

Leazier v Senderoff
2022 NY Slip Op 31790(U)
June 1, 2022
Supreme Court, New York County
Docket Number: Index No. 805251/2021
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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ANGELA LEAZIER,

Plaintiff,

- v -

DOUGLAS M. SENDEROFF, M.D., F.A.C.S., and PARK AVENUE AESTHETIC SURGERY, P.C.,

Defendants.

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INDEX NO. 805251/2021

MOTION DATE 04/14/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISCOVERY

In this action to recover damages for medical malpractice, the defendants move pursuant to CPLR 3124 to compel the plaintiff to respond to their outstanding September 8, 2021 demand for authorizations permitting them to obtain access to her social media accounts, as limited by the specific requests set forth in their attorney's affirmation submitted in support of the motion. Alternatively, the defendants move pursuant to CPLR 3126 to impose sanctions upon the plaintiff for her failure to respond to their demand. The plaintiff opposes the motion. The motion is granted to the extent that, on or before July 14, 2022, the plaintiff shall provide the defendants with the limited authorizations described herein, and the motion is otherwise denied.

Although the defendants' counsel failed to establish that she satisfied a condition precedent to the submission of the motion, as set forth in 22 NYCRR 202.20-f(b), which requires that she attest to "having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference," the court nonetheless addresses the merits of the motion, inasmuch as the dispute here involves a contested issue of law that a telephonic conference could not have resolved.

CPLR 3101 provides that “[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’ (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968])” (*Matter of Steam Pipe Explosion at 41st Sts & Lexington Ave.*, 127 AD3d 554, 555 [1st Dept 2015]). When the request involves access to a plaintiff’s social media accounts,

“New York discovery rules do not condition a party’s receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be *appropriately tailored and reasonably calculated to yield relevant information*. Indeed, as the name suggests, 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”

(*Forman v Henkin*, 30 NY3d 656, 664 [2018] [emphasis added]). Thus, the Court of Appeals rejected “the notion that the account holder’s so-called ‘privacy’ settings govern the scope of disclosure of social media materials” (*id.*). The Court of Appeals nonetheless

“agree[d] with other courts that have rejected the notion that commencement of a personal injury action renders a party’s entire Facebook account automatically discoverable (see e.g. *Kregg v Maldonado*, 98 AD3d 1289, 1290 [4th Dept 2012] [rejecting motion to compel disclosure of all social media accounts involving injured party without prejudice to narrowly-tailored request seeking only relevant information]; *Giacchetto v Patchogue-Medford Union Free Sch. Dist.*, 293 FRD [112], 114 [ED NY 2013]); *Kennedy v Contract Pharmacal Corp.*, 2013 U.S. Dist. LEXIS 67839, 2013 WL 1966219, *2 [ED NY, May 13, 2013, No. CV 12-2664 (JFB) (ETB)]”

(*id.* at 664-665). As the Court explained it,

“[d]irecting 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. Even under our broad disclosure paradigm, litigants are protected from ‘unnecessarily onerous application of the discovery statutes’ (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d [952], 954 [1998])”

(*id.* at 665).

In instructing lower courts within New York, the Court of Appeals directed that

“[r]ather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules—there is no need for a specialized or heightened factual predicate to avoid improper ‘fishing expeditions.’ In 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 that must be disclosed while avoiding disclosure of nonrelevant materials. *In a personal injury case such as this 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.* [emphasis added]).

Hence, items such as “post-accident photographs of social and recreational activities” (*Ferguson v Durst Pyramid, LLC*, _____AD3d_____, 2022 NY Slip Op 03210 *2 [1st Dept, May 17, 2022]) are subject to discovery (*see Caserta v Triborough Bridge & Tunnel Auth.*, 180 AD3d 532, 532 [1st Dept 2020]). Similarly, a defendant would be entitled to authorizations permitting it to obtain certain items in social media accounts of a minor “regarding the alleged emotional and mental trauma that the infant plaintiff suffered from as a result of the subject accident, which allegedly was, in part, evidenced by her social isolation and withdrawal” (*Abedin v Osorio*, 188 AD3d 764, 767 [2d Dept 2020]). Discovery of social media posts is also warranted where a personal injury plaintiff seeks to recover for loss of enjoyment of life, and the defendant seeks discovery of those social media posts to rebut that claim (*see Doyle v Temco Serv. Indus., Inc.*, 172 AD3d 554, 555 [1st Dept 2019]; *Vasquez-Santos v Mathew*, 168 AD3d 587, 588 [1st Dept 2019]).

In this action, the plaintiff seeks to recover for medical malpractice that she alleged arose from the defendants’ negligence performance of “facial procedures including removal of dimple piercings, [and] in failing to obtain informed consent to utilize an erbium laser, [and] in

failing to properly perform a bilateral hip augmentation, open rhinoplasty, and facial resurfacing.” She alleged that the defendants’ malpractice caused a severe burn to her abdomen and infected both her face and abdomen. The defendants submit proof that the plaintiff posted a picture of her scar on social media, and claimed that she posted it on Instagram. In objecting to the request to provide social media authorizations, the plaintiff claimed that she did not post that picture on her own Instagram account, and that she did not post anything about her case or her physical or mental condition on that account. She asserted that, rather, all of her posts on social media were made to www.realself.com, and that she posted the picture submitted by the defendants on the Instagram page of a surgeon other than the defendant Senderoff.

Although the defendants’ initial demand sought access to all of the plaintiff’s social media accounts, without limitation as to time or subject matter, in their motion, they narrowly tailored their request both as to time and subject matter. They now seek only authorizations permitting them access to the plaintiff’s social media accounts from 2018 until present, and limited to information and posts concerning the subject medical procedures and sequellae, including damages that she claims to have sustained as a consequence of the defendants’ alleged malpractice. The court concludes that the defendants’ limited requests are now properly tailored to permit them to obtain only information that is material and necessary to the defense of this action, or that may lead to the discovery of such information. The plaintiff’s argument to the contrary is unavailing. Hence, that branch of the defendants’ motion seeking to compel production of the authorizations is granted, as set forth below.

As to the branch of the defendants’ motion seeking the imposition of sanctions upon the plaintiff for failure to make discovery, the court concludes that the plaintiff’s conduct during the course of discovery has not been willful, contumacious, or in bad faith (*see Lee v 13th St. Entertainment LLC*, 161 AD3d 631, 632 [1st Dept 2018]; *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]), nor has the plaintiff’s conduct constituted a “pattern of disobeying court orders and failing to comply with disclosure obligations” (*Amini v Arena Constr. Co., Inc.*,

110 AD3d 414, 415 [1st Dept 2013]; see *Palmenta v Columbia Univ.*, 266 AD2d at 91 [noncompliance with one discovery order is not willful and contumacious conduct]; see also *Brigham v Jaffe*, 189 AD3d 475, 475-476 [1st Dept 2020]; *Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]; *Figueroa v City of New York*, 129 AD3d 596, 597 [1st Dept 2015] [party's failure to comply with three discovery orders was not willful and contumacious where that party evinced willingness to provide outstanding discovery]). Rather, the plaintiff's refusal to provide the disputed authorizations was based on a good-faith disagreement with the defendants as to the applicable law concerning the extent of her discovery obligations. Thus, the court declines to impose sanctions upon the plaintiff.

In light of the foregoing, it is

ORDERED that the defendants' motion is granted to the extent that, on or before July 14, 2022, the plaintiff shall provide them with authorizations permitting them to obtain all social media posts, across all platforms, (a) that refer or relate to the plaintiff's medical treatment, mental health treatment, plastic surgery procedures, and claims of pain and suffering, all from 2018 through the present, and (b) that refer or relate to the defendants Douglas Senderoff, M.D., F.A.C.S., and Park Avenue Aesthetic Surgery, P.C., and the defendants' motion is otherwise denied.

This constitutes the Decision and Order of the court.

6/1/2022
DATE


JOHN V. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE