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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

ROBERT CARR,

Plaintiff,

-against-

BOVIS LEND LEASE, CRP/RAR III PARCEL J, L.P., THE CARLYLE GROUP, and JOHN DOE #1 and #2 (fictitious name used to identify the corporation which owned the elevator, and the individual who operated it),

Defendants.

INDEX NO. 107413/10
MOTION DATE 08-01-2012
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for a Protective Order

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits cross motion	4 - 5
Replying Affidavits	6

FILED
SEP 05 2012
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: X Yes No

Plaintiff's motion submitted under Motion Sequence 003, pursuant to CPLR §3103, seeks a protective order, vacating or striking the defendants' Notice to Admit and demand for authorizations for social media sites, alternatively pursuant to CPLR §3123, extending the time to provide a response to the Notice to Admit and demand for authorizations.

Defendants' motion submitted under Motion Sequence 004, pursuant to CPLR CPLR §3124 seeks to compel plaintiff to preserve electronically stored information or pursuant to CPLR §3126, impose sanctions and/or dismiss the complaint for intentionally disposing of evidence.

Plaintiff's motion submitted under Motion Sequence 005, pursuant to CPLR §3103, seeks a protective order, vacating or striking the defendants' Demand for Preservation of Electronically Stored Information and extending plaintiff's time to file a Note of Issue and Certificate of Readiness.

On October 22, 2009, plaintiff alleges he sustained injuries at 400 West 63rd Street, New York, New York, when the door of a temporary elevator/hoist/alamac failed to properly open as he attempted to enter, injuring his left arm (Mot. Seq. 003, Exh. C).

On April 4, 2012, after plaintiff was deposed, the defendants served plaintiff with a twenty-eight (28) question Notice to Admit, seeking to have the plaintiff admit to postings on Facebook, MySpace,Twitter, YouTube video or YouTube channel (Mot. Seq. 003, Exh. A). On April 9, 2012, defendants served a demand seeking authorizations for Facebook, Twitter, MySpace,Youtube, Flickr, Friendster and Linkedin accounts (Mot. Seq. 003, Exh. C). Plaintiff responded to the Notice to Admit and served an objection to the Demand for Authorizations, objecting to both on the grounds that they were improper discovery tools

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

and there was no factual predicate for the discovery sought (Opp. Seq. 003, Exh. E & Mot. Seq. 004, Exh. E). On May 17, 2012, plaintiff provided defendants with an authorization for his Facebook account.

On June 5, 2012, defendants served a Demand for the Preservation of Electronically Stored Information seeking, "All Electronic Evidence, including but not limited to: The Blackberry cellular phone, including memory card...;" and, "Any and all videos, recording devices, and metadata, including memory cards used in the connection of uploading information onto Facebook and other social media sites"(Mot. Seq. 004, Exh.H). On June 5, 2012, plaintiff objected to the Demand for Preservation of all Electronically Stored Information and further objected to the Demand for Authorizations claiming they are unduly burdensome, excessive and improper as discovery tools (Mot. Seq. 005, Exh. E).

The court has broad discretion in supervising disclosure and to grant a protective order pursuant to CPLR §3103 (148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co., 62 A.D. 3d 486, 878 N.Y.S. 2d 727 [N.Y.A.D. 1st Dept., 2009]). The test concerning discovery is one of "usefulness and reason" and as such should lead to disclosure of admissible proof. Parties to an action are entitled to reasonable discovery of any relevant facts to the action (Allen v. Crowell-Collier Publ.Co., 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968]). Disclosure sought is required to lead to relevant evidence, and should not be, "overly broad or unnecessary and therefore 'palpably improper'" (Perez v. Board of Educ. Of City of New York, 271 A.D. 2d 251, 706 N.Y.S. 43 [N.Y.A.D. 1st Dept., 2000]) Online postings, are not shielded from discovery, regardless of the use of privacy settings, if they are relevant to issues in the case (Patterson v. Turner Constr. Co., 88 A.D. 3d 617, 931 N.Y.S. 2d 311 [N.Y.A.D. 1st Dept., 2011]). A party seeking authorization for access to "Facebook" postings, in the context of a personal injury action, is required to specify the evidence sought and, "establish a factual predicate with respect to the relevancy of the evidence." (McCann v. Harleysville Insurance Company of New York, 78 A.D. 3d 1524, 910 N.Y.S. 2d 614 [N.Y.A.D. 4th Dept., 2010]).

The purpose of a Notice to Admit is to eliminate those uncontested issues which would take up time and become a burden at trial. A Notice to Admit is designed to seek admissions of fundamental issues, a party is not obligated to provide admissions which may only be resolved after a full trial or which remains in dispute between the parties. A Notice to Admit may not be used as "subterfuge for obtaining additional discovery" (Hodes v. City of New York, 165 A.D. 2d 168, 566 N.Y.S. 2d 611 [N.Y.A.D. 1st Dept., 1991], and Meadowbrook-Richman, Inc. v. Chicchiello, 273 A.D. 2d 6, 709 N.Y.S. 2d 521 [N.Y.A.D. 1st Dept., 2000]). Failure to seek other related evidence or provide proof that the information sought exists as data prior to serving a Notice to Admit, results in a finding that discovery sought is only a subterfuge for obtaining additional discovery (Ahroner v. Isreal Discount Bank of New York, 79 A.D. 3d 481, 913 N.Y.S. 2d 181 [N.Y.A.D. 1st Dept., 2010]).

