SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

----------X

LISA LUBARSKY,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY PARKS & RECREATION, FJC SECURITY SERVICES, INC., UNIVERSAL PROTECTION SERVICE LLC d/b/a ALLIED UNIVERSAL SECURITY SERVICES and ALLIED BARTON SECURITY SERVICES, LLC,

Defendants.

----------X

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No.: 150514/2019
Motion No.: 001 & 002

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through "7" were fully submitted on the 7th day of October 2020.

	Papers Numbered
(001) Notice of Motion, Affirmation and Exhibits By defendants FJC Security Services, Inc., Universal Protection Service, LLC, and Allied Barton Security Services, LLC (NYSCEF 31-52)	1, 2
Plaintiff's Affirmation in Opposition with Exhibits (NYSCEF 61-70)	3
Defendants' Reply Affirmation	4
(002) Notice of Motion, Affirmation and Exhibits by Plaintiff (NYSCEF 53-60)	5, 6
Affirmation in Opposition by defendants FJC Security Services, Inc., Universal Protection Service, LLC, and Allied Barton Security Services, LLC (NYSCEF 71-73	7

Upon the foregoing papers, defendants, FJC Security Services, Inc., Universal Protection Service, LLC, and Allied Barton Security Services, LLC's, motion for an order pursuant to CPLR 3124 (MS001) and plaintiff's motion for an order striking the answer of defendants, FJC Security Services, Inc., Universal Protection Service, LLC d/b/a Allied Universal Security Services and Allied Barton Security Services, LLC answer and/or preclude defendants from testifying and offering evidence at the time of trial (MS002) are decided as follows:

This is an action for personal injuries sustained by plaintiff in Brookfield Park located in Staten Island, New York on September 20, 2018. The discovery disputes that are the subject of the respective motions concern the athletic performance recording devices, GPS and Social Media "apps" and Video Cam devices that were in use by the both parties at the time of the occurrence, as well as plaintiff's athletic activity pre and post-accident. The City defendants take no position with respect to either motion.

Plaintiff was training for an "Ironman Hawaii Ultra Marathon" (hereinafter "Ironman"). The Ironman consisted of a 2.5 mile swim, 112 mile bike ride and a full marathon.[1] At the time of the accident, plaintiff was training on her bike on the pathway in Brookfield Park. Plaintiff alleges that defendants' vehicle was on the pathway as she was coming around a curve which caused her to come into contact with a guard rail. More specifically, it is plaintiff's testimony that as she emerged from the curve, plaintiff observed defendants' vehicle on the pathway but was unsure whether it was stationary or moving (47:1-7). However, the rear lights were flashing like hazard lights, but she does not remember observing brake lights (47:17-25). In an effort to avoid the vehicle, plaintiff struck the guardrail sustaining injuries (47:10-12, 49:15-17).

[1] See plaintiff's deposition transcript, NYSCEF DOC. #43, p.22:¶21-23.

Plaintiff testified that as she approached the curve, she could not see the pathway beyond it (45:2-9) and upon entering the curve, she was slowing down to approximately 10 to 12 miles per hour (Id. at 45:10-13). Plaintiff testified that overall, her speed was decreasing "from 17 to 10 to 8" miles per hour prior to the impact (104:23-25).

Jeanette Romero, the driver of the vehicle, testified on behalf of the moving defendants. She testified that in her estimation, plaintiff was travelling "pretty fast",-- "26 miles" [per hour].[2] It is also defendant's contention that plaintiff was attempting to pass her vehicle on the pathway when the impact with the guard rail occurred. Defendant was alerted to plaintiff's approach when she heard the "hissing sound" of bicycle chains (42:10-13, 45:7-14). When she looked in her rearview mirror, defendant observed plaintiff directly behind the vehicle on her bicycle (42:5-9, 44:22-25, 45:16). Her vehicle was moving at approximately 10 miles per hour at the time of the accident (42:14-16). Defendant also testified that the vehicle involved the accident was equipped with a dash cam (71:21-25), but was unaware if the cam was turned on, and if so, whether the video of this accident was saved or exists (pp.72-74).

Plaintiff testified that her bicycle was equipped with a "Cat Eye" computer, a stand-alone device which is not connected to an "app" or another device, that recorded her distance, time and speed. She would manually enter this data into Strava, a "social media app", after each training session because the Cat Eye overwrites the data and, upon changing the battery [which has occurred since the accident], all data is lost.[3] She also wore a Garmin watch that was connected to the "Garmin app" to record distance, speed, time and other training data. However, according to plaintiff's testimony, she deleted the data from the Garmin watch and app for the session at the

---

[2] See defendant's deposition transcript, NYSCEF DOC. #45, p.86:¶12-18.
[3] See plaintiff's deposition transcript at pp. 29-34 regarding the electronic devices.

time of the accident, but not prior training sessions. Both the Garmin and Strava apps are downloaded on plaintiff's iPhone.

Plaintiff testified that she is a licensed massage therapist and fitness instructor. Plaintiff is employed by the Jewish Community Center ("JCC") and Remedy Day Spa ("RDS") since before the accident of September 2018. Prior to the accident, plaintiff was teaching aerobics, personal training, outdoor hikes and endurance training for biking and running at the JCC. As a result of the accident, plaintiff's duties have been modified to teaching chair yoga to senior citizens and nutrition classes. At RDS, the number of massage sessions has been reduced since the accident. Plaintiff attributes this change in her employment duties to the injuries sustained in this accident.[4] In 2019, plaintiff applied and was approved for recertification for her professional licenses, which included a physical assessment and online classes (pp.16-19). Also following this accident, plaintiff attempted to complete competitions, but was unable to do so (pp.89-97).

Plaintiff served a Further Notice for Discovery and Inspection on March 12, 2020 seeking the production of any and all videos taken by security cameras located on defendants' vehicle and a copy of the report prepared by Ms. Romero's supervisor (NYSCEF #57). After service of the current motion on August 10, 2020, defendants responded that they "have not been able to locate the video", reserved the right to supplement their response if the video is later located, and provided a copy of the supervisor's report.[5]

After service of this motion and defendants' response to plaintiff's discovery demand, defendants produced for a deposition the supervisor, Joseph Dolcimascolo. The testimony has

[4] See plaintiff's deposition transcript at pp.7-11 regarding employment history.

[5] NYSCEF DOC. #72

been summarized by defendants as follows:[6] The witness testified that video from the security vehicle's dashboard camera on September 20, 2018 was not preserved. The vehicle was equipped with a forward facing camera and an interior camera. Therefore, the forward facing camera would not have recorded this incident since it was pointed in the direction of travel and the interior camera was focused on the driver. It was his testimony that neither camera would have recorded plaintiff's accident (NYSCEF DOC. #71, ¶6-7).

Defendants also served a post deposition discovery demand on plaintiff dated May 8, 2020,[7] to which plaintiff timely responded and objected on May 19, 2020.[8] The following demands are the subject of this motion:

> 5. Copies of plaintiff's physician reports that she submitted to entities that organized the races she participated in races from 2017 through the present, including but not limited to the New York City Marathon, Philadelphia Marathon, Staten Island Half Marathon, Ironman competition.
>
> 6. Copies of plaintiff's race applications for any Ironman competitions, including half Ironman competitions, from 2017 through the present.
>
> 7. Copies of plaintiff's applications for the event in Mont Tremblant, Quebec, which she participated in 2019.
>
> 8. Copies of plaintiff's applications for each New York City Marathon from 2017 through the present.
>
> 9. Copies of plaintiff's applications for each Philadelphia Marathon from 2017 through the present.
>
> 10. Copies of plaintiff's applications for each and every half-marathon from 2017 through the present.

---

[6] The deposition was conducted during the pendency of this motion. Therefore, the transcript was presumably unavailable as it was conducted 10 days prior to defendants e-filing opposition to plaintiff's motion. Plaintiff has not filed reply objecting to defendants' recitation of the testimony.

[7] NYSCEF DOC. #46

[8] NYSCEF DOC. #49

11. Copies of plaintiff's applications for each and every cycling race from 2017 through the present.

12. Duly executed and notarized original written authorizations to obtain all of plaintiff's records from all governing bodies for any races she participated from 2017 through the present, including but not limited to the governing body of the New York City Marathon, Philadelphia Marathon, Staten Island Half-Marathon, and Ironman competitions.

16. Copies of any materials plaintiff submitted to the State of New York in support of her recertification, including but limited to plaintiff's recertification for Swedish massage, from 2017 through the present.

18. Copies of all data records of plaintiff's rate of speed, distance traveled, and location created by the Strava application ("app"), produced in a native format with all associated metadata and in a reasonably usable format, including but not limited to charts, diagrams, graphs, maps, images, and tables for the date of the incident and for any other dates when plaintiff trained in the Brookfield Park, Staten Island, New York in 2018, as described in plaintiff's deposition testimony.

19. Copies of all data records of plaintiff's rate of speed, distance traveled, and location created by any app on plaintiff's iPhone, including but not limited to health and activity apps, produced in a native format with all associated metadata and in a reasonably usable format, including but not limited to charts, diagrams, graphs, maps, images, and tables for the date of the incident and for any other dates when plaintiff trained in the Brookfield Park, Staten Island, New York in 2018, as described in plaintiff's deposition testimony.

20. Copies of all data records of plaintiff's rate of speed, distance traveled, and location produced by plaintiff's "Cat Eye" cycle computer in a native format with all associated metadata for the date of the incident and for any other dates when plaintiff trained in the Brookfield Park, Staten Island, New York in 2018, as described in plaintiff's deposition testimony.

21. Copies of all data records of plaintiff's rate of speed, distance traveled, and location produced by plaintiff's "Garmin" watch in a native format with all associated metadata for the date of the incident and for any other dates when plaintiff trained in the Brookfield Park, Staten Island, New York in 2018, as described in plaintiff's deposition testimony.

22. Copies of all data records of plaintiff's rate of speed, distance traveled, and location created by plaintiff's "Cat Eye" cycle computer, "Garmin" watch, or any other wearable device that created the requested data and was backed up on plaintiff's iPhone, produced in a native format with all associated metadata and in a reasonably usable format, including but not limited to charts, diagrams, graphs, maps, images, and tables for the date of the incident and for any other dates when plaintiff trained for the

Hawaii Ironman Race in the Brookfield Park, Staten Island, New York in 2018, as described in plaintiff's deposition testimony.

CPLR §3101(a) provides for full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof (*McMahon v. Manners,* 158 AD3d 616, 617 [2d Dept. 2018])." The terms "material and necessary" are not to be construed as unlimited and, therefore, the Supreme Court has broad discretion with respect to the supervision of disclosure (Id.). Therefore, the principle of full disclosure does not give a party the right to uncontrolled and unfettered disclosure (*see McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 547, 548 [2d Dept 2018]; *JPMorgan Chase, National Association v Levenson*, 149 AD3d 1053, 1054 [2d Dept 2017]).

Rule 3124 of the Civil Practice Law & Rules states that, "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." It is CPLR § 3126 that empowers the Court to impose penalties in connection with a Rule 3124 motion. If a party has refused "to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" (CPLR § 3126), the Court may impose, including but not limited to, the following penalties:

> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the

> action or any part thereof, or rendering a judgment by default against the disobedient party.

It is well settled that the Court is empowered to use discretion when fashioning a remedy for non-compliance with discovery demands served by the parties to a lawsuit and orders issued by the Court (see *Ordonez v. Guerra,* 295 AD2d 325, 326 [2d Dept. 2002]). As a result, a movant may ask for one or more remedies from the Court (see generally, *Oak Beach Inn Corp. v. Babylon Beacon,* 62 NY2d 158, 163 [1984]). It is also well settled that "the nature and degree of the penalty to be imposed pursuant to CPLR § 3126 for a party's failure to disclose lies within the sound discretion of the trial court" (*Ordonez v. Guerra,* 295 AD2d 325, 326 [2d Dept. 2002]). Such penalties are drastic in nature and should only be employed where there is "a pattern of willful disobedience of a specific notice for discovery" (Id. and see CPLR § 3126). "Pursuant to CPLR § 3126, a court may impose discovery sanctions, including the striking of a pleading or preclusion of evidence, where a party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (*Aha Sales, Inc. v. Creative Bath Prods., Inc.*, 110 AD3d 1019 [2d Dept. 2013] [internal quotations omitted]). The remedy of preclusion may be appropriate where "the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious. Such conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse" (*Arpino v. F.J.F. & Sons Elec. Co., Inc.,* 102 AD3d 201, 210 [2d Dept. 2012] [citations omitted]).

The failure to timely object to a document demand (CPLR 3122 [a][1]) forecloses any inquiry into the "propriety of the information sought except with regard to material that is privileged pursuant to CPLR 3101 or requests that are palpably improper" (*Recine v. City of New York,* 156 AD3d 836 [2d Dept. 2017]). Accordingly, "[I]t is incumbent 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, and bare unsubstantiated allegations of relevancy are insufficient to establish the factual predicate regarding relevancy" (*Wadolowski v Cohen*, 99 AD3d 793, 794 [2d Dept 2012]).

With this in mind, "a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR…by affirmatively putting his or her physical or mental condition in issue" (*Bravo v. Vargas,* 113 AD3d 577, 578 [2d 2014]). However, this too is not without limits (*Schiavone v. Keyspan Energy Delivery NYC,* 89 AD3d 916 [2d Dept. 2011]). An injured plaintiff must exchange authorizations for previous medical conditions where "broad allegations of physical and mental injuries" and "loss of enjoyment of life" are alleged (Id.).

Here, plaintiff timely objected to defendants' post-deposition demand for discovery (*Zambelis v. Nicholas,* 92 AD2d 936, 936-937 [2d Dept. 1983]). In the face of this timely objection, defendants have failed to demonstrate that disclosure of prior racing applications and physician reports are relevant to plaintiff's claims for injuries arising out of this incident (*Schiavone v. Keyspan Energy Delivery NYC,* 89 AD3d 916). Plaintiff has not alleged a loss of enjoyment of life or such broad allegations of pain and suffering so as to place any unrelated medical conditions in controversy (Id.). It is noted that plaintiff testified that her completion times in prior events are publicly available on the organizers' websites for defendants to confirm her participation (pp.39-40). In the event defendants cannot obtain plaintiff's prior participation and completion information from the organizers' websites, defendants may renew their request for authorizations limited to participation only.

Accordingly, defendants' motion to compel responses to demands numbered "6" through "12" seeking applications and physician reports prior to the date of accident is denied. However, the motion is granted only with respect to plaintiff's participation and completion times in post-accident competitions which are relevant to her claim that she cannot compete in events post-accident. Therefore, plaintiff shall provide an authorization for the release of her post-accident racing applications with the exception of the Canadian Ironman competition in 2019 as the application was completed prior to the accident but deferred until after the accident (p.97). Plaintiff shall also provide an authorization only for her 2019 professional recertifications in response to demand numbered "16" as this information is relevant to plaintiff's claim that her post-accident employment duties have been modified due to the accident.

