

Dilorenzo v Edible Analytics LLC

2021 NY Slip Op 30398(U)

January 27, 2021

Supreme Court, New York County

Docket Number: 151207/2018

Judge: Verna Saunders

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36

Justice

-----X

INDEX NO. 151207/2018

LINDA DILORENZO,
Plaintiff(s),

MOTION SEQ. NO. 002

- against -

**DECISION + ORDER ON
MOTION**

EDIBLE ANALYTICS LLC, d/b/a MIMI
RESTAURANT & BAR,
Defendant(s).

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY

Plaintiff commenced this action seeking to recover damages for personal injuries allegedly sustained on January 5, 2017 due to a defective condition at Mimi Restaurant and Bar, located at 185 Sullivan Street, New York, New York 10012. (NYSCEF Doc. No. 11, *amended complaint*).¹ Defendant Jack & Alice LLC, d/b/a MIMI NYC, the alleged owner of the premises, now moves, pursuant to 22 NYCRR 202.21(e), for an order vacating the note of issue and certificate of readiness and striking this case from the trial calendar until such time as plaintiff provides outstanding authorizations, as well as, for an extension of time to move for summary judgment. (NYSCEF Doc. Nos. 50-63, 69).²

Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3103, for a protective order with respect to her mental health records, her medical records relating to a prior ankle injury, and her social media account. (NYSCEF Doc. Nos. 64-67, 72).

As relevant here, following plaintiff's deposition, defendant served a notice for discovery and inspection, requesting, *inter alia*, an authorization to obtain all of plaintiff's medical records from Dr. Robert Ruffini, plaintiff's primary care physician, as well as, an authorization to obtain all of plaintiff's records from Facebook, unlimited in duration and scope. (NYSCEF Doc. No. 59, *April 2020 demand*). Plaintiff objected to these items, asserting that Dr. Ruffini's records were irrelevant to the injuries claimed in this action and that the demand for Facebook records

¹ This action was commenced on February 7, 2018 as against Edible Analytics, d/b/a MiMi Restaurant & Bar and, on April 6, 2018, defendant Jack & Alice LLC, d/b/a MIMI NYC interposed an answer. (NYSCEF Doc. Nos. 1-2, 9). Thereafter, on April 18, 2018, plaintiff filed an amended summons and complaint, changing the named defendant to Jack & Alice LLC d/b/a MIMI NYC. (NYSCEF Doc. No. 11). On July 30, 2018, Jack & Alice LLC d/b/a MIMI NYC interposed an answer with respect to the amended complaint. (NYSCEF Doc. No. 12). Since all parties agreed, on the record, that the caption in the amended complaint accurately reflects the parties in this action, the County Clerk is directed to amend the caption accordingly.

² Defendant has advised this Court that that branch of its motion seeking authorizations for Rippe & Kingston; Dr. Lawrence Shapiro; and Invision Eye Care is rendered moot insofar as they have already been provided.

was overbroad and burdensome. (NYSCEF Doc. No. 60 ¶ 1, 9, *June 2020 response*). Plaintiff testified that she had ankle surgery in November 2012 (NYSCEF Doc. No. 58 at 138-139, *plaintiff's EBT transcript*) and, although defendant concedes to receiving an authorization for the facility where plaintiff underwent physical therapy for the ankle injury, defendant asserts that plaintiff never exchanged an authorization to obtain records, including an operative report, from the surgeon or facility where the surgery was performed. (NYSCEF Doc. No. 52 ¶ 28). Plaintiff filed a note of issue and certificate of readiness on July 20, 2020, representing that all discovery in this matter was complete. (NYSCEF Doc. No. 46).

Defendant contends that it is entitled to an authorization for Dr. Ruffini, who treated plaintiff for depression, inasmuch as said records may bear on plaintiff's allegations in the amended complaint and Bill of Particulars, to wit: that the subject injuries impaired her general health and limited her activities in her employment and her life; that her injuries are permanent and progressive; and that she has suffered "shock, mental anguish, loss of normal pursuits and pleasures of life." (NYSCEF Doc. No. 52 ¶ 24; 60 ¶ 16).³ Moreover, defendant maintains that plaintiff's deposition testimony that she "probably" told Dr. Ruffini about the accident and "possibly" complained to him about her knees and her back, supports its entitlement to the same. (NYSCEF Doc. Nos. 52 ¶ 24; 58 at 136). According to defendant, the 2012 ankle surgery is substantially related to the knee, a claimed injury in this action, and, thus, plaintiff must provide an authorization with respect to records concerning that prior operation. (NYSCEF Doc. No. 52 ¶ 28).

Next, defendant argues that public photographs from plaintiff's Facebook account, annexed to its motion, show her standing, sitting, traveling, cooking and dining out, which "contradict or conflict with her alleged restrictions, disabilities, losses and other claims that she testified about during her deposition." (NYSCEF Doc. No. 52 ¶ 27). Defendant relies on portions of plaintiff's deposition testimony where she affirmed that after the incident, she can no longer walk very far, stand for more than 20 minutes without pain, take walks on the beach, entertain guests at her shore house as often, and that she has difficulty engaging in other activities, such as, squatting or sitting on the floor. (NYSCEF Doc. No. 58 at 103-118). Plaintiff also testified that she has traveled within and outside the United States since her accident. (NYSCEF Doc. No. 58 at 121-122).

In an attorney affirmation submitted in opposition to the motion, plaintiff argues, *inter alia*, that defendant is not entitled to her mental health records because only orthopedic injuries are alleged in this action, which were not treated by Dr. Ruffini. (NYSCEF Doc. No. 65 at 3-4). She also claims that her ankle surgery concerns a separate and distinct body part from the knee at issue here and is thus, not discoverable. (NYSCEF Doc. No. 65 at 4-6). Lastly, plaintiff claims that defendant has failed to show any inconsistencies between the public photographs on her Facebook account and her physical limitations as testified to at her deposition. (NYSCEF Doc. No. 65 at 9). As such, plaintiff maintains that defendant's request to access her Facebook account would amount to a prohibited fishing expedition. (NYSCEF Doc. No. 65 at 9).

³ Although plaintiff testified at her deposition that Dr. Ruffini was her primary care doctor (NYSCEF Doc. No. 58 at 17, 136), plaintiff's counsel refers to Dr. Ruffini as plaintiff's psychologist. (NYSCEF Doc. No. 65 at 3, *Bass Aff.*).

Pursuant to CPLR 3101, “[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’ as used in CPLR 3101(a) are ‘to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy.’” (*Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.*, 127 AD3d 554, 555 [1st Dept 2015], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). As such, “[a] court may vacate a note of issue where it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect.” (22 NYCRR 202.21(e); see *Gomes v Valentine Realty LLC*, 32 AD3d 699, 699 [1st Dept 2006]). As relevant to the issue at bar, “[a] litigant will be deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue.” (*Dillenbeck v Hess*, 73 NY2d 278, 287[1989]; see *Jones v FECS-WeCARE/Human Resources, NYC*, 139 AD3d 627, 628 [1st Dept 2016]).

Here, this Court finds that there is outstanding discovery warranting a vacatur of the note of issue and certificate of readiness. Specifically, defendant is entitled to records from plaintiff’s prior ankle surgery because, contrary to plaintiff’s averment, these records are relevant to plaintiff’s claimed knee injury and were placed at issue by allegations in the Bill of Particulars. The Bill of Particulars states, in pertinent part, that plaintiff “ambulates with antalgic gait”, has a “pelvic tilt” and has “difficulty in ambulating”, all of which she alleged were “caused, aggravated, accelerated, precipitated and/or enhanced” by defendant’s conduct. (see *Brito v Gomez*, 33 NY3d 1126, 1127 [2019]; *Rom v Eurostruct, Inc.*, 179 AD3d 418 [1st Dept 2020]; *McGlone v Port Auth. of NY & New Jersey*, 90 AD3d 479, 480 [1st Dept 2011]; *Rega v Avon Prods., Inc.*, 49 AD3d 329, 330 [1st Dept 2008]).

