The Law Alumni Association
University at Buffalo School of Law

Behind the Bench
Discovery Practice and Motion Abuse

March 14, 2018

Lobello v. New York Cent. Mut. Fire Ins. Co., 152 A.D.3d 1206 (4th Dept 2017) 25

- Following discovery, during which defendant repeatedly failed to provide documents in a timely manner or at all, plaintiff moved for various forms of relief, including an order striking defendant's answer based on discovery violations.

- Supreme Court granted plaintiff's motion in part, ordering defendant to pay plaintiff $1,500 as costs and sanctions for discovery violations and to provide plaintiff with claim notes for only the 2010 loss, with the redactions modified.

- Contrary to plaintiff's contention, the court did not abuse its discretion in imposing only a monetary sanction on defendant for its failure to disclose all of its claim notes. That penalty was commensurate with the particular disobedience it was designed to punish.

BDS Copy Inks, Inc. v. International Paper, 123 A.D.3d 1255 (3d Dept 2014) 29

- Trial court did not abuse its discretion in striking plaintiffs' complaint as discovery sanction, based on plaintiffs' continued refusal to disclose documents bearing on their claimed damages, instead insisting that defendant's ability to shift through 60 to 80 banker's boxes in warehouse represented reasonable compliance with document production request.

Hon. Tracey A. Bannister
Part 31 - Eighth Floor
50 Delaware Avenue
Buffalo, New York 14202
Phone: (716) 845-9492
Facsimile: (716) 845-5152

NO MOTIONS PAPERS VIA FACSIMILE

Confidential Law Clerk:	Mary L. Mikan, Esq.	845-9493
Secretary:	Sandra Panfil	845-9492
Court Clerk Part 31:	Rita Ventura	845-2759

MOTIONS: Civil & Matrimonial Wednesdays @ 9:30 am, per schedule in Part 31. Please call Court Clerk for exact dates and times prior to scheduling motion, or at any other times the Court and counsel mutually arrange.

E-FILES: The Court requests a courtesy hard copy with confirmation notice of all e-filed documents as soon as possible.

CIVIL & MATRIMONIAL MATTERS:

All original moving papers, answering papers, memoranda and special term notes of issue to be sent to chambers before 12:00 noon on the Monday before the motion return date. If motion papers are not timely served, motion may be adjourned by the court. TROs on notice if other attorney is known. No general adjournments. Adjournments granted with consent of parties, subject to Court's approval.

Civil Actions:

Preliminary conference will be held within forty-five (45) days of the Court's receipt of filed RJI. All conferences before IAS Judge or law clerk. Adjournments granted with consent of all parties, subject to Court's approval, by contacting secretary.

Matrimonial Actions:

Preliminary conferences will be scheduled upon assignments, Pleadings discovery demands, 236B Affidavits, motions, responses, prior orders, settlement proposals, proposed stipulations or agreements should be submitted to the Court as far in advance as possible. Parties must be present at all conferences unless instructed otherwise by the Court.

TRIALS

Trial dates considered to be "date certain" and adjournments will be granted only in the most exceptional circumstances. All motions *in limine* shall be made returnable prior to jury selection. Expert disclosure deadlines per Court's order.

HON. CATHERINE NUGENT-PANEPINTO
92 Franklin Street, Part 2, 3rd Floor
Buffalo, New York 14202
Phone: 845-2693 / Facsimile:

MOTION PAPERS VIA FACSIMILE OR EMAIL BY PRIOR ARRANGEMENT WITH COURT AND COUNSEL

Law Clerk:	**Kristen M. Wolf**	**716-845-2597**
Secretary:	**Kristin J. McCracken**	**716-845-2693**
Court Clerk:	**Sally Lemley**	**716-845-9427**

MOTIONS:

Civil and Matrimonial: Thursdays at 9:30 a.m. (Except with prior arrangement). Please call Court Clerk for exact dates prior to scheduling motion. Infant Settlements: Contact Court Clerk to schedule. Motions, cross-motions and orders to show cause cannot be scheduled until there is a paid stamped note of issue showing the original was filed with the Erie County Clerk. Motions for Summary Judgment should be made no later than one hundred twenty (120) days after the filing of the note of issue, except with leave of Court on good cause shown.

All original moving papers, answering papers, memoranda and special term notes of issue should be sent to chambers before 12:00 noon on the Tuesday before the motion return date. If motion papers are not timely served, motion may be adjourned by the court. TROs on notice if other attorney known. No general adjournments. Adjournments granted with consent of parties, subject to Court's approval, by contacting secretary or court clerk. Only stipulated or initialed Orders with consent of opposing counsel should be submitted to the Court for signature.

CONFERENCES:

Civil:

Preliminary conference will be held within forty-five (45) days of the Court's receipt of filed RJI. All conferences before Judge or law clerk. Adjournments granted with consent to all parties, subject to Court's approval, by contacting secretary. At the conference, a scheduling order may be issued.

Matrimonials:

Preliminary conferences will be scheduled upon assignment. Pleadings, discovery demands, 236-B affidavits, motions, responses, prior orders, settlement proposals, proposed stipulations or agreements should be submitted to the Court as far in advance as possible. Adjournments granted with consent of parties, subject to Court's approval, by contacting secretary.

HON. CATHERINE NUGENT-PANEPINTO

TRIALS:

Trial dates are considered to be "date certain". Adjournments granted under certain circumstances. All motions *in limine* should be made returnable prior to jury selection.

Expert disclosure, without good cause shown, should be exchanged thirty (30) days before the commencement date of trial. Any motions regarding the adequacy of expert disclosure should be made within ten (10) days of receipt of such disclosure.

Jury selection begins at 9:30 a.m. on Tuesday, with trial to commence at 9:30 a.m. on Wednesday or whichever date is agreed upon by the parties and Court.

Marked pleadings, requests or charge, proposed verdict sheets and papers for motions *in limine* should be submitted one (1) week prior to beginning of trial. Exceptions made, upon good cause shown. Conferences with Judge upon completion of jury selection. Proposed verdict sheets and requests to charge, may be e-mailed in WordPerfect format, to Judge's Law Clerk at kwolf@courts.state.ny.us or secretary at kmccrack@courts.state.ny.us.

Charge conference with the Judge after proof completed with results put on record upon request.

Matrimonials:

Referred to law clerk to hear and report on divorces on stipulation, contested economics, post-divorce arrears and post-divorce modifications. Judgments and findings of fact should be submitted on notice to opposing counsel within four (4) weeks of prove-up or decision. If no objections to final papers are received after ten (10) days, submitted papers and/or Orders will be signed without further delay.

Special Requirements on Policy Limits Cases:

If a case with a value in excess of the policy limits is being settled for available insurance coverage, be prepared to submit an affidavit from the insured's detailing their knowledge of insurance coverage; an affidavit from counsel offering the policy limits detailing their activities in ascertaining the existence of all available insurance coverage, and an affidavit from a principal with the insurance company swearing they have no knowledge of any other insurance coverage.

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NO MOTIONS PAPERS VIA FACSIMILE

Confidential Law Clerk:	Kristin St.Mary, Esq.	845-2739	kstmary@nycourts.gov
Secretary:	Michele Pieri	845-2685	mpieri@nycourts.gov
Court Clerk Part 30:	Debbie Wagner	845-9430	dwagner@nycourts.gov

MOTIONS: Civil & Matrimonial Wednesdays @ 9:30 am, per schedule in Part 30. Please call Court Clerk for exact dates and times prior to scheduling motion, or at any other times the Court and counsel mutually arrange.

E-FILES: The Court requests a courtesy hard copy with confirmation notice of all e-filed documents as soon as possible.

CIVIL & MATRIMONIAL MATTERS:

All original moving papers, answering papers, memoranda and special term notes of issue to be sent to chambers before 12:00 noon on the Friday before the motion return date. If motion papers are not timely served, motion may be adjourned by the court. TROs on notice if other attorney is known. No general adjournments. Adjournments granted with consent of parties, subject to Court's approval.

Civil Actions:

Preliminary conference will be held within forty-five (45) days of the Court's receipt of filed RJI. All conferences before IAS Judge or law clerk. Adjournments granted with consent of all parties, subject to Court's approval, by contacting secretary.

