

# NY Court of Appeals: 'Private' Social Media Is Discoverable – Foreman v. Henkin

February 21, 2018

On February 13, 2018, the Court of Appeals issued Kelly Foreman v. Mark Henkin, an opinion which confirms the broad scope of discovery as it pertains to social media. The ruling—which pertained to social media content that had been identified as “private” by a plaintiff on her Facebook account—resolves an ongoing conflict among lower courts and now provides a strong incentive for defense counsel to seek all available content regarding a party’s social media accounts and not need to establish a necessary burdensome predicate first.

In Foreman, the plaintiff alleged that she sustained traumatic injuries after falling from a horse owned by the defendant. At the plaintiff’s deposition, she stated that her pre-incident quality of life was documented on her Facebook account. She claimed that her injuries from the accident inhibited her ability to draft messages and emails. The defendant could not access or obtain any information from the plaintiff’s account because the plaintiff had utilized the security controls to make her account private. Following the plaintiff’s deposition, the 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). When the plaintiff failed to provide the authorization the defendant moved to compel, asserting that the Facebook material sought was relevant to the scope of the plaintiff’s injuries and her credibility. The plaintiff opposed the motion on the grounds that there was no basis to access the “private” portion of her account and argued that the “public” portion did not contradict her deposition testimony. The Supreme Court granted the defendant’s motion with the caveats that it was limited to photographs posted after the incident and basis facts—but not content—of the plaintiff’s messages after the incident.

The plaintiff appealed before any additional discovery was conducted. The Appellate Division modified the lower court’s ruling and substantially limited the plaintiff’s obligations with respect to the production of Facebook-related information. Specifically, the Appellate Division only required that the plaintiff produce photographs which she intended to introduce at trial. Two Justices dissented, finding that the defendant was entitled to broad access to the plaintiff’s social media account. The Appellate Division granted the defendant’s leave to appeal.

The New York Court of Appeals held that the Appellate Division had erred in limiting the plaintiff’s discovery obligations. In its decision, the Court of Appeals reaffirmed the “material and necessary” standard for seeking discovery and provided some guidance to the lower courts as to how to approach the discovery of the private portions of Facebook account contents. Through its ruling, the Court of Appeals held that there is no need for a specialized or heightened factual predicate to avoid fishing expeditions, which is a common defense in

discovery-related disputes. The decision notes that there is no need for a heightened threshold for production of social media records that depend on what the account holder has chosen to share on the public portion of the account. In other words, the “privacy” or “security” settings do not dictate what information is discoverable.

The Foreman decision essentially finds that social media accounts, like Facebook, are discoverable as any home photos or journals that a plaintiff may have, regardless of its private elements. Once a plaintiff puts issues into controversy in a case, like medical records, they can be discoverable.

Finally, it appears that the New York Courts are catching up with the widespread use of social media. We have an established, aggressive practice to make use of this significant development. Please contact us if you have any questions about the significance of this case and the best way to maximize its effect on your litigated matters.

Cullen and Dykman’s Construction Litigation Group have complete working knowledge of the fundamentals of construction law and litigation. We strive to remain current with regard to significant new developments in the law, such as multiple prime contracting, architect's and construction manager's liabilities, and those developments posed by the Foreman case.

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