

Jennings v TD Bank
2013 NY Slip Op 32783(U)
July 3, 2013
Sup Ct, Nassau County
Docket Number: 601947/12
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X TRIAL/IAS PART 17

JENNIFER JENNINGS,
Plaintiff(s), INDEX # 601947/12

-against- Mot. Seq. 1
Mot. Date 3.15.13
Submit Date 4.9.13

TD BANK,
Defendant(s).

-----X

TD BANK,
Third Party Plaintiff,

-against-

ISLAND MASTER LOCKSMITH
Third Party Defendant.

-----X

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

Upon the foregoing papers, defendant's motion for an order compelling plaintiff Jennifer Jennings to respond to defendant's combined demands dated November 14, 2012 is determined as provided herein.

This is an action for alleged negligent personal injury of the plaintiff, Jennifer Jennings. On April 16, 2011, while she was a customer at a TD Bank location, Ms. Jennings sustained injuries as a result of defendant's alleged negligence.

On November 14, 2012, defendant served combined demands, in which third-party defendant joins, requesting a multitude of records, including the plaintiff's social media accounts. The court held a preliminary conference on January 21, 2013 wherein the court ordered plaintiff to provide all authorizations, including medical care providers, diagnostic facilities, collateral sources, and employment records to defendant and third-party defendant and to respond to defendant's most recent demand letter for social media information. The plaintiff has not moved for a protective order in this matter.

Defendant's motion seeks to compel plaintiff to provide copies of electronically stored discovery on various social media accounts between plaintiff and any other individual or entity regarding the alleged incident. Defendant made the motion after an internet search revealed plaintiff's Facebook account contained posted pictures of her in front of a cruise ship, seemingly on vacation.

Plaintiff Jennifer Jennings opposes the motion and claims that the demands are overly broad, constitute a "fishing expedition," defendant has not established that the contents of plaintiff's social media accounts are relevant, and that if the social media accounts are found relevant, an *in camera* review must be held to determine what is discoverable.

CPLR § 3124 provides that the court has the discretion to compel discovery for failure to abide with discovery demands and orders. CPLR § 3101(a) requires "full disclosure of all matter material and necessary in prosecution or defense of an action." This has been liberally construed to include disclosure of any facts which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity (*Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Marten v. Eden Park Health Services Inc.*, 250 AD2d 44 [3rd Dept. 1998]). Moreover, according to § 3101(i), parties are entitled to "full disclosure of any films, photographs, video tapes or audio tapes" involving a party to the action (*Tran v. New Rochelle Hosp. Med. Ctr.*, NY2d 383 [2003]).

In order for a party to be entitled to a particular method of discovery, it must show that method will "lead to the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information that bears on the claims" (*Abrams v. Pecile*, 83 AD3d 527, 528 [1st Dept. 2011]; *Winchell v. Lopiccio*, 38 Misc 3d 458 [Sup. Ct. Orange County 2012]).

The courts have further held that there is a two-prong analysis for determining whether social media accounts are discoverable. First, the court determines whether the content in the accounts is material and necessary, and then it balances whether the production of this content would result in a violation of the account holder's privacy rights (*Fawcett v. Altieri*, 38 Misc3d 1022 [Sup. Ct. Richmond County 2013]).

Courts have held the contents of a social media account to be material and necessary where the information "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims" (*Patterson v. Turner Constr. Co.*, 88 AD3d 617, 618 [1st Dept.

2011]). In a recent personal injury action, *Tapp v. NYS Urban Development Corp.* (102 AD3d 620 [1st Dept. 2013]), the court held that a defendant must identify relevant information in plaintiff's social media account to establish a factual predicate for the disclosure request. In order to obtain discovery of a closed or private social media account by court order, a party must show with credible facts that the adversary subscriber has posted information or photographs that are relevant. (*Fawcett*, 38 Misc3d at 1027, 1028). Further, the discovery request should be narrowly tailored seeking only social media relating to the claimed injuries arising from the accident. (*Kregg v. Maldonado*, 98 AD3d 1289, 1290 [4th Dept. 2012]; *Patterson*, 88 AD3d at 618 where the action was reversed and remanded for a more specific identification of relevant information sought; *McCann v. Harleystown Insurance Co. of N.Y.*, 78 AD3d 1524 [4th Dept. 2010]).

Moreover, the courts have held that "digital 'fishing expeditions' are no less objectionable than their analog antecedents" (*Winchell v. Lopiccolo*, 38 Misc3d 458). This indicates that there must be a demonstration of a good faith basis for the request, meaning more than the mere hope of finding relevant evidence on social media accounts (*Id.*; *Fawcett* at 1028; *Caraballo v. City of N.Y.*, 2011 NY Slip op 30605(a) [Sup. Ct. Richmond County 2011]).

In *Tapp*, although defendants moved to compel authorization for plaintiff's Facebook records made after the incident alleged in the complaint, the court held that defendants were not entitled to disclosure on the grounds that they did not establish a factual predicate by identifying relevant information in plaintiff's account. In addition, the court went on to hold, "plaintiff's mere possession and utilization of a Facebook account is an insufficient basis" to compel access to the account or for an *in camera* inspection by the court (*Tapp* at 620). Further, the Appellate Division held that the defendants' argument that the postings may reveal relevant information was nothing more than a "fishing expedition" (*Id.*, quoting *McCann*, 78 AD3d 1524).

However, the second department found an *in camera* inspection was warranted in *Richards v. Hertz*, 100 AD3d 728 [2nd Dept. 2012]. In *Richards*, another personal injury action, defendants served a demand for authorizations for access to "all status reports, e-mails, photographs and videos posted on the injured plaintiff's Facebook profiles since the date of the accident" after discovering photographs conflicting with plaintiff's allegations on portions of one of the plaintiff's Facebook profiles not blocked by privacy settings (*Id.*). There, the second department held that the defendants showed that at least some of the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information relating to plaintiff's claims and that it is reasonable to believe other portions of the Facebook profile may contain relevant evidence. Further, due to the likelihood that the profile contains materials which are irrelevant, the supreme court was directed to conduct an *in camera* inspection to determine what was relevant, if anything. (*Id.*; *Romano v. Steelcase Inc.*, 30 Misc3d 426 [Sup. Ct. Suffolk County 2010] information sought from social networking account was material and necessary for defense to plaintiff's claims where plaintiff claimed that due to her injuries she was largely confined to bed but her public Facebook profile page showed her outside her home).

The second prong of the analysis balances the social media user's privacy against the opposing party's need for access to the information sought on social networking sites. (*Fawcett*, 38 Misc3d at 1024; *Romano*, 30 Misc.3d at 432). The Stored Communications Act, 18 U.S.C. § 2701 et seq., prohibits an entity from disclosing information without consent of the owner. (*Patterson*, 88 AD3d at 618; *Romano* at 427. Further, plaintiffs who place their physical condition in controversy may not shield from disclosure material which is necessary to the defense of the action (*Id.* at 426; *Hoenig v. Westphal*, 52 NY2d 605 [1981]).

In *Patterson*, the court refers to relevant matter from personal diary entries that are discoverable and furthers the idea to allow postings in a social media account to be disclosed, even where plaintiff used the service's privacy settings to restrict access (*Patterson*, 88 AD3d at 618; *Faragiano v. Town of Concord*, 294 AD2d 893 [4th Dept. 2002]; *Fawcett* at 1022).

In *Romano*, a personal injury action where the defendant sought access to plaintiff's Facebook and MySpace accounts, the court found that defendant was entitled to all deleted pages and relevant information due to the liberal discovery policies of New York and found that any privacy concerns of the plaintiff were outweighed by defendant's need for the information. (*Romano*, 30 Misc3d at 432-35). The court went on to hold that plaintiff knew her information may become publicly available and neither social networking site guarantees complete privacy, therefore "plaintiff has no legitimate reasonable expectation of privacy." (*Id.*) Further, it "is the very nature and purpose of these social networking sites" to consent to share personal information with others. (*Id.*; *Loporcaro v. City of N.Y.*, 35 Misc3d 1209(A) [Sup. Ct. Richmond County 2012] plaintiff could not claim that postings are somehow privileged or immune from discovery now since it appears that plaintiff has voluntarily posted at least some information about himself on Facebook which may contradict the claims made by him in the present action).

Therefore, disclosure of the relevant contents of plaintiff's Facebook account is warranted in this matter. The defendants have established a factual predicate to disclose relevant information from the Facebook account. Applying the foregoing analysis, such disclosure is ordered because information contained on the plaintiff's Facebook account is material and necessary, and plaintiff's privacy concerns are outweighed by defendants' need for the information.

As in *Richards* (100 AD3d 728), here, the photograph was found on public, unblocked portions of plaintiff's profile through an internet search. The photograph depicts plaintiff holding scuba gear on a beach in front of a cruise ship, which contradicts the following claims from plaintiff's verified bill of particulars, i.e., permanent and continuing physical injuries, "preventing plaintiff from enjoying normal fruits of social activities" and that the incident "contributed to plaintiff living a lesser quality of life, including loss of enjoyment of life than plaintiff would have otherwise experienced." Due to the conflict with plaintiff's claims, the defendants have demonstrated the relevance of the contents of the social media account. This case is on point with *Richards*, thus it is reasonable to believe other portions of plaintiff's Facebook profile may contain relevant evidence.

Further, unlike *Tapp* (102 AD3d 620) the defendants in this case have established a factual predicate for the Facebook account disclosure request. Here, defendants have identified relevant information which indicates that there may be more pictures or information revealed in the *in camera* inspection which are similar to the photograph found. Additionally, the plaintiff does not merely possess a Facebook profile and utilize it, she posted relevant photographs on unblocked portions of her account, and therefore there is a sufficient basis for the ordered disclosure.

Additionally, the defendants here already unveiled a photograph which may be deemed relevant evidence. Thus, there is little risk of a “fishing expedition” since relevant evidence has been found which makes the request more than the mere hope of finding relevant evidence and gives a good faith basis for the request.

The defendants’ combined demands also satisfies the requirement for a narrowly tailored discovery request because it calls for electronically stored discovery “regarding the alleged incident,” which is more specific than was required by the second department in *Richards*. Here, even more so, the request is narrowly tailored because it only seeks information regarding the alleged incident, as opposed to *Richards* where the defendants were requesting access to “all status reports, emails, photos, and videos posted on the injured plaintiff’s Facebook profiles since the date of the accident.”

The second prong of the *Fawcett* analysis is also satisfied in this matter. Similar to *Romano* (38 Misc3d 1022), plaintiff here cannot shield disclosure material which is necessary to the defense of the action because she placed not only her physical condition but also her enjoyment of life and social activities. The defendants need information such as photographs and postings from her Facebook account in order to defend against plaintiff’s claims of injuries and damages.

Furthermore, the plaintiff posted the photograph of herself and other information on Facebook which she was aware she put on the internet for the world to see. As the courts held in *Romano* and *Loporcaro* (35 Misc3d 1209[A]), because the plaintiff has voluntarily and purposefully posted this photograph, and it is reasonable to believe there is relevant information in addition to that photograph, she cannot now claim that those postings are somehow immune from discovery. Moreover, although plaintiff may utilize privacy settings on her account to restrict access, these postings are discoverable since there is no legitimate reasonable expectation of privacy.

Although the disclosure request satisfies the *Fawcett* analysis, there are likely to be portions of plaintiff’s profile which are irrelevant to the case at hand, therefore the plaintiff is ordered to produce any and all relevant information that has been posted onto her Facebook account, past and present.

All remaining contentions by defendants are denied as without merit.

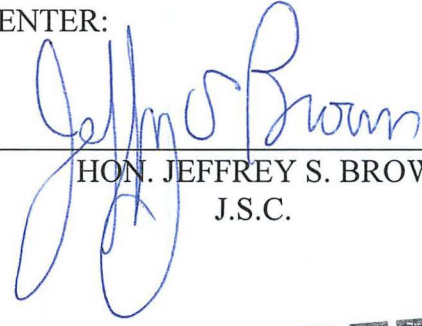
Accordingly, it is

ORDERED, that within 30 days from the date of service of a copy of this order, plaintiff is directed to produce any and all current and historical Facebook pictures, videos or relevant status postings from her personal Facebook account since the date of the alleged incident, including any records previously deleted or archived and plaintiff shall not take steps to delete or alter existing information and posts of her Facebook accounts. If plaintiff is unable to recover any deleted material, plaintiff is directed to obtain her entire record from Facebook, including any records previously deleted or archived by the operators of Facebook.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
July 3, 2013

ENTER:


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ENTERED
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