2019 WL 302266
Supreme Court, Appellate Division,
First Department, New York.

Genaro VASQUEZ–SANTOS, Plaintiff–Respondent,
v.
Leena MATHEW, Defendant–Appellant.
[And A Third Party Action]

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ENTERED: JANUARY 24, 2019

Synopsis

Background: First driver, who allegedly sustained injury when rear-ended by second driver's vehicle, brought personal-injury action against second driver and owner of first driver's vehicle. Second driver filed motion to compel access by a third-party data mining company to first driver's devices, email accounts, and social medical account. The Supreme Court, New York County, Adam Silvera, J., 2018 WL 2943760, denied motion. Second driver appealed.

The Supreme Court, Appellate Division, held that post-accident photographs and evidence of first driver engaging in basketball or similar activity posted on or sent on devices, emails accounts, and social media were discoverable.

Reversed.

See also 2018 WL 2943756.

Procedural Posture(s): On Appeal; Motion to Compel Discovery; Motion for Costs.

Order, Supreme Court, New York County (Adam Silvera, J.), entered June 7, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion to compel access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts, so as to obtain photographs and other evidence of plaintiff engaging in physical activities, unanimously reversed, on the law and the facts, without costs, and the motion granted to the extent indicated herein.

Attorneys and Law Firms

McDonald & Safranek, New York (Kenneth E. Pinczower of counsel), for appellant.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

Sweeny, J.P., Tom, Kahn, Oing, Singh, JJ.

Opinion

***1** Private social media information can be discoverable to the extent it "contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims" (*Patterson v. Turner Const. Co.*, 88 A.D.3d 617, 618, 931 N.Y.S.2d 311 [1st Dept. 2011]). Here, plaintiff, who at one time was a semi-professional basketball player, claims that he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball. Although plaintiff testified that pictures depicting him playing basketball, which were posted on social media after the accident, were in games played before the accident, defendant is entitled to discovery to rebut such claims and defend against plaintiff's claims of injury. That plaintiff did not take the pictures himself is of no import. He was "tagged," thus allowing him access to them, and others were sent to his phone. Plaintiff's response to prior court orders, which consisted of a HIPAA authorization refused by Facebook, some obviously immaterial postings, and a vague affidavit claiming to no longer have the photographs, did not comply with his discovery obligations. The access to plaintiff's accounts and devices, however, is appropriately limited in time, i.e., only those items posted or sent after the accident, and in subject matter, i.e., those items discussing or showing defendant engaging in basketball or other similar physical activities (*see Forman v. Henkin*, 30 N.Y.3d 656, 665, 70 N.Y.S.3d 157, 93 N.E.3d 882 [2018]; *see also Abdur–Rahman v. Pollari*, 107 A.D.3d 452, 454, 967 N.Y.S.2d 31 [1st Dept. 2013]).

All Citations

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