

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 14

_____X

NICHOLAS J. PACCIONE, SR.,

Plaintiff,

Index No.: 012383/11

Motion Sequence...01

-against-

Motion Date...03/01/13

ASHLEY M. BRADICA and TINO A. BRADICA,

Defendants.

_____X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendants, ASHLEY M. BRADICA and TINO A. BRADICA, seeking an order pursuant to CPLR § 3124, compelling the Plaintiff, NICHOLAS J. PACCIONE, SR. ("Paccione" or "Plaintiff"), to provide the Defendants with an authorization to obtain all of the Plaintiff's Facebook records compiled after the subject accident including deleted and archived records, is decided as provided herein.

This action arises out of a motor vehicle accident that occurred on March 31, 2009 at or near the entrance ramp of the Wantagh State Parkway southbound at or near its

intersection with Hempstead Turnpike, County of Nassau. The Plaintiff filed a summons and complaint on or about August 24, 2011 and issue was joined by service of the Defendants' answer on or about October 25, 2011. The Plaintiff claims that he sustained serious personal injuries as a result of the accident.

Specifically, in his verified bill of particulars, dated February, 15, 2012, the Plaintiff claims that the injuries suffered as a result of the accident are permanent in nature, are painful and cause limitation in motion. Also, the Plaintiff claims that the permanency of the injuries sustained has resulted in chronic pain and discomfort, mental anguish and distress, anxiety, depression, mental and emotional suffering and impairment of ability. (See Plaintiff's Verified Bill of Particulars, dated February 15, 2012, attached to the Defendants' Notice of Motion as Exhibit "B")

The Plaintiff first testified at his Examination Before Trial that he had not taken any trips or vacations since the subject accident, except that he had stayed at the Jersey Shore for a few months prior to his deposition. (See Plaintiff EBT Transcript, dated August 23, 2012, pages 93-94, attached to the Defendants' Notice of Motion as Exhibit "C") Counsel for the Defendants notes that as a follow up, the Plaintiff was asked on two subsequent occasions whether he had taken any other trips or vacations since the subject accident, to which the Plaintiff responded in the negative. (*Id.*) Subsequently, the Plaintiff changed the foregoing response on the Errata Sheet as follows: "yes, Jamaica & Cruise". (See Errata Sheet, sworn to on September 29, 2012, attached to the Defendants' Notice of Motion as

Exhibit "C") No explanation for the change in testimony was provided by the Plaintiff at that time. Thereafter, in response to a directive in a So-Ordered Stipulation, dated October 25, 2012, that the Plaintiff provide a response in accordance with the CPLR as to why the deposition transcript changes were made, the Plaintiff executed another Errata Sheet, sworn to on January 21, 2013. In the second Errata Sheet, the Plaintiff stated the following as the reason for the change in testimony: "checked records at home". (See Errata Sheet, sworn to on January 21, 2013, attached to the Plaintiff's Opposition as Exhibit "E")

At his Examination Before Trial, the Plaintiff was also asked whether he had any "physical altercations" since the subject accident, to which the Plaintiff responded that he needed clarification of the question. Counsel for the Defendants then inquired whether the Plaintiff was involved in any fights, or involved in any pushing, shoving or physical contact with other people, to which the Plaintiff responded "No". (See Plaintiff's EBT Transcript, pages 104-105, Defendants' Exhibit "C") Subsequently, the Plaintiff changed the foregoing response on the Errata Sheet as follows: "yes, 4 young men tried to run me into oncoming traffic, while on my bike. [C]aught them at the next light and while he was laughing I tried to pull him out of the car and they took off. [S]cary". (See Errata Sheet, Defendants' Exhibit "C") No explanation for the change in testimony was provided by the Plaintiff at that time. However, in the second Errata Sheet referenced above, the Plaintiff stated the following as the reason for the change in testimony: "couldn't recall when the incident occurred - recalled talking to friends". (See Errata Sheet, sworn to on January 21, 2013, attached to the

Plaintiff's Opposition as Exhibit "E")

Counsel for the Defendants claims that the Plaintiff's testimony contradicted postings on his Facebook page as reported to counsel by the Defendant, ASHLEY BRADICA. (See Defendants' Reply Affirmation, dated February 27, 2013, ¶ 2) Defendants' counsel questioning regarding the physical altercations was based upon postings on the Plaintiff's public Facebook page in connection with a physical altercation that had occurred subsequent to the subject accident.

