DISPO MOTION 2

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KATHLEEN A. ELLIS,

DECISION/ORDER

Plaintiff,

Index No.
64659/2021

—against —

ELIZABETH BYRNE, RACHEL HENNIG, THE PRINCIPAL FINANCIAL GROUP, INC. A/K/A PRINCIPAL, WELLS FARGO INSTITUTIONAL RETIREMENT AND TRUST, A BUSINESS UNIT OF WELLS FARGO BANK, N.A., AND SUBARU DISTRIBUTORS CORP.

Defendants.

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ZUCKERMAN, J.

The following papers numbered 1 through and including 109 in NYSCEF were read on this motion by Plaintiff Kathleen A. Ellis for an Order, pursuant to CPLR 3124, directing Defendants Elizabeth Byrne ("Byrne") and Rachel Hennig ("Hennig") to comply with certain discovery demands and to produce their cellular telephones for forensic examination and, pursuant to CPLR 3126, for sanctions. Byrne and Hennig oppose the motion. The other Defendants have not

responded to the motion.

FACTS

On October 11, 2021, Plaintiff commenced this action by filing a Summons and Complaint. The detailed Complaint contains causes of action for Declaratory Judgment, Breach of Contract, Tortious Interference with Contract, and Unjust Enrichment. In essence, Plaintiff alleges that, on February 16, 2021 and February 20, 2021, Defendants Byrne and Hennig (collectively, "Defendants") used a computer device to unlawfully change the beneficiary designation on a certain "401(k) account" from Plaintiff to themselves.

The tortuous year-long path of discovery proceedings includes four preliminary conference orders, three stipulations by counsel adjourning deadlines set forth in those orders, numerous letters to the court, and court notices to counsel regarding discovery. At issue here are the following interrogatory requests from Plaintiff:

> 1. Identify all of Byrne's Electronic Devices from December 13, 2019 through Decedent's Date of Death, including but not limited to any Electronic Devices she owned or was able to use or access, as follows: (a) name of all Electronic Devices; (b) model name of Electronic

Devices; (c) model number of Electronic Devices; (d) software versions of Electronic Devices; and (e) internet or service providers for all Electronic Devices.

2. Identify all of Hennig's Electronic Devices from December 13, 2019 through Decedent's Date of Death, including but not limited to any Electronic Devices she owned or was able to use or access, as follows: (a) name of all Electronic Devices; (b) model name of Electronic Devices; (c) model number of Electronic Devices; (d) software versions of Electronic Devices; and (e) internet or service providers for all Electronic Devices.

5. Identify all location data for all of Byrne's Electronic Devices and/or any associated accounts on February 16, 2021, including but not limited to Google location history, Apple frequent places history, and/or any other history data.

6. Identify all location data for all of Byrne's Electronic Devices and/or any associated accounts on February 20, 2021, including but not limited to Google location history, Apple frequent places history, and/or any other history data.

7. Identify all location data for all of Hennig's Electronic Devices and/or any associated accounts on February 16, 2021, including but not limited to Google location history, Apple frequent places history, and/or any other history data.

8. Identify location data for all of Hennig's Electronic Devices and/or any associated accounts on February 20, 2021, including but not limited to Google location history, Apple frequent places history, and/or any other history data.

With respect to Interrogatories one and two, Defendants submitted numerous responses. At best, Defendants indicated that, sometime after September 1, 2021, they "turned in" their iPhones. They did not indicate exactly when that occurred. With respect to interrogatories five through eight, Defendants submitted identical responses:

Defendants object to Interrogatory No. 5 [through eight] in that it is overbroad, oppressive and unduly burdensone and seeks irrelevant information that is not reasonably calculated to lead to the discovery of admissible evidence in this litigation.

CONTENTIONS OF THE PARTIES

Plaintiff asserts that Defendants have not completely responded to the above discovery demands. Since "[t]here is no dispute that someone made online changes to the beneficiary designations" (Reply Affirmation, p. 2), Plaintiff argues that Defendants are withholding critical information regarding their location on the dates when the designations were changed as well as documentation of their on-line activities on the relevant dates.

