

Vanegas v City of New York

2023 NY Slip Op 32761(U)

August 9, 2023

Supreme Court, New York County

Docket Number: Index No. 154772/2020

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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NUBE M VANEGAS,

Plaintiff,

- v -

THE CITY OF NEW YORK, NYC BOARD OF EDUCATION,
NYC DEPARTMENT OF EDUCATION, RELIANT
TRANSPORTATION INC, GILBERTO FAUSTIN
HERNANDEZ

Defendant.

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INDEX NO. 154772/2020

MOTION DATE 06/28/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON
MOTION

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

were read on this motion to/for DISCOVERY.

Upon the foregoing documents and following oral argument it is ordered that the post-note
of issue motion by Defendants the City of New York, NYC Board of Education, NYC Department
of Education, Reliant Transportation Inc, and Gilberto Faustin Hernandez (Defendants) for an
Order pursuant to CPLR 3126 precluding the Plaintiff from offering any evidence at the trial of
this action, or, in the alternative, for an Order pursuant to CPLR 3124 compelling the Plaintiff to
respond to the Demand for Social Media Information served on behalf of the Defendants and to
provide the requested authorizations for access to certain records and information contained in
Plaintiff's social media accounts is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a January 30, 2020
motor vehicle accident between Plaintiff pedestrian and a motor vehicle owned by Defendants City
of New York, NYC Board of Education, NYC Department of Education, and Reliant
Transportation Inc, and operated by Defendant Gilberto Faustin Hernandez. Plaintiff was initially
deposed on October 15, 2021. On May 2, 2022, Plaintiff served a supplemental Bill of Particulars
related to further a medical procedure and treatment. Plaintiff was deposed again regarding this
procedure and treatment, as well as damages, on April 26, 2022. Plaintiff filed a Note of Issue on
December 5, 2022. On April 12, 2023, Defendants investigated Plaintiff's public social media

information and discovered a photograph posted on August 7, 2022, depicting Plaintiff with four other individuals, in which Plaintiff is wearing a harness around her waist and a helmet with language on the photograph stating “Aventuras En Cancun.” On the same day, April 12, 2023, Defendants served a demand and a letter to obtain full access to and copies of Plaintiff’s current and historical social media accounts for the one year prior to the date of loss to the present. Plaintiff did not respond to the demand. On May 3, 2023, Defendants sent a second letter requesting a response to the demand. Plaintiff contends that Plaintiff is not obligated to provide such discovery nor is Plaintiff obligated to respond to any such demand.

Discovery that is sought after the filing of a note of issue is governed by a different set of procedural principles than discovery that is sought prior to the filing of a note of issue. Pre-note discovery includes disclosure of “all matter material and necessary in the prosecution or defense of an action,” which is to be liberally construed (*see* CPLR 3101 [a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). However, post-note discovery, may only be sought using two methods outlined in 22 NYCRR 202.21. The first, pursuant to 22 NYCRR 202.21(e), is by moving to vacate the note of issue within 20 days of its service by showing that the case is not ready for trial. The second, beyond the 20 days, requires that the movant meet a more stringent standard and demonstrate “unusual or unanticipated circumstances: substantial prejudice” absent the additional discovery (*see* 22 NYCRR 202.21 [d]; *Prevost v One City Block LLC*, 155 AD3d 531 [1st Dept 2017]; *Schroeder v IESINY Corp.*, 24 AD3d 180 [1st Dept 2005]). Here, only the second method is applicable, as the 20 days within which Defendants may have moved to vacate the Note of Issue have lapsed.

Defendants contend that their post-note of issue request for discovery is appropriate and meets the “unusual or unanticipated circumstances and substantial prejudice” standard. Defendants contend that at the time the Note of Issue had been filed, the discovery proceedings known to Defendants at the time had been completed. Only thereafter did their investigation reveal a public Facebook photograph which they believe will lead to additional discovery relevant to their defense in Plaintiff’s private Facebook profile, and as such, failure to grant them access to these private portions of Plaintiff’s Facebook account would cause substantial prejudice to them.

Plaintiff contends that Defendants signed a stipulation that all discovery was complete, they did not timely move to vacate the Note of Issue, and they provided no reasonable excuse for

performing their investigation after they agreed discovery was complete, as they acknowledge the subject photograph was posted online on August 7, 2022.

CPLR 3101 (a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action” (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99 [1st Dept 2009]). Courts have wide discretion to decide whether information sought is “material and necessary” to the prosecution or defense of an action, and that language is generally interpreted liberally to require disclosure of any facts relating to the controversy (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175 [1st Dept 1996]).

Based on the totality of the circumstances here, the Court finds that Defendants are not entitled to a third examination before trial of Plaintiff¹. However, the requested authorizations seek relevant information, particularly because Plaintiff has placed her physical condition in issue. The Court notes that Defendants learned about the photograph, and alleged trip to Cancun, after the Note of Issue was filed. Courts have held that the key to determining whether relevant evidence may be sought post-Note of Issue is whether the party seeking the discovery had knowledge prior to the filing of the Note of Issue (*see Pendergast v CONRAIL*, 244 AD2d 868 [4th Dept 1997] [where the Court permitted a psychiatric examination of the plaintiff because defense counsel did not have notice of the plaintiff’s alleged psychiatric damages until shortly before the plaintiff filed the note of issue], *compare Nikqi v Dedona Contr. Corp.*, 117 AD3d 620 [1st Dept 2014] [the Court found that the defendants failed to demonstrate “unusual or unanticipated circumstances” where the record showed a lack of diligence on defendants’ part in seeking plaintiff’s medical authorizations because defendants were aware of plaintiff’s alleged injuries prior to filing of note of issue and had ample time to request said authorizations]). Here, Defendants were not aware of Plaintiff’s photograph, despite it being posted on a public page and they therefore request “unrestricted right to obtain...full and complete social media record.”

The subject photograph is relevant as it relates directly to Plaintiff’s physical abilities after the subject accident and it would be prejudicial to Defendants to deny them relevant information (*see Ferguson v Durst Pyramid, LLC*, 205 AD3d 518 [1st Dept 2022]). Under these particular facts and circumstances, Defendants have failed to make a sufficient showing that unfettered access to Plaintiff’s social media is necessary. Defendants’ request is overbroad and must be

¹ The Court notes that Defendants’ papers do not request an EBT of Plaintiff, but the request was made during oral argument on August 8, 2023.

limited to information that is material and necessary to the defense of this action (*Doyle v Temco Serv. Indus., Inc.*, 172 AD3d 554 [1st Dept 2019] [defendants' discovery demands seeking access to all of plaintiff's social media accounts is overbroad]). Directing disclosure of a party's entire social media account(s) 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. Courts have held that such an order would be likely to yield far more nonrelevant than relevant information (*Forman v Henkin*, 30 NY3d 656, 659 [2018]).

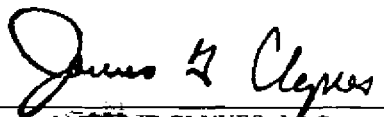
Defendants have made a sufficient showing for limited access to Plaintiff's Facebook posts from the date of the accident to present, showing participation in sports, physical recreational activities, lifting objects, vacuuming, gardening, and cleaning.

Accordingly, it is

ORDERED that Defendants' motion is granted only to the extent that Plaintiff must provide requested authorizations limited to Plaintiff's Facebook posts from the date of the accident to present, showing participation in sports, physical recreational activities, lifting objects, vacuuming, gardening, and cleaning within 20 days of this Decision and Order.

This constitutes the Decision and Order of the Court.

8/9/2023
DATE


JAMES G. CLYNES, J.S.C.

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 checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE