SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYNN R. KOTLER** **PART** **08**

Justice

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WILLIAM PINO NAVIA,

Plaintiff,

- v -

UNIQUE CONSTRUCTION & HOME IMPROVEMENT INC.,PHILIPS BRYANT PARK LLC,SKYLINE RESTORATION INC.,ANDAMIO SCAFFOLDING LLC,EVEREST SCAFFOLDING INC.,TRISTATE-SAFETY CORP,

Defendant.

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INDEX NO. 158732/2022

MOTION DATE 05/23/2025, 06/11/2025, 06/11/2025, 06/11/2025

MOTION SEQ. NO. 006 007 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 189, 190, 191, 192, 193, 214, 226, 231, 232, 233, 234, 256, 257, 258

were read on this motion to/for STRIKE AFFIRMATIVE DEFENSE.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 194, 195, 196, 197, 198, 199, 200, 201, 202, 215, 227, 235, 236, 237, 238, 239, 240, 241, 259, 260, 261, 262, 263, 264, 267

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 216, 228, 242, 243, 244, 245, 246, 247, 248, 266, 268

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 217, 218, 219, 220, 221, 222, 223, 229, 249, 250, 251, 252, 253, 254, 255, 265, 269

were read on this motion to/for DISCOVERY.

This is a labor law action. Plaintiff WILLIAM PINO NAVIA ("Navia") alleges that he sustained personal injuries at a construction site on September 12, 2022.

In motion sequence 6, Navia moves for an order striking defendant SKYLINE RESTORATION INC.'s ("SKYLINE") affirmative defense of fraud. Skyline opposes the motion.

In motion sequence 7, defendant Philips Bryant Park LLC ("Philips Bryant") and defendant/third-party plaintiff Skyline Restoration Inc. ("Skyline") move for an order to compel plaintiff to provide the following: a) a further deposition of Navia to answer questions he was directed not to answer at previous depositions; b) access to his social media accounts; c) all photographs and videos posted on his social media from date of the loss to present; and d) to impose spoliation sanctions for any deleted social media posts since the date of the accident.

In motion sequence 8, defendant ANDAMIO SCAFFOLDING LLC ("Andamio") requests the same relief as in motion sequence 7 and also requests a further deposition of Navia on damages.

In motion sequence 9 defendant TRISTATE-SAFETY CORP ("Tristate") requests the same relief as motion sequence 7 and requests the opportunity to conduct plaintiff's deposition on liability and damages.

Navia opposes defendants' motions in sequences 7, 8, and 9.

These motions are hereby consolidated for the Court's consideration and disposition in this single decision and order.

MOTION SEQUENCE 6

I. Motion to Strike Affirmative Defense of Fraud

A fraud claim must allege the basic facts to establish the elements of the cause of action (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). In order to satisfy CPLR 3016 (b), an action or defense based upon fraud be pled with "facts suffice to permit a reasonable inference of

the alleged misconduct" (*id.* at 559 [internal quotation marks omitted]). Conclusory allegations are insufficient to give rise to a claim of fraud (*id.* at 559-61).

Skyline's first affirmative defense states:

> The defendant(s) not being fully advised as to all the facts and circumstances surrounding the incident complained of, hereby asserts and reserves unto itself the defenses of accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense which the further investigation of this matter may prove applicable herein.

Skyline does not argue that they have successfully alleged a cause of action for fraud. Rather, they argue that "it is premature for defendants to determine whether an affirmative defense, and even a counterclaim for fraud is appropriate in this action." Skyline contends that they merely reserve the right to assert an affirmative defense of fraud in the future once they have additional facts.

Skyline's affirmative defense states that they both "assert and reserve" in the laundry list of defenses, including fraud. Here, Skyline fails to present any factual support their affirmative defense of fraud in this four year old case. Because Skyline has failed to assert fraud with any particularity, the affirmative defense of fraud is stricken from their answer.

Based on the foregoing, plaintiff's motion to strike defendant Skyline's affirmative defense of fraud is granted.

MOTION SEQUENCES 7, 8 and 9

II. Motions to Compel

Motion sequences 7, 8, and 9 all seek the same relief, and as such they will be discussed together.

A. Social Media Discovery

Navia argues that his social media posts are not discoverable as social media discovery "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" (*Forman v Henkin*, 30 NY3d 656, 665 [2018]). However, social media such as Facebook posts are discoverable where the request is "reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident" (*id.* at 666-67; *see also Patterson v Turner Const. Co.*, 88 AD3d 617, 618 [1st Dept 2011] [finding that social media is discoverable to the extent that it "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims"]. Even posts restricted by plaintiff's privacy settings are discoverable if relevant (*Patterson*, 88 AD3d at 618).

Defendants' requests to compel plaintiff to produce social media posts, which relate to plaintiff's post-accident activities do not constitute a "fishing expedition" as suggested by Navia. Defendants requests seek material and relevant information as to plaintiff's ability to engage in certain activities post-accident and are therefore discoverable. Navia may seek a protective order to the extent that his social media accounts contain any "sensitive or embarrassing materials of marginal relevance" (*Forman*, 30 NY3d at 665).

Based on the foregoing, plaintiff is directed to produce all social media postings, including photographs and video, from the date of accident to present within 30 days from the date of this order and to produce photographs, videos and recordings from three years prior to the accident to the present.

B. Questions Navia Was Directed Not to Answer

Next, defendants argue that a further deposition of plaintiff is necessary as Navia's counsel objected to a number of questions asked during plaintiff's depositions and instructed him not to answer. Defendants argue that these questions are not covered by any privilege that would permit Navia to refuse to answer them. The court agrees with defendants.

The Uniform Rules for the Conduct of Depositions severely limits the scope of objections at a deposition. 22 NYCRR 221.1 only permits objections pursuant to CPLR 3115 (b)-(d) that would be waived if not raised and states that after objection "the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR." Therefore, even when faced with an objection, "the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR § 3115" (*White v Martins*, 100 AD2d 805, 805 [1st Dept 1984]; *see also Orner v Mount Sinai Hosp.*, 305 AD2d 307, 309 [1st Dept 2003]).

Refusal to answer questions during a deposition is severely limited in scope and the "deponent shall answer all questions at a disposition, except: (a) to preserve a privilege or right of confidentiality; (b) to enforce a limitation set forth in an order of a court; or (c) when the question is plainly improper and would, if answered, cause significant prejudice to any person" (22 NYCRR 221.2). A review of the transcript shows several examples where Navia was instructed by his counsel not to answer questions, without invoking any objections that would permit him to do so.

Navia makes a number of arguments to support his position that the request for a further deposition should be denied, such as the repetitive nature of the questions, the fact that he has already been deposed on four different occasions, and that the questions he objected to are not relevant and are "inconsequential." What questions Navia's counsel unilaterally deemed to be

irrelevant does not excuse Navia from answering those questions at the deposition (*see Levine v Goldstein*, 173 AD2d 346, 346 [1st Dept 1991]). Navia's counsel should have stated his objection for the record and instructed his client to answer.

Navia also argues that his client did not need to answer questions regarding social media posts he made because the photographs were not disclosed by the defendants prior to the deposition and constituted a trial by ambush.

The court disagrees for the aforementioned reasons set forth above. As discussed previously, the social media posts by Navia are relevant and discoverable for the purpose of determining his physical abilities and limitations after the accident. Navia argues that his discovery requests included a request for all photographs and videos of "the physical condition of Plaintiff after the accident or occurrence". However, defendants' discovery request also asked for "[c]omplete, clear, and legible copies of all photographs, video tapes, audio and video recordings, of the Plaintiff and any other persons involved in the alleged accident made before and after the alleged accident.", which the court deems material and relevant in the instant action.

These photographs, posted by Navia on his social media, are obviously in his possession. Navia cannot on one hand claim defendants were required to turn over photographs then claim he has no obligation to do so himself. Moreover, there is no issue with notice as Navia was not prejudiced by being asked about photographs he had in his possession and posted on social media himself.

Based on the foregoing, defendants' motions to compel a further deposition of Navia are granted to the extent that Navia is to appear for a further deposition to answer any questions he was directed not to answer in previous depositions.

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C. Further Deposition of Navia on Liability and Damages

While defendants Philips Bryant and Skyline completed their deposition of Navia, in motion sequence 8, defendant Andamio moves to have additional time to finish deposing Navia on damages and in motion sequence 9, defendant Tristate moves to have additional time to depose Navia on injuries, treatment and damages.

The Uniform Rules limit a party deposition to seven hours (*see* 22 NYCRR 202.20-b [a] [2]) unless extended by the court for "good cause shown" (22 NYCRR 202.20-b [f]). Navia argues that the seven-hour limit has already been exceeded, and no good cause exists for extending the deposition further.

It is undisputed that plaintiff's deposition occurred on four separate dates and exceeded 7 hours. The parties disagree on the total time plaintiff has been deposed. Defendants argue that plaintiff requires a Spanish language interpreter, and that there were technical and logistical issues that caused delays at the depositions.

Navia argues that counsel for Philips Bryant and Skyline wasted time at the deposition "asking questions that were repetitive, improper, and inconsequential." and that this is a simple case regarding a worker falling. Even if that is the case, it is prejudicial to the other named defendants, more specifically Andamio and Tristate, to preclude them from completing plaintiff's deposition. Moreover, a review of the transcript shows that Navia's counsel used a significant portion of the deposition time reminding defense counsel of the seven-hour rule and objecting to questions rather than letting Navia answer them.

On the record before the court, defendants Andamio and Tristate have shown that good cause exists to permit a further deposition of Navia and as such would be prejudiced if precluded to do

so. The parties are reminded to meet and confer prior to the deposition to avoid unnecessary delay, apportion time and to ensure there are no repetitive questions.

Based on the foregoing, defendants motions are granted to the extent that plaintiff is directed to appear for a further deposition on or before January 30, 2026.

Finally, defendants motion for spoliation sanctions or whether plaintiff should be precluded from offering evidence at the time of trial on the issues of his alleged injuries and/or limitations, is deferred to the trial judge.

Conclusion

Accordingly, it is hereby

ORDERED that on motion sequence 6 is granted and Skyline's affirmative defense of fraud is stricken from their answer; and it is further

ORDERED that motion sequences 7, 8, and 9, are granted to the extent that plaintiff is ordered to appear for a further deposition not to exceed 7 hours, exclusive of breaks and/or lunch, on or before January 30, 2026; and it is further

ORDERED that motion sequences 7, 8, and 9 are granted to the extent that Navia is ordered to provide access and disclose any photos and videos posted to his social media, including, but not limited to Facebook and Instagram, including previously deleted data, from the date of the accident to present and photographs, videos and recordings from three years prior to the accident to the present within thirty days from the date of this order; and it is further

ORDERED that in motion sequences 7, 8, and 9, defendants request for spoliation sanctions or whether plaintiff should be precluded from offering evidence at the time of trial on the issues of his alleged injuries and/or limitations, is deferred to the trial judge.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

10/09/2025
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE