

**Morris v Tully Constr. Co., Inc.**

2019 NY Slip Op 35103(U)

April 22, 2019

Supreme Court, Bronx County

Docket Number: Index No. 30329/2017

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

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CHRISTOPHER MORRIS and JEANNEMARIE MORRIS,

Index No.: 30329/2017

Plaintiffs,

- against -

TULLY CONSTRUCTION CO., INC., and CITY OF NEW YORK,

Defendants.

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**DECISION and ORDER**

TULLY CONSTRUCTION, CO., INC., and CITY OF NEW YORK,

Third-Party Plaintiffs,

- against -

LAYOUT, INC.,

Third-Party Defendants.

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PRESENT: Hon. Lucindo Suarez

The issues in Plaintiffs’ motion for a protective order is whether Defendants are entitled to receive medical records regarding injured Plaintiff’s treatment for opioid addiction and whether they are entitled to gain access to the non-injured Plaintiff’s social media accounts. This court finds Defendants are entitled to receive the medical records and to gain limited disclosure of the social media accounts.

Plaintiff Christopher Morris (“CM”), sustained multiple injuries when he fell off a beam at a construction site on July 13, 2017. Defendants seek disclosure of CM’s medical chart from Lance Austein, M.D., whom treated CM since 2009 for opioid addiction. Plaintiffs argue that CM has not placed into issue an aggravation of a pre-existing addiction condition due to post accident ingestion of narcotics. However, after discovery demands were served and Defendants followed up with good

faith letters, Plaintiffs participated in a preliminary conference wherein they stipulated to the production of the authorizations for CM's opioid treatment records. Subsequently, an Order to that effect was issued by the Hon. Laura Douglass. As such, this court will not disturb Justice Douglass' ruling.

Plaintiffs also seek a protective order for the production of their social media accounts which, as requested by Defendants would include, "duly executed and acknowledged written authorization, including passwords, permitting access to all Plaintiff's Facebook and or other social media accounts." Plaintiffs argue that allowing access as requested amounts to an impermissible "fishing expedition."

Disclosure in civil actions is generally governed by CPLR 3101(a), which directs, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words, 'material and necessary', are . . . 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 Publ. Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

Plaintiff Jeanne Marie Morris ("JM"), publicly posted comments about CM's incident and posted photos of CM engaged in certain activities on her social media. She further testified about the postings at her 50-H hearing. CM testified he does not have any social media accounts. Defendants argue Plaintiffs have not put forth any evidence that any portions of JM's social media account would be sensitive or embarrassing materials, therefore, they should be entitled to the portions of JM's social media accounts that are private postings.

The purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. However, directing 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. Therefore, for purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information. *Forman v. Henkin*, 30 N.Y.3d 656, 93 N.E.3d 882, 70 N.Y.S.3d 157(2018).

Photographs, videos and status updates JM posted of CM after the accident might be reflective of post-accident activities and/or limitations. Photographs, videos and status updates of CM's capabilities prior to the accident may also be relevant to show certain activities he can no longer engage in or enjoy post-accident. As such, this court finds that JM's social media photographs, videos and status updates of CM engaging in activities post-accident and those posted pre-accident relevant to activities he can no longer enjoy are to be produced from every identified social media account JM has acknowledged owning.

#### Defendants' Cross-Motion

Defendants cross move to dismiss Plaintiffs' summons and complaint for failure to provide discovery. CPLR §3126, provides, if any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just." *Watson v. City of New York*, 157 A.D.3d 510, 69 N.Y.S.3d 294 (1st Dep't 2018). However, the court will not impose a sanction under CPLR §3126 unless the party's omission to disclose was willful. *Rodriguez v. Sklar*, 56 A.D.2d 537, 391 N.Y.S.2d 423 (1st Dep't 1977). "The drastic sanction of striking pleadings is only justified when the moving party shows conclusively that the failure to disclose was willful, contumacious or in bad faith, a burden borne by the movant. Generally, the sanction imposed should be commensurate with and proportionate to the nature and extent of the disobedience." *Christian v. City of New York*, 269 A.D.2d 135, 137, 703 N.Y.S.2d 5, 7 (1st Dep't 2000). To avoid

the imposition of a sanction, the non-disclosing party must set forth a reasonable excuse for the failure to disclose. *See Sage Realty Corp. v. Proskauer Rose LLP*, 275 A.D.2d 11, 713 N.Y.S.2d 155 (1st Dep't 2000).

In Plaintiffs' reply to the cross-motion they included an extensive list of discovery, which has already been provided to Defendants. As for the discoverable materials they have not produced, Plaintiffs have taken affirmative steps by seeking court intervention for a protective order. As such, this court finds that Plaintiffs' actions are not willful, and this court denies Defendants' cross-motion dismissing the summons and compliant.

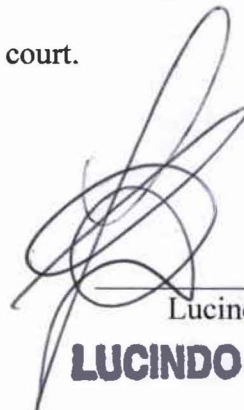
Accordingly, it is

ORDERED, Plaintiffs sign authorizations for the production of treatment records from Dr. Lance Austein; and it is further

ORDERED, that Plaintiffs shall produce the social media materials indicated in this decision and order to the court within 45 days upon receipt of this order, for *in camera* inspection, so that it can be determined if the usefulness of such information is outweighed by any privacy concerns.

This constitutes the decision and order of the court.

Dated: April 22, 2019



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Lucindo Suarez, J.S.C.  
**LUCINDO SUAREZ, J.S.C.**