

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 113059/2011
FORMAN, KELLY
vs.
HENKIN, MARK
SEQUENCE NUMBER : 002
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for compel disclosure
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court grants defendant's motion to compel disclosure or for penalties due to plaintiff's nondisclosure to the extent set forth in the parties' accompanying stipulation dated 1/7/13 and in the accompanying decision dated 2/20/14 and otherwise denies defendant's motion. C.P.L.R. §§ 3124, 3126.

FILED
MAR 19 2014
NEW YORK
COUNTY CLERKS OFFICE

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

Dated: 2/28/14

Lucy Billings
LUCY BILLINGS, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

-----x

KELLY FORMAN,

Index No. 113059/2011

Plaintiff

- against -

DECISION AND ORDER

MARK HENKIN,

Defendant

-----x

LUCY BILLINGS, J.S.C.:

Plaintiff sues for injuries suffered in a fall from defendant's horse. Defendant moves to compel plaintiff to provide authorizations to obtain records of (1) her private Facebook postings and (2) loans she has received to be repaid from this action's proceeds. C.P.L.R. § 3124. The parties' stipulation November 7, 2013, resolved all other disclosure or penalties for plaintiff's nondisclosure sought by defendant's motion. C.P.L.R. §§ 3124, 3126.

FILED

MAR 19 2014

NEW YORK

COUNTY CLERK'S OFFICE

I. FACEBOOK POSTINGS

Among the records from plaintiff's Facebook account, which plaintiff has deactivated since she commenced this action, defendant specifically seeks photographs, status messages, and instant messages. At plaintiff's deposition plaintiff testified that before her injuries claimed in this action she posted on Facebook photographs of herself engaging in various activities, but that she no longer engages in those activities as a result of her injuries. Plaintiff claims that a brain injury caused by the

fall from defendant's horse has impaired her memory and her ability to read and write. Consequently, at her deposition she did not recall whether she had posted any photographs on Facebook since her injury and testified that since her injury she has been unable to compose emails and text messages.

Photographs of plaintiff before her injury are of little probative value. If she did post such photographs on Facebook, they only will corroborate her testimony. If she did not post such photographs, their absence will not show that she did not engage in various activities before her injury that she no longer engages in. Nevertheless, insofar as plaintiff intends to introduce at trial photographs of her privately posted on Facebook before her injury, she shall provide all such photographs to defendant within 20 days after service of this order with notice of entry. C.P.L.R. §§ 3120(1)(i) and (2), 3124.

Photographs of plaintiff engaging in various activities after her injury, particularly any activities she claims she no longer is able to engage in due to her fall from defendant's horse, are of greater probative value. Patterson v. Turner Constr. Co., 88 A.D.3d 617, 618 (1st Dep't 2011); Richards v. McCarthy, 100 A.D.3d 728, 730 (2d Dep't 2012). Since plaintiff has failed to provide any information whether she privately posted any photographs on Facebook after her injury, within 20 days after service of this order with notice of entry, she shall obtain any photographs of her privately posted on Facebook after

her injury and provide all such photographs to defendant that do not show nudity or romantic encounters. Richards v. McCarthy, 100 A.D.3d at 730.

Defendant further seeks pre-injury and post-injury writings to ascertain the impact of plaintiff's injury on her ability to reason, find words, write, and communicate effectively. Yet defendant has not shown an inability to obtain plaintiff's writings other than her private status messages and instant messages on her Facebook account.

Defendant is entitled to request plaintiff's writings since her injury and for a limited period leading up to her injury for comparison. Defendant is entitled to a psychological and a physical examination of plaintiff to assess her ability to read, reason, find words, write, and communicate effectively. Her writing product other than her private Facebook messages and the constraints of a single psychological and single physical examination, however, may not fully reveal the frequency, speed, and volume of her writing. Therefore, within 20 days after service of this order with notice of entry, plaintiff shall authorize defendant to obtain records from Facebook, including archived or deleted records, showing each time plaintiff posted a private message and the number of characters or words in the text of each private message, from the date of her injury until she deactivated her Facebook account. Id.

Defendant completely fails to show how his request for his associates' messages on plaintiff's Facebook account, insofar as

they are not public or available from the authors, to validate her accusation that his associates transmitted harassing messages, is relevant to her claims or his defenses in this action. Therefore he is not entitled to obtain any information concerning these messages from plaintiff's private Facebook account. Abrams v. Pecile, 83 A.D.3d 527, 528 (1st Dep't 2011); Richards v. McCarthy, 100 A.D.3d at 730-31; McCann v. Harleystown Ins. Co. of N.Y., 78 A.D.3d 1524, 1525 (4th Dep't 2010).

II. LOANS

Defendant cites no authority supporting his entitlement to information concerning loans to be repaid by plaintiff. As long as they are to be repaid, even if they are to be repaid only from her recovery in this action, they are not a collateral source to compensate plaintiff for her injuries or losses claimed in this action. C.P.L.R. § 4545(a); Oden v. Chemung County Indus. Dev. Agency, 87 N.Y.2d 81, 83-84 (1995); Stowlowski v. Bellew, 89 A.D.3d 549 (1st Dep't 2011); Johnson v. New York City Tr. Auth., 88 A.D.3d 321, 327-28 (1st Dep't 2011); Staats v. Wegmans Food Mkts., Inc., 63 A.D.3d 1573, 1574 (4th Dep't 2009). Neither are any such loans liens imposed on her potential recovery pursuant to any statute that would obligate defendant to satisfy the lien if plaintiff does recover in this action. Obviously defendant is not a party to the loan transactions and thus is not contractually obligated to repay the loans. Nor are they part of plaintiff's damages from her claimed injuries or losses. Since

defendant presents no basis on which loans plaintiff has received are relevant to her claims or his defenses, he is not entitled to information concerning such loans.

III. CONCLUSION

In sum, the court grants defendant's motion to compel disclosure to the following extent. C.P.L.R. § 3124. Within 20 days after service of this order with notice of entry, plaintiff shall provide to defendant:

1. all photographs of her privately posted on Facebook before her injury claimed in this action that she intends to introduce at trial;
2. all photographs of her privately posted on Facebook after her injury that do not show nudity or romantic encounters; and
3. authorizations to obtain records from Facebook, including archived or deleted records, showing each time plaintiff posted a private message and the number of characters or words in the text of each private message, since her injury.

The court otherwise denies defendant's motion, except insofar as plaintiff stipulated November 7, 2013, to the relief sought. This decision constitutes the court's order.

DATED: February 28, 2014

FILED

MAR 19 2014

Lucy Billings

LUCY BILLINGS, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Kelly Forman

INDIVIDUAL ASSIGNMENT PART 46

STIPULATION

INDEX NO. 113059/11

MOTION CALENDAR NO.

DATE NOV. 7, 2013

Mark Henkin

IT IS HEREBY STIPULATED AND AGREED by and between the below-named attorney(s) as follows:

- ~~TI~~ to appear for a deposition on or
before 12/19/13 @ 10am location To be agreed
upon or NY County Reporter at Ps office

~~A motion dated 9/13/13 resolved as follows:~~

- As time to designate Doctors to perform IME
is extended until 12/19/13

~~+ Per Court Order to be issued.~~

- A motion to compel ~~per~~ second post-deposition notice
for D+I + D's notice for D+E dated 11/21/13 is
resolved as moot

FILED

MAR 19 2014

NEW YORK
COUNTY CLERK'S OFFICE

Attorney for Plaintiff

Date: 11/7/13

[Signature]
Attorney for Defendant

So Ordered.

Attorney for Defendant

ENTER: Lucy Billings

J.S.C.

SC-8G (rev 2/86)

LUCY BILLINGS
J.S.C.