Recent Decision Highlights Competing Approaches to Social Media Discovery

In a noteworthy decision highlighting the competing approaches as courts seek to reconcile the explosive growth in social media with traditional discovery principles, a New York appellate court recently found that absent a sufficient “factual predicate” or “reasoned basis” for the discovery, a defendant in a personal injury action was not entitled as a matter of course to discover a plaintiff’s private Facebook postings and messages. *Forman v. Henkin*, 22 N.Y.S.3d 178, 2015 N.Y. App. Div. LEXIS 9353, 2015 N.Y. Slip Op. 09350 (1st App. Div. Dec. 17, 2015). But a dissent challenged the majority holding, questioning whether the majority was placing an additional burden on parties seeking social media discovery that is not part of the “traditional discovery process”; whether it would create an unmanageable burden on trial courts to conduct in camera reviews; and whether invoking the “immutable” *stare decisis* doctrine was premature in the emerging realm of social media discovery.

The *Forman* decision presents an interesting conundrum for courts and practitioners alike: where to draw the line between a defendant’s right to prompt a review and obtain access to a plaintiff’s non-privileged social media postings despite the fact that the defendant might not know the content of those postings in the first instance, versus a plaintiff’s right to be protected from unfettered “fishing” expeditions into otherwise private (albeit non-privileged) content and the costs associated with such a review, particularly where the volume of responsive material could be proportionately marginal.

In *Forman*, the plaintiff alleged that she sustained traumatic physical and cognitive injuries in a horse riding accident that limited her ability to participate in social and recreational activities. In discovery, the defendant sought an order to compel plaintiff to provide an unlimited authorization to obtain information from her Facebook account, including all photographs, status updates and instant messages. After imposing certain limitations on the breadth of the requested discovery, the trial court granted the defendant’s motion.

The Appellate Division disagreed. Starting its analysis with the New York state discovery standard – that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action” – the Court emphasized that it 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.” Accordingly, discovery demands are improper if based upon “hypothetical speculations calculated to justify a fishing expedition.”

Against this background, and after reviewing a series of New York appellate decisions from 2010-2014, the *Forman* majority concluded that New York’s “well-established case law” has “required some threshold showing before allowing access to a party’s private social media information.” The Court would proceed to coin this the “threshold factual predicate, or ‘reasoned basis’ in the words of the dissent.”

In so holding, the *Forman* majority bristled at the dissent’s suggestion it was departing from traditional discovery principles: “Contrary to the dissent’s view, this Court’s prior decisions do not stand for the proposition that different discovery rules exist for social media information. The discovery standard we have applied in the social media context is the same as in all other situations – a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims.” This requirement, the majority concluded, “stands as a check against parties conducting ‘fishing expeditions’ based on mere speculation.” The Court accordingly found that – absent a “threshold factual predicate” – a “defendant’s speculation that the requested information might be relevant to rebut the plaintiff’s claims of injury or disability is not a proper basis for requiring access to plaintiff’s [private] Facebook account.”

Taking a different tack on the convergence of social media with “traditional discovery principles,” the dissent challenged both the logic and practical application of the majority approach.

Noting the rise in social networking cites and the variety of approaches taken by courts across the country in addressing the discoverability of private social media material, the dissent began by summarizing New York case law on the subject: “The case law that has emerged in this state in the last few years regarding discovery of information posted on personal social networking cites holds that a defendant will be permitted to seek discovery of the nonpublic information a plaintiff posted on social media *if, and only if*, the defendant can first unearth some item from the plaintiff’s publicly available social media postings that tends to conflict with or contradict the plaintiff’s claims.” (emphasis in original.)

This approach, the dissent suggested, fundamentally conflicts with New York’s liberal “material and necessary” standard for discovery, in that it seeks to impose “a preliminary requirement that the party seeking discovery must be able to prove that the other side has in its possession an item or items answering to the description in the discovery demand.” The problem with this approach, the *Forman* dissent noted, relying on analogous federal authority, is that both the federal and New York’s procedural rules “do not require a party to prove the existence of relevant material before requesting it.”

Therefore, according to the dissent, “[t]here is no reason why the traditional discovery process cannot be used equally well” in the social media context: so long as the defendant submits a request “limited to reasonably defined categories of items that are relevant to the issues raised,” then “[a] search would be conducted . . . and barring legitimate privilege issues, such responsive relevant [social media] would be turned over[.]” But, in the dissent’s view, the requesting party should not be first required to make a predicate “factual showing” that relevant and responsive information *actually exists* in the subject social media account: so long as the request is proper and narrowly tailored, the burden is on the responding party to conduct an appropriate search and produce any non-privileged and responsive social media content.

Not only does the majority approach impose an additional burden on requesting parties not found in the procedural rules argues the dissent, it also opens the door to social media material marked “private” as being deemed functionally equivalent to legally privileged. However, “categorizing posted material as ‘private’ does not constitute a legitimate basis for protecting it from discovery . . . [a]s long as the item is relevant and responsive to an appropriate discovery demand, it is discoverable. To the extent disclosure of contents of a social media account could reveal embarrassing information, ‘that is the inevitable result of alleging these sorts of injuries.’”

Not only did the dissent challenge the logic of the majority approach, but its practical application as well: “The procedure created by these cases . . . imposes a substantial – and unnecessary – burden on trial courts . . . to conduct in camera reviews of litigants social media postings.” Finding that New York trial courts were already overburdened, the dissent cautioned the appellate court “should think twice about unnecessarily adding to their workload.” In response, the *Forman* majority noted that not only was an in camera review not conducted or at issue in this case, but that its holding would not blow open the doors to routine in camera reviews, which would always be at the discretion of the trial court.

Finally, the dissent challenged the majority’s reliance on the existing (if limited) body of New York case law on the discoverability of social media content, and its refusal to consider the issue anew. In the dissent’s view, “[t]he majority suggests that the doctrine of stare decisis precludes us from altering our previous rulings. However, in my view this so-called ‘well-settled body of case law’ is not so long-established that it is deserving of immutable stare decisis treatment.” In response, the majority noted that were the parties agreed on the general legal principles – challenging only its application to the particular facts – and did not ask the court to revisit its controlling precedent, adherence to the doctrine of stare decisis was both appropriate and necessary.

In sum, the *Forman* decision highlights the rift in the varying approaches to social media discovery that continue to emerge across the country. The *Forman* decision would tend to suggest that a party seeking discovery of social media content should (1) endeavor to narrowly tailor its requests to particular subject matter it would reasonably anticipate to appear in the social media account, as opposed to the more generic request for “any and all photographs, updates messages or other content appearing on plaintiff’s Facebook account”; and (2) be prepared to articulate – to provide a “factual predicate” or “reasoned basis” – why the particular content sought is likely to appear on the social media site, and to rebut any appearance of an unfettered fishing expedition.

For those responding to social media discovery requests, *Forman* likewise presents two key take-aways: (1) don’t assume, simply given the rise in social media discovery and the fact that it may technically be non-privileged, that a court will sanction unfettered (or even more narrowly tailored) access to private social media content; and (2) challenging a requesting party’s basis and logic for pursing social media discovery may well prove fertile grounds for fending off unreasonable requests, particularly where they are of the “all content” variety.

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