Matrimonial Actions:

Preliminary conferences will be scheduled upon assignments, Pleadings discovery demands, 236B Affidavits, motions, responses, prior orders, settlement proposals, proposed stipulations or agreements should be submitted to the Court as far in advance as possible. Parties must be present at all conferences unless instructed otherwise by the Court.

TRIALS

Trial dates considered to be "date certain" and adjournments will be granted only in the most exceptional circumstances. All motions *in limine* shall be made returnable prior to jury selection. Expert disclosure deadlines per Court's order.

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
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Part 22 - Fourth Floor
25 Delaware Avenue
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FAX: 716-845-7505

Law Clerk:	**Darryl J. Colosi, Esq.**	**(716) 845-7480** **E-Mail: dcolosi@nycourts.gov**
Secretary:	**Christine D. Paz**	**(716) 845-7479** **E-Mail: cpaz@nycourts.gov**
Court Clerk:	**John H. Garbo, Jr.**	**(716) 845-9415** **E-Mail: jgarbo@nycourts.gov**
Court Reporter:	**Lynn Dulak**	**(716) 845-2139** **E- Mail: ldulak@nycourts.gov**

MOTIONS: **Generally every 3rd and 4th Wednesday - Morning session commencing at 9:30 a.m.; Afternoon session commencing at 2:00 p.m.;**
Generally every 1st and 2nd Wednesday - Afternoon session only.
Attorneys shall contact John Garbo prior to scheduling same.

1. Hard copies of all moving and opposing submissions for consideration by the Court (other than those relating to Orders to Show Cause - see below), shall be **received** by Chambers at least three (3) business days prior to the return date, and before **2:00 p.m.** Hard copies of reply submissions if any, must be **received** by Chambers at least one (1) business day prior to the return date, and before **2:00 p.m.,** and shall not re-iterate previous submissions. Cross-motions shall be governed by the CPLR, and the Court requires **strict** compliance with CPLR §2214(b). Except for applications for Orders to Show Cause, the originals of all submissions shall be filed with the office of the clerk of the county in which the matter is commenced/pending. Oral argument is expected on all cases, unless a) the motion is known in advance to be uncontested or b) a letter requesting the motion be decided on the papers is received by the Court prior to the original return date. Discovery motions shall be subject to a conference with the Law Clerk prior to filing the motion. In such case, counsel shall email the Law Clerk, copying opposing counsel, and briefly set forth the discovery-related dispute. Opposing counsel shall have a reasonable opportunity to email a brief response, after which the Law Clerk will determine whether a conference, or motion practice is required.

2. Motions shall be called in the order in which attorneys check in with the Court Clerk. Please report in immediately upon arrival.

3. **Matters shall not be scheduled until Chambers receives a paid, stamped RJI and/or E-filing notification showing the original papers were filed with the office of the clerk of the county in which the matter is commenced/pending, and the appropriate filing fee has been paid.**

ORDERS:

Shall be submitted to Chambers by the prevailing party's counsel within ten (10) business days of a decision as to same, together with verification that the order has been served upon all opposing counsel (or *pro se* litigants), and that no objection has been received within three (3) business days of service. **Orders will not be signed without said verification.**

CONFERENCES:

Conferences shall be automatically scheduled upon Chambers' receipt of a filed RJI or calendar note of issue. Conferences may also be scheduled upon request. Prior to a preliminary conference, counsel shall provide Chambers with copies of all pleadings and a one (1) paragraph summary of the case. At the conference, a scheduling order shall be issued after consultation with, and agreement among counsel, which shall include jury selection and trial dates. Counsel shall bring calendars, including trial availability, to all conferences. Conferences shall take place with the Law Clerk (or the Court, as matters dictate).

TRIALS:

The Court adheres strictly to jury selection and trial schedules. Marked pleadings (please contact Lynn Dulak to arrange for same), requests to charge, witness lists, and proposed verdict sheets shall be submitted to Chambers (after consultation with opposing counsel, so as to narrow issues and limit redundancy) two (2) weeks prior to commencement of jury selection. Motions *in limine* shall be filed and served so as to be heard prior to commencement of jury selection. A final charging conference shall be held prior to summations. Deadline for expert disclosure, absent good cause shown, is thirty (30) days prior to the scheduled commencement date of jury selection.

GENERAL RULES:

ADJOURNMENTS:

1. No same day adjournments shall be permitted, except in extraordinary circumstances, and only upon Court approval.

2. Matters shall not be adjourned generally. The first and second adjournments may be obtained without Court permission, on consent of all counsel, by informing Chambers at least twenty-four (24) hours prior to the return date. **Letters confirming adjournments, and re-scheduled return dates shall be provided to all counsel and Chambers by counsel requesting the adjournment.**

3. Conference adjournments shall be granted only with consent of all attorneys, and remain subject to Court approval.

TROs:

Shall be issued on a case-by-case basis, and shall be on notice to opposing counsel, if known. TROs in cases assigned to another Judge shall be granted only upon approval by that Judge or his/her Law Clerk.

DISCONTINUANCE:

In any discontinued action, the attorney for the defendant shall file a stipulation or statement of discontinuance with the appropriate county clerk within twenty (20) days of such discontinuance, and shall provide Chambers with a date-stamped copy of same. If the action has been noticed for judicial activity within twenty (20) days of such discontinuance, the stipulation or statement shall be filed before the date scheduled for such activity.

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dnorton@nycourts.gov
cselden@nycourts.gov

LAW CLERK:	**DEBRA A. NORTON, ESQ.**	**(716) 845-2108**
SECRETARY:	**CYNTHIA J. SELDEN**	**(716) 845-2107**
COURT CLERK:	**MARY JO GANG**	**(716) 845-9413**
COURT ATTORNEY REFEREES:	**SUZANNE MAXWELL BARNES, ESQ.**	**(716) 845-3628**
	KATHLEEN M. CROWLEY, ESQ.	**(716) 845-7448**
	JUDITH SAMBER, ESQ.	**(716) 845-7463**
	DONNA CASTIGLIONE, ESQ.	**(716) 845-2758**
	JAYA MADHAVEN, ESQ.	**(716) 845-2727**
EXPEDITED MATRIMONIALS:	**JANET MARCHINDA**	**(716) 845-2727**

PRELIMINARY CONFERENCES:

Preliminary conferences will be scheduled within 45 days of the filing of an RJI, as required by 22 NYCRR §202.12(b). Conferences will be scheduled with a Court Attorney Referee in Expedited Matrimonials, on the 5th floor of 25 Delaware Ave., Buffalo, NY 14202.

For such conference, each party shall submit to the Court the following:

1. A completed DRL 236B financial affidavit as set forth in 22 NYCRR §202.16(b);
2. A copy of the most recently filed income tax returns;
3. Proof of the party's most recent income;
4. A completed Preliminary Matrimonial Information Sheet (which is mailed to the parties in their notice of first Expedited Matrimonial conference date and is also available on the 8th Judicial District website);
5. An executed written Retainer Agreement and Statement of Client's Rights and Responsibilities;
6. A copy of the Summons with Notice, together with Affidavit of Service.

Counsel and/or parties will be expected to provide to the court and opposing counsel/party, no later than the second court conference:

7. Copy of the party's lifetime Social Security earnings statement;
8. The Plaintiff's Verified Complaint, including relief being sought;
9. The Defendant's Verified Answer (and counterclaim, if desired), including the relief being sought.

The Preliminary Conference Order will set forth, if applicable, an amount of temporary child support and temporary spousal maintenance as recommended by the Court Attorney Referee and as stipulated to by the parties.

When one or both of the parties are continuing to reside in the marital residence, and the costs of same are to be paid by one or both spouses, the parties must then complete the "Monthly Expense Sheet Addendum", which will also be attached as an addendum to the Preliminary Conference Order. In the event that no stipulation as to temporary payments can be agreed upon, the Court will entertain motion practice, including an application for motion costs and counsel fees, if it is determined consent was unreasonably withheld during the Preliminary Conference.

MOTIONS:

Motions may be made returnable on any business day by appointment, beginning at 9:30 a.m. Please contact the Court Clerk for exact dates and times prior to scheduling motions**.** Allow one hour for motions, especially on newly filed cases. Orders to show cause are not required where the motion is served upon at least 8 days notice, as set forth in CPLR 2214.

Please note that temporary injunctive relief will not be granted in the absence of prior notice to the opposing counsel or party, as required by 22 NYCRR §202.7(f), unless the moving party can demonstrate significant prejudice from providing such notice. Live testimony of the moving party may be required prior to signing an order to show cause containing temporary injunctive relief.