Plaintiff further asserts that, by admission, Defendants were aware of the allegations in the Complaint long before they disposed of their iPhones. Thus, Plaintiff argues that there has been a clear indication of spoliation of evidence. Consequently, the court should order Defendants to submit their present, replacement iPhones for forensic examination as they could disclose the requested information[1]. Finally, Plaintiff contends that the court should impose sanctions for Defendants' failure to respond to interrogatories.

Defendants respond that Plaintiff's motion should be denied in its entirety because they have each submitted affidavits indicating

[1]After a September 14, 2022 hearing, the court (Patel, J.) provided the parties with a briefing schedule for the instant motion. On September 30, 2022, the matter was reassigned to this court.

their locations on the relevant dates (Affirmation in Opposition, p. 6). Defendants also argue that they should not have to comply with the above interrogatories because they have already provided hundreds of e-mails to Plaintiff. Finally, Defendants contend that they should not have to comply with the interrogatories because Plaintiff can obtain the information from another person's computer device. Finally, Defendants argue that sanctions are inappropriate because Plaintiff has not demonstrated that they "intentionally disobeyed an order" (Defendants' Memorandum of Law, p. 12).

In Reply, Plaintiff asserts that Defendants "cannot simply pick and choose what they wish to produce or what they deem is 'necessary'" (Reply Affirmation, p. 6). With respect to Defendants' assertions that the interrogatories are overbroad, Plaintiff responds that "Defendants never moved for a protective order with respect to any of Plaintiff's discovery demands. Instead, they refused to comply . . ." (*id* at 9).

DISCUSSION

1. Motion to Compel

Any discussion of discovery begins with the long held maxim that a party is entitled to full disclosure of all evidence

"material and necessary in the prosecution or defense of an action" (CPLR §3101 [a]). Pursuant to CPLR 3124,

> [i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order . . . the party seeking disclosure may move to compel compliance or a response

To prevail on a motion to compel discovery, the movant must ""satisf[y] the threshold requirement of demonstrating that the disclosure sought is 'material and necessary'" (*U.S. Bank N.A. v Ventura*, 130 AD3d 919, 920 [2d Dept 2015]. "The words, "material and necessary", are, in our view, 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...we believe that a broad interpretation of the words "material and necessary" is proper" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406-407 [1968]). As the Second Department has held, "[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Crazytown Furniture, Inc. v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]). "The standard to be applied in determining the discoverability of information regarding a party's

cell phone usage is whether the information is material and necessary in the prosecution or defense of the action" (*Gonzalez v Jakaitis*, __Misc3d__, 2019 NY Slip Op 34374(U) [Sup Ct Westchester County 2019].

On the other hand, the principle of full disclosure "does not give a party the right to uncontrolled and unfettered disclosure" (*Pascual v Rustic Woods Homeowners Assn.*, 149 AD3d 757, 758 [2d Dept 2019]. " A motion to compel responses to discovery demands and interrogatories is properly denied where the demands and interrogatories seek information that is irrelevant, overly broad, or burdensome" (*Pesce v Fernandez*, 144 AD3d 653, 655 [2d Dept 2016]). The court should not countenance a party's "fishing expedition" disguised as a discovery request. (*Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]. "It is within the sound discretion of the trial court to supervise disclosure and set reasonable terms and conditions therefor, and absent an improvident exercise of that discretion, its determination will not be disturbed" (*Leibowitz v Babad*, 175 AD3d 639, 640 [2d Dept 2019]; (*Bernardis v Town of Islip*, 95 AD3d 1050, 1050 [2d Dept 2012]["The supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are matters within the sound discretion of the trial court"]).

Here, Plaintiff has demonstrated that the requested information is "material and necessary" (CPLR §3101 [a]). Thus, Plaintiff's motion for an Order directing Defendants to more specifically respond to Interrogatories one and two cited herein must be granted.

2. Overbreadth

"Notices for discovery and inspection and interrogatories are palpably improper if they are overbroad or burdensome, fail to specify with reasonable particularity many of the documents demanded, or seek irrelevant or confidential information" (*Fox v Roman Catholic Archdiocese of N.Y.*, 202 AD3d 1061 [2d Dept 2022]). Here, interrogatories five through eight are not overbroad. Therefore, Plaintiff's motion for an Order compelling Defendants to respond to them is granted.

