

Supreme Court, Bronx County, New York.
Christina T. SMITH, Plaintiff, v. Stafford E. BROWN and Frank W. Pasquale,
Defendants.

302550/2016

Decided: September 27, 2018

[*1] Smith v Brown 2018 NY Slip Op 28299 Decided on September 27, 2018 Supreme Court, Bronx County Higgitt, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on September 27, 2018
Supreme Court, Bronx County

Christina T. Smith, Plaintiff,

against

Stafford E. Brown and FRANK W. PASQUALE, Defendants.

302550/2016

Plaintiff's counsel: Rubenstein & Rynecki (Scott E. Rynecki, Esq.)

Counsel for defendant Pasquale: Collins, Fitzpatrick & Schoene, LLP (Ralph F. Schoene, Esq.)
John R. Higgitt, J.

In this action to recover damages for personal injuries plaintiff allegedly sustained in a motor vehicle accident, plaintiff seeks a protective order under CPLR 3103(a) vacating or striking defendant Pasquale's August 6, 2018 notice to admit or, alternatively, an extension of time to respond to the notice to admit. For the reasons that follow, that aspect of plaintiff's motion seeking a protective order is denied and that aspect of the motion seeking an extension of time to respond to the notice to admit is granted.

On July 22, 2016, plaintiff commenced this action against defendants to recover damages for personal injuries she allegedly sustained in a March 21, 2015 motor vehicle accident. Plaintiff claims that she sustained, among other things, injuries to her left knee and regions of her spine, and that her injuries satisfied the Insurance Law § 5102(d) "serious injury" categories of "permanent loss of use of a body organ, member, function or system," "permanent consequential limitation of use of a body organ or member," "significant limitation of use of a body function or system," and 90/180-day injury. Plaintiff seeks to recover for pain and suffering, including loss

of enjoyment of life, and asserts that her "injuries have caused a marked limitation of function" and "are permanent in nature."

Defendant Pasquale, the operator of a vehicle involved in the March 21, 2015 accident, interposed an answer on September 27, 2016. Following disclosure proceedings, a note of issue was filed on December 29, 2017.

Defendant Pasquale served on plaintiff a notice to admit on or about August 6, 2018. The notice contained requests for admissions on the following matters: (1) whether plaintiff owns and maintains an Instagram account with a specific "handle"; (2) whether the account associated with that handle was changed from a public to private account setting after a specific date; (3) whether plaintiff was depicted in a number of specified photographs — obtained from [*2]the Instagram account — and whether those photographs were taken after the accident;[FN1] and (4) whether plaintiff was depicted in a specified video — obtained from the Instagram account — and whether that video was taken after the accident. With regard to the photographs, copies of each of the 33 photographs for which admissions were sought were served with the notice; each photograph was separately identified using letters and numbers (exhibits A-G1). Some of the photographs depict a young woman engaged in different activities, such as riding in a car, climbing a rock, and walking on a boardwalk. The majority of the photographs though appear to be "selfies," "photograph[s] that one has taken of oneself, typically [photographs] taken with a smartphone or webcam and shared via social media" (Oxford Dictionary, online, at <https://en.oxforddictionaries.com/definition/selfie> [last visited on Sept. 26, 2018]; see *Silberberg v Board of Elections of the State of New York*, 216 F Supp3d 411, 414 [SD NY 2016]). Plaintiff did not respond to the notice to admit within the time to do so (see CPLR 3123[a]).

Plaintiff seeks a protective order under CPLR 3103(a)[FN2] vacating or striking the notice to admit or, alternatively, an extension of time to respond to it. Plaintiff argues that defendant Pasquale is attempting, impermissibly, to use the notice to admit in lieu of other disclosure devices, such as a deposition. She also argues that the notice to admit seeks admissions on material issues in the litigation.

Defendant Pasquale maintains that plaintiff's ownership of the Instagram account is (or at least was) public knowledge and easily provable at trial. He also maintains that it is easily provable that plaintiff is the individual depicted in the various photographs and the video, and that the photographs and video were taken after the accident. Therefore, defendant Pasquale contends that he reasonably believes that there can be no substantial dispute at trial as to the matters on which he seeks admissions from plaintiff. Moreover, according to defendant Pasquale, the admissions sought in the notice to admit are relevant to the issue of the extent of plaintiff's damages,[FN3] not to any ultimate questions of fact or any legal conclusions.

CPLR 3123(a) provides, in relevant part, that

"a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can

be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him [or her] upon reasonable inquiry" (emphasis added).

The party served with a notice to admit must respond to it with dispatch or risk being deemed to have admitted the matters on which admissions were sought (see CPLR 3123[a] ["Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he [or she] cannot truthfully either admit or deny those matters."]). The court may, however, extend a party's time to respond to a notice to admit (see Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3123, C3123:5).

The underlying purpose of the notice to admit "is to eliminate from contention factual matters [that] are easily provable and about which there can be no controversy to expedite the trial by eliminating as issues that as to which there should be no dispute" (*Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986] [internal asterisks omitted]). Because it is aimed at identifying and establishing for the purposes of an action "clear-cut matters of fact as to which [the requesting party] reasonably believes there can be no dispute or controversy" (*id.*; see Connors, Practice Commentaries, *supra*, C3123:1), the notice to admit may not be used to request admission of "ultimate conclusions" that can only be made after trial or information of a technical, detailed or scientific nature (*Berg v Flower Fifth Ave. Hospital*, 102 AD2d 760, 760 [1st Dept 1984]; see *Taylor v Blair*, *supra*; see also *Stanger v Morgan*, 100 AD3d 545 [1st Dept 2012] [notice to admit cannot seek admission on matter that goes to heart of material issue in case]).

Here, defendant Pasquale sought admissions from plaintiff as to uncontroversial, "clear-cut matters of fact" that are within plaintiff's knowledge (see *Blair*, 116 AD2d at 206). Plaintiff either owns and maintains an Instagram account with a specified handle or she does not, and either that handle was changed from a public to private account setting after a specific date or it was not. Moreover, with respect to the requested admissions relating to the photographs — that were obtained from plaintiff's Instagram account — plaintiff can state whether she is the one depicted in the photographs — most of which appear to be "selfies" — and whether the photographs were taken after the accident. The notice did not seek admissions as to any ultimate conclusions (such as which driver or drivers were negligent) or information of a technical, detailed or scientific nature. Therefore, that the matters on which defendant Pasquale seeks admissions could be explored at a deposition does not take them out of the ambit of the notice to admit. At bottom, the notice sought admissions of the truth of clear-cut matters of fact that defendant Pasquale reasonably believed there could be no substantial dispute at trial and were within the knowledge of plaintiff (see CPLR 3123[a]).

Thus, the aspect of plaintiff's motion seeking a protective order under CPLR 3103(a) vacating or striking the notice to admit is denied (see *Okon v Town of Wappinger*, 2017 WL 9249181 [Sup Ct, Dutchess County 2017]; cf. *Carr v Bovis Lend Lease*, 2012 WL 8018688 [Sup Ct, New York County 2012]; *Fernandez v Amos*, 2011 WL 13090367 [Sup Ct, New York County 2011]).

With regard to the aspect of plaintiff's motion seeking an extension of time to respond to the notice to admit, defendant Pasquale does not object to plaintiff's request for an extension.

Accordingly, it is hereby

ORDERED that the aspect of plaintiff's motion seeking a protective order under CPLR 3103(a) vacating or striking the August 6, 2018 notice to admit is denied; and it is further,

ORDERED that the aspect of plaintiff's motion seeking an extension of time to respond to the notice to admit is granted, and plaintiff is afforded 20 days from the date of service upon her of a copy of this order with notice of entry thereof to respond to the August 8, 2018 notice.

This constitutes the decision and order of the court.

Date: September 27, 2018

Bronx, NY

Hon. John R. Higgitt

Acting Supreme Court Justice Footnotes

Footnote 1:For each photograph, two requests for admissions were made: the first requesting an admission that plaintiff was depicted in the particular photograph, and the second requesting an admission that the particular photograph "was taken after the subject accident of March 21, 2015."

Footnote 2:A CPLR 3103(a) protective order may be used to test the validity of a notice to admit (Siegel & Connors, New York Practice § 364 [6th ed]; see Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3123, C3123:6).

Footnote 3:"On occasion, postings by plaintiffs on social media outlets shed light on the extent of their physical or psychological disabilities and economic losses, whether consistent or inconsistent with their litigation claims" (Hon. Mark C. Dillon, Discovery of Private Social Media Postings, NYLJ Apr. 9, 2013 at 4).