Motions to resolve discovery disputes shall be accompanied by an affidavit of good faith attempt at resolution. The Court is available to assist parties in resolving discovery issues, without resort to motion practice, by scheduling an informal "Discovery Oversight Conference" (DOC). Counsel should communicate with opposing counsel to select a mutually agreeable date and time to meet in Part 23 and then schedule a conference through Chambers.

ATTORNEY FOR CHILDREN APPOINTMENTS and PARENTING PLANS:

The Court encourages the appointment of an Attorney for Child(ren) (AFC) in cases involving minor children, where access is unresolved. Orders pertaining to issues of custody and access should be drawn by the AFC and circulated to the parties for review. Additionally, the

AFC will be asked to draft a final Parenting Plan concerning a final custody/access agreement and to work with the parties to have the custody/access portion of the case resolved as soon as possible.

SETTLEMENT CONFERENCES & TRIALS:

Cases that appear appropriate for expedited resolution will be scheduled for trial in the Expedited Part. Trial dates are firm and adjournments are granted only in exceptional circumstances. The availability of the parties for the trial date must be confirmed by the attorneys when the trial date is set.

Prior to trial, the parties will be afforded the opportunity for a Settlement Conference, the objective of which is to reach a fully executed agreement signed by the parties on that day. Counsel must therefore come to the conference with clients and with a written settlement agreement that was previously circulated to opposing counsel for review with the client. Counsel and parties should allow two hours for the Settlement Conference.

If there is no signed agreement prior to the date for trial, then counsel must supply a Statement of Proposed Disposition pursuant to 22 NYCRR §202.16(h). Parties are asked to follow the outline supplied by the Court. The Proposed Disposition is due one week prior to trial. At the start of the trial, the Court will ask the parties to place on the record any subjects on which they have reached agreement, and to delineate those issues remaining for judicial resolution. Parties are encouraged to sign a partial agreement in such cases.

Exhibits for trial must be marked by the court reporter prior to the start of trial and listed on a form supplied by the court. Counsel must supply one copy for each attorney and one for the court. For lengthy exhibits, only the particular pages at issue need be copied. The Court will ask the parties to stipulate all exhibits into evidence at the start of trial. Parties are encouraged to stipulate to as many facts as possible in order to expedite the proof. In addition, parties are encouraged to stipulate to summaries or charts of agreed-upon issues, in lieu of bulky documents.

It is the Court's general policy that there shall be no expert witnesses called on the first day of trial. Counsel are reminded of the requirements as to expert witnesses and their reports, as provided in Court Rule 22 NYCRR §202.16(g).

At the conclusion of the testimony, the parties will be asked to supply a Post-Trial Submission, to summarize the items to be judicially determined and to summarize the reasons supporting each party's position on those items. The Court encourages the parties to resolve issues concerning attorney fees. Where *Quantum Meruit* applications are made, the parties must indicate in advance whether they have stipulated to have such applications decided on papers only, without a hearing on that issue.

APPEARANCES AND ADJOURNMENTS:

Parties must be personally present for the settlement conference, trials and such other court dates as the court shall direct. If a party cannot be present at any such required appearance, counsel for such party will immediately notify opposing counsel so the opposing party is on notice before the appearance.

Minor children are not to be brought to the courthouse absent a direction of the court requiring their presence.

Short adjournments of motions or report back conferences may be obtained based upon consent of opposing counsel, by contacting Chambers or Expedited Matrimonials, depending on where the conference is scheduled. If consent is denied, the Court has a liberal adjournment policy for motions, especially when made on minimum notice, unless the relief sought is emergency in nature. Counsel should keep in mind the Standards of Civility (22 NYCRR §1200, Appendix A). Motions must be adjourned to a specific date and must include notice to the Attorney for Children, if applicable. Trial dates are firm and adjournments are rarely granted.

SUBMIT OR APPEAR DATES:

When counsel believe they have reached agreement in principle, the next appearance may be to "submit or appear". The signature page of the agreement should be faxed to Chambers prior to the submit date. If the agreement is not forthcoming, the Court may set a mandatory appearance by clients or may schedule a trial, if it appears the parties are unable to reach resolution.

ORDERS:

All orders and other papers for signature (except orders to show cause) must first be circulated to opposing counsel or *pro se* party for comment and approval. Orders and judgments will not be signed without proof that opposing counsel or the *pro se* party had the opportunity to review them. Proof of opposing counsel's consent by letter or e-mail is preferred.

JUDGMENT OF DIVORCE PAPERS:

Once the parties have submitted a signed settlement agreement resolving all issues in the case, the parties are granted 30 days to submit the remaining judgment of divorce papers, which are reviewed by the Court Attorney Referees. Due to a heavy influx of such papers at the end of each year, counsel are asked to be mindful of the deadlines noted for such submissions.

HENRY J. NOWAK, J.S.C

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Law Clerk:	**John A. Ziegler, Esq.**	(716) 845-9478	jziegler@nycourts.gov
Secretary:	**Sara Mazgaj**	(716) 845-9477	smazgaj@nycourts.gov
Court Clerk:	**Elaine Xenos**	(716) 845-9433	exenos@nycourts.gov

MOTIONS Every Thursday, beginning at 9:30 am. Upon request or at the court's discretion, motions that require extensive oral argument may be scheduled at a later time.

The court will permit multiple attorneys to argue different points for each party. Such practice is encouraged when multiple attorneys researched and briefed various issues. Appearance on motions by telephone will not be permitted.

All oral decisions by the court are recorded. Oral argument is recorded as a matter of course only if there is an appearance by one or more self-represented litigants. In cases where all parties appear by counsel, oral argument will be recorded only upon prior stipulation by counsel that the transcript of the argument will be requested and included in any record on appeal.

MOTION PAPERS All papers shall be e-filed three days before the return date, with hard copies (less exhibits) due by noon at least two days before the return date. The purpose of these time limitations is to allow the court to fully review all papers prior to oral argument. Counsel who are unable to comply with these time limitations should request a telephone conference to set a briefing schedule.

On e-filed cases, parties shall provide chambers with hard copies of notices of motion, affidavits, and memoranda of law. Hard copies of e-filed exhibits are not necessary, but parties may provide a hard copy of a critical exhibit or excerpt of an exhibit. Do not send any motion papers by fax. Binding of papers is discouraged.

ADJOURNMENTS Requests for adjournments must be made at least one business day before the scheduled appearance. Motions must be adjourned to a specific date and will not be generally adjourned. All requests for adjournments must

be approved by the court, and only after consent is sought from opposing counsel. Any party or attorney refusing to consent to an adjournment must demonstrate a sound basis for that refusal. Upon receiving an adjournment, the requesting party the must send e-mail confirmation of the adjournment and the rescheduled date to all parties and the court.

ORDERS

Proposed orders are to be provided to all attorneys and self-represented litigants at least five days before submission to the court for signature. The court will entertain requests to shorten the five day requirement if circumstances warrant. Any objection to a proposed order shall be settled pursuant to Uniform Rules for the New York State Trial Courts § 202.48.

DEADLINES BEFORE TRIAL

Expert disclosure shall be made thirty days before trial, absent good cause shown. One week before jury selection, marked pleadings, requests to charge, witness lists and proposed verdict sheets shall be submitted to chambers. Motions *in limine* shall be filed and served so as to be heard before commencement of jury selection.

COMMERCIAL ACTIONS

Applicability of Rules of Practice for the Commercial Division

Except as otherwise stated herein, all commercial actions are subject to the rules of practice set forth in Uniform Rules for the New York State Trial Courts § 202.70 (g), including Rule 13 (c) concerning expert disclosure.

Requests for Temporary Restraining Orders

All requests for TRO's must be made on notice to opposing counsel if known. TRO's for other Justices will be signed only with approval of that Justice or Justice's Law Clerk.

Preliminary Conferences

A preliminary conference will be scheduled upon receipt of a filed RJI and verification by the court that the case meets the jurisdictional requirements for the Commercial Division. At least one day before the conference, counsel shall provide chambers with a one paragraph summary of the case, preferably by e-mail to Sara Mazgaj at smazgaj@nycourts.gov. At the conference, counsel and self-represented litigants should be prepared to discuss appropriate deadlines and their availability for future appearances, as well as any objection to mediation or other methods of alternative dispute resolution.

