To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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RAYMOND WALKER,

Plaintiff,

DECISION & ORDER
Index No. 61494/2015

-against-

Seq. Nos. 2, 3

POKO-ST ANNS L.P., HOFFMAN FUEL COMPANY OF DANBURY and GUS & G CONSTRUCTION, INC.,

Defendants.

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POKO-ST ANNS L.P., HOFFMAN FUEL COMPANY OF DANBURY,

Third-Party Plaintiffs,

-against-

GUS & G CONSTRUCTION, INC.,

Third-Party Defendant,

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LEFKOWITZ, J.

The following papers were read on: (1) the motion by plaintiff (sequence no. 2) for, inter alia, a protective order pursuant to CPLR 3103 from providing full and unrestricted access to plaintiff's social media accounts, including but not limited to Facebook and Instagram; and (2) defendants/third-party plaintiffs Poko-St. Anns L.P. and Hoffman Fuel Company of Danbury (hereinafter "Poko defendants"), motion (sequence no. 3) for, inter alia, an order dismissing the complaint or alternatively, compelling plaintiff's compliance with this court's compliance conference orders, including the contents of plaintiff's Facebook and Instagram accounts, all authorizations previously demanded and upon plaintiff's continued failure to do so striking plaintiff's complaint or, alternatively precluding plaintiff from offering any testimony or evidence of permanence, loss of enjoyment of life and lost earnings.[1]

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[1]By Decision & Order of the Supreme Court, Westchester County (Lubell, J.), entered November 13, 2017, the third-party complaint was dismissed in its entirety. Any relief sought by the moving

Plaintiff's Order to Show Cause; Affirmation in Support; Exhibits A-J
Defendant's Affirmation in Opposition; Exhibits A - E
Third-party defendant's Affirmation in Opposition; Exhibits A - J
Defendant's Order to Show Cause; Affirmation in Support; Affirmation of Good Faith; Exhibit A - J
Plaintiff's Affirmation in Opposition; Exhibits A- O
Third-Party Defendant's Affirmation in Opposition; Exhibits A - J
Defendant's Supplemental Affirmation as directed by Court

Upon the foregoing papers and proceedings held herein, this motion is determined as follows:

On or about July 7, 2015, plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on January 14, 2015, while working to remove a boiler at the premises owned by the Poko defendants. At the time of his accident, the plaintiff was employed by third-party defendant Gus & G Construction, Inc. Issue was joined on or about September 16, 2015, by service of the Poko defendants' answer.

On or about September 16, 2015, the Poko defendants served plaintiff with their demands for, inter alia, medical authorizations, photographs, and social networking records. In the so-ordered Preliminary Conference Stipulation, entered on January 15, 2016, in addition to unrestricted medical and hospital authorizations, the plaintiff stipulated to providing on or before February 12, 2016, authorizations for employment records for the period of January 14, 2012 to present, and unrestricted authorizations for IRS, Workers Compensation Board, Medicaid, pharmacy records and ambulance call reports. The plaintiff failed to comply and by Compliance Conference Referee Report & Order entered July 5, 2016, the plaintiff was ordered to provide all the authorizations enumerated in the Preliminary Conference Stipulation on or before July 22, 2016. The plaintiff again failed to comply and by Compliance Conference Referee Report & Order entered August 8, 2016, the plaintiff was again ordered to provide the same authorizations enumerated in the Preliminary Conference Stipulation on or before August 19, 2016. Plaintiff apparently complied in part, because by Compliance Conference Referee Report & Order entered September 12, 2016, the plaintiff was ordered to provide the authorizations for IRS, Medicaid and pharmacy records on or before September 16, 2016. Plaintiff again apparently complied in part, because by Compliance Conference Referee Report & Order entered October 31, 2016, the plaintiff was ordered to provide authorizations for, inter alia, IRS and CVS pharmacy records on or before November 4, 2016. Thereafter, the plaintiff's deposition was held and by Compliance Conference Referee Report & Order, entered December 9, 2016, the defendants were directed to serve any post-deposition demands on or before December 30, 2016 and the plaintiff's responses were to be served on or before January 20, 2017. The Poko defendants served their post-deposition demands on or about December 23, 2016. Included in those demands were demands

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defendants against the third-party defendant is, therefore, moot and will not be addressed herein.

for plaintiff's Facebook and Instagram URLs, photographs, HIPAA-compliant authorizations for St. John's Riverside, St. Joseph's Hospital, Lawrence Hospital, Montefiore New Rochelle Hospital and various medical providers, collateral sources and pharmacy records.