3. Spoliation

"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense

such that the trier of fact could find that the evidence would support that claim or defense" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015][internal quotation marks omitted]). In addition, "spoliation sanctions may be imposed 'even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the party was on notice that the evidence might be needed for future litigation" (*Gitman v Martinez*, 169 AD3d 1283 [3d Dept 2019] quoting *Simoneit v Mark Cerrone, Inc.*, 122 AD3d 1246, 1247 4th Dept 2014], amended on reargument, 126 AD3d 1428 4th Dept 2015]).

Here, Defendants "turned in" their iPhones, and obtained replacement devices, while already aware that Plaintiff had accused them of using a computer device to unlawfully change the beneficiary designation. Defendants do not argue otherwise. Thus, Plaintiff has met its burden to establish spoliation. Therefore, Plaintiff's motion for an Order directing Defendants to produce their presently owned iPhones for forensic examination must be granted. Plaintiff's request that Defendants bear the cost of such forensic examination is denied.

4. Sanctions

Pursuant to CPLR 3126,

> 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.

"The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion . . . The general rule is that the court will impose a sanction commensurate with the particular disobedience it is designed to punish and go no further than that" (*Crupi v Rashid*, 157 AD3d 858, 859 [2d Dept 2018][internal citations omitted]). To impose the most severe sanctions, the offender's conduct must be "willful and contumacious" (*Chowdhury v Hudson Valley Limousine*

Serv., LLC, 162 AD3d 845, 847 [2d Dept 2018]).

Here, Plaintiff asserts that Defendants "wilfully fail[ed] to disclose information which the court finds ought to have been disclosed pursuant to this article" and that, consequently, "the court may make such orders with regard to the failure or refusal as are just" (CPLR 3126). Plaintiff does not seek sever sanctions; e.g., striking pleadings or preclusion of evidence. Rather, Plaintiff contends that the appropriate sanction, for Defendants' wilful defiance of discovery orders, is to assess attorney's fees and costs.

The court, while troubled by Defendants' conduct during the discovery process, does not agree that sanctions are appropriate. Therefore, Plaintiff's motion for sanctions must be denied. The court makes this determination without prejudice to Plaintiff renewing the motion, along with the allegations set forth in their moving papers, should Defendants engage in sanctionable conduct in the future.

Accordingly, based upon the forging, it is hereby

ORDERED, that the motion for an ORDER, pursuant to CPLR 3124, directing Defendants Elizabeth Byrne and Rachel Hennig to comply

with certain discovery demands and to produce their cellular telephones for forensic examination is granted; and it is further

ORDERED, that Defendants Elizabeth Byrne and Rachel Hennig shall fully and completely respond to Plaintiff's interrogatories one, two and five through eight as forth herein, within ten days of this Decision and Order; and it is further

ORDERED, that Defendants Elizabeth Byrne and Rachel Hennig shall provide the replacement iPhones that they obtained when they "turned in" the ones which they owned on February 20, 2021 ("the iPhones") to counsel for Plaintiff, along with any information necessary to access all of the images, data, and information in the iPhones, within ten days of this Decision and Order; and it is further

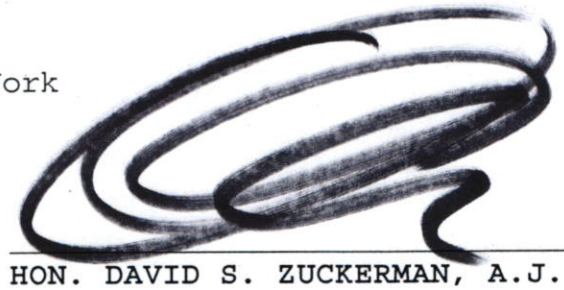
ORDERED, that, beginning on the date of this Decision and Order, Defendants shall not alter, delete or in any way change any of the images, data, and information in the iPhones; and it is further

ORDERED, that counsel for Plaintiff shall return the

aforesaid iPhones to counsel for Defendants within ten days of receipt.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
November 21, 2022



HON. DAVID S. ZUCKERMAN, A.J.S.C.

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