Medina v City of New York
2015 NY Slip Op 32429(U)
December 22, 2015
Supreme Court, New York County
Docket Number: 156411/13
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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ALVARO MEDINA,

Plaintiff,

Index No. 156411/13

- against -

Motion Seq. No. 001

THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY LONG ISLAND RAIL ROAD, METROPOLITAN TRANSPORTATION AUTHORITY, LONG ISLAND RAIL ROAD, NEW YORK CITY TRANSIT AUTHORITY AND MTA CAPITAL CONSTRUCTION COMPANY,

Decision and Order

Defendants.
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HON. MICHAEL D. STALLMAN, J.:

In this action arising from injuries to plaintiff in the course of his work at the East Side Access Project, defendants move to compel plaintiff to provide authorizations for the release of plaintiff's social media records from Facebook and Instagram.

BACKGROUND

Plaintiff alleges that he was operating a drill machine on July 31, 2012 around 11:50 a.m., when the drill slipped on unsteady ground and pinned plaintiff against the wall, causing plaintiff to sustain permanent

injuries . (Def. Opening Affirm. Ex. B [Complaint] at ¶148.) In addition to his physical injuries, plaintiff claims damages for a variety of mental injuries, including Post-traumatic Stress Disorder, "Loss of Social interest," "Loss of libido and loss of motivation," "Sadness," "Pessimism and Failure," "Loss of energy," "Concentration impairment," "Difficulty relaxing," "Fearing the worst happening." (Def. Opening Affirm. Ex. B [Verified Bill of Particulars] at 6.) Defendants argue that these claims place plaintiff's mental condition in controversy, and that they are thus entitled to discovery of any information relevant to these claims.

At his continued deposition on March 13, 2015, plaintiff testified that he has a Facebook page and an Instagram account. (Def. Opening Affirm. Ex. G [Plaintiff's EBT], at 326-327.) By a demand dated March 23, 2015, defendants sought, among other things, "Duly executed, original authorization[*sic*] allowing release of the plaintiff's social media records from Facebook and Instagram." (Def. Opening Affirm. Ex. D [Disclosure Demand] at ¶7.)

DISCUSSION

CPLR 3101 states that there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." It has long been New York law that the words "material and necessary" are "to be

interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968].)

A party's "mere possession and utilization of a Facebook account is an insufficient basis to compel [that party] to provide access to the account or to have the court conduct an in camera inspection of the account's usage." (*Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013].) Rather, the Appellate Division, First Department has held that "[t]o warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account—that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." (*Id.* [internal quotation marks omitted].) In addition, the party seeking discovery must show "that the method of 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." (*Forman v Henkin*, ___ AD3d ___, 2015 NY Slip Op 09350 [1st Dept Dec. 17, 2015] [internal quotation marks omitted].)

Here, defendants submit printouts of the profile page of plaintiff's Facebook account, which is accessible to the general public, which shows thumbnails of some photographs posted to plaintiff's Facebook account. According to defendants, these photographs "depict the plaintiff wearing a marijuana gas mask, drinking a bottle of Corona while making a profane gesture with his middle finger towards the photographer, dressed in costume, and smiling and laughing in each photograph." (*Id.*; *see also* Def. Opening Affirm., Ex H.) Defendants argue that not one of the publicly available images on plaintiff's Facebook profile page "depict a person who suffers from post-traumatic stress disorder, irritability, loss of social interests, or any of the other psychiatric conditions" alleged in plaintiff's bill of particulars. (*Id.*)

The Court agrees with defendants that the thumbnail images from the profile page of plaintiff's Facebook account could be construed as contradicting or conflicting with plaintiff's alleged mental injuries; plaintiff does not dispute this. Instead, plaintiff objects to unrestricted access to plaintiff's social media accounts on the ground that such additional discovery would be cumulative, citing *Winchell v Lopiccolo* (38 Misc 3d 458, 462 [Sup Ct 2012]), because plaintiff asserts that defendants' private investigator has already uncovered at least 10 pages of materials from his

Facebook account. (Pl. Opp. Affirm. ¶5.) Moreover, plaintiff's counsel states, "[i]t cannot be overstated, this is not a case where the Plaintiff has a private, restricted access Facebook page warranting a court order for authorization." (*Id.*) In addition, plaintiff argues that defendants' requests are overbroad, and that simply because he has alleged damages for mental injuries does not mean that he is required to produce every thought he may have reduced to writing. (Pl. Opp. Affirm. ¶5.)

In reply, defendants argue that plaintiff misapplies the law in claiming that production of the private portions of his Facebook account would be cumulative. (Def. Reply Affirm. ¶¶9-10.) Were such a defense of cumulativeness available, defendants contend, movants would never be able to gain discovery of restricted-access social media accounts because supplying the required factual predicate—by pointing to portions of the public account that contradict the claim at issue—would make production of the private portions cumulative. In addition, defendants dispute plaintiff's counsel's representation that plaintiff does not have "'a private, restricted access Facebook page,'" noting that plaintiff's counsel makes this representation "without reference to an affidavit or testimony of anyone with personal knowledge as to plaintiff's use of privacy settings." (*Id.* ¶11.) That there is an invitation at the top of plaintiff's Facebook profile stating "[t]o see

[* 6]

what he [plaintiff] shares with friends, send him a friend request" indicates, according defendants, that there is content on plaintiff's Facebook profile which is viewable to plaintiff's Facebook friends, but not viewable to defendants and the public. (*Id.*) Moreover, defendants contend that, if plaintiff's profile is truly open to public view, "plaintiff would have no objection to providing the subject authorization, because everything would already be visible." (*Id.* ¶12.)

Notwithstanding the factual predicate shown for the Facebook account, the blanket authorizations sought for the Facebook and Instagram accounts are unrestricted as to subject matter and time. (*See* Def. Opening Affirm. Ex. D [Disclosure Demand] at ¶7.) Therefore, they are overbroad. (*See Spearin v Linmar, L.P.*, 129 AD3d 528 [1st Dept 2015] [finding that defendant established a factual predicate for discovery of the private portions of plaintiff's Facebook account but that granting defendant "access to all of [plaintiff's] post-accident Facebook postings is overbroad"]; *Winchell v Lopiccolo*, 38 Misc 3d 458, 462 [Sup Ct 2012] [denying Defendants' motion to compel access to plaintiff's Facebook page without prejudice to service of a more narrowly-tailored discovery demand upon finding that defendants request for unrestricted access to plaintiff's Facebook page was overbroad].)

The Court notes that plaintiff's attorney's representations about whether plaintiff has a restricted access Facebook account are hearsay at best and have no probative value. It would appear that this remains a proper subject for further discovery.

Defendants have not established any factual predicate for discovery of plaintiff's Instagram account. This, too, can be addressed in discovery. The Court need not address the parties' remaining arguments.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to compel discovery of the plaintiff's social media records from Facebook and Instagram is DENIED.

Dated: December 22, 2015
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.