By Compliance Conference Referee Report & Order entered March 10, 2017, the plaintiff was directed to serve a verified supplemental bill of particulars regarding the arthroscopic left knee surgery he had on January 19, 2017, and all authorizations related thereto on or before March 27, 2017. By compliance conference Referee Report & Order entered April 11, 2017, the plaintiff was again directed to serve a verified supplemental bill of particulars and all authorizations related thereto. Further, the plaintiff was also directed to serve his responses to post-deposition demands served on December[2] 23, 2016 on or before April 24, 2017. A further deposition and physical examination of the plaintiff was to be scheduled at the next compliance conference. By Compliance Conference Referee Report & Order entered May 11, 2017, the plaintiff was again directed to serve a verified supplemental bill of particulars and all authorizations related thereto on or before May 18, 2017. In addition, the plaintiff was again directed to serve his responses to post-deposition demands served on December 23, 2016 on or before May 18, 2017.

By Compliance Conference Referee Report & Order, entered May 30, 2017, the plaintiff was ordered to provide supplemental responses, including "copies of all entries and photographs of the plaintiff's Facebook and Instagram URL's for two months prior the date of the subject accident to present, which shall be clearly paginated/Bate-stamped," and outstanding authorization, including for Lawrence Hospital. Thereafter, the plaintiff objected to the production of the contents of his Facebook and Instagram accounts. This Court offered to conduct an in camera review of same, however, plaintiff sought and obtained a briefing schedule for a protective order.[3] At a subsequent conference held on June 23, 2017, the Poko defendants requested a briefing schedule to compel the plaintiff's compliance with outstanding discovery. Plaintiff and the Poko defendants filed their respective motions.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent

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[2]A typographical error in the order erroneously provides the date as "February" 23".

[3]An amended briefing schedule was issued to plaintiff on June 23, 2017, changing the return date of the motion.

on the party seeking disclosure to demonstrate 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" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]). If the information sought is sufficiently related to the issues in litigation so as to make the effort to obtain it in preparation for trial reasonable, then discovery should be permitted (*see Allen v Crowell-Collier* Publishing Co., 21 NY2d 403, 406–407 [1968]; *In re Beryl,* 118 AD2d 705, 499 N.Y.S.2d 980 [2d Dept 1986]). It is immaterial that the information sought may not be admissible at trial as "pretrial discovery extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance Inc.,* 226 AD2d 175 [1st Dept. 1996]; *Polygram Holding Inc. v Cafaro,* 42 AD3d 339 [1st Dept 2007]).

Here, the Poko defendants seek to challenge plaintiff's claims of permanence of injuries, inability to return to work, loss of enjoyment of life and lost earning through evidence from his social media presence. The discoverability of social media content is well-established in the State of New York. Social media postings and entries are subject to disclosure. In fact, the First Department has equated the discoverability of Facebook entries to that of personal diary entries (*see Patterson v Turner Constr. Co.,* 88 AD3d 617, 618 [1st Dept 2011]). Courts have found that private information from a plaintiff's social media account is relevant to a plaintiff's damages claim where a defendant has shown that plaintiff's public Facebook page contained photographs of plaintiff engaged in a variety of recreational activities that were probative on the issue of damages (*Melissa G. v N. Babylon Union Free School Dist.*, 48 Misc3d 389, 392 [Supreme Court, Suffolk County, 2015]; *see also, Pereira v City of New York*, 40 Misc3d 1210(A) [Supreme Court, Queens County, 2013]). More particularly, entries in a social media account are probative of a plaintiff's activities and enjoyment of life all of which are material and relevant to the defense of an action (*see Roman v Steelcase Inc.*, 30 Misc3d 426, 430 [Sup Ct, Suffolk County, 2010]).

It is well-settled that a two prong analysis exists for determining whether a social media account is discoverable. First, the court must determine that the content in the account is material and necessary, and then the court must balance whether the production of this content will result in a violation of the account holder's privacy rights (*Frugis v Swift*, 2014 NY Slip Op 33000 [Supreme Court, Westchester County, 2014], *citing Jennings v TD Bank*, NY Slip Op. 32783 [Supreme Court, Nassau County, 2013]). Turning to the first prong of this test, in order to compel production of a private social media account, the party seeking discovery must establish a factual predicate by making "a showing that at least some of 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 prosecution or defense of the action (*Richards v Hertz Corp.*, 100 AD3d 728 [2d Dept 2012]; *Gonzalez v City of New York*, 47 Misc3d 1220(A) [Sup Ct, Queens County, 2015]; *Fawcett v Altieri*, 38 Misc3d 1022 [Supreme Court, Richmond County, 2013]; *Winchell v Lopiccolo*, 38 Misc3d 458 [Supreme Court, Orange County, 2012]). More

particularly, photographs and entries from a plaintiff's public pages of a Facebook account have been found to be sufficient to establish the requisite factual predicate to warrant disclosure (*see Flowers v City of New York*, 151 AD3d 590 [1st Dept 2017]). Where a plaintiff's public Facebook pages contain images of plaintiff engaged in a variety of recreational activities that are probative to plaintiff's damages claims, it is reasonable to believe that other portions of the Facebook pages may contain further evidence relevant to the defense and are therefore discoverable (*see Richards v Hertz Corp.,* 100 AD3d at 730; *Melissa G. v N. Babylon Union Free School Dist.*, 48 Misc3d at 392).

Here, the Poko defendants have established the first prong of the two prong analysis which necessitates a factual predicate to compel plaintiff to provide disclosure of his social networking sites. Defendant has established that the information sought regarding the plaintiff's Facebook and Instagram accounts is both material and necessary to the defense of this action and and to the alleged claims and injuries. Unlike the cases relied upon by the plaintiff— which are predominantly not Second Department cases (*see Tapp v New York State Urban Dev. Corp.*, 102 AD2d 620 [1st Dept 2013] [defendant made no factual predicate and failed to identify relevant information]; *Abrams v Pecile*, 83 AD3d 527 [1st Dept 2011] [defendant had made no showing]; *see also Kregg v Maldonando,* 98 AD3d 1289 [4th Dept 2012] [no factual predicate]; *see also Frugis v Swift*, 2014 NY Slip Op 33000, *4-5 [Sup Ct, Westchester County, 2014] [*plaintiff's* motion to compel *defendant's* social media account was denied by this Court where the plaintiff did not "establish a necessary factual predicate to compel production of the account information;" this Court held that there was no evidence that either defendant or anyone else "posted information, messages or photos, related to the relevant issues of this case on social networking pages"]; *Fawcett v Altieri*, 38 Misc3d 1022, 1028 [Sup Ct, Richmond County, 2013] [no good faith basis for discovery of social media made "other than supposition, hope or speculation"]; *Winchell v Lopiccolo*, 36 Misc3d 458, 461 [Sup Ct, Orange County, 2012] [defendant failed to establish a factual predicate]), here, there is evidence on the record, including the plaintiff's own testimony at his deposition, that plaintiff posted to both Facebook and Instagram regarding the extent of his injuries and his social activities (*see Richards v Hertz Corp.*, 100 AD3d 728, 730 [2d Dept 2012]; *Flowers v City of New York*, 151 AD3d 590 [1st Dept 2017]; *Gonzalez v City of New York*, 47 Misc3d 1220(A) at *2; *compare Romano v Steelcase, Inc.*, 30 Misc3d 426).

At his deposition, the plaintiff testified that he posted images of his leg, his treatment, and social activities on his Facebook and Instagram accounts (Plaintiff's deposition tr. at 168-170). Further, prior to the filing of plaintiff's underlying motion, plaintiff also provided copies of 25 photographs and seven videos depicting the plaintiff and his injuries taken from his social media accounts. The Poko defendants have also provided copies of screen shots of public pages from plaintiff's Facebook account. Notably, most of these photographs appear to depict the plaintiff's scar, and at least one of the videos appears to be the plaintiff diving from a diving board after the date of the accident herein. Thus, contrary to the contentions of the plaintiff, it is not the mere possession and utilization of a Facebook account that serves as the basis for the disclosure sought by the Poko defendants, but the plaintiff's own deposition testimony and the

photographs and videos exchanged by the plaintiff from his social media accounts that depict his injuries after his accident. Accordingly, defendant has demonstrated a factual predicate warranting the discovery of plaintiff's social media accounts.

Where, as here, a defendant has established a factual predicate that "at least some of 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 plaintiff's claims, the Second Department has held that the Supreme Court should conduct an in camera inspection of all status reports, e-mails, photographs, and videos posted on [the plaintiff's] Facebook profile since the date of the subject accident to determined which of those materials, if any, are relevant to [the] alleged injuries" (*Richards v Hertz Corp.*, 100 AD3d at 730; *see Gonzalez v City of New York*, 47 Misc3d 1220(A) at *2 ; *Pereira v City of New York*, 40 Misc3d 1210(A), at *2; *Loporacaro v City of New York*, 35 Misc3d 1209[A] (Sup Ct, Richmond County, 2012] *see also Spearing v Linmar, LP,* 129 AD3d 528 [1st Dept 2015]; *Patterson v Turner Constr. Co.,* 88 AD3d 617, 618 [1st Dept 2011]; *Imanverdi v Popovici*, 109 AD3d 1179 [4th Dept 2013]; *A.D. v C.A.,* 50 Misc3d 180 [Sup Ct, Westchester County, 2015]; *M.N. v 30 Ellwood Realty LLC*, 39 Misc3d 63 [App Term, 1st Dept, 2013]). Plaintiff argues that he has already provided all photographs and videos from his Facebook account. However, as noted by the Second Department in *Richards*, a plaintiff's Facebook account may also contain other items such as status reports, emails, and postings, that would also be relevant to the extent of plaintiff's injuries. Accordingly, safeguarding the second prong of the test for discovery of social media material, plaintiff is directed to provide to this Court unredacted copies of the entire contents of his Facebook and Instagram accounts since the date of the subject accident for an in camera inspection, including but not limited to, status reports, emails, timelines, photographs and videos posted on the plaintiff's Facebook and Instagram accounts for this Court to conduct an in camera inspection to determine what is relevant and warranting disclosure.[4]

It is axiomatic that under CPLR 3101(a)(1), there must be full disclosure of all matters "material and necessary" in the prosecution or defense of an action. The phrase "material and necessary" is interpreted liberally to require disclosure, on request, of any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Matter of Kapon*, 23 NY3d 32 [2014], *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Trial courts have broad discretion to supervise discovery and enter appropriate remedies to ensure the fair and efficient conduct of discovery (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). On a CPLR 3126 motion to strike a pleading as a consequence of a party's failure to proceed with discovery, "the nature and degree of the penalty ... is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's

[4]While not directed to do so herein, plaintiff may also submit to the Court a separate copy of the entries, etc. from his Facebook and Instagram account with his proposed redactions for the Court's in camera consideration.

failure to disclose is willful and contumacious (*see Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court-ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*see Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal,* 38 AD3d at 820; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

Here, it is undisputed that plaintiff failed to comply with multiple court orders. Numerous discovery demands and at least ten compliance conference orders have dealt with the issue of plaintiff providing outstanding authorizations. In fact, even the Preliminary Conference Stipulation, entered on January 15, 2016, provided for some of the same authorizations that remain outstanding, including, IRS, Workers Compensation Board, Medicaid, and pharmacy records. In fact, in opposition to the defendant's underlying motion, plaintiff first served his responses to outstanding discovery demands, including providing some of the outstanding authorizations. In light of plaintiff's albeit late attempt to provide at least some of the outstanding discovery and authorizations in opposition to this motion, the court declines to find his conduct wilful and contumacious at this juncture warranting dismissal. However, as outlined in the Poko defendants supplemental affirmation, plaintiff has still not provided all the outstanding authorizations. Accordingly, if on or before January 19, 2018, defendant has not received valid, original, unrestricted authorizations for the following paragraphs as delineated in counsel's supplemental affirmation—¶¶ 4(a), (b), (c), (e), (f), (g), (h), (I) and (j)— and has not been provided with valid, original authorizations that were attached as exhibits to plaintiff's affirmation in opposition, the originals of which were never provided to defendant, defendant shall file a detailed affidavit/affirmation so stating and a proposed order precluding plaintiff from offering any evidence concerning the permanence of his injuries, loss of enjoyment of life and loss of earnings, upon notice to plaintiff.

All other arguments raised and evidence submitted by movants have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing, it is

ORDERED that plaintiff's motion is granted only to the extent that, on or before January 19, 2018, plaintiff shall provide to the court for in camera review unredacted, Bates-stamped copies of the entire contents of his Facebook and Instagram accounts, from the date of his accident to present, including but not limited to, all postings, entries, captions, photographs, videos, timelines, etc.; in all other respects the plaintiff's motion is denied; and it is further

ORDERED that defendants/third-party plaintiffs Poko-St. Anns L.P. and Hoffman Fuel Company of Danbury's motion is granted only to the extent that, if on or before January 19, 2018, defendant has not received valid, original, unrestricted authorizations as delineated in the following paragraphs of defendant's supplemental affirmation dated August 23, 2017, ¶¶ 4(a), (b), (c), (e), (f), (g), (h), (I) and (j), and valid, original authorizations of the copies of

authorizations that were attached as exhibits to plaintiff's affirmation in opposition, defendant shall, on or before January 26, 2018, file a detailed affidavit/affirmation so stating and a Proposed Order precluding plaintiff from offering any evidence concerning the permanence of his injuries, loss of enjoyment of life and loss of earnings, upon notice to plaintiff; in all other respects the defendant's motion is denied; and it is further

ORDERED that counsel shall appear for a conference in the Compliance Part, Courtroom 800 on February 1, 2018, at 9:30 A.M.; and it is further

ORDERED that defendant shall serve all parties with a copy of this decision and order with notice of entry within 10 days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
Dec 19, 2017

Hon. Joan B. Lefkowitz, J.S.C.

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cc: Compliance Part Clerk
Motion Clerk