Defendant’s contention regarding entitlement to authorizations, unlimited in duration and scope, premised on a plaintiff’s general allegations and claims of mental anguish and loss of enjoyment of life, has been repeatedly rejected by the First Department as being insufficient to compel disclosure of a plaintiff’s entire mental history. (see *James v 1620 Westchester Ave. LLC*, 147 AD3d 575, 576 [1st Dept 2017]; *Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 574 [1st Dept 2014]; *Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 640-641 [1st Dept 2014]; see also *Wolf v Walgreens Boots Alliance, Inc.*, 2017 NY Slip Op 31225[U][Sup Ct, NY County 2017]). Under the facts and circumstances present here, inasmuch as plaintiff averred that she may have complained to Dr. Ruffini about her injuries, defendant is entitled, at the very least, to an authorization for Dr. Ruffini, as limited to medical records prepared after the subject accident. However, since plaintiff also testified that Dr. Ruffini treats her for depression, this Court finds that defendant should be allowed to delve into plaintiff’s entire mental health treatment to ascertain what extent of plaintiff’s mental anguish and loss of enjoyment of life claims may be attributed to the subject accident. (see *Velez v Daar*, 41 AD3d 164, 165-166 [1st Dept 2007]; *Gross v Fishbane-Mayer*, 2018 NY Slip Op 30412[U], *7 [Sup Ct, NY County 2018]; *McLeod v Metro. Transp. Auth.*, 47 Misc 3d 1219[A], 2015 NY Slip Op 50705[U], *8-9 [Sup Ct, NY County 2015]). These documents are material and necessary for the defense and, thus, in accordance with the broad nature of discovery, that branch of the motion seeking an authorization for Dr. Ruffini is granted.

This Court partially grants the branch of the motion seeking an authorization for plaintiff's Facebook account. When addressing the issue regarding disclosure of materials in Facebook accounts, the Court of Appeals recently noted the following:

“[i]n the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific ‘privacy’ or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials.” (*Forman v Henkin*, 30 NY3d 656, 663 [2018] [internal brackets omitted]).

Here, the public photographs on plaintiff's Facebook account appear to suggest that plaintiff posts media content about her social and recreational activities. It can thus be inferred that photographs, videos, and/or postings on her private Facebook account might be reflective of her post-incident activities and/or limitations. As such, defendant's request for disclosure is reasonably calculated to yield materials relevant to plaintiff's claim that she can no longer engage in certain activities due to her injuries. (*see Forman v Henkin*, 30 NY3d at 66-667; *Caserta v Triborough Bridge & Tunnel Auth.*, 180 AD3d 532, 532 [1st Dept 2020]). However, to the extent defendant seeks an authorization for all of plaintiff's Facebook records, “unlimited in duration and scope,” said request is denied as overbroad. (*see Doyle v Temco Serv. Indus., Inc.*, 172 AD3d 554, 555 [1st Dept 2019]). Accordingly, defendant is entitled to post-incident photographs, videos and/or postings relating to social and recreational activities that plaintiff claims has been limited by her accident. (*see Doyle v Temco Serv. Indus., Inc.*, 172 AD3d at 555; *Vasquez-Santos v Mathew*, 168 AD3d 587, 588 [1st Dept 2019]). Moreover, to the extent her Facebook account contains “sensitive or embarrassing materials of marginal relevance, plaintiff can seek a protective order.” (*Doyle v Temco Serv. Indus., Inc.*, 172 AD3d at 555, quoting *Forman v Henkin*, 30 NY3d at 665). The remaining arguments are either without merit or need not be addressed given the findings above. Furthermore, the cross-motion seeking a protective order is denied as moot. Accordingly, it is hereby

ORDERED that, as agreed to by the parties, this action shall bear the following caption:

LINDA DILORENZO,
Plaintiff,

-v-

JACK & ALICE LLC, d/b/a MIMI NYC,
Defendant.

and, it is further

ORDERED that the motion by defendant is granted to the extent that the note of issue and certificate of readiness are hereby vacated, and the case is stricken from the trial calendar; and it is further

ORDERED that any dispositive motions shall be filed within sixty (60) days after the filing of the note of issue in this matter, and it is further

ORDERED that, within forty-five (45) days from entry of this order, plaintiff shall provide, as limited by the foregoing decision and order, authorizations for Dr. Robert Ruffini; all medical providers relating to plaintiff's November 2012 ankle surgery; and plaintiff's Facebook account; and it is further

ORDERED that plaintiff's cross-motion and that branch of defendant's motion seeking authorizations for Rippe & Kingston; Dr. Lawrence Shapiro; and Invision Eye Care are denied as moot; and it is further

ORDERED that, within thirty (30) days after this decision and order is uploaded to NYSCEF, defendant shall serve a copy of this order, with notice of entry, upon plaintiff; the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein, and upon the Clerk of the Trial Support Office, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that parties are directed to appear for a remote conference on March 10, 2021 and Note of Issue shall be re-filed on or before April 9, 2021; and it is further

ORDERED that this constitutes the decision and order of this Court.

JANUARY 27, 2021


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE