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Is Discovery of Private Facebook Postings On Equal Footing With General Discovery Principles?

Are private Facebook postings entitled to more stringent protections from civil discovery? A significant string of New York Appellate Division decisions seemed to suggest that they are.[1] But a divided panel in *Forman v. Henkin* (2015 NY Slip Op. 09350 [1st Dep't Dec. 17, 2015]), recently insisted that social media discovery is measured by the same standards as other non-privileged information. We are not so sure.

The plaintiff in *Forman* suffered physical and cognitive injuries as a result of a horseback riding accident. The trial judge directed the injured plaintiff to produce from her recently deactivated Facebook page:

(1) all photographs of plaintiff privately posted on Facebook prior to the accident at issue that she intends to introduce at trial,

(2) all photographs of plaintiff privately posted on Facebook after the accident that do not show nudity or romantic encounters, and

(3) authorizations for defendant to obtain records from Facebook showing each time plaintiff posted a private message after the accident and the number of characters or words in those messages.

Reversing the trial court, the First Department ruled for the plaintiff, and eliminated the second and third items, permitting discovery only as to plaintiff's "photographs of herself posted on Facebook, either before or after the accident, that she intends to use at trial." In other words, the plaintiff would have to search and produce private social media information only if she, herself, decided to use it to prove her case. Otherwise, her postings were off limits.

[1] *See, e.g., Patterson v. Turner Constr. Co.*, 88 AD3d 617 [1st Dep't 2011]; *Tapp v. N.Y. State Urban Dev. Corp.*, 102 AD3d 620 [1st Dep't 2013]; *Spearin v Linmar, L.P.*, 129 AD3d 528 [1st Dep't 2015].

IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:

Andrew T. Solomon
212 660 3023
asolomon@sandw.com

SULLIVAN & WORCESTER

BOSTON
One Post Office Square
Boston, MA 02109

LONDON
Tower 42
25 Old Broad Street
London, EC2N 1HQ

NEW YORK
1633 Broadway
New York, NY 10019

WASHINGTON, DC
1666 K Street, NW
Washington, DC 20006

ZAG-S&W

ISRAEL
41-45 Rothschild Blvd., Beit Zion
Tel Aviv, 65784 Israel

Ordinary Discovery Rules Prohibit "Fishing Expeditions"

So are private postings on social media in a special class (like tax returns) that warrant special protection? "No," *Forman* insists, "social media information" is subject to the same limitations as other forms of discovery. That limitation is embodied in CPLR 3101(a), which provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." But that seemingly limitless standard does not authorize the proverbial "fishing expedition." Thus, the party seeking discovery must "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." (2015 NY Slip Op 09350, *1, *quoting Vyas v. Campbell,* 4 AD3d 417, 418 [2d Dept 2004]).[2]

In *Forman*, the requests violated the general principle that "demands are improper if they are based upon 'hypothetical speculations' calculated to justify a fishing expedition.'" (2015 NY Slip Op 09350, * 1-2, *quoting Budano v. Gurdon*, 97 AD3d 497, 499 [1st Dept 2012]). The undue "speculation" was the possibility that searching plaintiff's Facebook postings *might* reveal physical activity that could undermine her claim of disability or injury. Imagine plaintiff surfing or *horseback riding* three weeks after the accident.

For the *Forman* court, a hypothetical possibility that the social media posting might reveal relevant information is insufficient. The requesting party must "demonstrate that the information sought is *likely to result* in the disclosure of relevant information bearing on the claims." (*Id.* at *3). In other words, before plaintiff can be forced to even search her social media, the defendant must adduce some proof that the contradictory information actually exists.

Fish or No Fish, Courts Routinely Order Litigants to Search For Documents

But is *Forman* actually applying general discovery principles, or is it a special case for social media? In our experience, fish or no fish, litigants are routinely compelled to review and produce thousands, if not millions, of documents based on broadly drafted discovery demands supported by just the type of "speculation" that the court in *Forman* found insufficient. Courts may limit the scope of what must be produced, or, in the case of emails, permit search terms to mitigate the burden. But in *Forman* the court is simply exempting an entire category of information, not based on the relevance of the information sought, but because the defendant cannot show that the search will be successful.

The Dissent: Discovery of Social Media Gets Special Protection And The Court Should Revisit The Issue

A more realistic view of the precedent is offered by Judge Saxe in dissent. He noted, "Little is said about how the existing decisions [including *Forman*] have unfairly created a rule of judicial protectionism for the digital messages and images created by social networking site users, in contrast to how discovery of tangible documents is treated under the CPLR." (*Id.* at *8). He argues, not without force, that social media is the only arena where a plaintiff is exempt from searching a potential trove of information, unless the defendant "has first found an item tending to contradict the plaintiff's claims." (*Id. at* *5). And even if discovery is ordered, an *in camera* review by the court is usually required before production. (*Id.*) Judge Saxe also points out that the New York approach to social media is in tension with the federal procedure. (*Id.* at *6-7, *quoting Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 FRD 112, 114 n 1 [EDNY 2013]).

Practical Tips

The bottom line is that even if no special rule exists, experience teaches that New York State courts will not authorize open-ended discovery of a person's social media account unless the requesting party can show some evidence that the intrusion is likely to yield relevant information. The mere possibility is not enough.

Thus, best practice for a requesting party is to obtain publicly available information immediately from the adversary while it is still available. In *Forman*, for example, the plaintiff deactivated her Facebook account just a few months after she commenced the litigation (a tantalizing fact completely discounted by the majority). As a result, the defendant may have missed an opportunity to search the public

[2] Emphasis is our own.

information before deactivation. The requesting party should also frame the request in the narrowest possible terms, not in categorical form, like the *Forman* defendant (compare: "social media exhibiting physical activities" with "all photographs"). Also, it may be advisable to defer propounding requests for social media until a litigant has deposed the owner of the social media about its likely contents and the nature of the postings. Finally, the requesting party should proactively ask for an *in camera* review to defuse privacy objections.

To the extent that *Forman* has broader applicability, however, it adds backbone to the oft-repeated, but usually ignored, prohibition against "fishing expeditions" in discovery. Discovery based on a hypothetical "possibility" of finding relevant information is improper. If *Forman* is taken at face value in all contexts (not just social media) the requesting party must adduce evidence showing the "probability" that the effort will bear fruit. Our readers should keep that in mind before reflexively embarking on massive search and production efforts.

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