Defendants' motion is also denied with respect to demands numbered "18" through "22." The rates of speed on prior occasions are irrelevant to the issue of plaintiff's speed on the date of the accident (see generally *Feaster v. New York City Transit Authority,* 172 AD2d 284, 285 [1st Dept. 1991]). A party may not "adduce evidence to demonstrate that a person alleged to have committed a negligent act has previously committed similar acts or was generally negligent" (*Reynolds v. Burghezi,* 227 AD2d 941, 942 [4th Dept. 1996]). Here, plaintiff's rate of speed on prior occasions is not relevant to whether she was comparatively negligent in light of the circumstances then and there existing on the day of this accident. Finally, it is noted that defendants did not establish whether there was an existing speed limit on the pathway for bicycles on the date of accident or any time prior thereto.

The balance of defendants' demands with respect to the production of plaintiff's devices is denied in its entirety. Plaintiff testified that the Garmin information was deleted after this accident and the Cat Eye information has been overwritten. Defendants are bound by the

testimony of plaintiff, just as plaintiff is bound by the testimony that the dash cameras did not record this incident. Finally, defendants did not lay a foundation for any other social media apps other than Garmin and Strava. Therefore, any request to search through plaintiff's iPhone for any relevant information is overbroad and palpably improper (*Zambelis v. Nicholas,* 92 AD2d 936-937. The Court notes that if were to grant the forensic inspection of any devices, it would be at defendants' own expense to pay their expert.

Plaintiff's motion is denied as moot only to the extent that defendants sworn testimony [after service of this motion] corroborates the discovery response served by counsel and the supervisor's report has been provided. Based upon defendants' response that they reserve the right to their response with regards to the dash camera video, plaintiff's motion is granted in the Court's discretion to the extent that defendants are precluded from offering into evidence at the time of trial any video in connection with the aforesaid dash cameras unless the video is exchanged no less than 90 days prior to the trial of this action.

Accordingly, it is hereby

ORDERED, that defendants, FJC Security Services, Inc., Universal Protection Service, LLC, and Allied Barton Security Services, LLC's, motion for an order pursuant to CPLR 3124 (MS001) is denied as to demands numbered "6" through "12" seeking applications and physician reports prior to the date of accident; and it is further

ORDERED, that defendants, FJC Security Services, Inc., Universal Protection Service, LLC, and Allied Barton Security Services, LLC's, motion for an order pursuant to CPLR 3124 (MS001) is granted to the extent that plaintiff shall provide an authorization for the release of her post-accident racing applications with the exception of the Canadian Ironman competition in

2019 as the application was completed prior to the accident but deferred until after the accident within 45 days of service of this Order with Notice Entry through NYSCEF; and it is further

ORDERED, that defendants, FJC Security Services, Inc., Universal Protection Service, LLC, and Allied Barton Security Services, LLC's, motion for an order pursuant to CPLR 3124 (MS001) is granted to the extent that plaintiff shall provide an authorization only for her 2019 professional recertifications in response to demand numbered "16" within 45 days of service of this Order with Notice Entry through NYSCEF; and it is further

ORDERED, that defendants, FJC Security Services, Inc., Universal Protection Service, LLC, and Allied Barton Security Services, LLC's, motion for an order pursuant to CPLR 3124 (MS001) is denied as to demands numbered "18" through "22"; and it is further

ORDERED, that the balance of defendants, FJC Security Services, Inc., Universal Protection Service, LLC, and Allied Barton Security Services, LLC's, motion for an order pursuant to CPLR 3124 (MS001) is denied in its entirety; and it is further

ORDERED, that plaintiff's motion for an order striking the answer of defendants, FJC Security Services, Inc., Universal Protection Service, LCC d/b/a Allied Universal Security Services and Allied Barton Security Services, LLC answer and/or preclude defendant from testifying and offering evidence at the time of trial (MS002) is granted to the extent that defendants are precluded from offering into evidence at the time of trial any video in connection with the aforesaid dash cameras unless the video is exchanged no less than 90 days prior to the trial of this action.

This constitutes the decision and order of the Court.

Dated: December 8, 2020

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.