of his route is contained [in] his WAZE navigation account. Provide username and password for said account and an authorization to obtain data from said provider.
> (5) Defendant could not recall neither the starting point nor the destination of any of the various places visited on the date of the accident. Defendant testified that a record of locations visited is contained [on] his social media accounts. Provide username and password for facebook, Instagram, Snapchat of the account and an authorization to obtain date from said provider(s)."

Of note, it is undisputed that defense counsel responded to all of the plaintiff's disclosure demands, with the exception of Nicholas's social media account and WAZE GPS account.[2]

Plaintiff filed the instant application, pursuant to the briefing schedule, to compel responses to his post-deposition demands or, in the alternative, to preclude the defendant from introducing any evidence at trial. In that regard, plaintiff's counsel argues that Nicholas's social media account and WAZE GPS account contain a record of each location that Nicholas visited en route to the accident site. Counsel contends that Nicholas's social media account and WAZE GPS account information related to "where the defendant was going to, from, or the route utilized" is both "material and necessary to the prosecution of this case."[3]

Defense counsel opposed the plaintiff's motion. Counsel contends that the defendant has disclosed all information requested, with the exception of Nicholas's username and password as well as authorizations to obtain data from his social media and WAZE GPS accounts. In that regard, defense counsel contends that counsel properly objected to such demands as "irrelevant" and "intrusive".

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[1] NYSCEF Doc. 33, *citing* the defendant driver's deposition transcript filed as NYSCEF Doc. 36.

[2] At the oral argument for the instant motion held on July 8, 2019, plaintiff's counsel confirmed that the remaining discovery issues were limited to Nicholas's Facebook social media account and WAZE GPS account. Defense counsel also submitted evidence of responses to the remainder of plaintiff's post-deposition discovery demands dated April 15, 2019 (*see* NYSCEF Doc. 40).

[3] NYSCEF Doc. 33 ¶10.

Analysis:

CPLR 3101(a) requires "full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof." 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, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The 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 (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

As a general proposition, information contained on social networking sites may be discoverable where it is reasonably likely that the sites contain evidence which is material and relevant to the action (*Romano v Steelcase Inc.*, 907 NYS2d 650 [Sup Ct, Suffolk County 2010]). The movant has the burden of demonstrating "the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on her claim" (*Richards v Hertz Corp.*, 100 AD3d 728, 730 [2d Dept 2012]). However, it is incumbent upon the party seeking disclosure to demonstrate a factual predicate with respect to the relevancy of the evidence (*McCann v. Harleysville Ins. Company of New York*, 2010 NY Slip Op 8181 [4th Dept 2010]).

Here, the plaintiff failed to make the requisite showing that the requested disclosure will result in disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on his claims. Plaintiff's counsel merely avers, in a conclusory fashion, that "where the defendant was going to, from, or the route utilized" is both material and relevant to this action. However, the fact that Nicholas made various stops prior to approaching the accident site, which according to Nicholas's testimony included stops to his grandparents' grave sites on Long Island and a Nathan's hot dog restaurant in Coney Island, are neither material nor relevant to the issues of liability and damages caused by the accident. The exact site of the accident is not in dispute - the collision occurred at the intersection of Coney Island Avenue and Park Circle, a public roundabout thoroughfare located in Kings County, New York. According to Nicholas's deposition testimony, plaintiff's vehicle was exiting the traffic circle and entering into Nicholas's general direction of traffic when the plaintiff struck Nicholas's vehicle in the driver's side front fender region. It is evident that Nicholas's social media posts and/or WAZE GPS tracking information are neither material nor necessary to identify the accident site or the happening of the accident. Furthermore, Nicholas admits that he is an out-of-state resident who is unfamiliar with the street names and overall vicinity of the accident site. Accordingly, it cannot be said that the disclosure of Nicholas's social media and/or WAZE account information will adduce information that is material to happening of the accident or that may be used to impeach Nicholas's credibility at trial.

In so holding, this court notes that the plaintiff's disclosure request in this case is distinguishable from requests for Facebook access that many courts have previously addressed. In

many of those cases, it is defendants who sought access to the Facebook account after demonstrating that plaintiff's Facebook profile contained a photograph that was probative of the issue of the extent of plaintiff's injuries and thus, under those circumstances, it is reasonable to believe that the Facebook profile may contain additional photographs or further evidence relevant to the issue of plaintiff's injuries (*see generally Forman v Henkin*, 30 NY3d 656, 70 NYS3d 157, 93 NE3d 882 [2018]; *Romano v Steelcase, Inc.*, 30 Misc.3d 426 [Sup. Ct., Suffolk County, 2010]; *Richards v Hertz Corp.*, 100 AD3d 728 [2d Dept 2012]; *Pereira v City of New York*, 40 Misc.3d 1210 (A) [Sup. Ct., Queens County 2013]; *Nieves v 30 Ellwood Realty, LLC*, 39 Misc.3d 63 [App. Term, 1st Dept. 2013]; *Reid v Soults*, 138 AD3d 1091 [2d Dept 2016]). To the contrary, there are no such allegations or evidence in the instant case to warrant disclosure of the defendant's social media or WAZE GPS navigation information under the circumstances presented in this matter.

Accordingly, it is hereby

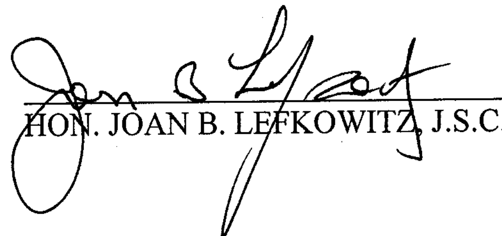
ORDERED that plaintiff's motion is denied in its entirety; and it is further,

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendants within ten (10) days of entry of this order; and it is further,

ORDERED that the parties are directed to appear in the Compliance Conference Part, Courtroom 800, on August 7, 2019, at 9:30 A.M. for further proceedings.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
July 25, 2019



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

To:

Service upon all counsel via NYSCEF

cc: Compliance Part Clerk