

**Russo v Old Westbury Hebrew Congregation**

2019 NY Slip Op 34794(U)

January 10, 2019

Supreme Court, Nassau County

Docket Number: Index No. 602682/17

Judge: Sharon M.J. Gianelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU – IAS/TRIAL PART 20  
Present: HON. SHARON M.J. GIANELLI, J.S.C.

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JOHN RUSSO,

*Plaintiff,*

Index No. 602682/17

*-against-*

Decision and Order

OLD WESTBURY HEBREW CONGREGATION,

Motion Seq. 002

*Defendant.*

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Papers Submitted:

Defendant’s Notice of Motion and Affirmation \_\_\_\_\_X

Plaintiff’s Affirmation in Opposition \_\_\_\_\_X

Defendant’s Reply Affirmation \_\_\_\_\_X

Defendant OLD WESTBURY HEBREW CONGREGATION moves the Court for an Order striking Plaintiff’s complaint and dismissing his cause of action, or precluding Plaintiff from offering evidence at trial for failure to provide vital discovery, pursuant to CPLR §§ 3126 and 3042, respectively; or directing Plaintiff to provide authorizations by a date certain permitting Defendant to access and copy Plaintiff’s cell phone records, including provider information, cell phone number, records of incoming and outgoing calls and text messages on date of alleged incident, pursuant to CPLR § 3124; and scheduling a discovery conference.

Defendant opposes on the basis of relevancy.

*Background*

Plaintiff commenced this action by the filing of a Summons and Complaint on or about April 8, 2011. Defendants (Old Westbury Hebrew Congregation, CBS Corporation and CBS Broadcasting, Inc.) responded by Verified Answer on or

about May 4, 2011, and also made various discovery demands. Plaintiff's claims against the CBS defendants were dismissed pursuant to a summary judgment motion, and a venue change to Nassau County was granted by Order dated January 11, 2017 (Edmead, J). A preliminary conference was held on May 17, 2017. On May 18, 2018, Defendant served on Plaintiff a Demand for cell phone information. Plaintiff objected to the demand as improper. On June 7, 2018, Plaintiff appeared for an Examination Before Trial (EBT). On August 1, 2018, a compliance conference was held wherein Plaintiff again objected to the release of the cell phone records. The motion herein followed.

### *Arguments*

Defendant argues that CPLR discovery rules require disclosure of all matter material and necessary in the prosecution or defense of an action. Defendant further argues that caselaw supports his position that cell phone records are discoverable under certain circumstances. Plaintiff maintains that the fact that this incident does not arise from a motor vehicle accident is irrelevant as this matter is a negligence action involving an alleged slip and fall where the Plaintiff may have been contributorily negligent.

Plaintiff argues in opposition on the premise that cellphone records disclosure is not relevant herein as the alleged incident does not emanate from a motor vehicle accident. He further argues that Plaintiff's cellphone use, if at all, would have been legal, reasonable and non-negligent. Consequently, he asserts that the cellphone records are irrelevant to this litigation.

*Law*

CPLR § 3101(a) states: “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: (1) a party....”

*Analysis/Ruling*

The question of what is “material and necessary” runs the gamut. Plaintiff cites caselaw that supports the disclosure of cellphone records and asserts that same cases are distinguished from the case herein because in each instance the genesis of the action was a motor vehicle accident, as was the case in *D’Allesandro v. Nassau County Medical Center*, 137 A.D.3d 1195 (2<sup>nd</sup> Dept. 2016).

Defendant conversely argues that the fact that this action does not arise out of a motor vehicle accident is not dispositive as to the issue of the discoverability of the cellphone records. The Defendant points to the fact that this is a “slip and fall” negligence action, which by its very nature renders Plaintiff’s comparative negligence, if any, relevant. Further, Plaintiff testified at his EBT that he might have been on his cell phone at or near the time of the alleged incident. Defendant cites the case of *Miller ex rel. Miller v. Lewis*, 40 Misc.3d 490 [Sup. Ct. 2013], where the court found to be discoverable the cellphone records of a pedestrian who had been struck by a vehicle, in support of his position.

Though *Miller (id.)* involved a motor vehicle accident, it is distinguishable in that the Plaintiff therein was a pedestrian and not the occupant of a motor vehicle. More significantly, the issue of the Plaintiff’s potential partial negligence was found to be “relevant and material”, therefore, leading to a ruling that the cellphone records were discoverable.

Upon review of the papers, and reviewing the totality of the facts and circumstances herein, the Court finds that the Plaintiff's cellphone records are relevant and material, and it is

**ORDERED**, that Defendant's motion for an Order striking Plaintiff's complaint and dismissing his cause of action for failure to provide vital and necessary discovery is DENIED; and it is further

**ORDERED**, that Defendant's motion for an Order precluding Plaintiff from offering evidence upon the trial of this action for failure to provide vital and necessary discovery is DENIED; and it is further


**ORDERED**, that Defendant's motion for an Order directing Plaintiff to provide authorizations allowing Defendant access to and copies of Plaintiff's cell phone records, including provider information, cell phone number, as well as cell phone records inclusive of incoming and outgoing calls and text messages concerning the date of the alleged incident herein is GRANTED; and Plaintiff shall provide same authorizations to Defendant on or before January 24, 2018; and it is further

**ORDERED**, that a further compliance conference shall be held in Part 20, Nassau County Supreme Court located at 100 Supreme Court Drive, Part 22 Mineola, New York 11501, where all counsel with knowledge shall appear, on March 5, 2019 at 9:30 a.m.

Any item not specifically ruled upon has been considered and denied

This constitutes the Decision and Order of the Court.

ENTER: January 10, 2019  
Mineola, New York

  
HON. SHARON M.J. GIANELLI, JSC

**ENTERED**

JAN 14 2019

NASSAU COUNTY  
COUNTY CLERK'S OFFICE