

Morales v City of Mount Vernon
2018 NY Slip Op 33679(U)
October 29, 2018
Supreme Court, Westchester County
Docket Number: 51194/2017
Judge: Joan B. Lefkowitz
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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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BLANCA MORALES,

Plaintiff,

DECISION and ORDER

**Index No. 51194/2017
Motion Date: Oct. 29, 2018
Seq. No. 2**

-against-

THE CITY OF MOUNT VERNON, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., PERSICO
CONTRACTING & TRUCKING, INC. and PCT
CONTRACTING LLC,

Defendants.
-----X

LEFKOWITZ, J.

The following papers were read on this motion by defendant PCT Contracting LLC (“PCT”) for an order pursuant to CPLR 3124 compelling plaintiff to provide her entire social media accounts, including by not limited to, Facebook and Instagram, and for such other further and different relief as this court may deem just and proper.

- Order to Show Cause - Affirmation in Support -Exhibits A-L -Affirmation of Good Faith
- Affirmation in Opposition

Upon the foregoing papers and upon oral argument heard on October 29, 2018, this motion is determined as follows:

Plaintiff commenced this personal injury action by filing a summons and verified complaint on January 27, 2017 seeking damages for injuries allegedly sustained as a result of a slip and fall accident which occurred on January 14, 2016 (the “accident”). Issue was joined by the service of an answer by PCT on January 6, 2017, the City of Mount Vernon (“Mt. Vernon”) on April 26, 2017, Consolidated Edison (“ConEd”) on March 9, 2017.

Plaintiff served a verified bill of particulars on PCT on or about October 30, 2016. Plaintiff supplemented her bill of particulars on June 29, 2018 and July 23, 2018. Plaintiff alleges

injuries of both knees, lumbar spine, left shoulder, left elbow and her hands as well as headaches dizziness and blurred vision.

A preliminary conference was held on October 31, 2017 and compliance conferences were held on March 1, 2018, March 30, 2018, April 30, 2018, June 25, 2018, July 12, 2018, August 22, 2018 and September 7, 2018.

Plaintiff appeared for her deposition on June 18, 2017 and July 9, 2018. During her deposition plaintiff testified she was injured in two prior falls, one in or about 2012/2013 and the other in 2016. Plaintiff testified that she hurt her left knee in the 2012/2013 fall. Plaintiff testified that she hurt her left knee and her lower back in the 2016 fall. Plaintiff further testified that she has an active Facebook account which she has had for six to seven years and which she uses daily. Plaintiff testified that she has an active Instagram account which she has had for about two to three years. Plaintiff testified that she has posted pictures and videos of herself to both of these accounts, both before and after the alleged accident.

On July 10, 2018 PCT served post-EBT demands including the demand for the complete download of plaintiff's Facebook and Instagram accounts. PCT also served a demand to preserve plaintiff's social media accounts. On July 23, 2018 plaintiff objected to providing the social media accounts claiming that PCT's demand was "unduly burdensome" and "irrelevant to the defense of this action." On July 31, 2018 PCT rejected plaintiff's claims as "unduly burdensome" and "irrelevant." As the parties were unable to resolve this issue, on September 7, 2018 PCT was provided a briefing schedule pursuant to which it brings this motion.

PCT brings this motion seeking discovery of plaintiff's entire Facebook and Instagram accounts. In support of its motion PCT relies on the recent case of *Forman v Henkin*, 30 NY3d 656 (2018). In that case plaintiff was suing for damages for injuries she alleged she sustained after falling from a horse owned by defendant. During her deposition plaintiff testified that she had a Facebook account where she posted 'a lot' of photographs showing her pre-accident lifestyle. Defendant sought production of plaintiff's entire Facebook account on the ground that plaintiff had testified that she was quite active before the accident and that she had posted photographs to Facebook relative to that lifestyle, thus allowing for the conclusion that her Facebook account would contain evidence relevant to her activities. The Court of Appeals in *Forman* rejected the test applied by other courts which required that the party seeking discovery of a social media account establish a factual predicate by identifying relevant information in the social media account that contradicts or conflicts with the claims and allegations made by the owner of the account (usually the plaintiff) (*See Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013]). The Court also rejected "the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials" (*Forman v Henkin*, at 665). While reaffirming the existing principles of liberal discovery, the *Forman* Court cautioned that even under such liberal rules, discovery is not unlimited and noted that "directing the disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation ..[which] would be likely to yield far more nonrelevant than

relevant information” [*Id.*]. The Court determined that while discovery of social media accounts is subject to the same rules concerning other discovery, in order to avoid unnecessarily onerous applications of discovery rules, when directing disclosure of Facebook and other social media discovery the court should first consider “the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account and “second, balancing the potential utility of the information sought against any specific ‘privacy’ or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of non-relevant materials” (*Id.*).

PCT argues that plaintiff’s social media accounts are material and necessary to the defense of this action and to the issues of liability and damages. PCT contends that it has met its threshold burden of showing that plaintiffs’ Instagram and Facebook accounts are reasonably likely to yield relevant evidence. PCT contends that complete downloads of plaintiff’s entire Facebook and Instagram accounts would allow PCT to evaluate her physical baseline and lifestyle prior to the 2012 and 2016 falls. PCT argues that these photographs and videos are material and necessary as they will either support or refute plaintiff’s claim for damages.

In opposition plaintiff argues that in order to seek discovery of her social media accounts PCT must establish a factual predicate for the request by identifying relevant information on plaintiff’s Facebook account. Plaintiff further contends that PCT’s demand for her Facebook file is insufficient on its face in that it lacks specificity. Plaintiff contends that PCT’s demands for her social media accounts is nothing more than a fishing expedition. Plaintiff requests that in the event it is determined that any portion of her Facebook account is discoverable that the court conduct an in camera review of those materials to limit the discovery to relevant evidence. Additionally plaintiff contends that a Facebook profile could include information that is irrelevant to this action and to which PCT is not entitled, including online gaming applications, Facebook chats, a listing of the plaintiff’s friends, her political opinions, religious views, work history, education history, sexual orientation, activities, hobbies, and interests. Additionally plaintiff states that it would be impossible to view or record all the contents of her Facebook profile without invading the privacy of other users.

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” 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, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). This standard applies to the discovery of social media accounts (*Forman v Henkin*, 30 NY3d 656 [2018]). However, a party moving to compel production of social media materials needs to include scope and temporal limitations and carefully draft the demands to seek specific information that is necessary to the prosecution or defense of the action (*Paul v The Witkoff Group*, 2018 1697285 [Supreme Court, NY Co April 3, 2018], and see *Forman v Henkin*, 30

NY3d 656 [2018]). The 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 (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

The Court finds that plaintiff's social media accounts are relevant to the injuries she claims are the result of the accident and could yield relevant information. However, PCT has not demonstrated that it is entitled to discovery of plaintiff's complete Facebook and Instagram accounts. Any discovery produced with respect to plaintiff's social media accounts must be tailored to reflect plaintiff's injuries as alleged in her bills of particulars. Accordingly, plaintiff will be directed to provide the entirety of her Facebook and Instagram accounts for in camera review and a determination by the court as to relevancy as set forth below.

Accordingly, it is:

ORDERED that the motion by defendant PCT Contracting LLC is granted to the following extent:

On or before November 29, 2018, plaintiff shall provide to the court two sets, one unredacted and one redacted, of Bates-stamped copies of the downloads of her Facebook and Instagram social media accounts, from January, 2012 (or from the date the account was started if later than January 2012) through the date of this order to the Compliance Part Room 800; and it is further,

ORDERED that plaintiff is directed to preserve both her Facebook and Instagram accounts; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendants within ten (10) days of entry of this order; and it is further,

ORDERED that the parties appear for a conference in the Compliance Part, Room 800, on November 30, 2018, at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 29, 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

Service upon all counsel via NYSCEF

cc: Compliance Part Clerk