SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET CHAN** **PART 33**

Justice

----------X

STEPHANIE LOPEZ,

Plaintiff,

- v -

HAROLD BENDELL, BRONX FORD, INC.,CITY WORLD ACQUISITION GROUP, INC.,CITY WORLD MOTORS, L.L.C., CITY WORLD ESTATE AUTO HOLDINGS, L.L.C., AND/OR ANY OTHER ENTITIES AFFILIATED WITH OR CONTROLLED BY BRONX FORD, INC.,CITY WORLD ACQUISITION GROUP, INC.,CITY WORLD MOTORS, L.L.C., AND/OR CITY WORLD ESTATE AUTO HOLDINGS, L.L.C.

Defendants.

----------X

INDEX NO. 156292/2017

MOTION DATE 12/03/2021

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 205, 206, 207, 208, 209, 210, 211, 212

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

In this employment discrimination action, defendants move for an order pursuant to CPLR 2221, granting reargument or renewal of the court's decision and order dated October 13, 2021 (the Original Decision). Plaintiff opposes the motion.

Plaintiff was employed by defendants as a car salesperson from 2008 to the beginning of 2010, and then 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 died, and the action was discontinued against him (NYSCEF # 5); an 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. Plaintiff is no longer seeking damages for front or back pay, and the remaining compensatory damages are related to her emotional distress during her employment at the dealership.

In its Decision and Order dated March 3, 2021 (March Order), the court granted defendants' motion to compel discovery to the extent of requiring plaintiff "to provide her social media posts related to the workplace during her period of employment (2011-2017) ... 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" (NYSCEF # 178 at 9). Plaintiff responded to the request for social media posts by letter from her counsel dated April 2, 2021, indicating that plaintiff stated that she was not in possession of social media posts responsive to defendant's request as narrowed by the March Order (NYSCEF # 192). The court held a discovery conference on June 3, 2021, and directed that the note of issue be filed by June 22, 2021 (NYSCEF # 188). At the conference, defendant did not raise any issue as to the adequacy of plaintiff's response to its request for social media posts. On June 22, 2021, plaintiff filed the note of issue.

On July 12, 2021, defendant moved to vacate that note of issue on the ground that plaintiff did not adequately respond to the court's order requiring plaintiff to provide social media posts; plaintiff opposed the motion.

In the Original Decision, the court denied defendant's motion to vacate the note of issue finding that "such relief is not appropriately granted since defendants waited until after the note of issue was filed to object to the letter from plaintiff's counsel stating that plaintiff did not possess responsive social media posts" (NYSCEF # 202 at 2). However, because the court had ordered plaintiff to provide social media posts and given that plaintiff's response was an unsworn letter from counsel, the court granted the motion to the extent of "requiring plaintiff to provide a Jackson Affidavit which, *inter alia*, delineates the nature of her search, the social media accounts searched, and the methods used to conduct the search" (*id.* at 4).

After the issuance of the Original Decision, plaintiff furnished defendant with plaintiff's affidavit and nine Facebook posts resulting from an additional search made by plaintiff (NYSCEF # 207). In her affidavit, plaintiff states that in response the direction in the Original Decision and before providing the affidavit, "I again searched my Facebook and Instagram accounts. I searched very carefully scrolling through every post and photo from the years 2011 to the present. This time I noticed nine Facebook posts that may fit within the criteria set in the Court's order. One post is from May 2014, another from 2013, and the remainder from 2012. In the abundance of caution and to ensure my discovery obligations are fully met, they are being produced now" (*id.* at 2).

Defendant moves for reargument of the Original Decision, asserting that the court erred in denying its motion to vacate the note of issue so that there can be further discovery proceedings including a further deposition of plaintiff and a subpoena to Facebook or the wholesale production of plaintiff's social media posts to be provided to the court for *in camera* inspection. Defendant argues that such relief is necessary since the social media posts are highly relevant to plaintiff's allegations of emotional distress, and request for punitive damages. Defendant also asserts that

renewal is appropriately granted as plaintiff's belated production of documents reveals the inadequacy of her searches.

Plaintiff opposes the motion, asserting that plaintiff has provided extensive discovery, and that the March Order granting defendant's motion to compel did not grant defendant complete access to plaintiff's social media accounts. Additionally, plaintiff notes that the Original Decision denied defendant's motion to vacate the note of issue based on defendant's failure to raise any discovery issues, including issues related to plaintiff's social media accounts, until after the note of issue was filed.

In reply, defendant argues that the production of the Facebook posts after her second search shows that plaintiff either intentionally withheld the documents or, at the very least, was confused as to what should be produced. Therefore, defendant maintains that the note of issue should be vacated and plaintiff should be required to produce all her social media posts or an in camera inspection should be directed, as well as a further deposition of plaintiff regarding her social media posts.[1]

Discussion

A motion for leave to reargue "is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at an earlier decision" (*William P. Pahl Equipment v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). As for a motion to renew, such a motion "is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore not brought to the court's attention" (*Tishman Constr. Corp. of New York v City of New York*, 280 AD2d 374, 376 [1st Dept 2001]).

Regarding the motion to reargue, contrary to defendant's argument, the court did not overlook or misapprehend the facts or the law in denying defendant's motion to vacate the note of issue. Instead, under the circumstances, including that defendant failed to object to plaintiff's response to its request for social media posts until after the note of issue was filed, the court properly denied the motion and required plaintiff to produce a Jackson affidavit regarding her search for social media records. In addition, while the March Order directed plaintiff to produce certain social media records, it did require her to produce all her social media post or order a further deposition of plaintiff following the production. Furthermore,

---

[1] To the extent defendant argues in reply that plaintiff should be precluded from offering evidence to support her claim for emotional distress damages, such argument has not been considered as it was raised for the first time in reply (*JP Morgan Chase Bank v Luxor Capital LLC*, 101 AD3d 575, 576 [1st Dept 2012]).

discovery has been extensive in this 2017 action, and plaintiff was already deposed over two days.

As for defendant's motion to renew based on plaintiff's belated production of social media posts, the court finds that the record does not provide a basis for requiring the disclosure of plaintiff's entire social media accounts or, at least at this juncture, an *in camera* inspection of these accounts (*see Forman v Henkin*, 30 NY3d 656, 665 [2018] [rejecting that a plaintiff's entire Facebook account is automatically discoverable upon commencing a personal injury action and that such as order would be "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—[and] would be likely to yield far more nonrelevant than relevant information"]).

At the same time, in light of the potential relevance of the social media posts to plaintiff's claims of emotional distress and punitive damages, and the inconsistent results of the two searches which were apparently conducted by plaintiff and not her counsel, the motion to renew is granted to the extent of requiring plaintiff's counsel to conduct a search of plaintiff's social media posts, and provide any additional documents found as a result of the search and a Jackson Affidavit regarding the such search (see *Forman,* 30 NY3d at 662, n. 2 [noting the role of attorneys in ensuring discovery obligations are met so that the court need not exercise "its *in camera* review power...."]; *Melissa "G" v North Babylon Union Free Dist.*, 48 Misc 3d 389, 392-393 [Sup Ct Suffolk Co 2015][*in camera* inspection of a plaintiff's social media account will generally not be ordered as such function can be performed by the account holder's counsel]; *Giacchetto v Patchogue-Medford Union Free School Dist.*, 293 FRD 112, 117 [ED NY 2013][directing that plaintiff's counsel, rather than plaintiff, review plaintiff's social media postings for relevance]).

Accordingly, it is

ORDERED that defendant's motion to reargue is denied; and it is further

ORDERED that defendant's motion to renew is granted to the extent of directing that within 30 days of entry of this order, plaintiff's counsel shall conduct a further search of plaintiff's social media accounts, and any additional documents resulting from the search.and a further Jackson affidavit regarding such search.

1/31/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☐ GRANTED ☐ DENIED ☒ NON-FINAL DISPOSITION ☒ GRANTED IN PART ☐ OTHER

156292/2017 LOPEZ, STEPHANIE vs. BENDELL, HAROLD
Motion No. 006