Pursuant to CPLR §3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (Roman Catholic Church of the Good Shepard v. Tempco Systems, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [N.Y.A.D. 1st Dept. 1994]). Pursuant to CPLR §3126, there must be a showing of a willful violation of a prior Order for discovery or that the failure to provide discovery was willful, contumacious or due to bad faith. This would include predicate failure to provide the discovery sought. (Siegman v. Rosen, 270 A.D. 2d 14, 704 N.Y.S. 2d 40 [N.Y.A.D. 1st Dept. 2000]).

Courts have discretion to impose sanctions when a party "intentionally , contumaciously or in bad faith" destroys evidence prior to an adversary's inspection. (Sage Realty Corporation v. Proskauer Rose LLP, 275 A.D .2d 11, 713 N.Y.S. 2d 155 [N.Y.A.D. 1st Dept., 2000]). Spoliation claims involving electronically stored evidence apply to the potential destruction of evidence in anticipation of litigation and when a party is on notice of, "a credible probability that it will become involved in litigation" (Voom HD Holdings LLC v. Echostar Satellite, L.L.C., 93 A.D. 3d 33, 939 N.Y.S. 2d 321 [N.Y.A.D. 1st Dept., 2012]).

Plaintiff objects to the discovery sought by the defendants claiming that it is excessive, palpably improper and has no factual basis. The Notice to Admit should be vacated or stricken because no issue was raised concerning social media at his February 27, 2012 deposition, or after service of the bill of particulars. The Notice to Admit, although not seeking an admission to a material issue, is being used solely as a disclosure device and is duplicative of the demand for authorizations. Plaintiff claims the defendants provided a good faith basis to obtain discovery from his Facebook account and obtained an authorization. He claims potential inability to recall user names and has not provided any other social media authorizations. Plaintiff opposes the Demand for the Preservation of Electronically Stored Information claiming that it is cumulative after defendants obtained an authorization for access to his Facebook account and an invasion of his privacy.

Defendants oppose plaintiff's motions for protective orders claiming that the discovery sought is relevant on the issue of damages, and that plaintiff has placed his physical condition into controversy. The Notice to Admit involves an admission of matters that are not in dispute and is proper. Defendants seek authorizations because they are relevant to plaintiff's claims concerning his medical condition and damages. Defendants seek to compel or obtain sanctions claiming they are entitled to the discovery sought after obtaining photographic postings from public Facebook entries revealing the plaintiff was engaged in physical activities. Defendants claim that the plaintiff is under an obligation to preserve evidence and prevent routine destruction. They claim that preservation of the Blackberry and its memory card are necessary for authentication purposes based on potential third party access.

Upon review of all the papers submitted, this Court finds, that the Notice to Admit is being used as a disclosure device, is duplicative of the demand for authorizations, it therefore shall be stricken. Defendants failed to state a basis for sanctions because plaintiff has provided an authorization for his Facebook account, is willing to supplement his responses, and defendants have not established that the discovery sought has already been destroyed or deleted. Pursuant to CPLR §3124, plaintiff shall be compelled to provide a supplemental response to the demand for authorizations and comply with the Demand for the Preservation of Electronically Stored Information. Plaintiff has not denied that he has other social media accounts, or provided an affidavit denying their existence. Plaintiff has posted information on Facebook which may contradict assertions made concerning the extent of his injuries in this action. Defendant's need for access to relevant information outweighs plaintiff's concerns of privacy, since plaintiff claims he cannot recall all of his user names for authorizations to obtain access to other social media accounts, and this information may be maintained on the memory card or other metadata, plaintiff shall be required to maintain and preserve videos, and metadata, including memory cards, in connection with uploading information onto all social media sites from the date of the accident to the present. Defendant has not stated a basis for maintaining

and preserving plaintiff's cellular phone or recording devices in addition to preserving the data.

Accordingly, it is ORDERED, that plaintiff's motion submitted under Motion Sequence 003, pursuant to CPLR §3103 for a protective order, vacating or striking the defendants' Notice to Admit, alternatively pursuant to CPLR §3123, extending the time to provide a response to the Notice to Admit and demand for authorizations, is granted to extent that plaintiff is granted a protective Order striking defendant's Notice to Admit, and it is further

ORDERED, that the plaintiff's time to serve a supplemental response to defendants' demand for authorizations is extended to September 28, 2012, the remainder of the motion is denied, and it is further

ORDERED, that defendants motion submitted under Motion Sequence 004, pursuant to CPLR §3124 to compel plaintiff to preserve electronically stored information or pursuant to CPLR §3126 for sanctions and dismissing the complaint for intentionally disposing of evidence, is granted to the extent that the plaintiff shall provide supplemental responses to the defendants' demand for authorizations and respond to the Demand for the Preservation of Electronically Stored Information, for the period from October 22, 2009 to the present, by September 28, 2012, failure to do so shall result in plaintiff's preclusion from testifying as to damages at the time of trial, and it is further

ORDERED, that the plaintiff shall preserve and maintain any and all videos, and metadata including memory cards used in connection with uploading information onto Facebook and other social media sites from October 22, 2009 to the present, except plaintiff shall not be required to preserve the Blackberry cellphone or recording devices, and it is further

ORDERED, that the remainder of the motion is denied, and it is further

ORDERED, that plaintiff's motion submitted under Motion Sequence 005, pursuant to CPLR §3103 for a protective order vacating or striking defendants' demand for Preservation of Electronically Stored Information dated May 29, 2012 and extending plaintiff's time to file a note of issues, is granted to the extent that plaintiff shall not be compelled to preserve his Blackberry or recording devices, and the time to file the note of issue is extended to November 9, 2012, and it is further

ORDERED that the remainder of the motion is denied, and it is further

ORDERED that the parties shall appear for a Status Conference, in IAS Part 13, room 307 at 80 Centre Street, New York, New York at 9:30a.m. on October 31, 2012.

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: August 30, 2012

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE