

2018 WL 1697285 (N.Y.Sup.) (Trial Order)

Supreme Court of New York.

Part 13

New York County

Jason PAUL, Plaintiff,

v.

THE WITKOFF GROUP, 150 Charles Street Holdings, LLC, and Plaza Construction Corp., Defendants.

THE WITKOFF GROUP, 150 Charles Street Holdings,
LLC, and Plaza Construction Corp., Third-Party Plaintiffs,

v.

UNIVERSAL BUILDERS, INC., Third-Party Defendant.

No. 151322/2014.

April 3, 2018.

Trial Order

Manuel J. Mendez, Judge.

*1 MOTION DATE 03/28/2018

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to strike and/or compel.

PAPERS NUMBERED

1 -3

Notice of Motion/ Order to Show Cause —
Affidavits — Exhibits

Answering Affidavits — Exhibits

4-6

Replying Affidavits

7

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion pursuant to  CPLR §3126, §3124, and §6301, is granted to the extent that Plaintiff must fully respond to Defendants' June 7, 2017 Social Media Discovery Demands Numbered 1 3, 4, 5, 6 and 7, and for the duration of this action, Plaintiff is restrained from modifying, changing, or deleting any information from his social networking accounts that relate to this action. The remainder of the motion is denied.

Plaintiff alleges that on February 4, 2014 at around 8:45am, he was injured when he slipped and fell on a ramp covered with ice, snow and slush (Moving Papers Ex. C). Plaintiff, a second-year apprentice, was employed by non-party Ecker Windows Corporation. He was employed to work at a construction project located at 150 Charles Street, New York, New York. Plaintiff commenced this action on February 12, 2014 to recover for damages due to his alleged injuries.

Defendants served a Social Media Discovery Demands on June 7, 2017 (“Demands,” Moving Papers Ex. F). Plaintiff objected to the Demands via letter on July 5, 2017 (*Id* at Ex. G). This Court ordered Plaintiff to respond to the Demands in this Court’s September 9, 2017 Status Conference Order, and allowed Defendants to reserve their right to make a motion on these Demands in the event of Plaintiff’s noncompliance (*Id* at Ex. I).

The Defendants now move for an Order to strike Plaintiff’s Complaint, or preclude him from offering evidence at the time of trial regarding damages pursuant to  CPLR §3126, or in the alternative, compel Plaintiff to respond to their June 7, 2017 Demands pursuant to CPLR §3124. Defendants further seek to compel Plaintiff to appear for another deposition on the theory that Plaintiff was initially untruthful when he denied having a social media account. Finally, Defendants seek for this Court to issue a temporary restraining order and preliminary injunction restraining Plaintiff from directly, or indirectly, modifying, changing or deleting any information from his social networking accounts pursuant to §6310. Plaintiff opposes the motion.

 CPLR §3101 (a) allows for the “full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof ( CPLR §3101 [a]). It 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 (*GS Plasticos Limitada v Bureau Veritas Consumer Prods. Servs., Inc.*, 112 AD3d 539, 977 NYS2d 245 [1st Dept. 2013]). These principles equally apply to demands for parties’ social media accounts (*Flowers v City of N.Y.*, 151 AD3d 590, 55 NYS3d 51 [1st Dept. 2017]). “There is nothing so novel about [social media] materials that precludes application of New York’s longstanding disclosure rules,” but the party moving to compel production needs to include scopes and temporal limitations and carefully draft the demands to seek specific information material that is necessary to the prosecution or defense of the action (*Forman v Henkin*, 2018 NY Slip Op 01015 [N.Y. Ct. App., Feb. 13, 2018]).

*2  CPLR §3126 grants the court the power to sanction a party that fails to comply with a court’s discovery order. The nature and degree of the penalty to be imposed for a party’s failure to comply with an order is a matter within the sound discretion of the court ( CPLR §3126). To warrant dismissal of plaintiff’s action, defendant must show that plaintiff has incurred in a long-standing pattern of default, lateness and failure to comply with court orders, which gives rise to an inference of willful and contumacious conduct (See *Merchants T&F v Kase & Druker*, 19 A.D.3d 134, 796 NYS2d 343 [1st Dept. 2005]).

Pursuant to CPLR §3124, the court may compel compliance upon failure of a party to provide discovery. It is within the court’s discretion to determine whether the materials sought are “material and necessary” as a legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (*Roman Catholic Church of the Good Shepherd v Tempco Systems*, 202 AD2d 257, 608 NYS2d 647 [1st Dept. 1994]). “The words ‘material and necessary’ as used in  §3101 must be interpreted liberally to require disclosure” ( *Kapon v Koch*, 23 NY3d 32, 11 NE3d 709, 988 NYS2d 559 [2014]).

Plaintiff has not engaged in willful and contumacious conduct to warrant any sanction. However, some of the discovery sought in Defendants’ Demands are material and necessary to sufficiently defend this action. In Plaintiff’s Bill of Particulars, he is claiming severe depression, anxiety, stress, anxiousness and suicidal thoughts (Moving Papers Ex. C).

Plaintiff allegedly posted suicidal comments on his Facebook page. Responding to the Demands Numbered 1, 3, 4, 5, 6 and 7 of Defendants' Social Media Discovery Demands will result in the disclosure of relevant evidence bearing on Plaintiff's claim. Demands Numbered 2 and 8 are over-broad and not sufficiently tailored with scopes and temporal limitations. The Plaintiff must fully respond to Defendants' Demands Numbered 1, 3, 4, 5, 6 and 7.

[CPLR §6301](#) allows the court the power to issue an order directing a plaintiff to refrain from performing an act that would be injurious to the Defendants ([CPLR §6301](#)). The issuance of a preliminary injunction or a temporary restraining order is within the discretion of the trial court. A movant seeking a stay or injunction, is required to show: “(I) the likelihood of ultimate success on the merits; (ii) irreparable injury to him absent granting of the preliminary injunction; and (iii) that a balancing of the equities favors his position” ([Nobu Next Door, LLC v Fine Arts Housing, Inc.](#), 4 NY3d 839, 833 NE2d 191, 800 NYS2d 48 [2005]).

Defendants have shown the necessity for a temporary restraining order and preliminary injunction restraining Plaintiff from directly, or indirectly through other persons, modifying, changing or deleting any information from his social networking accounts relating to this action. Plaintiff originally denied possessing any social media accounts during his deposition (Moving Papers Ex. J). However, medical records relating to Plaintiff's hospitalization related to an alleged suicide attempt revealed Plaintiff made suicidal statements on his Facebook account (*Id* at Ex. K). Plaintiff then deleted/deactivated his Facebook account on the alleged advise from his legal counsel to aid him in this action. With Plaintiff's inclination to delete/deactivate his Facebook account (and potentially other social media accounts), Plaintiff must be temporarily restrained from modifying, changing or deleting any statements related to this action made on his social media accounts for the duration of this action.

*3 Accordingly, it is ORDERED, that Defendants motion pursuant to  [CPLR §3126](#), [§3124](#), and [§6301](#) is granted to the extent that Plaintiff must fully respond to Defendants' June 7, 2017 Social Media Discovery Demands Numbered 1, 3, 4, 5, 6 and 7, and for the duration of this action, Plaintiff is restrained from modifying, changing, or deleting any information from his social networking accounts that relate to this action, and it is further,

ORDERED, that within twenty (20) days from the date of service of a copy of this Order with Notice of Entry, Plaintiff is to fully respond to Defendants' June 7, 2017 Social Media Discovery Demands Numbered 1, 3, 4, 5, 6 and 7, and it is further,

ORDERED, that Plaintiff, and all other persons acting at the direction of Plaintiff, are enjoined and restrained, during the pendency of this action from modifying, changing or deleting any information from his social networking accounts that relate to this action, and it is further,

ORDERED, that the remainder of the motion is denied, and it is further,

ORDERED, that the parties appear for a Status Conference on May 23, 2018 at 51:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

Dated: April 2, 2018

ENTER:

<<signature>>

MANUEL J. MENDEZ J.S.C.

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