Portions of this decision have been omitted.

30 N.Y.3d 656
Court of Appeals of New York.

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

No. 1
|
Decided February 13, 2018

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:
pre-accident and post-accident photographs privately posted on rider's social networking website account were discoverable, and
data revealing timing and number of characters in post-accident messages privately posted on rider's account was discoverable.
Reversed.

Attorneys and Law Firms

****885** Wade Clark Mulcahy, LLP, New York City (Michael A. Bono, Brian Gibbons and Christopher J. Soverow of counsel), for appellant.

Pollack Pollack Isaac & DeCicco, LLP, New York City (Kenneth J. Gorman and Brian J. Isaac of counsel), and Siegel & Coonerty, LLP, for respondent.

Vincent P. Pozzuto, Defense Association of New York, Inc. (Andrew Zajac, Rona L. Platt, Brendan T. Fitzpatrick and Amanda L. Nelson of counsel), for Defense Association of New York, Inc., amicus curiae.

OPINION OF THE COURT

DiFIORE, Chief Judge:

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). . . .

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 in 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" *[citations omitted]*. 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]) *[citations omitted]*. 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" *[citations omitted]*.

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" *[citations omitted]*. . . .

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. . . .

Plaintiff suggests that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. . . . [E]ven 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 *[citations omitted]*. 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 . . .

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. 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. . . .

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. . . .

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. . . .

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