Lopez v Bendell
2021 NY Slip Op 30625(U)
March 3, 2021
Supreme Court, New York County
Docket Number: 156292/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** IAS MOTION 33EFM

Justice

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STEPHANIE LOPEZ,

Plaintiff,

- v -

HAROLD BENDELL, individually, and BRONX FORD, INC., CITY WORLD ACQUISITION GROUP, INC., CITY WORLD MOTORS, LLC, CITY WORLD ESTATE AUTO HOLDINGS, LLC and/or any other entities affiliated with or controlled by BRONX FORD, INC., CITY WORLD ACQUISTION GROUP, INC., CITY WORLD MOTORS, LLC, CITY WORLD ESTATE AUTO HOLDINGS, LLC,

Defendants.

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INDEX NO. 156292/2017

MOTION DATE ____________

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152,153, 154, 155, 156, 157, 158,159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 172, 173, 174, 175, 176

were read on this motion to COMPEL.

In this employment discrimination action, defendants move pursuant to CPLR 3121 and 3124 for an order compelling plaintiff to appear for an independent medical examination, and to respond to various interrogatories and requests for the production of documents. Plaintiff opposes the motion.

This action seeks to recover damages based on allegations of race and national origin discrimination, hostile work environment, retaliation, and “unlawful termination” under the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL). Plaintiff was employed by defendants as a car sales person from 2008 to the beginning of 2010, and again from the end of 2010 to the end of 2013, and again from approximately mid-2014 to March 2017. Shortly, after the action was commenced in 2017, the alleged harasser, defendant Alan Yuzuk (“Yuzuk”) died, the action was discontinued against him (NYSCEF # 5), and amended complaint was filed (NYSCEF #21). Following the filing of the first amended answer (NYSCEF # 21), discovery proceeded, including plaintiff’s deposition which was taken on February 14, 2020 and completed on July 8, 2020. According to plaintiff she is no longer seeking damages for front or back pay.

Defendants now move to compel the following discovery: (i) plaintiff’s appearance for an independent medical examination; (ii) tax materials; (iii)

government benefit applications; (iv) diaries, logs, tapes, memoranda, communications, and social media; (v) plaintiff's home addresses since she stopped working for defendants and all vehicles leased and purchased since 2009; (vi) information regarding attorneys' fees and costs, including her retainer agreement and counsel's contemporaneous bills; (vii) job application sent to plaintiff's current employer and the name of her current employer; (viii) criminal background and arrest information; and (ix) certain statements in response to defendants' interrogatories.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial" (*Roman Catholic Church of Good Shepherd v Tempco Systems*, 202 AD2d 257, 258 [1st Dept 1994]). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 408 [1968]). At the same time, however, "a party is not entitled to unlimited, uncontrolled or unfettered disclosure" (*Gutierrez v Trillium, USA*, 111 AD3d 669 [2d Dept 2013] [internal citation and quotations omitted]). In this connection, "competing interest must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Kavanagh v Ogden Allied Maintenance Corp.* 92 NY2d 952, 954 [1998] [citations omitted]).

<u>Independent Medical Examination</u>

Defendants argue that they are entitled to an independent medical examination of plaintiff as plaintiff is seeking to recover damages for emotional distress and mental anguish resulting from the alleged harassment and discrimination. In support their argument, defendants point to plaintiff's deposition testimony that as a result of her termination she went through depression and anxiety, stress and experienced headaches and that the stress exacerbated her preexisting vertigo[1] (NYSCEF # 157, Feb. 14, 2020 Dep. at 161-162; 167-170).

Plaintiff counters that a medical examination is not warranted in this action for employment discrimination, which does not assert a claim for intentional or negligent infliction of emotional distress, or allege that plaintiff suffered specific mental or physical injuries. Plaintiff also notes that she is not calling an expert witness to establish emotional damages. Plaintiff further points to her testimony that she did not seek treatment from a social worker, psychologist or psychiatrist

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[1] Contrary to defendants' argument, as plaintiff timely objected to the notice for the medical examination, she was not required to move for a protective order (see CPLR 3122 [a]).

for emotional distress; did not go to a health facility for treatment of any physical symptoms related to her emotional distress; and treated her headaches, which are not continuing, by taking Advil (*id.,* Feb. 14, 2020 Dep. at 167-168). Plaintiff argues that under these circumstances, a medical examination should not be required based on plaintiff's testimony that she suffered from various symptoms related to stress and notes that plaintiff testified that she is not claiming that her vertigo was the result of the discrimination (*id.,* July 8, 2020 Dep. at 22).

It is well established that medical examination is permitted in an action where a party's mental or physical condition is "in controversy." (CPLR 3121 [a]); *Dillebeck v Hess*, 73 NY2d 278, 287 [1989]). The party seeking discovery of medical records or an examination pursuant to CPLR 3121 has the burden of showing that the plaintiff put his or her medical condition at issue (*Koump v Smith*, 25 NY2d 287, 300 [1969]).

Here, even assuming *arguendo* that plaintiff's testimony that she suffered from stress, depression, headaches and worsening vertigo as a result of the workplace discrimination is sufficient to satisfy defendants' burden, plaintiff has demonstrated that she has not affirmatively put her medical condition in issue and has represented that she is not seeking to recover for specific mental or physical disorder arising from the alleged employment discrimination. And, contrary to defendants' position, the holding in *Clark v Allen & Overy, LLP*, 125 AD3d 497 [1st Dept 2015] is not controlling here. In *Clark,* the plaintiff, who was terminated from the defendant law firm, asserted claims for, *inter alia*, sexual harassment, retaliatory discharge and intentional infliction of emotional distress, and "alleged that defendant caused her to suffer 'extreme mental and physical anguish' and 'severe anxiety'" (*id., at* 497). At her deposition, plaintiff testified that her emotional distress included "experiencing eczema all over her body, hair pulling, anxiety, depression and suicidal thoughts" (*id.,* at 497-498). In contrast to *Clark*, here, plaintiff has not asserted a claim of the intentional or negligent infliction of emotional distress, nor is she seeking recovery for any specific mental or physical injuries resulting from the alleged discrimination. Under these circumstances, it cannot be said that plaintiff has affirmatively placed her medical condition "in controversy" for the purposes of CPLR 3121(a) (*see Jarrar v Harris,* 2008 WL 2946000, at *3-4 [ED NY 2008][finding the plaintiff's mental condition is not "in controversy" under Federal Rule 35[2] in employment discrimination action where plaintiff did not assert a claim for the infliction of emotional distress, did not allege a specific mental disorder, or disclose an expert to testify as to plaintiff's mental condition]). Thus, defendants are not entitled to an independent medical examination.

[2] Federal Rule 35, like CPLR 3121(a), requires a party to submit to a physical or medical examination when the party's mental or physical condition is "in controversy."

Tax Records

Defendants seek plaintiff's federal and state tax returns, paycheck stubs, W-2's, 1099's and other documents generated by plaintiff's employers which reflect wages, earnings, compensation, fringe benefits, commissions, reimbursement advances of any kind received or made available to plaintiff from the period July 2011 to date. Defendant argues that these records are relevant because, for her discrimination claim under the NYSHRL, plaintiff must establish that she is "qualified" to perform duties as a sale person, and that because she is a commissioned-sales person her income is directly relevant to her qualifications.

Plaintiff counters that her qualifications are not at issue in this action as she was employed by defendants for seven years and her separation from employment was not related to her qualifications. Moreover, plaintiff argues that defendants have plaintiff's earning records for her period of employment with them from 2011 and 2017, are aware of her qualifications, and have not explained the relevance of future earnings records to the issue.

It is well established that "[b]ecause of their confidential and private nature, disclosure of tax returns is disfavored. The party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources" (*Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005]). Under this standard, defendants have not demonstrated entitlement to plaintiff's tax returns and related information. While to make a prima showing of employment discrimination, plaintiff must show that she is qualified to hold her position (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]), defendants have not shown that plaintiff's tax returns are required to show that plaintiff was a qualified salesperson, particularly as plaintiff worked for defendant for approximately six years.

Authorizations for Government Benefits

Defendants seek authorizations for applications for government benefits received by plaintiff during her employment with defendants' dealership. Defendants assert the authorizations are relevant since in order to apply for such benefits, applicants must swear the truth of their income and possibly hours.

Plaintiff counter that defendants are not entitled to authorizations as they know what plaintiff earned while at their dealership.

In reply, defendants cite plaintiff's deposition testimony that she applied for certain benefits. They argue that the plaintiff's statements regarding her income on government benefit applications binds her under the doctrine of judicial estoppel.

Contrary to defendants' argument, they are not entitled to authorizations for plaintiff's applications for government benefits since, as plaintiff's employer, they are in possession of payroll and other records showing what plaintiff earned during her employment at the dealership so that any income (or hours) information that plaintiff may have included in the applications is irrelevant and immaterial. In any event, judicial estoppel would not apply to bar plaintiff from asserting her income was different from that which she listed in any government benefit application (*see Ferring v Merrill Lynch & Co.*, 244 AD2d 204, 204-205 [1st Dept 1997][finding that in action for employment discrimination, including related to disability, judicial estoppel did not apply based on purportedly inconsistent position taken by plaintiff in applying for disability benefits before Social Security Administration]).

