2012 WL 11980337 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Orange County

Christina M. D'AGOSTINO, Plaintiff,
v.
YRC INC., Yellow Transportation, Inc., Yellow Freight and Peter J. Timpe, Jr., Defendants.

No. 0005652011.
May 17, 2012.

Trial Order

Catherine M. Bartlett, Judge.

***1** Index No. 565/2011

Motion Date: April 11, 2012

(Adjourned to May 11, 2012)

The following papers numbered I to 6 were read on the defendants' motion compelling plaintiff to respond to defendants' supplemental discovery notice and letter request for discovery as well as the oral argument held on May 11, 2012:

Notice of Motion-Affirmation-Exhibits..... 1-3

Affirmation in Opposition-Exhibit..... 4-5

Reply Affirmation..... 6

Upon the foregoing papers, it is hereby ORDERED that the motion is disposed of as follows:

Defendants move for an order compelling plaintiff to respond to a supplemental notice for discovery and inspection dated December 29, 2011. Essentially, defendants seek an order compelling plaintiff to provide defendants with plaintiffs Facebook account postings pre-dating the accident which is the subject of this action. Defendants argue that plaintiff is claiming psychological and emotional damages in this action. Based upon the plaintiffs own deposition testimony, she suffered emotional and psychological problems and stressors predating this action and actually posted on the Facebook social media website comments concerning her mental and emotional state prior to this accident.

Plaintiff opposes this application, claiming that defendants failed to satisfy the factual predicate for obtaining these materials, and further claims that such discovery is not material to the defense of the action.

CPLR §3101 (a) states in pertinent part: "There shall be full disclosure of all mater material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party, or the officer, director, member, agent or employee of a party; ..." In interpreting this statute, the Court of Appeals stated unequivocally in *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 (1968), that:

the words "material and necessary", are, in our view, 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. CPLR 3101 (subd.(a)) should be construed, as the leading text on practice puts it, to permit discovery of testimony "which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable (3 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3101.07, p.31-13)".

See, Hoenig v Westphal, 52 NY2d 605, 608 (1981). Moreover, the *Allen* Court held that " 'The purpose of disclosure procedures ... is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits' and, ... '(i)f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material * * * in the prosecution or defense' [citation omitted]." *Allen,* 21 NY2d at 407.

According to Professor David D. Siegel:
It is often said that the disclosure devices may not be used by a party merely to conduct a "fishing expedition", i.e. merely to see what beneficial things might be inadvertently discovered from the other side. Lip service is still occasionally paid to that shibboleth. The contention is often thrown up as a defense against reasonable disclosure, but it doesn't work. If the seeking party is within the criterion of CPLR 3131(a) and beyond the immunities of (b), (C), and (d), and if nothing unusual can be shown to invoke the court's protective order powers under CPLR 3103, as with a showing that the disclosure devices are being used for harassment or delay, the party entitled to this disclosure and the waving of the "fishing expedition" sign will be unavailing...

If it is relevant, that party is clearly entitled to find it out by asking any questions reasonably calculated to elicit data about the transaction or occurrence that grounds the suit and its background and incidents. If the English language chooses to label such a pursuit a "fishing expedition", then west must in candor (and perhaps relief) acknowledge that a "fishing expedition" into one's adversary's case is precisely what the CPLR invites. The broad scope assigned to disclosure by the Allen case [citation omitted] invites that conclusion.

N.Y. C.P.L.R. 3101, Practice Commentaries, C3101:8 (1991).

The liberal disclosure requirements are not without limits, however. "The full disclosure requirement of CPLR 3101 (a) is subject to a test of 'usefulness and reason' (*Allen v. Crowell-Collier Publ. Co.,* 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430 [1968])." *Reyes v Riverside Park Community (Stage I), Inc.,* 47 AD3d 599, 599-600 (1st Dept.,2008). Specifically related to social media postings, the Court in *McCann v Harleysville Insurance Company,* 78 AD3d 1524 (4th Dept. 2010) noted that a party seeking access to an adversary's social media posting must satisfy a two prong test, the first being the specifics of what is sought and the second part being a factual predicate for seeking such evidence. In the instant case, defendants have satisfied both prongs of the test.

Specifically, defendants request all social media postings and photographs contained on plaintiffs social media accounts whether posted by her or others concerning any mental, emotional or physical condition suffered by plaintiff for which she claims an injury in this action. Such postings both pre- and post-date this accident. According to plaintiffs own sworn deposition testimony, she suffered from various mental and emotional stressors which pre-dated this accident and about which she routinely posted concerning her feelings and emotions. Plaintiff claims depression and emotional and mental injuries in this lawsuit, but now wants to prevent the defendants from ascertaining the extent that those conditions existed prior to the accident and the extent they may have been exacerbated or not from this accident. By bringing this action, plaintiff placed her own mental, emotional and physical conditions at issue. The fact that she testified that she regularly posted her feelings on social media websites prior to and subsequent to this accident is wholly relevant information concerning her mental, physical and emotional states both before and after the accident. Plaintiff cannot now claim an

expectation of privacy when she shared her feelings online, testified that she did so, and now makes claims for related injuries in this action. As such, defendants' motion is granted and the plaintiff is to respond fully to the supplemental notice for discovery and inspection within 30 days from the date of this order. Failure to fully respond within that time frame will result in the striking of those claims from plaintiffs action. This order shall be self-executing.

The foregoing constitutes the decision and order of this Court.

Dated: May 17,2012 Goshen, New York

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HON. CATHERINE M. BARTLETT, A.J.S.C.

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