SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 158896/2017

ARTHUR VALENTINE,

MOTION DATE 08/21/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

COLLINS BROTHERS MOVING CORPORATION, PAULO OLIVERIA

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is ordered that plaintiff's motion to compel and defendants' cross-motion for discovery are both denied.

With regards to plaintiff's motion, plaintiff seeks to compel defendants to provide the non-privileged portions of their insurer's claims file for the subject collision, or in the alternative, for an *in-camera* review of such file to determine the non-privileged portions.

It is well settled that "[d]ocuments in an insurer's claim file, including an accident investigation report, that were prepared for litigation against its insured are immune from disclosure. … In the absence of any demonstration of hardship by plaintiff, the insurer's accident investigation report remains privileged." *Dabo v One Hudson Yards Owner, LLC*, 176 AD3d 631 (1st Dep't 2019)(internal citations omitted). Here, plaintiff has failed to establish entitlement to defendants' insurers claims file. As such, plaintiff's motion to compel is denied.

As to defendants cross-motion, defendants seek to: (1) compel plaintiff to provide an authorization to his student-athlete file at both the University of Maryland Eastern Shore and

Fulton-Montgomery Community College; (2) compel plaintiff to provide an affidavit as to all social media accounts he maintains or controls; (3) preserve all of his websites, photographs, video recordings, electronic communications; (4) allow defendants access to plaintiff's social media accounts or direct plaintiff to download and disclose the contents of these accounts; (5) provide duly-executed unrestricted authorizations for all of plaintiff's social media accounts; and (6) direct plaintiff to refrain from altering, suspending or deleting any accounts or content until they are preserved and provided to defendants as demanded in defendants' Social Media Demands and Preservation dated February 21, 2018.

Preliminarily, the Court notes that defendants failed to submit a satisfactory affirmation of good faith as required, and, thus, the instant cross-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 advised plaintiff's counsel to comply with defendants' discovery request.

Even if the Court considers defendants' cross-motion on the merits, such cross-motion would still be denied. First, in support of their cross-motion, defendants argue that plaintiff's student-athlete files are relevant to the injuries sustained by plaintiff in the motor vehicle accident. Defendants further argue that plaintiff received treatment for soreness in his legs

throughout his collegiate basketball career and therefore the records may reveal prior injuries or medical conditions that predated the accident. *See* Notice of Cross-Motion, Aff. ¶ 38. Second, defendants argue that plaintiff alleges that the injuries sustained have restricted his daily activities and therefore access to plaintiff's social media accounts "may yield relevant evidence." *Id.* at ¶ 44, 54.

In opposition, plaintiff proffers an attorney's affirmation arguing that defendants failed to provide a basis for plaintiff's student-athlete files. Plaintiff further argues that the files are from over 10 years ago and that plaintiff never testified that he had any injuries or medical treatment for his injured body parts while attending either college. *See* Aff. in Opp. ¶ 5. As for plaintiff's social media accounts, plaintiff argues that the request is overly broad. Alternatively, plaintiff contends that defendants' cross-motion is moot as plaintiff previously disclosed the necessary discoverable photographs. *See* Aff. in Opp. ¶ 22, 27. Additionally, plaintiff's affirmation in opposition notes that defendants have provided no basis that plaintiff is under any obligation to preserve all of his websites and electronic communications. *See* Aff. in Opp. ¶ 30.

In reply, defendants argue that plaintiff's opposition papers fail to show that defendants are not entitled to disclosure of plaintiff's college records. Defendants further argue that the fact that plaintiff did not suffer an injury or undergo any medical treatment during his collegiate basketball career does not preclude discovery of his student-athlete files. *See* Reply Aff. ¶ 4. Defendants additionally cite second department case law in support of their argument that they are entitled to such discovery because plaintiff claims his injuries have restricted his daily activities. *See* Reply Aff. ¶ 9. Defendants again argue that the court should grant defendants access to "plaintiff's social media account [because] they are relevant not just to loss of life's enjoyment, but also to physical injuries that include left knee surgery, left shoulder surgery and

L5-S1 herniation, annular bulges at L2-L3, L3-L4, and L4-L5, as well as claims that plaintiff's permanent injuries have resulted in 'restricting his daily activities and/or causing plaintiff to perform his daily activities with significant pain…' " Reply Aff. ¶ 29.

Defendants cite to the Court of Appeals case *Forman v Henkin*, 30 NY3d 656 (2018) in support of their argument. 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 or 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, restriction of daily activities, and restriction and limitation of motion, the requested discovery is discoverable. 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 compel plaintiff to authorize defendants access to his student-athlete file from both Colleges he attended as well as "preserve all of his websites, photographs, video recordings, and electronic communications … refrain from altering, suspending or deleting any accounts or any content therein until the materials have been fully preserved and provided to defendant". Notice of Cross-Motion, Exhs F., Demand for Auth. & H., Social Media Demands & Preservation. 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 action renders a party's entire Facebook 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*, access to, and the preservation of, plaintiff's "Internet, web or mobile based, employment related and/or social networking websites, all photographs, video recordings, posts, emails, likes, and chat rooms discussions". Notice of Cross-Motion, Exh. H., Social Media Demands & Preservation. Undoubtedly there would likely be a significant amount of nonrelevant information stored on such accounts. 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 subject motor vehicle accident.

Finally, the Court agrees with plaintiff's argument that defendants did not provide a sufficient basis for his student-athlete file at both the University of Maryland Eastern Shore and Fulton-Montgomery Community College. Plaintiff suffered no injuries or treatment at either College and his collegiate basketball career concluded over a decade prior to the accident. Defendants have wholly failed to establish how such discovery is relevant to the instant action, and similarly failed to establish a basis for such records. Thus, defendants cross-motion seeking discovery is denied.

Accordingly, it is

ORDERED that plaintiff Arthur V. Valentine's motion to compel is denied in its entirety; and it is further

ORDERED that defendants Collin Brothers Moving Corporation and Paulo Oliveria's cross-motion for discovery is denied in its entirety; and it is further

ORDERED that the parties shall appear on December 16, 2019 at 9:30 am, in room 106 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.

12/5/2019
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

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