SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA **PART** IAS MOTION 22

Justice

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ALEXANDRA MYLON,

Plaintiff,

- v -

ANDREW LEIBOWITZ, AND BARRY FRIEDMAN

Defendant.

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INDEX NO. 151849/2017

MOTION DATE 01/16/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is ordered that defendants' motion for discovery is decided below.

Here, defendants seek: (1) to compel plaintiff to provide all photos and videos of plaintiff from the date of loss until the present from her smart phone, social media accounts, and computers; (2) to compel the production of all documents, photographs, data, and videos as demanded in defendants' Demand for Discovery dated August 15, 2018; (3) to direct plaintiff to preserve all emails, social media accounts, texts, whatsapp accounts, smart phones, apps on smart phones, laptops, tablets, cameras, go cams, photographs, videos, tags, and not deleting any data from the above devices, including buy not limited to photographs, emails, texts, tags, from the date of the accident until present; and (4) to adjourn plaintiff's deposition until production of the requested discovery.

Preliminarily, the Court notes that defendants failed to submit a satisfactory affirmation of good faith as required, and, thus, the instant motion seeking discovery is denied. *See* 22 NYCRR §202.7(c); *Sixty-Six Crosby Assoc. v. Berger & Kramer, LLP*, 256 AD2d 26 (1st Dep't

1998). 22 NYCRR §202.7(a) provides that no motion which relates to discovery shall be filed unless it includes, "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion". Such affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions". 22 NYCRR §202.7(c). Here, defendants' counsel's affirmation in good faith does not indicate the "time, place and nature of the consultation and the issues discussed...", as required. Instead, such affirmation merely states that defendants' counsel's office communicated with plaintiff's counsel's office.

Even if the Court considers defendants' motion on the merits, such motion would still be denied. In support of their motion, defendants argue that plaintiff's Bill of Particulars alleges, *inter alia*, various physical injuries, loss of enjoyment of life, inability to live a quality life, depressive disorder, and post-traumatic stress disorder such that plaintiff's physical activities, exercise, social activities, vacation, and enjoyment of life are discoverable. Defendants further argue that plaintiff may not withhold photographs taken after the accident showing her physical activities post accident, and that today's technology stores data about a person's health and physical efforts which would be used during the questioning of plaintiff at her deposition and would lead to the discovery of other evidence. Defendants state that "the existence of at least some of the items demanded is not in dispute." Pinczower affirmation in support, ¶15.

In further support, defendants proffer the affidavit of Katie Friedman, the daughter of defendant Barry Joel Friedman. In her affidavit, Ms. Friedman contends that she and plaintiff were close friends until the instant litigation. Ms. Friedman further contends that she and plaintiff were friends on Facebook and Instagram prior to and subsequent to the accident, however, she unfriended plaintiff from both social media accounts after the commencement of this action.

According to Ms. Friedman, she is "aware that after the accident plaintiff has posted onto her social media accounts photographs of herself engaging in…various…activities that would show that plaintiff has been leading a very active life since the accident and has full range of motion and engages in a variety of physical activities since the accident." Notice of Motion, Exh. F, Friedman Aff., ¶5. Thus, defendants argue that they are entitled to the requested discovery.

In opposition, plaintiff proffers an attorney's affirmation arguing that the requested discovery is beyond the bounds of reasonable discovery. Such affirmation further argues that plaintiff does not, and never owned, a fitness tracker, and that plaintiff's social media posts do not contradict her claims of injury and will not contradict her deposition testimony as she does not claim she is disabled from work and that she has been instructed to exercise by her medical providers. As to Ms. Friedman's affidavit, the opposition papers argue that there are misstatements of fact and that at least one of the photographs mentioned was taken before the accident. Plaintiff's opposition states that the requested discovery is an invasion of her privacy.

In reply, defendants argue that the opposition papers do not include an affidavit from plaintiff, rather only an attorney's affirmation is attached. Regarding plaintiff's counsel's affirmation in opposition, defendants contend that the statement that plaintiff never owned a fitness tracker is insufficient as no affidavit from plaintiff was provided to support this position. According to defendants, "given the broad array of permanent injuries alleged by plaintiff both physically and mentally,…all of the items demanded by defendants must be produced." Reply Affirmation, ¶12. Moreover, based upon plaintiff's counsel's affirmation claiming that some photos were taken before the accident, defendants contend that they "retain the right to have plaintiff's smart phones, lap tops, computers, emails, social media accounts examined by [their]

forensic expert …to help retrieve the META DATA for the items demanded, which would tell us when the events depicted occurred." *Id.* at ¶7.

Defendants and plaintiff both cite to the Court of Appeals case *Forman v Henkin*, 30 NY3d 656 (2018). The Court of Appeals in *Forman* explicitly specified a two-prong test for "courts addressing disputes over the scope of a social media discovery". *Id.* at 665. The Court of Appeals held that:

> courts 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. 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 nonrelevant materials."

Id. Furthermore, the Court of Appeals found that "[a] party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary' " *Id.* at 661. The *Forman* Court determined that the "defendant [in the *Forman* case]…met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence[, as, a]t her deposition, plaintiff indicated that, during the period prior to the accident, she posted 'a lot' of photographs showing her active lifestyle." *Id.* at 666.

Here, defendants failed to meet their initial burden. Defendants' counsel's affirmation in support lists the damages alleged by plaintiff, and argues that by virtue of plaintiff's claimed injuries, which include, *inter alia*, loss of enjoyment of life, inability to live a quality life, post-traumatic stress disorder, depression, and injury to her liver, the requested discovery is discoverable. Defendants' counsel further argues that, while not required, Ms. Friedman's affidavit is proffered as she has "actual knowledge that plaintiff after the accident engaged in

activities that plaintiff had posted photographs and other data to her social media accounts showing plaintiff leading a very active life style." Pinczower Aff., ¶15. However, a review of Ms. Friedman's affidavit reveals, although she states that she was friends with plaintiff on Facebook and Instagram prior to the accident until this lawsuit commenced, Ms. Friedman fails to state that she has any personal or actual knowledge of plaintiff's posts to social media. Ms. Friedman's sworn statements regarding plaintiff's social media posts, merely states that she is "aware that after the accident plaintiff has posted onto her social media accounts" but fails to state that she has any personal or actual knowledge of plaintiff's posts, or even mention how she is "aware" of such posts, i.e. whether she personally observed the posts or whether a third party told her about such posts. Notice of Motion, Exh. F, Friedman Aff., ¶5.

Here, defendants have failed to meet their initial threshold burden as required by the Court of Appeals. A review solely of defendants' first demand demonstrates that defendants failed to demand discovery that was "reasonably calculated to yield information that is 'material and necessary' ". *Forman v Henkin* 30 NY3d at 661. Such first demand seeks to have plaintiff "preserve all emails, social media accounts…texts, whatsapp accounts, smart phones, laptops, tablets, cameras, gocams, photographs, videos, tags, and not delete any data from the above devices, including but not limited to photographs, emails, texts, tags, from the date of accident until present." Demand for Discovery and Inspection, dated August 15, 2018, ¶1. Defendants blanket request fails to even attempt to narrow or limit the requested discovery to eliminate material that would be irrelevant to the instant action. The Court of Appeals in *Forman* explicitly held that "[t]he right to disclosure, although broad, is not unlimited." *Id.* at 661. The *Forman* Court "rejected the notion that commencement of a personal injury action renders a party's enter Facebook account automatically discoverable…[, and went on to state that d]irecting 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 – such an order would be likely to yield far more nonrelevant than relevant information.". *Forman v Henkin* 30 NY3d at 664-665. Here, defendants are attempting to do just that, and are seeking to compel, *inter alia*, plaintiff's smart phones, laptops, tablets, and cameras, with no limitation on what data defendants would be entitled to. Undoubtedly there would likely be a significant amount of nonrelevant information stored on such devices. The remainder of defendants demands, similar to the first one, also fail to tailor the demand to yield material and necessary information. Rather, defendants demands are blanket demands which would yield every photograph or communication plaintiff has on any topic prior to and since the motor vehicle accident.

Finally, the Court must address defendants arguments that plaintiff's counsel's affirmation is simultaneously insufficient to support plaintiff's position that she never owned a fitness tracker, yet is sufficient to support plaintiff's position that one of the photographs requested was taken before the accident, and is somehow also sufficient to be the basis for defendants' "right" to have a forensic expert examine plaintiff's devices and social media accounts. Reply Affirmation, ¶7. Defendants contradictory arguments are unpersuasive, and further exemplifies defendants' fishing expedition without proper basis for the discovery requested. As defendants failed to meet their initial threshold burden of demonstrating that the discovery demanded was reasonably calculated to yield material and necessary' information, defendants' motion is denied in its entirety without prejudice to renew, if applicable, following the completion of plaintiff's deposition.

Accordingly, it is

ORDERED that defendants Andrew R. Lebowitz and Barry Joel Friedman's motion to compel is denied in its entirety without prejudice to renew subsequent to the completion of plaintiff's deposition; and it is further

ORDERED that the parties shall appear on February 20, 2019 at 9:30am, in room 103 of 80 Centre Street, New York, NY, for a previously scheduled compliance conference; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

2/4/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE