SHORT FORM ORDER

INDEX NO:20459/08

Supreme Court of the State of New York
IAS Part 43 - County of Suffolk

PRESENT:
Hon. ARTHUR G. PITTS

SEAN O'NEILL and DIANNE O'NEILL,

Plaintiffs,

-against-

DONNA WEBER and JOHN WEBER,

Defendants.

ORIG. RETURN DATE:9/8/11
ADJOURNED DATE:9/8/11
MOTION SEQ. NO.:003-MG

PLTF'S/PET'S ATTY:
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DEFT'S RESP'S ATTY:
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Atty for Donna Weber
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Hicksville, New York 11801

Upon the following papers numbered 1 to 35 read on this motion protective order
Notice of Motion and supporting papers 1-13; Notice of Cross-Motion and supporting papers
Affirmation/affidavit in opposition and supporting papers 14-19; Affirmation/affidavit in reply and supporting papers 20-24; Other 25-28/29-35; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that plaintiffs Sean O'Neill and Dianne O'Neill's motion for an order striking defendant John Weber's Notice to Admit dated August 12, 2011 is granted under the circumstances presented herein. (CPLR 3123) It is further

ORDERED that the plaintiffs' motion to vacate and strike defendant John Weber's Supplemental Notice for Discovery and Inspection dated August 12, 2011 is granted.

The matter at bar is one for personal injuries sounding in negligence which arose from an incident that occurred January 11, 2008 when plaintiff Sean O'Neill slipped and fell on the defendants' elevated deck at their premises located at 44 North Hamilton Avenue, Lindenhurst, Suffolk County, New York. Plaintiff Dianne O'Neill, Sean O'Neill's spouse has brought a derivative claim. On or about August 12, 2011 defendant John Weber served the plaintiff with a Notice to Admit, each proffered admission relating to the plaintiff's use of social media sites such as Facebook, Twitter, MySpace and YouTube. It is well settled that the purpose of a Notice to Admit is to eliminate from the litigation, factual matters which will

not be in dispute at trial, not to obtain information in lieu of other disclosure devices. The underlying purpose of such a notice is to eliminate from contention factual matters which are easily provable and about which there can be no controversy to expedite the trial by eliminating an issue that as to which there should be no dispute. Thus, a notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts which can only be resolved after a full trial. It may not be employed as a substitute for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories. (***Taylor v. Blair,*** 116 A.D.2d 204, 500 N.Y.S.2d 133 [1st Dept 1986]) Herein, the information sought by defendant John Weber pursuant to the service of a Notice to Admit, would be available through other disclosure devices, including simply asking the plaintiff at his examination before trial whether he utilizes social media sites. A Notice to Admit clearly is the improper device to obtain such information.

Defendant John Weber also served the plaintiff's with a Supplemental Notice for Discovery and Inspection on or about August 12, 2011. Said notice seeks the production of all electronic and written data from the plaintiff's computer, cell phones and personal digital assistants as well as anything which may have been posted by the plaintiff on Facebook, MySpace, Twitter or similar sites as well as providing the defendants with authorizations to allow access to his accounts on those and other electronic media services.

It has consistently been held that far reaching pretrial discovery is long favored. The words "material and necessary" in CPLR 3101(a) as used in the statute are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial. (***Anonymous v. High School For Environmental Studies,*** 32 A.D.3d 353, 820 N.Y.S.2d 573 [1st Dept 2006]) The test is one of usefulness and reason. A party does not have the right to uncontrolled and unfettered disclosure. 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. (***Foster v. Herbert Slepoy Corp.,*** 74 A.D.3d 1139, 902 N.Y.S.2d 426 [2nd Dept 2010]) Herein, defendant John Weber has failed to establish any foundation which would warrant access to the plaintiffs electronic writings or social media accounts. (see ***Morgana v. Guttman,*** 2010 NY Slip Op 30302 [Sup Ct, Nassau Cty 2010]) The parties have not provided the Court with the transcripts of the plaintiff's examination before trial. If the defendants questioned the plaintiff regarding his use of social media sites, a foundation supporting further discovery might have been deemed established. Absent such evidence, the plaintiffs' motion to vacate and strike the Supplemental Notice for Discovery and Inspection is granted.

This shall constitute the decision and order of the Court.

Dated: Riverhead, New York
November 16, 2011

J.S.C.

CHECK ONE: ____ FINAL DISPOSITION __XX__ NON-FINAL DISPOSITION