ADDITIONAL RULES

Please be advised that the court utilizes specific written procedures for summary jury trials and motions to withdraw as counsel. Request such procedures when appropriate.

McKinney's CPLR § 3126

§ 3126. Penalties for refusal to comply with order or to disclose

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Credits
(L.1962, c. 308. Amended L.1978, c. 42, § 1; L.1993, c. 98, § 11.)
Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Patrick M. Connors
2017

C3126:8 Which Sanction to Impose?

Defendants Precluded from Introducing Facebook Printouts Unless Person Who Procured Them Is Produced for a Deposition

The decision in Lantigua v Goldstein, 149 A.D.3d 1057, 53 N.Y.S.3d 163 (2d Dep't 2017), addressed a disclosure dispute in a medical malpractice action in which plaintiff was confronted at his deposition with printouts of 13 pages that allegedly were from his Facebook account. The printouts depicted a gentleman of many pursuits who "allegedly talked about going out to a bar, having a great workout, and crossing the Williamsburg Bridge three times." The plaintiff acknowledged that he had used a Facebook account, but denied that the printouts were from his account and denied making the statements.

The plaintiff then served disclosure requests of his own, seeking information about the individual who obtained the printouts and requesting a deposition of this witness. When responses were not forthcoming, plaintiff moved to, among other things, preclude the defendants from offering as evidence at trial the printouts of the Facebook pages.

The Second Department reversed the supreme court, ruling that the defendants should be precluded from offering as evidence at trial the printouts of Facebook pages that were marked at plaintiff's deposition unless those defendants produced the person who obtained the printouts for a deposition. The court emphasized that the plaintiff denied that the printouts were from his Facebook account, and he had no other means to disprove their authenticity.

2018 WL 828101

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

Kelly FORMAN, Respondent,
v.
Mark HENKIN, Appellant.

No. 1
|
Decided February 13, 2018

Synopsis

Background: Horseback rider, who fell from horse and allegedly suffered spinal and traumatic brain injuries, brought personal injury action against owner of horse. The Supreme Court, New York County, Lucy Billings, J., 2014 WL 1162201, granted owner's motion to compel discovery with respect to rider's private posts, including photographs, on social networking website. Rider appealed. The Supreme Court, Appellate Division, 134 A.D.3d 529, 22 N.Y.S.3d 178, affirmed as modified. Owner appealed.

Holdings: The Court of Appeals, DiFiore, Chief Judge, held that:

[1] pre-accident and post-accident photographs privately posted on rider's social networking website account were discoverable, and

[2] data revealing timing and number of characters in post-accident messages privately posted on rider's account was discoverable.

Reversed.

West Headnotes (25)

[1] Appeal and Error
Scope of Inquiry

A review of a Supreme Court, Appellate Division order by the Court of Appeals is limited to those parts of the order that have been appealed and that aggrieve the appealing party.

Cases that cite this headnote

[2] Pretrial Procedure
Relevancy and materiality

A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is material and necessary, i.e., relevant, regardless of whether discovery is sought from another party or a nonparty. N.Y. CPLR §§ 3101(a)(1), 3101(a)(4).

Cases that cite this headnote

[3] Pretrial Procedure
Discovering truth, narrowing issues, and eliminating surprise

Pretrial Procedure
Liberality in allowance of remedy

The statute governing the scope of discovery embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[4] Pretrial Procedure
Scope of Discovery

The right to disclosure under the statute governing the scope of discovery, although broad, is not unlimited. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[5] Pretrial Procedure
Work-product privilege

Privileged Communications and Confidentiality

Privileged Communications and Confidentiality

The rule governing the scope of discovery establishes three categories of protected materials, also supported by policy considerations: privileged matter, which is absolutely immune from discovery; attorney's work product, which is also absolutely immune; and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship. N.Y. CPLR §§ 3101(b), 3101(c), 3101(d).

Cases that cite this headnote

[6] Pretrial Procedure

Objections and protective orders

Privileged Communications and Confidentiality

Construction in general

Privileged Communications and Confidentiality

Presumptions and burden of proof

The burden of establishing a right to protection from disclosure under the privileged matter, attorney work product, and trial preparation materials provisions of the rule governing the scope of discovery is with the party asserting it; the protection claimed must be narrowly construed, and its application must be consistent with the purposes underlying the immunity. N.Y. CPLR §§ 3101(b), 3101(c), 3101(d).

Cases that cite this headnote

[7] Pretrial Procedure

Control by court in general

Pretrial Procedure

Scope of Discovery

When resolving a discovery dispute, competing interests must always be balanced, and the need for discovery must be weighed against any special burden to be borne by the opposing party. N.Y. CPLR §§ 3101, 3103(a).

Cases that cite this headnote

[8] Pretrial Procedure

Control by court in general

Pretrial Procedure

Scope of Discovery

When a court is called upon to resolve a discovery dispute, discovery requests must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure.

Cases that cite this headnote

[9] Pretrial Procedure

Control by court in general

While the courts have the authority to oversee disclosure during discovery, by design, the process often can be managed by the parties without judicial intervention.

Cases that cite this headnote

[10] Attorney and Client

Nature and term of office

Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process during discovery.

Cases that cite this headnote

[11] Appeal and Error

Depositions, affidavits, or discovery

Absent an error of law or an abuse of discretion, the Court of Appeals will not disturb a determination resolving a discovery dispute.

Cases that cite this headnote

[12] Appeal and Error

Power to Review

Appeal and Error

Abuse of discretion

The Appellate Division has the power to exercise independent discretion, that is, to substitute its discretion for that of the trial court, even when it concludes the trial court's order was merely improvident and not an abuse of discretion, and when it does so applying the proper legal principles, the Court of Appeals will review the resulting Appellate Division order under the deferential abuse of discretion standard.

Cases that cite this headnote

[13] Pretrial Procedure
Relevancy and materiality

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[14] Pretrial Procedure
Relevancy and materiality

The purpose of discovery is to determine if material relevant to a claim or defense exists; in many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[15] Pretrial Procedure
Documents, papers, and books in general

An account holder's privacy settings do not govern the scope of disclosure of materials posted on a social networking website. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[16] Pretrial Procedure
Documents, papers, and books in general

The commencement of a personal injury action does not render a party's entire social networking website account automatically discoverable. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[17] Pretrial Procedure
Scope of Discovery

Even under New York's broad disclosure paradigm, litigants are protected from unnecessarily onerous application of the discovery statutes.

Cases that cite this headnote

[18] Pretrial Procedure
Determination

A court addressing a dispute over the scope of discovery of materials on a social networking website should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the social networking website account. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[19] Pretrial Procedure
Determination

Pretrial Procedure
Order

A court addressing a dispute over the scope of discovery of materials on a social networking website should balance the potential utility of the information sought against any specific privacy or other concerns raised by the account holder, and the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[20] Pretrial Procedure
Determination

In resolving a discovery dispute over material on a social networking website in a personal injury case, it is appropriate for the court to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[21] Pretrial Procedure
Relevancy and materiality

Private materials may be subject to discovery if they are relevant. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[22] Privileged Communications and Confidentiality
Acts constituting waiver

When a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records, including the physician-patient privilege, are waived. N.Y. CPLR § 4504.

Cases that cite this headnote

[23] Pretrial Procedure
Relevancy and materiality

For purposes of disclosure during discovery, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[24] Pretrial Procedure
Photographs;X rays;sound recordings

Pre-accident photographs privately posted on horseback rider's social networking website account that she intended to introduce at trial and all privately posted post-accident photographs of rider that did not depict nudity or romantic encounters were discoverable, in personal injury action by rider, who fell from horse and allegedly suffered spinal and traumatic brain injuries, against owner of horse, even if only publicly-available photograph on account was not relevant, since rider had tendency to privately post photographs that were representative of her activities, and subject photographs were relevant to rider's assertions that she could no longer engage in pre-accident activities she had enjoyed and that she had become reclusive. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[25] Pretrial Procedure
Relevancy and materiality

Data revealing timing and number of characters in post-accident messages privately posted on horseback rider's social networking website account was discoverable, in personal injury action against owner of horse by rider, who fell from horse and allegedly suffered spinal and traumatic brain injuries, since such data was relevant to rider's claim that she suffered cognitive injuries that caused her to have difficulty writing and using a computer, particularly her claim that she was painstakingly slow in crafting messages. N.Y. CPLR § 3101(a).

