SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: CCP

IRENE SPENCE,

Plaintiff, Decision and order

- against - Index No. 514470/2020

JEVAN C. SEEPAUL and JEANNE A. SEEPAUL,
Defendants, August 15, 2024

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #5 & #6

The plaintiff commenced this action following a car accident that took place October 3, 2018. The parties have engaged in discovery and now these motions seeking further discovery have been filed. First, the defendants seek authorizations concerning prior accidents and accidents that occurred after the accident that is the subject of this case. Furthermore, the defendants seek all photographs the plaintiff possesses that reveal post-accident activities that are relevant regarding the extent of injuries alleged, in any social media account, from the date of the accident to the present. The plaintiff has cross-moved and seeks discovery from the defendants. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Conclusions of Law

First, the court grants defendant's request for the consideration of this motion.

In Forman v. Henkin, 30 NY3d 656, 70 NYS3d 157 [2018] the Court of Appeals explained that "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" (id). However, that does not mean a defendant can ask for the private photographs contained within a plaintiff's social media without any basis at all. Indeed, in Henkin (supra) the basis was established when the plaintiff testified at a deposition that she posted "a lot" of photographs to her Facebook account. The court reasoned that "given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations" (id).

Thus, concerning social media information "there must be a clear factual predicate in order to compel the production of social media records from the defendants or authorizations for the production of that material from certain social media

providers" (Fawcett v. Altieri, 38 Misc3d 1022, 960 NYS2d 592 [Supreme Court Richmond County 2013]). Indeed, the production of photographs from social media accounts are no different than the production of a personal diary (id). There can be no serious argument that a defendant could seek to discover an injured plaintiff's diary, without any basis, simply to examine what has been written there and to explore whether anything has been recorded about post-accident activity. However, upon a proper basis presented such diary is surely discoverable (see, Patterson v. Turner Construction Company, 88 AD3d 617, 931 NYS3d 311 [1st Dept., 2011]). Social media information should not be treated differently.

The defendants argue that these requests for social media information were made "well in advance of any dates for plaintiff's deposition and these documents are needed to allow a meaningful deposition of plaintiff" (see, Reply Affirmation, ¶10 [NYSCEF Doc. No. 114]). However, Henkin (supra) essentially declined to endorse that very argument. The court specifically "rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable" (id). The court also rejected the opposite extreme, that only photographs that will be introduced at trial are discoverable. Rather, the court stressed that traditional rules governing what materials are discoverable should be

employed to this new and non-traditional medium. Therefore, "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" (id). Next, the court explained that to protect the privacy interests of the plaintiff, trial courts 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" (id). The court concluded that discovery of the Facebook account was permissible, tailored to relevant photographs, only because a threshold showing of necessity was presented after the deposition took place and the plaintiff admitted to posting many pictures to Facebook. Thus, in Vasquez-Santos v. Mathew, 168 AD3d 587, 92 NYS3d 243 [1st Dept., 2019] the plaintiff's Facebook account was discoverable to rebut the allegations he was disabled after the plaintiff testified that pictures of him playing basketball were posted to Facebook (see, also, Spoljaric v. Savarese, 66 Misc3d 1220(A), 121 NYS3d 531 [Supreme Court Suffolk County 2020], Lorenzo v. Great Performances/Artists as Waitresses Inc., 2017 WL 276334 [Supreme Court New York County 2017]). Again, in Mylon v. Leibowitz, 2019 WL 429462 [Supreme Court New York County 2019] the court declined requests to review social media accounts of the plaintiff prior

to a deposition.

Thus, the request, even tailored, of social media photographs, is no different than seeking photographs, even if tailored, contained in a physical photo album. No such discovery is permissible simply because an accident occurred. Likewise, the discovery of the plaintiff's personal diary or any such personal information of the plaintiff is not discoverable without a firm basis. That basis can only be established after a deposition. The case Caraballo v. City of New York, 2011 WL 972547 [Supreme Court Richmond County 2011] is instructive. In that case the defendant sought social media information of the plaintiff. The defendant argued such information was "just as relevant as plaintiff's medical records to the extent that there are photographs, status reports, [and] videos that depict plaintiff engaging in activities that contradict his injury claims in this case" (id). The court rejected that argument and distinguished cases that allowed such information to be furnished after a deposition of the plaintiff had taken place. Once a deposition occurred and testimony was elicited then the defendant could "establish a factual predicate with respect to the relevancy of the information the sights may contain" (id). The court concluded that "digital "fishing expeditions" are no less objectionable than their analog antecedents" (id).

Therefore, there is no basis to seek discovery of any social

media account prior to establishing a predicate that such information may be relevant. Therefore, the request seeking such discovery at this time is denied. Following a deposition of the plaintiff this application may be renewed.

Turning to discovery regarding other accidents sustained by the plaintiff, authorizations of such medical treatment is proper (Bennett v. Gordon, 99 AD3d 539, 952 NYS2d 166 [1st Dept., 2012]). The defendants are entitled to explore whether the injuries allegedly sustained in this accident were caused or were exacerbated by other accidents (see, generally, Thomas v. Hudson Group HG Retail LLC, 217 AD3d 990, 194 NYS3d 214 [2d Dept., 2023]). The request for the property damage sustained in other accidents is denied at this time and may be renewed upon further evidence of the plaintiff's alleged injuries in those other accidents.

The plaintiff's motion seeking discovery from the defendants is granted. There has not been principled opposition filed to the discovery requested by the plaintiff.

So ordered.

ENTER:

DATED: August 15, 2024
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC