Virano v Daggett
2016 NY Slip Op 32901(U)
September 22, 2016
Supreme Court, Greene County
Docket Number: 14-0897
Judge: Charles M. Tailleur

State of New York
Supreme Court: County of Greene

HEATHER VIRANO, individually, and
WESLEY LEE, an infant, by his parent and natural guardian, HEATHER VIRANO,

Plaintiff

–against-

ZEKE T. DAGGETT and BRIAN A. DAGGETT,

Defendant

Decision & Order

 # 14-0897

Appearances:

For Plaintiff: Daniel J. Persing, Esq.
Tully Rinckey PLLC
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Albany, New York 12205

For Defendant: Danielle N. Meyers, Esq.
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20 Corporate Woods Boulevard
Albany, New York 12211

(Tailleur, J.)

Plaintiff commenced the above-captioned action for personal injury arising from an automobile accident by the filing the summons and complaint in the Office of the Greene County Clerk on September 15, 2014.

The plaintiff was deposed on September 28, 2015 and December 30, 2015. She testified that her doctor had ordered that she remain out of work from the date of the accident (May 10, 2014) (tr of deposition of plaintiff at 25, line 15). However, she indicated that she had discussed returning to work with certain limitations (Id. at 87, line 12-19) and that she had started to apply for jobs with those limitations (Id., lines 18-19).

She alleged that, as a result of the accident, her left knee was injured (Id. at 68, line 19-22); that she is unable to fully bend or extend her left knee (Id. at 74, lines 23-24; at 75, line 1) and that she was in extreme pain (Id., at 79, line 22). She also testified that she had surgery to remove scar tissue from under her kneecap (Id. at 89, lines 2-5) and that the surgery was not effective as she continues to have pain (Id. at 94, lines 23-24), numbness, lack of feeling (Id. at 96, lines 11-15) and much pain in her knee and that her ability to extend her knee has improved "very little" (Id. at 89, lines 10-13) and that, from time to time, he knee "gives out" limiting her activities (Id. at 97, lines 15-22)

Five (5) copies of photographs taken from the plaintiff's Facebook account were marked into evidence at the deposition. The plaintiff testified that exhibit "I" was a photograph of her changing the oil in her car (Id. at 128, line 16) that was taken in the summer of 2016 (Id. at 129, line 8). She also testified that exhibits "J", "K" and "M" were photographs of her, her son and a family friend taking a "nature walk" in Thatcher Park in August of 2015 (Id. at 134, line 6-11). Exhibits "J" and "K" were photographs of the plaintiff, taken on the same day at the "nature walk" (Id. at 135, lines 8-9). She explained that the "nature walk" was not strenuous (Id., lines 14-15) and that she stopped about half-way when the ground became "rocky and mountainy" (Id. line 21) and that she didn't do the stairs (Id., line 23).

The plaintiff admitted that exhibit "L" was a copy of a photograph of her riding a dirt bike [hereinafter "dirt bike photograph"] (Id. at 131, line 8). The defendant was asked when the photograph was taken. She replied "A couple of months–a couple of years ago (Id., line 12). She asserted that the picture was taken before the automobile accident (Id., line 14).

This exhibit has been the source of an ongoing discovery dispute between the parties. On October 2, 2015, the defendants demanded that the plaintiff produce the camera which took the dirt bike photograph and the cell phone or computer that uploaded the photograph to Facebook. The plaintiff objected to this demand. On November 24, 2015, the defendant made a second demand for the dirt bike photograph. After a teleconference, on December 10, 2015, this Court ordered that the plaintiff produce the "native version" of the photograph. On February 11, 2016, the defendant responded that she was unable to produce the photograph, since she could not locate it. On February 16, 2016, the plaintiff served a response to the defendant's demand originally dated October 2, 2015. A second teleconference was held on March 1, 2016 and this Court permitted the defendants to serve a demand for social media information that occurred after the date of the accident. The defense objected to the demand calling it "duplicative, overly broad and without a factual predicate" (letter of plaintiff's counsel attached as exhibit "R" to defendant's motion). Counsel for the defendant then notified the plaintiff that it did not intend to withdraw its demand.

Now, the plaintiff, by motion returnable on June 10, 2016, has moved this Court for a protective order "denying the use of any disclosure device meant to inquire into plaintiff's social or electronic media usage, in order to prevent unreasonable annoyance, expense, embarassment, disadvantage or other prejudice to any person and to the Court under CPLR § 3103 (a)" and sanctions (plaintiff's notice of motion, 1-2). This motion is in response to the defendant's previous demands for disclosure of data from the plaintiff's social media site(s). The defendant opposes this motion.

The defendant has, in turn, moved by motion returnable on June 13, 2016, to

compel the plaintiff to "turn over information relating to her social media activity since the date of the accident, turn over the native or original version of a certain photograph of herself [the]; and submit for examination" the device(s) used to take or upload a certain photograph of herself [the dirt bike photograph] (defendant's affirmation in support of the motion to compel at 1, ¶ 2).

Here the Court is being asked to allow the defendant to examine the plaintiff's social media data "that occurred after the plaintiff's accident [May 10, 2014]" (Id. at 9, ¶ 25).

First, the Court will address the ongoing dispute concerning the production of the dirt bike photograph. The plaintiff claims that the dirt bike photograph was taken **before** the accident that allegedly caused her knee injury (tr of plaintiff's deposition at 131) but was posted on Facebook on "a few months" prior to her deposition (Id. at 131, line 17).

The defendants claim that if the photo were taken after the accident, it would demonstrate that the plaintiff has exaggerated the extent and seriousness of her condition and claimed limitations that do not exist, all of which would undermine her credibility. Therefore, the defendants assert that they are entitled to inspect the camera that took the picture of the plaintiff riding the dirt bike or, alternatively, the computer or phone that uploaded the photo to social media (defendant's affirmation in support of motion to compel at 6, ¶ 13) to determine if the photograph had been taken after the accident.

This Court has previously ordered that the dirt bike photograph be produced in a ".tiff or .pdf format with accompanying load file or in its 'native format" ("So Ordered" letter from Court attached to defendant's motion as exhibit "N"). The plaintiff's counsel has responded, explaining that "despite due diligence and a good faith effort on her part to

locate said photograph, she has been unable to locate the file" (response to demand for discovery and inspection, ¶ 1, attached to defendant's motion as exhibit "O"). However, where a party alleges that a discoverable item does not exist or, as here, is lost, the unsupported allegations of the party's counsel are insufficient (Modern New York Discovery, § 28:20, citing Fuhs v. Fuhs, 132 AD 2d 824, 824 [3d Dept 1987])). Where a party pleads that a discoverable item is non-existent, a person with personal knowledge of the facts must execute an affidavit concerning the non-existence of the item and must swear that the item is lost (Id.). Therefore, this Court **GRANTS** the plaintiff fifteen (15) days from the date of this Decision and Order to comply with its Order dated December 1, 2015 respecting the dirt bike affidavit or to submit the required affidavit. This applies only to the photograph marked exhibit "L", denominated as the "dirt bike photograph" in this Decision. In the interim, the defendant's motion to compel and for sanctions applicable to the dirt bike affidavit are held in abeyance.

The remainder of this Decision is limited to a consideration of the defendant's motion to compel and the plaintiff's motion for a protective order.

Here, the Court is being asked to the allow the defendant to examine the plaintiff's social media data "that occurred after the plaintiff's accident [May 10, 2014]" (defense affirmation in support of motion to compel 9, ¶ 25).

> CPLR 3101 (a) provides that there shall be full disclosure of all evidence 'material and necessary' in the prosecution or defense of an action, regardless of the burden of proof. The words 'material and necessary' are to be interpreted liberally and require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason [citations omitted].
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> A party's right to discovery is not unlimited, however, and may be curtailed when it becomes an unreasonable annoyance and tends to

> harass and overburden the other party [citation omitted]. (Harrison v. Bayley Seton Hospital, Inc., 219 AD 2d 584, 584 [2d Dept 1995], aff'd after remand 247 AD 2d 513 [1998]).

A court must conduct a two-pronged analysis before it orders the production of data from social media accounts: the Court must determine if the content on the social media account is material and necessary and, second, conduct a balancing test to determine "whether the production of content would result in the violation of the account holder's privacy rights" (Fawcett v. Altieri, 38 Misc 3d 1022, 1024 [Sup Ct Richmond County 2013]). But first, to warrant discovery, the movant must establish a factual predicate by identifying relevant information in the non-movant's Facebook account that "contradicts or conflicts with the plaintiff's alleged restrictions, disabilities, and losses and other claims" (Tapp v. New York Urban Development Corp., 102 AD 3d 620, 620-621 [1st Dept 2013]). The defense seeks "Plaintiff's Facebook account data, and more specifically, a complete copy of posts and photographs uploaded to the social media account from September 30, 2014 through the present for each one of the plaintiff's Facebook accounts, including those posts and photographs in which plaintiff was 'tagged' by other Facebook users" **AND** "Plaintiff's Instagram account data, and more specifically, a complete copy of posts and photographs uploaded to the social media account from September 30, 2014 through the present for each one of the plaintiff's Instagram accounts, including those posts and photographs in which plaintiff was 'tagged' by other Instagram users" (defendant's second demand for social media information, attached as exhibit "Q" to defendant's motion to compel). The defense describes these requests as being a "narrowly-tailored discovery request" for information "for possible use as evidence-in-chief that plaintiff's injuries are

exaggerated or on cross-examination as to plaintiff's credibility (defense affirmation in opposition, ¶ 28). Clearly, the defense has not established a factual predicate with specificity, much less if it is material and necessary. Their argument is "nothing more than a request to conduct a fishing expedition" (Tapp at 621, citation and internal quotation marks omitted). Setting aside exhibit "L", the dirt bike photograph", the defense has four (4) photographs that were introduced at the deposition. At that time, the plaintiff testified under oath as to the facts and circumstances of those photographs (see tr of deposition at 127, line 23 - 135, line 24). Whether those photographs make the plaintiff's allegations more or less credible is a determination left to the trier of fact. This Court does not belief that a review of all photographs of the plaintiff posted on Facebook and Instagram that may lead to a photograph or photographs that would enhance the defendant's claims is reasonable or necessary. Furthermore, the defense has not alleged that the information they seek is not available from another source.

Therefore, defendant's motion to compel is **DENIED**. Plaintiff's motion for a protective order is **DENIED** since a protective order would effectively bar the defendant from seeking Facebook or Instagram materials at a future date (see McCann v. Harleysville Ins. Co. of N.Y., 78 AD 3d 1524, 1525 [4th Dept 2010]).

The foregoing constitutes the **DECISION and ORDER** of this Court, the original of which is being transmitted to counsel for the plaintiff. All other papers have been delivered to the Greene County Clerk by Chambers. The signing of this Decision and Order does not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

DATED: September 22, 2016
Catskill, New York

Hon. Charles M. Tailleur
Acting Supreme Court Justice

Papers Considered:

Plaintiff's Notice of Motion and Motion for a Protective Order and Sanctions with exhibits
Plaintiff's Memorandum of Law in Support of Motion for Protective Order and Sanctions
Defendant's Affirmation in Opposition to Motion for Protective Order and Sanctions with exhibits
Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Protective Order and Sanction
Defendant's Notice of Motion and Motion to Compel Disclosure with exhibits
Defendant's Memorandum of Law in Support of Defendant's Motion to Compel
Plaintiff's Affirmation in Opposition to Defendant's Motion to Compel

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