

**Whalen v Sammi**

2019 NY Slip Op 34648(U)

July 25, 2019

Supreme Court, Westchester County

Docket Number: Index No. 58852/2018

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

-----X  
LINDSEY WHALEN,

Plaintiff,

-against-

**DECISION and ORDER**  
**Index No. 58852/2018**  
**Motion Date: July 1, 2019**  
**Seq. Nos. 4, 5**

PARAMJEET SAMMI and ROSENA SAMMI,

Defendants.  
-----X

LEFKOWITZ, J.

The following papers were read on this motion (sequence number 4) by defendants seeking an order (1) compelling plaintiff to produce social media photographs and videos showing plaintiff engaging in physical activity; (2) producing medical records and notes from Dr. Belkin (“Belkin”); (3) and for such other and further relief as the Court deems proper:

Order to Show Cause; Affirmation in Support; Exhibits A-G; Supplemental Affirmation in Support; Exhibit A; Memorandum of Law In Support  
Affirmation in Opposition; Exhibits A-I  
NYSCEF File

The following papers were read on this motion (sequence number 5) by plaintiff seeking an order holding non-party J. Bruce McGuirk, Esq. (“McGuirk”) in contempt of this Court’s Decision and Order dated February 26, 2019 (the “February 26, 2019 Decision and Order”); compelling compliance with and production of documents as set forth in the February 26, 2019 Decision and Order within five days from the date of the decision and order on this motion, or else be fined or imprisoned, or both; directing that the Pirrotti & Glatt Law Firm PLLC be reimbursed for five hours at \$575.00 per hour plus \$45.00 motion fee (total of \$2,920.00); and for such other and further relief as this Court deems just and proper:

Order to Show Cause; Affirmation in Support; Exhibits A-N  
Affirmation in Opposition by McGuirk; Exhibits A-J; Memorandum  
Of Law in Opposition  
Affidavit of Service  
NYSCEF File

Upon the foregoing papers and the proceedings held on July 1, 2019, these motions are determined as follows:

This case involves a trip and fall while plaintiff was babysitting at defendants' home. The underlying facts and procedural history of this case were previously set forth in the February 26, 2019 Decision and Order.

*Motion Sequence Number 4*

On or about June 25, 2018 defendants served discovery demands, including inter alia, a notice to produce an authorization for the complete records of all of plaintiff's social media accounts for the period of one year prior to the date of the incident, as well as to preserve plaintiff's social media information. On November 19, 2018 plaintiff appeared for her deposition.

Defendants state that plaintiff's social media accounts reveal that she is a "lifestyle blogger" who engages in a number of activities including but not limited to photo shoots, traveling, running, walking, and participating in workout classes such as SoulCycle. Defendants state that plaintiff also appears to host a podcast which references plaintiff's physical activities.

On or about April 8, 2019, defendants served a supplemental demand requesting, inter alia, discovery pertaining to plaintiff's social media accounts (the "supplemental demands").<sup>1</sup> Defendants contend that prior to plaintiff's deposition they were able to access her social media accounts. Defendants state that after her deposition plaintiff made her social media accounts private. Defendants contend that plaintiff's podcasts reference plaintiff engaging in a variety of physical activities, including participating in SoulCycle exercise classes and carrying another adult "piggyback" style. Defendants further contend that plaintiff's podcasts reveal that there may be photographs and/or videos of her running races, jumping on trampolines, and standing all day while attending parties.

On or about May 7, 2019 defendants served additional supplemental discovery demands (the "second supplemental demands"), which seek, inter alia, photos or videos of plaintiff performing any of the following activities: exercising; anything at SoulCycle; wearing high heels; running; taking walks; walking/standing barefoot; holding anyone on her back; and photos of plaintiff while on vacation, at a parade/ festival/cocktail party/gala or other similar event where she would/may stand for a long period of time; participating in any sporting event, including cycling, yoga, volleyball, soccer, kickboxing, etc. and standing with all weight bearing just on her injured leg/ankle.

Defendants argue that plaintiff has claimed significant life-changing injuries specifically

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<sup>1</sup> Plaintiff's supplemental and second supplemental demands dated May 7, 2019 also sought authorizations for Dr. Belkin. However, these demands were withdrawn at oral argument upon plaintiff's representations that she is not seeking damages for mental anguish.

to her right ankle and foot and that any photographs or videos of her engaging in physical activities are relevant to the extent of her claimed injuries. At oral argument defendants stated that they are only seeking photographs depicting plaintiff engaging in activities which she claims she is limited in pursuing as a result of her injuries. Defendants state that they are not seeking access to plaintiff's social media accounts and that they are only seeking photographs from November 19, 2018 to present since prior to November 19, 2018 defendants were able to access plaintiff's photographs posted to her social media accounts themselves. Defendants state that it was not until after plaintiff's deposition that they became aware of plaintiff's podcasts which referenced the extent of her physical activity.

In opposition plaintiff first argues that defendants' demands for all pictures of her on social media engaging in any activity is vague and overbroad and that plaintiff objected to that demand when it was made in 2018. Plaintiff also argues that pictures of her engaging in the activities set forth in the second supplemental demand do not contradict her testimony that although she is still able to engage in the same activities as she could prior to her accident, it is more difficult for her to engage in those activities. Plaintiff further states defendants served their initial discovery demands seeking plaintiff's social media information in May 2018 and plaintiff responded and/or objected to those demands. Plaintiff contends that defendants' failure to raise the issue of plaintiff's social media information since then constitutes waiver of such disclosure.

#### *Motion Sequence Number 5*

By this motion, plaintiff seeks to hold McGuirk, an attorney with the firm of Skadden, Arps, Slate, Meagher & Flom, LLP ("Skadden") which represented defendants in the purchase of their residence in 2010 in contempt for failure to comply with this court's February 2, 2019 Decision and Order. Plaintiff alleges inter alia that McGuirk has failed to provide the closing file and has not complied with the directives of that Decision and Order with respect to the furnishing of an affidavit. In opposition, McGuirk provides a copy of the closing binder which he argues is the closing file and has also provided to plaintiff, affidavits of McGuirk and Catherine Cosgrove ("Cosgrove") another Skadden attorney who was involved in defendants' purchase of their residence. Both of these affidavits state, inter alia, that they have diligently searched their correspondence, including their emails, and do not have anything therein concerning the home inspection report. Additionally McGuirk avers that he has asked Skadden to check its central files and those files do not contain the home inspection report. McGuirk asks for sanctions on the grounds that in light of his compliance with the court's order plaintiff's motion is frivolous.

#### *Analysis*

CPLR 3101(a) requires "full disclosure of all matter 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 party seeking disclosure has the burden to demonstrate that the method of discovery sought

will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). 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]).

With respect to defendants' motion photographs of plaintiff engaging in physical activities which she alleges have been limited by the injuries alleged in this action are clearly relevant. During her deposition plaintiff testified that it was more difficult for her to run, workout, wear heels and stand or walk for a long period of time. Plaintiff objected to defendants' first request for her social media information, which was arguably much broader than the present request. Prior to plaintiff's deposition her social media accounts were public and defendants were able to access information posted to those accounts. Once plaintiff made those accounts private defendants no longer had access to that information. Defendants state that it was not until after plaintiff's social media accounts became private that they discovered her podcasts which referenced certain physical activity. Photographs depicting plaintiff engaging in physical activities which involve her right ankle and foot are relevant to plaintiff's claimed injuries and defendants are entitled to this discovery as limited below (*see Forman v Henkin*, 30 NY3d 882 [2018]).

With respect to the motion for contempt, this court finds no basis for finding McGuirk in contempt. It appears that he has fully complied with the directives of this Court. The distinction between the closing file and the closing binder, insofar as it relates to this case is inconsequential. Accordingly, the motion is denied. To the extent that McGuirk has requested costs and sanctions, in the absence of a pre-motion conference and the issuance of an order to show cause to obtain that relief, the Court is unable to make such an award.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

ORDERED that defendants' motion sequence number 4 is granted to the extent that plaintiff shall provide to defendants on or before August 12, 2019, digital copies of photographs limited in time from November 19, 2018 to the date of this Decision and Order which she has posted to social media, of plaintiff engaging in physical activity involving the use of her right foot and/or right ankle, including: exercising, including participating in SoulCycle; wearing high heels; running; taking walks; walking/standing barefoot; holding or carrying another person on her back; and including photographs of plaintiff while on vacation, at parades/ festivals/social events involving standing for a long period of time; participating in any sporting event, include cycling, yoga, volleyball, soccer, kickboxing, and any activity during which she is standing with all of her weight bearing solely on her right foot/ankle; and it is further

ORDERED that motion sequence number 5 is denied; and it is further

ORDERED that any applications not decided are herewith denied; and it is further

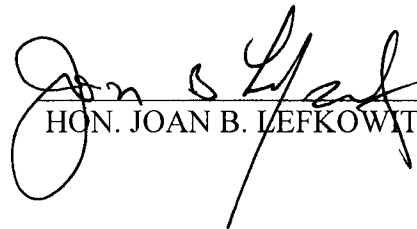
ORDERED that counsel shall appear for a conference in the Compliance Part, Courtroom 800, on August 13, 2019 at 9:30 A.M.; and it is further

ORDERED that within three (3) days of entry, defendants shall serve a copy of this order with notice of entry upon plaintiff.

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.

Service upon all counsel via NYSCEF  
cc: Compliance Part Clerk