

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver
Justice

PART 22

STERLING, KATHERINE

INDEX NO. 106493-2009

- v -

MOTION DATE _____

MAY, BONNIE JO

MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion for

FILED

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits _____

No(s). 1

Notice of Cross-Motion — Affirmation — Exhibits — Memorandum of Law _____

NOV

2 2011

No(s). 2, 3

Upon the foregoing papers, it is

NEW YORK
COUNTY CLERK'S OFFICE

In this action to recover for personal injuries allegedly sustained a motor vehicle accident defendants Bonnie Jo May and Lawrence E. May ("defendants") move pursuant to CPLR §§ 3124 and 3126 for an order compelling plaintiff Katherine Sterling ("plaintiff") to comply with their post examination before trial notice for discovery and inspection. Plaintiff cross-moves pursuant to CPLR § 3103 for a protective order with respect to the notice for discovery and inspection.

Plaintiff testified at her second examination before trial on March 29, 2011 that she has a Facebook account and has been a member of Facebook since 2009. Plaintiff, who is claiming that she sustained a traumatic brain injury with resultant cognitive defects, vertigo and trauma induced depressive disorder as a result of a February 2, 2009 accident, also testified that she keeps lists of appointments and her daily work schedule her personal cell phone and that her daily work schedule as a nanny is synched with her employer's cell phone. Defendants served a notice for discovery and inspection dated May 16, 2011 in which they demanded HIPAA compliant authorizations, copies of daily notebooks kept by plaintiff and authorizations pertaining to plaintiff's gym membership. Defendants also requested an authorization for AT&T pertaining to plaintiff's cell phone records, including plaintiff's daily electronic work schedule and the synched electronic work calendar from her employer, and authorizations for plaintiff's current and historical Facebook, My Space and Twitter accounts. Plaintiff objected defendants' demands pertaining to her social networking and he cell phone as overly broad and unduly burdensome.

With respect to defendants' demand for authorizations for plaintiff's social networking, defendants' conclusory claim that plaintiff's Facebook account is material and necessary to their defense of the action and that preventing them from accessing the account would be in direct contravention of this state's liberal disclosure policy does not constitute a factual predicate with respect to the relevancy of the evidence (*McCann v Harleysville Ins. Co. of N.Y.*, 2010 NY Slip Op 8181 [4th Dept]). To allow defendants access to plaintiff's Facebook account based solely upon the fact that plaintiff testified that she has such an account would allow defendants' to conduct a "fishing exposition" predicated upon a mere hope of finding relevant evidence (*id.*). Moreover, there is no nothing on plaintiff's public

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Facebook page, a printout of which is attached to plaintiff's cross-motion, that would lead one to infer that her private Facebook pages may contain information that is relevant to her claims and may lead to the disclosure of admissible evidence (*compare Romano v Steelcase Inc.*, 2010 NY Slip Op 20388 [Sup Ct Suffolk County]). Further, there is no testimony by plaintiff in either of her depositions that she maintains a Twitter and/or My Space account. Accordingly, defendants' motion to compel is denied with respect to item number seven of their May 16, 2011 notice for discovery and inspection and plaintiff's cross-motion for a protective order is granted.

Defendants' motion to compel plaintiff to provide an authorization for her cell phone provider is granted. Plaintiff provided defendants with copies of the notebooks she began maintaining in the summer of 2009 in which she kept lists of work related appointments, personal appointments and bills. Just as the notebooks are discoverable, so to are the appointments and daily work schedules she testified she maintains on her personal cell phone. Therefore, plaintiff is to furnish defendants with an authorization allowing defendants to obtain the daily work schedule kept by plaintiff on her cell phone. Assuming plaintiff's cell phone service provider can produce such information, the court will review the material *in camera*. Accordingly, it is hereby

ORDERED that defendants' motion to comply is denied and plaintiff's cross-motion for a protective order is granted with respect to plaintiff's social networking accounts; and it is further

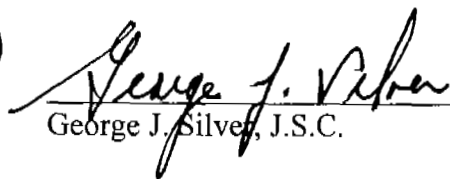
ORDERED that defendants' motion to compel is granted with respect to plaintiff's cell phone records and plaintiff's cross-motion for a protective order is denied; and it is further

ORDERED that the parties are to appear in Part 22, room 136, 80 Centre Street, New York, New York 10013 on January 4, 2012 for an *in camera* inspection by the court of plaintiff's cell phone records; and it is further

ORDERED that defendants are to serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

FILED

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George J. Silver, J.S.C.

Dated: *November 18, 2011*
New York County

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COUNTY CLERK'S OFFICE

HON. GEORGE J. SILVER