Vivona v Bridgeview Assoc., LLC
2019 NY Slip Op 31535(U)
April 4, 2019
Supreme Court, Bronx Count
Docket Number: 308611/2012
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

Index No. 308611/2012

JAMES VIVONA and RAISSA VIVONA,

Plaintiffs,

-against-

BRIDGEVIEW ASSOC., LLC, DITMAS MANAGEMENT CORP., and BERGEN-PASSAIC ELEVATOR OF NY, INC.,

Defendants.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to dismiss or compel production of certain disclosure:

Papers	**Numbered**
Notice of Motion by Defendants Bridgeview Assoc., LLC and Ditmas Management Corp., Good Faith Affirmation of Carol A. Morell, Esq. dated July 18, 2018, Affirmation of Carol A. Morell, Esq. dated July 18, 2018 in Support of Motion, and Exhibits ("A" through "S")	**1**
Affirmation of Johanna C. Abreu, Esq. dated November 9, 2018 in Opposition to Motion and Exhibits ("A" through "F")	**2**
Reply Affirmation of Carol Morell, Esq. dated November 30, 2018 and Exhibits ("A" through "D")	**3**

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion and is as follows:

Defendants Bridgeview Assoc., LLC and Ditmas Management Corp. (collectively, "Bridgeview") seek an order pursuant to CPLR § 3126 dismissing the plaintiffs' complaint as a penalty for their purported failure to furnish certain disclosure or, alternatively, compelling the plaintiffs to provide the disclosure pursuant to CPLR Rule 3124. The motion is granted solely as ordered below and is otherwise denied.

The plaintiffs seek monetary damages arising from personal injuries allegedly sustained by

plaintiff James Vivona ("Vivona") on August 1, 2012 when he was caused to trip as a result of a misleveling elevator at the defendants' building.

Many of the discovery issues raised by this motion were resolved at a court conference in October 2018. The remaining issues include whether Vivona needs to disclose his educational records dating back to elementary school, specifically, "authorizations for elementary, middle school, high school, and college records including complete file and all testing records and scores" (*see* Bridgeview's notice for discovery and inspection dated November 22, 2017). Bridegview contends that the additional claims set forth in the plaintiffs' supplemental bills of particulars dated February 14, 2017 and May 11, 2017 warrant such disclosure, since the following are alleged therein as "additional injuries": Major depressive disorder, emotional distress, impaired perceptual reasoning, information processing, receptive and expressive language, attention/concentration and verbal and nonverbal executive functioning, and lowering of intellectual functioning. Bridgeview argues that Vivona's complete educational records are an important source of information regarding his cognitive abilities prior to the accident. For the same reasons, Bridgeview seeks authorizations to obtain Vivona's employment records for prior employers Westpark Capital, National Securities Corp., and Joseph L. Stevens Company.

Bridgeview has failed to demonstrate that all of Vivona's educational and employment records are material and necessary to defend against the claims brought in this action. Vivona has not claimed that this accident aggravated and/or exacerbated a pre-existing condition (*see O'Brien v. Port Authority of New York and New Jersey*, 100 AD3d 546 [1st Dept 2012]). Bridgeview has not cited any of Vivona's current medical records for the proposition that he had any congenital or longstanding cognitive deficits, which would support disclosure of the requested items (*see Shamicka R. v. City of New York*, 117 AD3d 574 [1st Dept 2014]).

Bridgeview also seeks an authorization to obtain the content posted on Vivona's Facebook account. The demand for Facebook material was made after Vivona served his third supplemental bill of particulars alleging cognitive injuries, including headaches, concussion, forgetfulness, and impaired perceptual reasoning. In support of this request, Bridgeview submits an affidavit from a licenced private investigator who searched for and accessed Vivona's publicly-available Facebook content. At his deposition on June 19, 2014, Vivona identified two photographs which predate this accident and depict him playing hockey and sporting a black eye as a result of having been struck

by a hockey puck. Bridgeview identifies these photographs as having once been available on Vivona's publicly-accessible Facebook page, but since deleted. Bridgeview argues that similar material contained on his private Facebook account is material and relevant to defend itself, since it can reveal pre-existing conditions or injuries which may have affected his physical and cognitive functions.

There is no heightened threshold for disclosure of records maintained on social media accounts and claims that certain material has been marked as "private" will not shield it from disclosure (*see Forman v. Henkin*, 30 NY3d 656 [Ct App 2018]). Instead, it must merely be shown that the disclosure request is appropriately tailored and reasonably calculated to yield information relevant to a claim or defense. Here, Vivona has affirmatively placed his mental and physical condition at issue. He testified that he told his physician that he's "had my bell rung during the course of playing sports, but I've never been diagnosed with a concussion. Maybe they would call it a concussion nowadays, but I don't know" (Vivona deposition transcript, August 21, 2017, p. 358 ll. 2-6). He testified that he sustained such hits at least a couple of times while playing hockey. Vivona could not recall if he suffered headaches, dizziness, or other symptoms following those hits. He further testified that he last played hockey in June 2012. Vivona's practice of posting such photographs on Facebook, coupled with his admission that he may have sustained concussion(s) previously, satisfy Bridgeview's burden of showing that Vivona's Facebook account is reasonably likely to reveal relevant evidence (*see Vasquez-Santos v. Mathew*, 168 AD3d 587 [1st Dept 2019]).

Accordingly, it is hereby

ORDERED that Vivona provide such authorization(s) and other documents required to release his Facebook contents to Bridgeview, limited to photographs and other content referencing Vivona engaged in athletic activities, no later than 30 days following service of a copy of this Order with notice of entry.

This constitutes the Decision and Order of this Court.

DATED: 4-4-19

Bronx, New York

HON. LAURA G. DOUGLAS
J.S.C.