Angulo v Nathan
2019 NY Slip Op 35228(U)
August 14, 2019
Supreme Court, Queens County
Docket Number: Index No. 704037/2018
Judge: Chereé A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No. 704037/2018

STALIN ANGULO,

Plaintiff,

-against-

ALLEN NATHAN and LEENOY NATHAN,

Defendants.
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FILED
AUG 21 2019
COUNTY CLERK
QUEENS COUNTY

Motion
Date: July 31, 2019

Motion Cal. No.: 6

Motion Sequence No.: 4

The following efile papers numbered 42-52 submitted and considered on this motion by defendants Allen Nathan and Leenoy Nathan seeking an Order pursuant to Court Rule 202.21 and CPLR 3024 striking the case from the trial calendar and compelling plaintiff Stalin Angulo to complete discovery.

	Papers Numbered
Notice of Motion -Affidavits-Exhibits.....	EF 42-47
Affirmation in Opposition-Affidavits-Exhibits.....	EF 48-50
Reply Affirmation-Affidavits-Exhibits.....	EF 51-52

This litigation was commenced by plaintiff Stalin Angulo on March 16, 2018 to recover damages for injuries he sustained on June 8, 2017. Plaintiff alleged *inter alia* that defendants Allen Nathan and Leenoy Nathan own certain property and he was hired to perform certain work at the property. While performing the work at the property plaintiff claimed he was injured. Plaintiff filed a Note of Issue on June 17, 2019.

On June 28, 2019 defendants filed the instant motion seeking to strike the matter from the trial calendar on the grounds that plaintiff has not produced his wife for a deposition. His wife was a purported eyewitness to the accident. Defendants also seek unrestricted authorizations and records from a subsequent motor vehicle accident that may or may not be related to the case, and an unrestricted authorization for plaintiff's Facebook records. Defendants maintained that they are in possession of certain images from social media shortly after the occurrence which suggest that the

plaintiff was engaged in certain recreational activities. Movants argue that discovery is not complete and the Note of Issue was filed prematurely and should be stricken, or the Court should compel discovery.

In opposition to the motion, plaintiff argued that he has no objection to producing his wife, non-party Patrizia Montejo Avalos, for a deposition on a mutually convenient date since she was present on the date of the accident and also witnessed the accident. Also on July 25, 2019, plaintiff served a Supplemental Response to Discovery & Inspection wherein an authorization related to a subsequent accident from St John's Episcopal Hospital was provided. Plaintiff objects to providing a Facebook authorization since defendants failed to establish a good faith basis as to why they are entitled to these records, other than the assertions made by their attorney.

In reply, defendants stated that non-party witness Patrizia Montejo Avalos will be produced for a non-party deposition and defendants are amenable to scheduling a date and location in the County of Queens. Also, plaintiff served an authorization for plaintiff's hospital record as it relates to his subsequent accident, after the motion was made, however defendants have a good faith basis to believe that plaintiff has made an insurance claim and now request an authorization or sworn response to same. As to the social media account, defendants believed that they have made a good faith offer of proof in the original motion papers. Plaintiff posted his own photograph from the hospital which shows that the accident he claims warranted published; plaintiff is further seen on the beach; and after the accident it appears he is moving his afflicted arm. Although he denied working after the accident he posted a copy of his business card, holding himself out as a laborer. The aforementioned demonstrated a substantial need and good faith basis to believe that the discovery requested will lead to admissible evidence.

Discussion

CPLR 3101 (a)(1) states that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. The words 'material and necessary' are... 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... [a]t the same time, however, the principle of "full disclosure" does not give a party the right to uncontrolled and unfettered disclosure... [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." (*See Mendives v Curcio*, –AD3d–, 2019 NY Slip Op 05771 [2d Dept 2019]; *see also Forman v Henkin*, 30 NY3d 656 [2018]; *Asphalt Maintenance Servs. Corp. v Oneil*, –AD3d–, 2019 NY Slip Op 05508 [2d Dept 2019]).

In *Mendives*, defendant moved for a protective order and plaintiff cross-moved seeking the disclosure, including an authorization to obtain defendant's cellular telephone records. In affirming the trial Court's denial of the defendant's motion and granting the branch of plaintiff's cross-motion under CPLR 3126 to compel an authorization to obtain defendant's cellular telephone records for

the date of the accident for certain times, the Appellate Division, Second Department found that "plaintiff's motion papers adequately demonstrated that the plaintiff's request for the defendant's cellular telephone records may result in the disclosure of relevant evidence, was reasonably calculated to lead to the discovery of information bearing on the plaintiff's claim, and was sufficiently related to the issues in the litigation to make the effort to obtain them in preparation for trial reasonable." (*Id.*)

"Mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the accounts usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook- that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." (*See Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013]).

In *Forman v Henkin*, (30 NY3d 656 [2018]) a case in which the Court of Appeals stated the basis for which Facebook account information is discoverable, applied the rule in *Tapp*, supra. The Court stated that just because a plaintiff commenced a personal injury action does not make the party's entire Facebook account automatically discoverable. The Court of Appeals reversed the Appellate Division which modified the trial court order, since "defendant had met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence" based upon plaintiff's deposition testimony.

In the case *Richards v Hertz Corp.*, (100 Ad3d 728 [2d Dept 2012]), the Appellate Division, Second Department modified the trial court's denying of defendant's motion to preclude plaintiffs and granted plaintiffs' cross-motion for a protective order, and held that plaintiff had to exchange an authorization for her Facebook website. Plaintiff testified at her deposition that her injuries were exacerbated in cold weather and she could not play sports. The Court found that the plaintiff had posted on her personal webpage on her social media website a picture of herself skiing which postdated her automobile accident, (which defendants discovered by searching the portions of plaintiff's Facebook which were not blocked by privacy settings) and defendants had made a sufficient showing that the portion of her webpage which was blocked by the privacy setting could contain other evidence relevant to the defense of the lawsuit.

The Court finds that the branch of the defendants' motion seeking an authorization for plaintiff's Facebook account should be granted to the extent that plaintiff should provide defendants with copies of any photographs evidencing any recreational activities subsequent to the accident and photographs related to any work performed as a laborer following this accident. Plaintiff has already agreed to produce his wife for a non-party deposition, and has exchanged an authorization for defendant to obtain records related to plaintiff's subsequent accident, except to the extent that if plaintiff has a No-Fault file for his subsequent accident, an authorization should be provided or an affidavit stating that none such No Fault file exists. Therefore, it is

ORDERED, defendants' motion is granted to the extent that plaintiff is directed to provide defendants with copies of any Facebook photographs evidencing any recreational activities engaged in subsequent to the instant accident, and Facebook photographs related to any work performed as a laborer following this accident within thirty (30) days of the filing of this Order; and it is further

ORDERED, that plaintiff is directed provide an authorization for the defendants to obtain the No-Fault file related to his subsequent accident, or a sworn affidavit stating that no such No-Fault file exists within thirty (30) days of the filing of this Order.

This constitutes the decision and Order of the Court.

Dated: August 14, 2019

Hon. Cheryl A. Buggs, JSC