Defendants' counsel argues, based upon the discrepancies outlined above, that the private information sought from the Plaintiff's Facebook page are relevant and discoverable in this litigation as he has placed his physical condition in issue pertaining to his normal daily activities and enjoyment of life, which would include vacations.

The Plaintiff states in opposition that the Defendants have failed to establish a good faith basis for the Facebook authorization. Moreover, the Plaintiff states that a reasonable explanation was provided for the changes in testimony indicated on the Errata Sheet.

CPLR § 3101 (a) sets forth the criterion for disclosure under the CPLR, requiring "full disclosure of all matter material and necessary in the prosecution or defense of an action." Requests for disclosure, however, may not be overbroad, burdensome, or lacking in specificity and they may not seek irrelevant information. *Osowski v. AMEC Constr. Mgt., Inc.*, 69 A.D.3d 99, 106 (1st Dept. 2009). The words material and necessary

are to be liberally interpreted 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 to determine if the information sought is material and necessary is one of usefulness and reason.” *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406-407 (1969).

The principle of full disclosure does not, however, give a party the right to uncontrolled and unfettered disclosure. Matters relating to disclosure lie within the broad discretion of the trial court which is in the best position to determine what is material and necessary. *Buxbaum v. Castro*, 82 A.D.3d 925 (2d Dept. 2011).

A plaintiff’s mere possession and utilization of a Facebook account is an insufficient basis to compel a plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account’s usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff’s Facebook account—that is, information that “contradicts or conflicts with plaintiff’s alleged restrictions, disabilities, and losses, and other claims”. *Patterson v. Turner Constr. Co.*, 88 A.D.3d 617, 618 (1st Dept. 2011); *see Kregg v. Maldonado*, 98 A.D.3d 1289 (4th Dept. 2012).

The Defendants sufficiently demonstrated that the Plaintiff’s Facebook profile contained information that was probative of the issue of the extent of his alleged injuries and it is reasonable to believe that other, private portions of his Facebook records may contain

further evidence relevant to that issue. *See Patterson v. Turner Constr. Co.*, 88 A.D.3d 617 (1st Dept. 2011); see also *Richards v. Hertz Corp.*, 100 A.D.3d 728 (2d Dept. 2012). Specifically, the contradictory testimony regarding whether the Plaintiff had been involved in a physical altercation and his vacations to Jamaica and the cruise, may be relevant to the injuries claimed in the Plaintiff's verified bill of particulars. Since the Plaintiff's testimony contradicted that which was stated in his Facebook postings, allowing the Defendants access to other portions of the Plaintiff's Facebook records is reasonably calculated to lead to discovery of relevant information. *Richards v. Hertz Corp.*, *supra*.

The Plaintiff's contention that a sufficient explanation was provided for the significant change in testimony regarding a substantive and material issue is unavailing. As cited in the Plaintiff's opposition papers, "Where there is a significant conflict on a material issue between the original deposition testimony of a witness and the correction sheet on the errata sheet, a credibility issue is created..." (44 N.Y.Jur.2d Disclosure Section 265) As there exists an issue of fact with regard to whether the original testimony or the correction on the errata sheet is correct, the Court, in the interest of "full disclosure of all matter material and necessary in the prosecution or defense of an action", will permit the discovery of the Plaintiff's Facebook records from the date of the subject accident to the present day.

The Court will conduct an *in camera* review of the records in response to an authorization for the release of the Plaintiff's Facebook records from the date of the accident, March 31, 2009, through the date of this Order, including the private and public portions of

the account, as well as any records previously deleted or archived.

Accordingly, it is hereby

ORDERED, that the motion by the Defendants, ASHLEY M. BRADICA and TINO A. BRADICA, seeking an order pursuant to CPLR § 3124, compelling the Plaintiff, NICHOLAS J. PACCIONE, SR., to provide the Defendants with an authorization to obtain all of the Plaintiff's Facebook records compiled after the subject accident including deleted and archived records, is **GRANTED**; and it is further

ORDERED, that the Plaintiff shall provide the Court with all records in response to a duly executed authorization for the release of all Facebook records from March 31, 2009 to the date of this Order, including the public and private portions thereof, as well as any previously deleted or archived records, within forty-five (45) days of the date of this Order, in order for the Court to conduct an *in camera* review to determine which of those materials, if any, are relevant to the Plaintiff's alleged injuries.

This constitutes the decision and Order of the Court.

DATED: Mineola, New York
April 29, 2013



Hon. Randy Sue Marber, J.S.C.

ENTERED
MAY 01 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE