

Bianco v North Fork Bancorporation

2012 NY Slip Op 32611(U)

October 10, 2012

Sup Ct, New York County

Docket Number: 107069/2010

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 107069/2010
BIANCO, ANTHONY F.
vs.
NORTH FORK BANCORPORATION
SEQUENCE NUMBER : 001
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for to compel

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered that this motion ~~is~~ to compel by
defendants/ third-party plaintiffs is
granted to the extent provided
in the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
OCT 16 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/10/12

[Signature], J.S.C.

JUSTICE DORIS LING-COHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
ANTHONY F. BIANCO,

Plaintiff,

-against-

NORTH FORK BANCORPORATION, INC.,
et al.,

Defendants.

-----X

FILED

OCT 16 2012

Index
COUNTY CLERK'S OFFICE
107069/2010 NEW YORK

Motion Seq. No.: 001

DECISION/ORDER

DORIS LING-COHAN, J.:

This action was commenced by plaintiff to recover damages from injuries he allegedly sustained on June 7, 2007, during the course of his employment, as an electrical apprentice, with Jordan Daniels Electric. According to his bill of particulars, the extensive injuries he sustained "have substantially prevented plaintiff from enjoying the normal fruits of activities, social, educational and economic...". Exh. C, Notice of Motion, ¶19.

Defendants/third-party plaintiffs have filed the within motion to compel plaintiff to supply the following discovery: (1) a duly executed authorization permitting defendants/third-party plaintiffs access to plaintiff's Facebook account and all available data, past and present, or, in the alternative to produce the complete Facebook record, including all pictures, videos, wall posts and correspondence to the Court for an *in camera* inspection; (2) the address of plaintiff's mother and father in Florida, and the address of plaintiff's sister; (3) HIPAA compliant authorizations to obtain copies of plaintiff's medical records for five years prior to and including the date of the subject accident; and (4) authorizations to obtain plaintiff's social security earnings information.¹

In support of the demand for plaintiff's Facebook account, defendants/third-party plaintiffs argue

¹ It is noted that defendants/third-party plaintiffs have withdrawn their demand for an authorization to obtain the non-privileged portion of the files from the attorneys Weiss, Wexler & Wornow.

that such information is relevant in light of the allegations in plaintiff's bill of particulars and plaintiff's own testimony at his deposition as to the alleged impact of the claimed accident and his alleged injuries, on his ability to enjoy his normal activities. As to their request for the addresses of plaintiff's family members, defendants/third-party plaintiffs argue that such information is discoverable in that plaintiff testified that such family members are allegedly witnesses to how plaintiff's injuries affected his life, both financial, as well as his family relations, which plaintiff testified have been damaged as a result of the subject accident. As to the request for plaintiff's medical records for five years prior to the accident, defendants/third-party plaintiffs argue that such information is relevant and material to the defense of this action. Defendants/third-party plaintiffs also maintain that plaintiff's social security earnings information is discoverable.

In opposition, plaintiff argues that defendants/third-party plaintiffs demands are improper as they have failed to provide a factual basis to show that the information is material and relevant to this lawsuit and that defendants/third-party plaintiffs are on a fishing expedition.

Discovery Standard

CPLR §3101 provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Regardless of whether or not the subject discovery will be determined at trial to be admissible, it shall be exchanged if it is "sufficiently related to the issues in litigation to make the effort to obtain [them] in preparation for trial reasonable...". *Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 406-07 (1968)(citation omitted); *see also Josephs v. Oliver*, 48 AD2d 688 (2nd Dept 1975). Further, "pretrial disclosure extends *not only* to proof that is admissible *but also* to matters that *may lead* to the disclosure of admissible proof". *Matter of New York County DES Litigation v. Eli Lilly & Co.*, 171 AD2d 119, 123 (1st Dept 1991)(emphasis supplied). The test for CPLR §3101 (a) purposes is "usefulness and reason"; disclosure will be permitted where the information sought concerns the controversy in issue and will assist in the preparation for trial. *Id*; *see also Williams Real Estate*,

Co., Inc. v. Viking Penguin, Inc., 216 AD2d 27, 28 (1st Dept 1995); *Conway v. Bayley Seton Hospital*, 104 AD2d 1018, 1019 (1st Dept 1984).

Facebook

Based upon the above liberal discovery standard, and plaintiff's deposition testimony, as well as his broad claims as to the alleged impact of the subject accident to his life style and alleged loss of enjoyment of life claim, that portion of defendants' motion which seeks to compel the production of plaintiff's Facebook content is granted to the following extent. It is

ORDERED that plaintiff shall produce plaintiff's Facebook content², for *in camera* review, to be supervised by a Special Referee, in accordance with CPLR 3104 and as detailed below; it is further

ORDERED that within 20 days of assignment of a Special Referee, or at the schedule of the Special Referee, plaintiff shall make the requested discovery available for *in camera* review and all parties shall supply the Special Referee with the previously submitted papers on this motion.

It is further

ORDERED that, within 30 days of entry of this order, defendants/third-party plaintiffs shall serve a copy of this order upon the Special Referee Clerk (Room 119M), for the placement of this matter on the Referee's calendar; Defendants/third-party plaintiff's failure to comply will be deemed a waiver of their request for plaintiff's Facebook content.

The assigned Special Referee shall review the supplied documentary discovery, *in camera*, and make a determination as to whether such information is subject to disclosure and identify specific information that is discoverable, in accordance with *Patterson v. Turner Construction Co.*, 88 AD3d 617 (1st Dept 2011)(the First Department remanded the case to the trial court for a "more specific identification of [the] plaintiff's Facebook information that is relevant, in that it

² To the extent possible, such documentary discovery shall be "Bates-stamped" (or the equivalent), so that each document will be easily identified by number, for easy reference.

contradicts or conflicts with [the] plaintiff's alleged restrictions, disabilities, and losses, and other claims", in a matter in which the trial court had done an *in camera* review). See also *Abrams v. Pecile*, 83 AD3d 527 (1st Dept 2011)(the discovery sought "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims").

Family Information

Based upon plaintiff's claims and his deposition testimony and the discovery standard previously stated, defendants/third-party plaintiff's request for the names and addresses of plaintiff's parents and sister is granted. As such, it is

ORDERED that within 20 days of service of a copy of this order, with notice of entry, plaintiff shall supply to the parties, the addresses of plaintiff's parents and sister.

Medical Records

Defendant/third-party plaintiffs request for authorizations to obtain plaintiff's medical records for five (5) years prior to and including the date of the accident is denied, as movants failed to particularize the relevance of such information in their moving papers. With respect to such demand, movants *merely state that* "[t]his demand is permissible under the case law and is defined with reasonable particularity...[and] is both relevant and material to the defense of the action". ¶21, Affirmation in Support of Motion. However, no facts or details are supplied to support such request, and, significantly, no case law is supplied. Moreover, in opposition, plaintiff maintains that he has "already provided authorizations for medical records for treatment related to this lawsuit, as well as conditions which may be relevant to plaintiff's claim for loss of enjoyment of life". It is noted that without a factual showing, defendants/third-party plaintiffs are not entitled to the requested relief. See *Hawkes v. Mount Sinai Hospital*, 75 AD2d 509 (1st Dept 1980).

Social Security Information

Defendants/third-party plaintiffs' request for authorizations to obtain plaintiff's social security earnings information is denied. While movants argue that such information is relevant and

necessary to the defense of this action and, in particular, plaintiff's claim of loss of enjoyment of life and inability to work, plaintiff has *previously supplied* his W-2s, as well as authorizations to obtain his employment and union records; thus, the requested information is duplicative. Moreover, defendants/third-party plaintiffs have supplied no factual basis or supporting case law to support the granting of *additional* information as to plaintiff's past earnings, specifically, plaintiff's social security earnings information.

Conclusion

Based upon the above, it is

ORDERED that defendants/third-party plaintiffs' motion to compel is granted, to the extent set forth herein; and it is further

ORDERED that within 30 days of entry of this order, movants shall serve a copy upon all parties with notice of entry; and a copy upon Room 119M, for placement on referee calendar.

Dated: 10/10/12


Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION

NON-FINAL DISPOSITION

DO NOT POST

REFERENCE

J:\In Camera\Bianco in camera facebook.wpd

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OCT 16 2012
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