<u>Diaries, Logs, Tapes, Memoranda, Communications & Social Media</u>

Defendants argue that plaintiff is required provide "all diaries, logs, notes, tapes, memoranda and communications kept during her course of employment with defendants;" "all documents including electronic communications, given and/or sent by plaintiff to any employee, officer and/or agent of defendants;" "all text messages between herself and managers Nick Tayeh, Freddy Juseinowski and Zeudi Cocking;" and "all social media posts concerning plaintiff's work at defendants' dealership and concerning happy communications." Defendants assert that the discovery of this information, including plaintiff's diaries and social media accounts, is relevant to allegations that plaintiff suffered emotional distress during her employment at the defendant dealership.

While the discovery requests at issue will potentially result in the production of information relevant to plaintiff's allegations that the conduct of defendants caused her emotional distress, the discovery requests seeking "all" documents, diary entries and text messages between certain managers during plaintiff's employment at the defendant dealership are overbroad and burdensome in their scope (*W.S.L.S.J. & I Weinreb v Bogoch*, 295 AD2d 108, 109 [1st Dept 2002]; *Konrad v 136 East 64th Street Corp*, 209 AD2d 228, 229 [1st Dept 1994]). When, as here, discovery demand "are overbroad [and] lack specificity … the appropriate remedy is to vacate the entire demand rather than to prune it" (*Bell v Cobble Hill Health Ctr., Inc.*, 22 AD3d 620, 621 [2d Dept 2005]; *Arroyo v. Fourteen Estusia Corp.,* 194 AD2d 309 [1st Dept 1993] [same]).

With regard to discovery as it relates to plaintiff's social media accounts, the Court of Appeals in *Forman v Henkin*, 30 NY3d 656, 663-664 [2018] held that the general principles governing discovery apply "in the context of a dispute over disclosure of social media materials," and thus found that the Appellate Division "erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account." At the same time, the court "rejected the notion that

commencement of an action renders a plaintiff's entire Facebook account automatically discoverable" (*id.*, at 664-665 [citations omitted]).

With respect to the appropriate method for addressing disputes regarding discovery of social media information, the court wrote that:

> [C]ourts 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 that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case ... it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate--for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (*see* CPLR 3103[a]).

(id., at 665.)

Under these principles, while defendants are entitled to discovery from plaintiff's private social media accounts to rebut plaintiff's claims of emotional distress related to allegations of workplace discrimination, defendants' request for "all social media posts concerning plaintiff's work at defendants' dealership and concerning happy communications," is overly broad and burdensome. In this connection, the court finds that the usefulness of social media posts to measure plaintiff's happiness over the entire duration of her employment at the dealership is not sufficient to warrant the wholesale turning over of plaintiff's social media accounts (*id,* at 665 ["the potential utility of the information sought [must be weighed] against any specific 'privacy' or other concerns raised by the account holder"]; *see also Doyle v Tempco Service Industries, Inc*., 172 AD3d 554-555 [1st Dept 2019] [defendants' discovery demands seeking access to all of plaintiff's social media accounts is overbroad).

Accordingly, the request for social media posts shall be limited to those related to plaintiff's posts about her work place during her period of employment (2011-2017) and for six months following her termination which concern the impact of her employment at the defendant dealership on her mental or physical well-

being, including stress or anxiety experienced at the work place, and her satisfaction or lack of satisfaction with her employment.

"Basic Pedigree" Information

Defendants seek all documents evidencing where plaintiff has lived since March 2017, and for plaintiff to identify every vehicle she has leased or purchased since August 2009.

As defendants have not explained the relevance of this information, their motion to compel its disclosure is denied (*see generally*, *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 408 [1968]). Moreover, contrary to defendants' argument in reply, the cost to plaintiff of leasing certain vehicles will not lead to relevant evidence.

Disclosure Regarding Attorney's Fees

Defendants have requested all documents supporting plaintiff's claim for reasonable attorney's fees and costs, including retainers, time slips, expense vouchers, and invoices for legal services since attorney's fees are a component of damages in this action.

Plaintiff opposes the motion, arguing that the information is not subject to discovery until liability is established. The court agrees. Information as to the amount of plaintiff's attorneys' fees is not material or relevant at this stage of the litigation, although such discovery may be sought in the event plaintiff prevails in this action and seeks such fees (*Hussain v General* Motors Corp., 276 AD2d 452, 453 [1st Dept 2000] [affirming trial court's denial of defendant's motion to compel discovery of plaintiff's retainer agreement and counsel's time sheets in action as attorneys' fees "do not become an issue until plaintiff prevails" and thus the documents sought "are neither material nor necessary at this stage of the litigation"]).

Job Application and Current Employer

Defendants seek plaintiff's job application with her current employer and for the identity of her current employer, asserting that this information is relevant to plaintiff's qualifications, current emotional state and her credibility.

Plaintiff opposes the request, arguing that since plaintiff is still a salesperson in the car business, she is concerned about the negative effect the disclosure of this information might have on her current employment. In addition, plaintiff notes that at her deposition, while she refused to disclose her current employer, she testified as to her current employment during her deposition, including the pay structure,

the type of payroll records she currently receives and the costs of the vehicles sold. Moreover, plaintiff asserts that her current employment information is not relevant as she is not seeking back pay, her qualifications are not in issue, and plaintiff is not claiming that she continues to suffer from emotional distress at work, and notes that defendants did not inquire of plaintiff whether her emotional distress impacted on her ability to sell vehicles.

As it is unclear from the papers the purpose of seeking information from plaintiff's current employer and if such information is relevant, and whether protections may be implemented to protect plaintiff's privacy interest in the information sought, the issue of whether defendant is entitled to the application with her current employer and the identity of her current employer is held in abeyance pending the discovery conference ordered below.

<u>Criminal History/Arrests</u>

As for defendants request disclosure of information relating to plaintiff's criminal history or arrests, the court notes that plaintiff testified that she has never been convicted of any crime, has not committed any crime and has not received any citations (Feb. 14, 2020 Dep. at 28). She also testified that other than arrests that occurred more than ten years ago and have been sealed, she has not been arrest (*id.,* at 27).

Thus, even assuming this information could be shown to be relevant, as there is no factual predicate for plaintiff's purported criminal history or arrests, the motion to compel the production of such information is denied (*see GS Plasticos Limitada v Bureau Veritas Consumer Prods*., 112 AD3d 539, 540 [1st Dept 2013] [denying a motion to compel as they discovery requests sought irrelevant information for which the party had "laid an insufficient factual predicate."] [citations omitted]).

<u>Remaining Issues</u>

The remaining issues concern defendants' request for interrogatories regarding statements as to (i) plaintiff's damages, (ii) plaintiff's race and national origin, (iii) plaintiff's compensation structure while employed by defendants, and (iv) periods of time that Yuzuk worked at the defendant dealership.

Plaintiff has agreed to provide a statement of damages sought for compensatory and punitive damages, reserving the right to adjust the amounts based on further discovery in this action, and plaintiff shall provide an updated statement as to damages. Next, plaintiff is not required to provide an affirmative statement as to her race and national origin as she has provided testimony in this regard (see July 8, 2020 Dep at 74; 282 and Feb. 14, 2020 Dep. at 24:233-234). As

for information regarding the attendance of Mr. Yuzuk and plaintiff's compensation structure, plaintiff asserts that she does not have the information to those requests and has agreed to affirmatively state her lack of knowledge in her response to the interrogatories under oath. As such, the motion to compel with respect to these requests is moot.

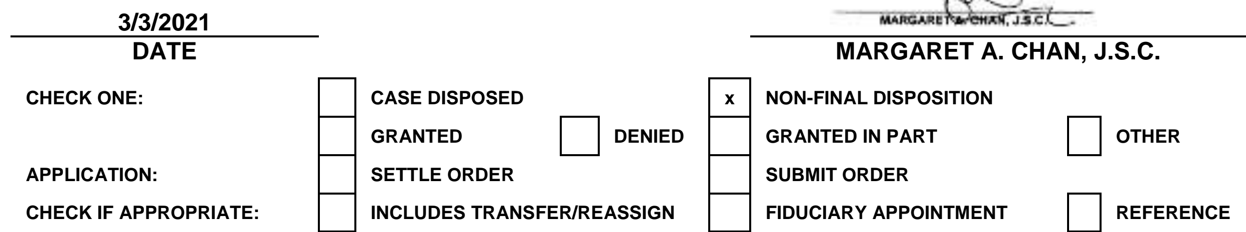
In view of the above, it is

ORDERED that the motion to compel is granted to the extent of requiring plaintiff, within 30 days of efiling of this order, to provide her social media posts related to the workplace during her period of employment (2011-2017) by defendants and for six months following her termination, to the extent the posts concern the impact of her employment at the defendant dealership had on her mental or physical well-being, including stress or anxiety arising out of her employment, and her satisfaction or lack of satisfaction with her employment; and it is further

ORDERED that plaintiff shall provide a statement of damages consistent with this decision and order within 30 days of efiling of this order; and it is further

ORDERED that as for defendants' request for plaintiff's application for her current position, and the identity of her current employer, such requests shall be addressed at the status conference scheduled for March 12, 2021 at 10 am.

This constitutes the Decision and Order of the court.



3/3/2021 DATE		MARGARET A. CHAN, J.S.C.	
CHECK ONE:	[ ] CASE DISPOSED	[x] NON-FINAL DISPOSITION	
	[ ] GRANTED [ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN	[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE