

Zuckerbrot v Lande

2024 NY Slip Op 30712(U)

March 6, 2024

Supreme Court, New York County

Docket Number: Index No. 655110/2020

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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TANYA ZUCKERBROT MS RD, TANYA ZUCKERBROT NUTRITION, LLC, D/B/A F-FACTOR	INDEX NO.	<u>655110/2020</u>
Plaintiffs,	MOTION DATE	<u>09/21/2023</u>
- v -	MOTION SEQ. NO.	<u>007</u>
EMILY GELLIS LANDE,	DECISION + ORDER ON MOTION	
Defendant.		

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 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, 170, 171, 172, 173

were read on this motion to STRIKE ANSWER OR ALTERNATE RELIEF.

Plaintiffs Tanya Zuckerbrot, MS, RD’s (“Zuckerbrot”) and Tanya Zuckerbrot Nutrition, LLC d/b/a F-Factor’s (“F-Factor” and with Zuckerbrot “Plaintiffs”) motion to strike or, in the alternative, to conditionally strike Defendant Emily Gellis Lande’s (“Gellis” or “Defendant”) answer is **denied**. However, the motion is **granted in part** to the extent that it seeks “such other and further relief” as the Court deems proper. Gellis is ordered to promptly complete her discovery production; produce a privilege log; and produce or provide authorization for Plaintiffs and their expert to access electronically stored information (“ESI”) in its native form. Should Gellis be unable to produce native ESI, she shall provide the necessary authorization for Meta and any other relevant custodians to produce ESI. Should the ESI be unavailable, Gellis shall provide her devices to Plaintiffs’ expert for a forensic inspection. Gellis’ failure to abide by the Court’s directives may result in substantial sanctions.

BACKGROUND

Zuckerbrot is a dietician and creator of the F-Factor weight loss program. Gellis is an Instagram “influencer” who, in 2020, made negative posts about Plaintiffs resulting in a widely publicized feud (*Zuckerbrot v Lande*, 75 Misc 3d 269 [Sup Ct New York County 2022]).

On March 30, 2023, the Court granted in part Plaintiffs’ motion to compel (*Zuckerbrot v Lande*, 2023 N.Y. Slip Op. 31029[U] [N.Y. Sup Ct, New York County 2023] [“Discovery Order”]). The Discovery Order provides that Defendant’s “utter failure to participate in the discovery process is plainly sanctionable” and afforded “Defendant a final opportunity to correct course” or risk “significant sanctions” (*Id.* at 1-2). Defendant was directed to “provide written responses to Plaintiffs’ discovery demands and interrogatories within twenty (20) days, complete document production within forty-five (45) days, and provide a sworn certification that production is complete” (*Id.* at 6).

Plaintiffs argue that Gellis violated the Discovery Order by making a “document dump” without formal responses. Plaintiffs further submit that Defendant falsely certified the completeness of her production, which consisted of “screenshots” rather than native format ESI. Plaintiffs also complain that Defendant has not served a privilege log. Plaintiffs submit the Affidavit of Robert Knudsen of Global Digital Forensics, Inc. who states that Defendant’s ESI can be recovered by providing an authorization to Meta, the parent company of Instagram and other social media sites, and a forensic evaluation of Defendants’ electronic devices.

Gellis argues that she complied with the Discovery Order by producing relevant ESI in the format in which it is maintained by her. Gellis submits that Instagram is in possession of native ESI, some of which may be inaccessible through no fault of her own. In particular, Gellis argues that Instagram Direct Messages or “DMs” may not be recoverable based on Instagram’s

settings. Finally, Gellis argues that requiring her to provide her personal devices or account access is overly intrusive and that the Court should shift any associated costs to Plaintiffs.

DISCUSSION

CPLR 3124 provides that a party may move to compel discovery and CPLR 3126 provides that the Court may fashion an appropriate remedy for violation of a discovery order. CPLR 3101's "material and necessary" standard applies to cases involving social media (*Forman v Henkin*, 30 NY3d 656, 665 [2018]). Accordingly, "access to accounts and devices" may be proper so long as access is "appropriately limited in time . . . and in subject matter" (*Vasquez-Santos v Mathew*, 168 AD3d 587, 588 [1st Dept 2019]).

Screenshots are not native ESI nor are they complete records (*Simons v Petrarch LLC*, 2017 N.Y. Slip Op. 30457[U], 22 [N.Y. Sup Ct, New York County 2017] *citing Zubulake v UBS Warburg LLC*, 220 FRD 212, 217 [SD NY 2003]). However, the failure to maintain ESI in native form should not result in a dispositive sanction where its loss will "not fatally compromise" a claim or defense (*id. quoting E.W. Howell Co., Inc., v S.A.F. La Sala Corp.*, 36 AD3d 653, 655 [2d Dept 2007]).

The Court does not find that Defendant's responses to the Discovery Order are so egregious so as to warrant the striking of the Answer. However, Defendant's Instagram messages and other ESI are highly relevant to the claims in defenses in this action. Accordingly, Defendant must provide relevant ESI in its native format, or alternatively provide authorization(s) to facilitate access to the pertinent accounts. If Meta, or any other relevant custodian, determines that native ESI is unavailable, in whole or in part, Defendant shall provide Plaintiffs' expert with access to her electronic devices for forensic examination. Should the ESI

be determined to be unavailable, in whole or in part, following a forensic examination, Plaintiffs may move for appropriate relief.¹

The parties must engage in good-faith efforts to establish a protocol for the search and retrieval of ESI, including but not limited to identifying search terms and a relevant time frame. The process must be interactive, including experts if necessary, and efforts must be made to retrieve the ESI without the necessity of a forensic review in the first instance (*Genger v Genger*, 144 AD3d 581, 584 [1st Dept 2016] citing *Melcher v. Apollo Med. Fund Mgt. L.L.C.*, 52 A.D.3d 244, 245, 859 N.Y.S.2d 160 [1st Dept 2008]). The parties may submit a stipulated confidentiality order or, if necessary, move for a confidentiality order (*In re New York City Asbestos Litig.*, 133 AD3d 463, 464 [1st Dept 2015]). Should disputes arise, the parties must submit a detailed Rule 14 submission and arrange for a conference with the Court's Principal Law Clerk (*Cashbamba v 1056 Bedford LLC*, 172 AD3d 415, 416 [1st Dept 2019]).

Finally, Defendant must produce a privilege log in accordance with Rule 11-b of the Rules of the Commercial Division (*VXI Lux Holdco S.A R.L. v SIC Holdings, LLC*, 79 Misc 3d 1223(A) [Sup Ct New York County 2023]).

* * * *

Accordingly, it is

¹ Such relief may include an adverse inference under CPLR 3126 “to provide proportionate relief to a party deprived of lost or destroyed evidence” (*RCSUS Inc. v SGM Socher, Inc.*, 214 AD3d 488 [1st Dept 2023] quoting *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 551, 26 N.Y.S.3d 218, 46 N.E.3d 601 [2015]). The Court may also give a missing document charge as well as award expert fees incurred in retrieving ESI (*Ahroner v Israel Discount Bank of New York*, 79 AD3d 481, 482 [1st Dept 2010]).

ORDERED that Plaintiff’s motion to strike or, in the alternative, conditionally strike Defendant’s Answer is **DENIED**, however, the motion is **GRANTED IN PART** to the extent the motion seeks “such other and further relief” as the Court deems proper; it is further

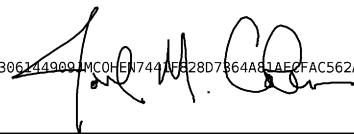
ORDERED that within five (5) days of this order the parties commence meet-and-confer efforts concerning the production of ESI, including the need for authorizations, a confidentiality order and retention of experts; it is further

ORDERED that within twenty (20) days of this order that Defendant provide: (1) any outstanding written discovery responses; (2) a privilege log; and (3) all relevant ESI in native form or, in the alternative, appropriate authorization(s) for Plaintiffs and their expert to access to her relevant social media accounts; and it is further

ORDERED that should it be determined that native ESI is unavailable, in whole or in part, Defendant shall provide her electronic devices to Plaintiff’s expert for forensic review.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

3/6/2024
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: