

**Quito v Zappone**

2020 NY Slip Op 34753(U)

October 13, 2020

Supreme Court, Queens County

Docket Number: Index No. 701591/2019

Judge: Chereé A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

**FILED**

NEW YORK SUPREME COURT-QUEENS COUNTY

**10/14/2020  
10:52 AM**

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

**COUNTY CLERK  
QUEENS COUNTY**

-----X  
MIGUEL QUITO,

Index No.:701591/2019

Plaintiff,

Motion

Date: September 30, 2020

-against-

Motion Cal. No.: 51, 52 and 53

VALERIA ZAPPONE, WENYU ZHAO, HERTZ  
VEHICLES, LLC., ISMAEL MANZANO,  
JAQUELINE GRAZIANO, BARRY  
GRAZIANO V. ANIL MHARTE, JYOTSNA ANIL  
MHARTE, and JOHN TRUAX,  
Defendants.

Motion Sequence No.: **2, 3 and 4**

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The following e-filed papers numbered 60-66, 75- 79 and 87 submitted and considered on this **motion sequence number 2** by defendants JAQUELINE GRAZIANO and BARRY GRAZIANO (collectively referred to as “Graziano”) seeking an Order vacating the Note of Issue and Certificate of Readiness for Trial filed by plaintiff MIGUEL QUITO (hereinafter referred to as “Plaintiff”) and striking this action from the trial calendar, pursuant to New York City Rules and Regulations (hereinafter referred to as “NYCRR”) § 202.21(e) upon the grounds that discovery is not complete; the e-filed papers numbered 68-70, 81- 86 and 88 submitted and considered on this **motion sequence number 3** by defendants V. ANIL MHARTE and JYOTSNA ANIL MHARTE (collectively referred to as “Mharte”) pursuant to 22 NYCRR 202.17 and 202.21 striking this action from the trial calendar and vacating Plaintiff’s Note of Issue and Certificate of Readiness on the grounds that the action is not ready for trial and extending the time to move for summary judgment; the e-filed papers numbered 71-74 and 89 submitted and considered on this **motion sequence number 4** by defendant ISMAEL MANZANO (hereinafter referred to as “Manzano”) pursuant to 22 NYCRR 202.21(e) striking this action from the trial calendar and vacating Plaintiff’s Note of Issue and Certificate of Readiness on the grounds that discovery is incomplete all three seeking such other and further relief as this Court deems just and proper.

	Papers <u>Numbered</u>
<b>Motion Sequence #2</b>	
Notice of Motion -Aff.-Exhibits.....	EF 60-66
Notice of Cross-Motion- Exhibits.....	EF 75-79
Stipulation.....	EF 87
<b>Motion Sequence #3</b>	
Notice of Motion- Aff.- Exhibits.....	EF 68-70
Aff. in Opp.- Exhibits.....	EF 81-83
Reply- Exhibits.....	EF 84-86
Stipulation.....	EF 88
<b>Motion Sequence #4</b>	
Notice of Motion- Aff.- Exhibits.....	EF 71-74
Stipulation.....	EF 89

During the Microsoft Teams Conference held on September 30, 2020 between Chambers and the parties, the parties disputed discovery surrounding Plaintiff’s Facebook records. Plaintiff has provided counsel with his Facebook name. This Court will now address Mharte’s demand for an authorization.

In *Jane Doe etc., et al. v The Bronx Preparatory Charter Sch.*, 160 AD3d 591 (1<sup>st</sup> Dept 2018) plaintiffs sought recovery due to personal injuries sustained. Defendant sought an order precluding plaintiffs from submitting evidence and testimony. Additionally, Defendant sought an order compelling plaintiffs to provide an authorization for the infant plaintiff’s social media records five years prior to the incident and an authorization for the infant plaintiff’s cell phone records for two years prior to the incident (*id*). The court held that the defendant failed to submit the necessary proof to establish that plaintiffs failed to comply willfully or otherwise. Furthermore, the court held plaintiffs provided access to the aforementioned records for a period of two months before the date of the incident to the present “which was a reasonable time period” (*id*). The court found that defendant’s demands were “overboard and not reasonably tailored to obtain discovery relevant to the issues of the case (*id*).

In *Kelly Forman v Marl Henkin*, 30 NY3d 656 (2018) plaintiff sought to recover for personal injuries sustained while horseback riding. The defendant sought an unlimited authorization to obtain plaintiffs entire Facebook account, claiming the posts were material and necessary to his defense. The court rejected the notion that the party seeking discovery of private social media posts needs to satisfy a higher threshold than one seeking access to the public portions (*id* at 663). The court acknowledged that granting disclosure of a party’s entire Facebook account would yield more non-relevant than relevant information and amount to an “unnecessarily onerous application of the discovery statutes” (*id* at 665 citing *Kavanagh et al. v Odgen Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]). As such, the court set forth certain factors to consider to avoid a “fishing

expedition” (*Auerbach v. Bennet* 47 N.Y.2d 619,636 [1979]). First, courts should consider the nature of the event giving rise to the litigation, the injuries claimed and any information specific to the case to assess whether relevant material “is likely to be found on the Facebook account” (*Forman* at 665) Second, the court must balance the potential utility of the information sought against any specific concerns raised. Ultimately, “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 held temporal limitation may be appropriate because photos and messages posted years before, may not be germane to the litigation (*id*).

Here, Mharte seeks a duly executed HIPAA to obtain Plaintiff’s Facebook records. Specifically, Mharte seeks, photos and posts for at least one year prior to the accident up to the present. Mharte claims it is entitled to the authorization because Plaintiff has put his physical condition and his alleged incapacity at issue. Mharte argues one year prior to the accident is relevant since Plaintiff claims he missed one year of work as a result of the accident. At the very least, Mharte requests a copy of the public portions of Plaintiff’s Facebook page from one year prior to the accident up to the present. In support, Mharte points to Plaintiff’s testimony that he posted to Facebook, as recently as, five months prior to his deposition. Therefore it is,

**ORDERED**, that the branches of motion sequences 2, 3 and 4 seeking to strike the Note of Issue and Certificate of Readiness is denied; and it is further,

**ORDERED**, that the time to move for summary judgment shall be extended to on or before February 12, 2021; and it is further,

**ORDERED**, that the Defendant John Truax shall appear, virtually if requested, for his deposition on or before October 23, 2020. Failure to do so shall result in preclusion from offering testimony at the time of trial; and it is further,

**ORDERED**, that Plaintiff shall provide a duly executed HIPAA for defendants to access, Plaintiff’s private Facebook photos, posts and videos that are relevant to Plaintiff’s physical condition and incapacity, to the extent that Plaintiff has put the same at issue; for the time period of twelve months prior to the accident up to the present by November 27, 2020; and it is further,

**ORDERED**, that Plaintiff shall respond to the following demands by November 27, 2020:

- a. Defendant John Truax’s Demand for Authorizations dated February 19, 2020;
- b. Plaintiff to provide all defendants with all color photos taken on his phone at the scene of the accident, or provide an affidavit explaining why the same cannot be produced in accordance with his deposition testimony;
- c. Plaintiff shall provide all defendants with available records from the vehicle inspection and maintenance performed four days before the accident, per his deposition testimony, or alternatively provide an affidavit explaining why the same

can not be produced; and Plaintiff shall provide the name and address of the facility/entity where the inspection and maintenance was performed, and any other identifying information concerning the facility/entity that provided the aforementioned inspection/maintenance, so as to permit defendants to identify and locate said facility/entity. If payment was made by check or credit card, provide copies of the cancelled check or credit card statement;

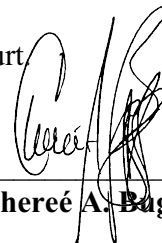
d. Plaintiff shall provide all defendants with an authorization for his gym attendance records for one year prior to the accident to the present, in accordance with his deposition testimony; or alternatively Plaintiff shall provide an affidavit attesting to the fact that he was not a gym member at any point during the relevant time period and a brief explanation rectifying Plaintiff's prior deposition testimony and any claim that he was not a gym member; and it is further,

**ORDERED**, that, to the extent not already provided, Plaintiff shall provide all defendants with authorizations to obtain his medical and/or employment records from the following providers by November 27, 2020:

- a. WEIDAO ACUPUNCTURE, P.C., 1650 West 10 Street, Suite 2B, Brooklyn, NY 11223 TEL 718-837-5361;
- b. SOUL RADIOLOGY, 35-25F 79<sup>th</sup> Street, Suite 2B, Howard Beach, NY 11414;
- c. APPLE ACUPUNCTURE P.C., 2940 West 5 Street, Apt. 18B, Brooklyn, NY, 11224;
- d. COMPLETE WELLNESS CHIROPRACTIC, P.C., 9207 Roosevelt Avenue, Jackson Heights, New York 11327;
- e. ALL COUNTY, LLC. DIAGNOSTIC RADIOLOGY, 161-05 Horace Harding Expressway, Fresh Meadows, NY 11365;
- f. Dr. Tao
- g. NYC WORKFORCE

The foregoing constitutes the decision and Order of this Court

Dated: October 13, 2020



**Hon. Chereé A. Baggs, JSC**

**FILED**

**10/14/2020  
10:53 AM**

-4-

**COUNTY CLERK  
QUEENS COUNTY**