Cases that cite this headnote

Attorneys and Law Firms

Michael A. Bono, for appellant.

Kenneth J. Gorman, for respondent.

Defense Association of New York, Inc., amicus curiae.

Opinion

OPINION

DIFIORE, Chief Judge:

***1** In this personal injury action, we are asked to resolve a dispute concerning disclosure of materials from plaintiff's Facebook account.

Plaintiff alleges that she was injured when she fell from a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation. At her deposition, plaintiff stated that she previously had a Facebook account on which she posted "a lot" of photographs showing her pre-accident active lifestyle but that she deactivated the account about six months after the accident and could not recall whether any post-accident photographs were posted. She maintained that she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages. In that regard, plaintiff produced a document she wrote that contained misspelled words and faulty grammar in which she represented that she could no longer express herself the way she did before the accident. She contended, in particular, that a simple email could take hours to write because she had to go over written material several times to make sure it made sense.

Defendant sought an unlimited authorization to obtain plaintiff's entire "private" Facebook account, contending the photographs and written postings would be material and necessary to his defense of the action under CPLR 3101(a). When plaintiff failed to provide the authorization (among other outstanding discovery), defendant moved to compel, asserting that the Facebook material sought was relevant to the scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. Specifically, defendant cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on Facebook would likely be material to these allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer.

Plaintiff opposed the motion arguing, as relevant here, that defendant failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Plaintiff's counsel did not affirm that she had reviewed plaintiff's Facebook account, nor allege that any specific material located therein, although potentially relevant, was privileged or should be shielded from disclosure on privacy grounds. At oral argument on the motion, defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff's credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. Supreme Court inquired whether there is a way to produce data showing the timing and frequency of messages without revealing their contents and defendant acknowledged that it would be possible for plaintiff to turn over data of that type, although he continued to seek the content of messages she posted on Facebook.

***2** Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. Supreme Court did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident.

[1] Although defendant was denied much of the disclosure sought in the motion to compel, only plaintiff appealed to the Appellate Division. [1] On that appeal, the court modified by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre– or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages, and otherwise affirmed. Two Justices dissented, concluding defendant was entitled to broader access to plaintiff's Facebook account and calling for reconsideration of that court's recent precedent addressing disclosure of social media information as unduly restrictive and inconsistent with New York's policy of open discovery. The Appellate Division granted defendant leave to appeal to this Court, asking whether its

order was properly made. We reverse, reinstate Supreme Court's order and answer that question in the negative.

[2] **[3]** Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: "[t]here shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof." We have emphasized that "[t]he words 'material and necessary,' ... are 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" (*Allen v. Crowell–Collier Publ. Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430 [1968]; *see also Andon v. 302–304 Mott St. Assoc.*, 94 N.Y.2d 740, 746, 709 N.Y.S.2d 873, 731 N.E.2d 589 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary"—i.e., relevant—regardless of whether discovery is sought from another party (*see* CPLR 3101[a][1]) or a nonparty (CPLR 3101[a][4]; *see e.g. Matter of Kapon v. Koch*, 23 N.Y.3d 32, 988 N.Y.S.2d 559, 11 N.E.3d 709 [2014]). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (*Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 376, 575 N.Y.S.2d 809, 581 N.E.2d 1055 [1991]).

[4] **[5]** **[6]** The right to disclosure, although broad, is not unlimited. CPLR 3101 itself "establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship" (*Spectrum*, *supra*, at 377, 575 N.Y.S.2d 809, 581 N.E.2d 1055). The burden of establishing a right to protection under these provisions is with the party asserting it—"the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (*id.*).

***3** **[7]** **[8]** **[9]** **[10]** **[11]** **[12]** In addition to these restrictions, this Court has recognized that "litigants are not without protection against unnecessarily onerous application of the disclosure statutes. Under our discovery statutes and case law competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 954, 683 N.Y.S.2d 156, 705 N.E.2d 1197 [1998] [citations and internal quotation marks omitted]; *see* CPLR 3103[a]). Thus, when courts are called upon to resolve a dispute, [2] discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure ... Absent an [error of law or an] abuse of discretion, this Court will not disturb such a determination (*Andon*, *supra*, 94 N.Y.2d at 747, 709 N.Y.S.2d 873, 731 N.E.2d 589; *see Kavanagh*, *supra*, 92 N.Y.2d at 954, 683 N.Y.S.2d 156, 705 N.E.2d 1197). [3]

Here, we apply these general principles in the context of a dispute over disclosure of social media materials. Facebook is a social networking website "where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking" (*Romano v. Steelcase, Inc.*, 30 Misc.3d 426, 907 N.Y.S.2d 650 [Sup. Ct. Suffolk County 2010]). Users create unique personal profiles, make connections with new and old "friends" and may "set privacy levels to control with whom they share their information" (*id.*). Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder—in fact, the viewer need not even be a fellow Facebook account holder (*see* Facebook Help: What audiences can I choose from when I share? https://www.facebook.com/help/211513702214269?helpref=faq_content [last accessed January 15, 2018]). However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (*id.*). While Facebook—and sites like it—offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

***4** On appeal in this Court, invoking New York's history of liberal discovery, defendant argues that the Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account. We agree. Although it is unclear

precisely what standard the Appellate Division applied, it cited its prior decision in *Tapp v. New York State Urban Dev. Corp.,* 102 A.D.3d 620, 958 N.Y.S.2d 392 [1st Dept. 2013]), which stated: "To warrant discovery, defendants must establish a factual predicate for their request *by identifying relevant information in plaintiff's Facebook account*—that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims' " (*id.* at 620, 958 N.Y.S.2d 392 [emphasis added]). Several courts applying this rule appear to have conditioned discovery of material on the "private" portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the "public" portion that tended to contradict the injured party's allegations in some respect (*see e.g. Spearin v. Linmar*, 129 A.D.3d 528, 11 N.Y.S.3d 156 [1st Dept. 2015]; *Nieves v. 30 Ellwood Realty LLC*, 39 Misc.3d 63, 966 N.Y.S.2d 808 [App. Term. 2013]; *Pereira v. City of New York*, 40 Misc.3d 1210[A], 2013 WL 3497615 [Sup. Ct. Queens County 2013]; *Romano*, *supra*, 30 Misc.3d 426, 907 N.Y.S.2d 650). Plaintiff invoked this precedent when arguing, in opposition to the motion to compel, that defendant failed to meet the minimum threshold permitting discovery of any Facebook materials.

Before discovery has occurred—and unless the parties are already Facebook "friends"—the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account. [4] Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible—and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action" (*see* CPLR 3101[a]).

[13] **[14]** **[15]** New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.

[16] **[17]** That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable (*see e.g. Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 [4th Dept. 2012] [rejecting motion to compel disclosure of all social media accounts involving injured party without prejudice to narrowly-tailored request seeking only relevant information]; *Giacchetto*, *supra*, 293 F.R.D. 112, 115; *Kennedy v. Contract Pharmacal Corp.*, 2013 WL 1966219, *2 [E.D.N.Y. 2013]). Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation—such an order would be likely to yield far more nonrelevant than relevant information. Even under our broad disclosure paradigm, litigants are protected from "unnecessarily onerous application of the discovery statutes" (*Kavanagh*, *supra*, 92 N.Y.2d at 954, 683 N.Y.S.2d 156, 705 N.E.2d 1197).

***5** **[18]** **[19]** **[20]** Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules—there is no need for a specialized or heightened factual predicate to avoid improper "fishing expeditions." In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate—for example, the court should

consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (*see* CPLR 3103[a]). Here, for example, Supreme Court exempted from disclosure any photographs of plaintiff depicting nudity or romantic encounters.

[21] **[22]** **[23]** Plaintiff suggests that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. We assume for purposes of resolving the narrow issue before us that some materials on a Facebook account may fairly be characterized as private. [5] But even private materials may be subject to discovery if they are relevant. For example, medical records enjoy protection in many contexts under the physician-patient privilege (*see* CPLR 4504). But when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records—including the physician-patient privilege—are waived (*see Arons v. Jutkowitz*, 9 N.Y.3d 393, 409, 850 N.Y.S.2d 345, 880 N.E.2d 831 [2007]; *Dillenbeck v. Hess*, 73 N.Y.2d 278, 287, 539 N.Y.S.2d 707, 536 N.E.2d 1126 [1989]). For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.

[24] Applying these principles here, the Appellate Division erred in modifying Supreme Court's order to further restrict disclosure of plaintiff's Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial. [6] With respect to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted "a lot" of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy.

***6** **[25]** In addition, it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiffs' claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages. Because Supreme Court provided defendant no access to the content of any messages on the Facebook account (an aspect of the order we cannot review given defendant's failure to appeal to the Appellate Division), we have no occasion to further address whether defendant made a showing sufficient to obtain disclosure of such content and, if so, how the order could have been tailored, in light of the facts and circumstances of this case, to avoid discovery of nonrelevant materials. [7]

In sum, the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were reasonably calculated to contain evidence "material and necessary" to the litigation. A remittal is not necessary here because, in opposition to the motion, plaintiff neither made a claim of statutory privilege, nor offered any other specific reason—beyond the general assertion that defendant did not meet his threshold burden—why any of those materials should be shielded from disclosure.

Accordingly, the Appellate Division order insofar as appealed from should be reversed, with costs, the Supreme Court order reinstated and the certified question answered in the negative.

Order insofar as appealed from reversed, with costs, order of Supreme Court, New York County, reinstated and certified question answered in the negative.

Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

All Citations

--- N.E.3d ----, 2018 WL 828101, 2018 N.Y. Slip Op. 01015

Footnotes

1 Defendant's failure to appeal Supreme Court's order impacts the scope of his appeal in this Court. “Our review of [an] Appellate Division order is ‘limited to those parts of the [order] that have been appealed and that aggrieve the appealing party’ ” (*Hain v. Jamison*, 28 N.Y.3d 524, 534, 46 N.Y.S.3d 502, 68 N.E.3d 1233 [2016], quoting *Hecht v. City of New York*, 60 N.Y.2d 57, 467 N.Y.S.2d 187, 454 N.E.2d 527 [1983]). Because defendant did not cross-appeal and, thus, sought no affirmative relief from the Appellate Division, he is aggrieved by the Appellate Division order only to the extent it further limited Supreme Court's disclosure order.

2 While courts have the authority to oversee disclosure, by design the process often can be managed by the parties without judicial intervention. If the party seeking disclosure makes a targeted demand for relevant, non-privileged materials (*see* CPLR 3120[1][i], [2] [permitting a demand for items within the other party's “possession, custody or control,” which “shall describe each item and category with reasonable particularity”]), counsel for the responding party—after examining any potentially responsive materials—should be able to identify and turn over items complying with the demand. Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process. When the process is functioning as it should, there is little need for a court in the first instance to winnow the demand or exercise its in camera review power to cull through the universe of potentially responsive materials to determine which are subject to discovery.

3 Further, the Appellate Division has the power to exercise independent discretion—to substitute its discretion for that of Supreme Court, even when it concludes Supreme Court's order was merely improvident and not an abuse of discretion—and when it does so applying the proper legal principles, this Court will review the resulting Appellate Division order under the deferential “abuse of discretion” standard (*see e.g. Andon*, *supra*; *Kavanagh*, *supra*; *see generally Kapon*, *supra*).

4 This rule has been appropriately criticized by other courts. As one federal court explained, “[t]his approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section ... Furthermore, this approach shields from discovery the information of Facebook users who do not share any information publicly” (*Giacchetto v. Patchogue–Medford Union Free School Dist.*, 293 F.R.D. 112, 114 [E.D.N.Y. 2013]).

5 There is significant controversy on that question. Views range from the position taken by plaintiff that anything shielded by privacy settings is private, to the position taken by one commentator that “anything contained in a social media website is not ‘private’ ... [S]ocial media exists to facilitate social behavior and is not intended to serve as a personal journal shielded from others or a database for storing thoughts and photos” (McPeak, The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery or Social Media Data, 48 Wake Forest L Rev 887, 929 [2013]).

6 Because plaintiff would be unlikely to offer at trial any photographs tending to contradict her claimed injuries or her version of the facts surrounding the accident, by limiting disclosure in this fashion the Appellate Division effectively denied disclosure of any evidence potentially relevant to the defense. To the extent the order may also contravene CPLR 3101(i), we note that neither party cited that provision in Supreme Court and we therefore have no occasion to further address its applicability, if any, to this dispute.

7 At oral argument, Supreme Court indicated that, depending on what the data ordered to be disclosed revealed concerning the frequency of plaintiff's post-accident messages, defendant could possibly pursue a follow-up request for disclosure of the content. We express no views with respect to any such future application.

152 A.D.3d 1206
Supreme Court, Appellate Division,
Fourth Department, New York.

Jamie LOBELLO, Plaintiff–Appellant,
v.
NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, Defendant–Respondent.

July 7, 2017.

Synopsis

Background: After homeowner's insurer disclaimed coverage for two burglary losses, insured brought action against insurer for breach of contract and seeking a declaration that the policy provided coverage. The Supreme Court, Oswego County, Norman W. Seiter, Jr., J., sanctioned insurer for a discovery violation and granted insurer's motion for summary judgment with regard to one of the losses. Insured appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] trial court did not abuse its discretion in imposing only a $1,500 monetary sanction on insurer for its failure to disclose during discovery all of its claim notes;

[2] insurer's disclaimer of coverage for burglary loss pursuant to policy's two-year limitations period could not support claim under the deceptive trade practices statute; and

[3] "date of loss" within meaning of policy provision requiring any action against the insurer to be brought within two years of that date was date insurer denied insured's claim for burglary loss, not date burglary occurred.

Affirmed as modified.

West Headnotes (6)

[1] Pretrial Procedure

Insurance policies and related documents

Trial court did not abuse its discretion in imposing only a $1,500 monetary sanction on homeowner's insurer for its failure to disclose during discovery all of its claim notes in insured's action seeking coverage for burglary losses; penalty was commensurate with the particular disobedience it was designed to punish.

Cases that cite this headnote

[2] Action

Statutory rights of action

Insurance

Actions

An alleged violation of the unfair claim settlement practices statute does not give rise to a private cause of action. McKinney's Insurance Law § 2601.

Cases that cite this headnote

[3] Antitrust and Trade Regulation

Nature and Elements

A plaintiff under the deceptive trade practices statute must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act. McKinney's General Business Law § 349.

Cases that cite this headnote

[4] Antitrust and Trade Regulation

Public impact or interest;private or internal transactions

Homeowner's insurer's disclaimer of coverage for burglary loss pursuant to policy's two-year limitations period could not support claim by insured under the deceptive trade practices statute; although insurer may have disclaimed coverage after the two-year policy period in a few other cases within the previous 10 years, action was essentially a private contract dispute over policy coverage and processing of a claim which was unique to the parties,

not conduct affecting the consuming public at large. McKinney's General Business Law § 349.

Cases that cite this headnote

[5] **Insurance**
Accrual

"Date of loss" within meaning of homeowner's policy provision requiring any action against the insurer to be brought within two years of that date was date insurer denied insured's claim for burglary loss, not date burglary occurred, where the limitations provision did not contain specific "inception of loss" or other similarly distinct language.

Cases that cite this headnote

[6] **Insurance**
Ambiguity, Uncertainty or Conflict

Ambiguities in an insurance policy are to be construed against the insurer.

Cases that cite this headnote

Attorneys and Law Firms

****843** Costello, Cooney & Fearon, PLLC, Camillus (Megan E. Grimsley of Counsel), for Plaintiff–Appellant.

Law Office of Keith D. Miller, Liverpool (Keith D. Miller of Counsel), for Defendant–Respondent.

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND TROUTMAN, JJ.

Opinion

MEMORANDUM:

***1207** Plaintiff's residence, which was insured by a homeowner's insurance policy issued by defendant, was burglarized on September 24, 2009 (2009 loss) and again on June 6, 2010 (2010 loss). After each theft, plaintiff filed a claim with defendant seeking coverage for the loss, and defendant disclaimed coverage for both losses on September 30, 2011. Plaintiff thereafter commenced this action, alleging that defendant had breached the terms of the insurance policy and seeking a declaration that the insurance policy issued by defendant provided coverage for the subject losses. Defendant moved to dismiss the complaint and appealed from an order insofar at it denied that part of the motion seeking dismissal of the first cause of action, for a declaratory judgment. We affirmed (*Lobello v. New York Cent. Mut. Fire Ins. Co.,* 112 A.D.3d 1287, 976 N.Y.S.2d 901).

****844** Following discovery, during which defendant repeatedly failed to provide documents in a timely manner or at all, plaintiff moved for various forms of relief, including an order striking defendant's answer based on discovery violations. Defendant cross-moved for summary judgment dismissing the complaint, contending, inter alia, that plaintiff was barred by the policy's two-year limitations period from recovery for any claims related to the 2009 loss. Supreme Court granted plaintiff's motion in part, ordering defendant to pay plaintiff $1,500 as costs and sanctions for discovery violations and to provide plaintiff with claim notes for only the 2010 loss, with the redactions modified. The court denied those parts of plaintiff's motion that sought a declaration that the denials of coverage were invalid, an order directing defendant to provide plaintiff with unredacted claim notes for the 2009 loss and an order granting plaintiff leave to serve an amended complaint. In addition, the court granted that part of defendant's cross motion "with regard to the [2009] loss" only. We conclude that the court should have denied defendant's cross motion in its entirety, and we therefore modify the order accordingly.

[1] **[2]** Contrary to plaintiff's contention, the court did not abuse its discretion in imposing only a monetary sanction on defendant for its failure to disclose all of its claim notes. That penalty was " 'commensurate with the particular disobedience it [was] designed to punish' " (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Global Strat Inc.,* 22 N.Y.3d 877, 880, 976 N.Y.S.2d 678, 999 N.E.2d 156; *see Getty v. Zimmerman,* 37 A.D.3d 1095, 1097, 830 N.Y.S.2d 409; *see also Burchard v. City of Elmira,* 52 A.D.3d 881, 881–882, 859 N.Y.S.2d 276). Contrary to plaintiff's further contention, he was not entitled to summary judgment on the ground that defendant allegedly violated ***1208** Insurance Law § 2601 inasmuch as an alleged violation of Insurance Law § 2601 "does not give rise to a private cause of action" (*Litvinov v. Hodson,* 34 A.D.3d 1332, 1333, 826 N.Y.S.2d 536; *see*

generally Rocanova v. Equitable Life Assur. Socy. of U.S., 83 N.Y.2d 603, 614–615, 612 N.Y.S.2d 339, 634 N.E.2d 940).

[3] **[4]** We agree with defendant that the court properly denied that part of plaintiff's motion in which he sought leave to amend his complaint to assert a cause of action alleging defendant's violation of General Business Law § 349. "A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v. Chemical Bank,* 95 N.Y.2d 24, 29, 709 N.Y.S.2d 892, 731 N.E.2d 608). We conclude that this action is "essentially a 'private' contract dispute over policy coverage and the processing of a claim which is unique to these parties, not conduct which affects the consuming public at large" (*New York Univ. v. Continental Ins. Co.,* 87 N.Y.2d 308, 321, 639 N.Y.S.2d 283, 662 N.E.2d 763; *see generally Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank,* 85 N.Y.2d 20, 25, 623 N.Y.S.2d 529, 647 N.E.2d 741). The fact that defendant may have disclaimed coverage after the two-year policy period "in a few [other] cases ... within the last [10] years is insufficient" to establish a cause of action under General Business Law § 349 (*JD & K Assoc., LLC v. Selective Ins. Group Inc.,* 143 A.D.3d 1232, 1234, 38 N.Y.S.3d 658; *cf. Ural v. Encompass Ins. Co. of Am.,* 97 A.D.3d 562, 564–565, 948 N.Y.S.2d 621; *Shebar v. Metropolitan Life Ins. Co.,* 25 A.D.3d 858, 859, 807 N.Y.S.2d 448).

****845** **[5]** We agree with plaintiff, however, that the court erred in granting that part of defendant's cross motion that sought summary judgment dismissing the complaint with respect to the 2009 loss as time-barred. The policy issued to plaintiff provides that no action can be brought against defendant unless, inter alia, the action "is started within two years after the date of loss." The policy contains no definition for the term "loss," but it defines an occurrence as "an accident ... which results, during the policy period, in ... 'Bodily injury'; or ... 'Property damage.' "

Plaintiff commenced this action more than two years after the 2009 theft. Interpreting the phrase "date of loss" as the date on which the theft occurred, defendant contends that the action is time-barred under the terms of the policy. Plaintiff, on the other hand, interprets the phrase "date of loss" as the date on which the claim was denied and, as a result, contends that the action was timely commenced. We agree with plaintiff. Despite cases holding that "date of loss" means the date of the ***1209** underlying catastrophe, including cases from this Department (*see Baluk v. New York Cent. Mut. Fire Ins. Co.,* 114 A.D.3d 1151, 979 N.Y.S.2d 890; *amended on rearg.* 126 A.D.3d 1426, 6 N.Y.S.3d 917 [2015]; *Klawiter v. CGU/OneBeacon Ins. Group,* 27 A.D.3d 1155, 810 N.Y.S.2d 756), the Court of Appeals has found a distinction between the generic phrase "date of loss," and the term of art " inception of loss" (*see Medical Facilities v. Pryke,* 95 A.D.2d 692, 693, 463 N.Y.S.2d 804, *affd.* 62 N.Y.2d 716, 476 N.Y.S.2d 532, 465 N.E.2d 39; *Proc v. Home Ins. Co.,* 17 N.Y.2d 239, 243–244, 270 N.Y.S.2d 412, 217 N.E.2d 136, *rearg. denied* 18 N.Y.2d 751, 274 N.Y.S.2d 1031, 221 N.E.2d 183; *Steen v. Niagara Fire Ins. Co.,* 89 N.Y. 315, 322–325, 1882 WL 12681). As the Second Circuit noted in *Fabozzi v. Lexington Ins. Co.*, 601 F.3d 88, 91, those cases have not been overruled or disavowed in any way.

Indeed, as the First Department recognized in *Medical Facilities,* "nothing in [*Proc*] suggests an intention to alter [the] general rule" (95 A.D.2d at 693, 463 N.Y.S.2d 804), which is "that an action for breach of contract commences running at the time the breach takes place" (*id.*). Thus, only the very specific "inception of loss" or other similarly "distinct language" permits using the catastrophe date as the limitations date (*Steen,* 89 N.Y. at 324, 1882 WL 12681; *see Medical Facilities,* 95 A.D.2d at 693, 463 N.Y.S.2d 804). Here, the policy did not contain the specific "inception of loss" or other similarly distinct language, and we thus disavow our decisions in *Baluk* and *Klawiter* to the extent that they hold otherwise.

[6] Inasmuch as " '[a]mbiguities in an insurance policy are to be construed against the insurer' " (*Dean v. Tower Ins. Co. of N.Y.,* 19 N.Y.3d 704, 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143; *see Steen,* 89 N.Y. at 324, 1882 WL 12681), we conclude that the two-year limitations period contained in the policy did not begin to run until "the loss [became] due and payable" (*Steen,* 89 N.Y. at 324, 1882 WL 12681; *see Cooper v. United States Mut. Benefit Assn.,* 132 N.Y. 334, 337, 30 N.E. 833). As a result, we conclude that the court erred in granting that part of defendant's cross motion that sought summary judgment dismissing the complaint with respect to the 2009 loss, and we further modify the order by granting that part

of plaintiff's motion to compel defendant to disclose the unredacted claim notes related to the 2009 loss, through the date of the denial letters.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion seeking to dismiss defendant's ****846** affirmative defense of expiration of the two-year limitations period set forth in the policy, denying defendant's cross motion in its entirety and reinstating the complaint with respect to the loss of September 24, 2009 and granting that part of plaintiff's motion to compel defendant to produce unredacted claim notes for the September 24, 2009 claim through the date of the denial letters, September 30, 2011, and as modified the order is affirmed without costs.

All Citations

152 A.D.3d 1206, 58 N.Y.S.3d 842, 2017 N.Y. Slip Op. 05543

123 A.D.3d 1255
Supreme Court, Appellate Division,
Third Department, New York.

BDS COPY INKS, INC., et al., Appellants,
v.
INTERNATIONAL PAPER et al., Respondents.

Dec. 11, 2014.

Synopsis

Background: Order was entered by the Supreme Court, Albany County, Platkin, J., granting defendants' motion to, among other things, strike plaintiffs' complaint as discovery sanction.

[Holding:] The Supreme Court, Appellate Division, Lynch, J., held that trial court did not abuse its discretion in striking plaintiffs' complaint as discovery sanction based on plaintiffs' continued refusal to disclose documents bearing on their claimed damages.

Affirmed.

West Headnotes (3)

[1] Appeal and Error
Depositions, affidavits, or discovery

Pretrial Procedure
Failure to Disclose;Sanctions

When trial court determines that party has failed to comply with its discovery obligations, it has broad discretion to remedy that violation, and the sanction that it imposes will not be disturbed in absence of clear abuse of discretion.

1 Cases that cite this headnote

[2] Pretrial Procedure
Facts taken as established or denial precluded;preclusion of evidence or witness

Preclusion is drastic remedy for discovery violation, especially when it has effect of preventing party from asserting its claim, and is reserved for those instances in which offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious.

3 Cases that cite this headnote

[3] Pretrial Procedure
Failure to Comply;Sanctions

Trial court did not abuse its discretion in striking plaintiffs' complaint as discovery sanction based on plaintiffs' continued refusal to disclose documents bearing on their claimed damages, instead insisting that defendant's ability to shift through 60 to 80 banker's boxes in warehouse represented reasonable compliance with document production request.

Cases that cite this headnote

Attorneys and Law Firms

****235** Hinman Straub, P.C., Albany (Jennie J. Shufelt of counsel), for appellants.

Hodgson Russ, LLP, Albany (Noreen DeWire Grimmick of counsel), for respondents.

Before: McCARTHY, J.P., EGAN Jr., Lynch, Devine and Clark, JJ.

Opinion

LYNCH, J.

***1255** Appeal from an order of the Supreme Court (Platkin, J.), entered March 12, 2013 in Albany County, which granted defendants' motion to, among other things, strike plaintiffs' complaint.

In September 2009, plaintiffs commenced this action to recover for damages suffered after they lost the opportunity to perform certain printing and copying services for the state. According to plaintiffs, they submitted a bid in October 2007 based on the price of

certain paper that defendants represented complied with the bid's specification for the paper's recycled content. The state determined that the paper did not comply and rejected plaintiffs' bid. When the state reopened the bidding, plaintiffs asked defendants to provide conforming paper at a discount; defendants refused and the state awarded the contract to another entity. By their complaint, plaintiffs allege damages in the form of lost profits in the amount of $750,000.

In June 2010, defendants served combined discovery demands seeking "copies of any documents which reflect any loss of income ... due to the allegations in the [c]omplaint." In September 2010, plaintiffs served a verified bill of particulars claiming damages in the amount of $1,500,000, characterized as the "profits that the plaintiffs would have made" if it had been ***1256** awarded the 2007 state contract. [1] As for the requested documents, plaintiffs stated that "any documents which reflect any loss of income to plaintiff[s]" were to be provided. In December 2010, defendants demanded plaintiffs' tax returns and "[c]opies of any documents pertaining to revenues received by [plaintiffs], including, but not limited to, invoices, cancelled checks, payment records, balance sheets and ledgers for the years 2002 to present." In response, plaintiffs provided some, but not all, of the requested tax returns and a spreadsheet that purported to summarize annual sales for 2002 to 2009. In November 2011, plaintiffs' counsel wrote to defendants to invite their counsel to review "two or three pallets of documents that fall within the demand of the defendants." Defendants did not undertake the offered review and, in February 2012, defendants moved to strike plaintiffs' complaint (*see* CPLR 3126[3]) based on its failure to provide the supporting documentation. In response, and in an apparent attempt to resolve the issue, defendants agreed to withdraw the motion and to depose plaintiffs' principal, Jason Maltz. Plaintiffs also delivered three banker's boxes of documents to defendants' counsel "to see if the samples satisfy [defendants'] [d]iscovery ****236** demands." Defendants served a notice to produce with their notice of deposition, but Maltz did not bring any supporting documentation with him to the deposition. During the deposition, when asked whether there were any documents to support plaintiffs' damage claims, Maltz again invited counsel to review the banker's boxes in the warehouse. In July 2012, after the deposition, defendants served a specific demand requesting, as relevant here, the documentation supporting plaintiffs' damages claims. Plaintiffs did not respond and defendants moved to strike plaintiffs' complaint. Supreme Court granted the motion and this appeal ensued.

[1] **[2]** Where a trial court determines that a party has failed to comply with its discovery obligations, it has broad discretion to remedy the violation (*see* CPLR 3126), "and the sanction imposed is not disturbed in the absence of a clear abuse of discretion" (*D.A. Bennett LLC v. Cartz,* 113 A.D.3d 945, 946, 979 N.Y.S.2d 179 [2014]; *see Hameroff & Sons, LLC v. Plank, LLC,* 108 A.D.3d 908, 909, 970 N.Y.S.2d 102 [2013]). Because "the remedy of preclusion is drastic, especially where, as here, it has the effect of preventing a party from asserting its claim, [it is] reserved for those instances where the offending party's lack of cooperation with disclosure ***1257** was willful, deliberate, and contumacious" (*D.A. Bennett LLC v. Cartz,* 113 A.D.3d at 946, 979 N.Y.S.2d 179 [internal quotation marks and citations omitted]).

[3] In our view, Supreme Court did not abuse its discretion by striking plaintiffs' complaint. The record confirms that from June 2010 until February 2012 the court met with counsel at least six times and issued at least two orders extending plaintiffs' time to comply with their discovery obligations. During this time, the primary issue was the adequacy of plaintiffs' response. Although plaintiffs now claim that defendants' document demand was overly broad, no objection to the demand was ever made (*see* CPLR 3122[a]). Rather, plaintiffs maintained that responsive documents would be found if defendants searched through the 60 to 80 banker's boxes stored in a warehouse. Plaintiffs remained steadfast with this response even after the court made it clear, following defendants' first motion, that the court did not consider this to be reasonable compliance with plaintiffs' discovery obligations.

We recognize that plaintiffs provided certain documents and that Maltz appeared at a deposition. This limited cooperation does not necessarily preclude a finding of willful and contumacious behavior (*see Ernie Otto Corp. v. Inland Southeast Thompson Monticello, LLC,* 53 A.D.3d 924, 925, 863 N.Y.S.2d 95 [2008], *lv. dismissed* 11 N.Y.3d 827, 868 N.Y.S.2d 595, 897 N.E.2d 1079 [2008]). Plaintiffs had the burden to prove damages and defendants were entitled to review documents supporting the damages claim prior to trial. Notably, plaintiffs were able to create and provide annual sales summaries, but never

provided the documents that were used to calculate the sales figures. The record confirms that despite Supreme Court's frequent intervention and direction to produce the documents in a more organized fashion, plaintiffs continued to insist that their offer to have defendants sift through 60 to 80 boxes of miscellaneous business records was adequate. Indeed, plaintiffs refused to respond otherwise even after defendants narrowed their document request following Maltz's deposition. Even if, as plaintiffs claim, Supreme Court overlooked Maltz's affidavit in opposition to defendants' motion, it is of no moment. Maltz did not offer to organize the documents (*compare State of New York v.* ****237** *Sand & Stone Assoc.,* 282 A.D.2d 954, 955, 723 N.Y.S.2d 725 [2001]). Rather, though he makes no claim that he went to the warehouse to inspect the documents held in the "likely ... well over 60 ... [or] could be up to, or more than, 80 ... boxes," he continued to maintain that each document in each of the unspecified number of boxes was responsive to defendants' demand.

In our view, the record demonstrates "[a] pattern of noncompliance" ***1258** sufficient to support Supreme Court's finding that plaintiffs' conduct was willful (*Hameroff & Sons, LLC v. Plank, LLC,* 108 A.D.3d at 909, 970 N.Y.S.2d 102). Under the circumstances, we thus conclude that the court did not abuse its discretion in granting defendants' motion and striking plaintiffs' complaint.

ORDERED that the order is affirmed, with costs.

McCARTHY, J.P., EGAN JR., DEVINE and CLARK, JJ., concur.

All Citations

123 A.D.3d 1255, 999 N.Y.S.2d 234, 2014 N.Y. Slip Op. 08692

Footnotes

1 In March 2011, plaintiffs served an amended bill of particulars explaining that they lost profits of at least $750,000 when its low bid was rejected and an additional $750,000 for "money [plaintiffs] had to spend to cover costs that would have been covered by the gross receipts over two years."