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Social Media and Privacy Rights Of Nonparties in Discovery

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The whole point of social media is for people to socialize and interact with one another. Social media is invariably password protected, and has various privacy settings that restrict access to account postings. People may send private and personal emails to their friends and family via their social media account, and use their social media account like an Internet service provider. Depending on the privacy setting used, the "friends" of the subscriber are listed on the public "page" of the account.

When a party seeks an authorization to obtain social media records, it seeks the private emails and records of these nonparty "friends." Most of the decisions discussing discovery of social media have not addressed the rights of non parties, including notice to them of the application for their records, the right of non parties to object to the disclosure, and consideration of potential embarrassment or annoyance such disclosure might cause them.

Federal Law

Congressional intent makes clear that disclosure of electronic communications is not to be given freely. Under the Stored Communication Act,[1] an entity providing an electronic communications service to the public "shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." The Computer Fraud and Abuse Act (CFAA)[2] provides a civil remedy against "[w]hoever intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer." The Wiretap Act[3] states that an entity "providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication [or its agent]."

A defendant may be prevented from serving a subpoena on a thirdparty provider of Internet services to the plaintiff. The Stored Communications Act4 does not permit such disclosure, and in In re Subpoena Duces Tecum to AOL, LLC,[5] the court quashed a subpoena issued by a state to obtain such records. In order to obtain a person's social media account information, an authorization permitting such disclosure is required.

However, in *United States v. Warshak*,[6] the U.S. Court of Appeals for the Sixth Circuit noted that the mere fact that a third party [ISP] can access the contents of a communication does not extinguish the expectation of privacy, and held that "a subscriber enjoys a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial ISP.'" In *United States v. Maxwell*,[7] the court noted that general emails are afforded more privacy than "chat room" postings.

Disclosure from Nonparties

CPLR 3101(a)(4) requires that a request for disclosure from "any other person," i.e., a nonparty witness, be "upon notice stating the circumstances or reasons such disclosure is sought or required."

In *Velez v. Hunts Point Multi-Serv. Ctr.*,[8] the Appellate Division, First Department, noted that "a party is distinguished from a nonparty and where disclosure is sought against a nonparty more stringent requirements are imposed on the party seeking disclosure."[9] Subsequent to Velez, the First Department returned to requiring proof of necessary "special circumstances" to warrant obtaining the disclosure from a nonparty.[10]

In *Velez*,[11] the court noted that

Nothing in the amendments to CPLR 3120, however, dispenses with the general requirement of CPLR 3101(a)(4) that, where disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required. The purpose of such requirement is presumably to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond.

The court held that the CPLR 3101(a)(4) notice requirement applicable to subpoenas duces tecum issued pursuant to CPLR 3111 is equally applicable to nonparty subpoenas issued pursuant to CPLR 3120, and that the mandatory requirement of CPLR 3101(a)(4) is to include the requisite notice on the face of the subpoena or in a notice accompanying it.

In *Kooper v. Kooper*,[12] the Second Department held that while special circumstances are no longer required for obtaining discovery from a nonparty, there are procedural and other equitable requirements that must be met to allow such disclosure.

To withstand a challenge to a discovery request, therefore, the party seeking

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discovery must first satisfy the threshold requirement that the disclosure sought is "material and necessary," whether the request is directed to a party (see CPLR 3101[a][1]) or a nonparty (see CPLR 3101[a] [4]). Entitlement to discovery of matter satisfying the threshold requirement is, however, tempered by the trial court's authority to impose, in its discretion, appropriate restrictions on demands which are "unduly burdensome" (*Scalone v. Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 70 [1992]; see *Kaye v. Kaye,* 102 AD2d 682, 691 [1984]) and to prevent abuse by issuing a protective order where the discovery request may cause "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]).[13]

The court noted that "[B]eyond the requirement of materiality and necessity which defines the scope of permissible discovery, a disclosure request directed to a nonparty implicates considerations in addition to those governing discovery from a party."[14] The court emphasized that:

... cases have consistently adhered to the principle that "[m]ore than mere relevance and materiality is necessary to warrant disclosure from a nonparty" .... The Legislature would not have included a separate subsection of the statute for nonparties if discovery from parties and non parties were subject to identical considerations. Inclusion of the language "circumstances or reasons such disclosure is sought or required" from a nonparty (CPLR 3101[a] [4]) indicates that something more than mere relevance is required if the discovery request is challenged .... As a matter of policy, nonparties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement.[15]

In terms of procedural requirements, the court held that a subpoena duces tecum served on a nonparty is "facially defective" and unenforceable if it neither contains, nor is accompanied by, a notice stating the circumstances or reasons such disclosure is sought or required.[16]

In *Matter of Troy Sand & Gravel Co. v. Town of Nassau*,[17] the Third Department took a more protective view of the rights of non parties.

... Court has repeatedly held that disclosure from a nonparty under CPLR 3101(a) (4) may be obtained "only upon a showing of special circumstances, i.e., that the information sought to be discovered is material and necessary and cannot be discovered from other sources or otherwise is necessary to prepare for trial'".[18]

Imposition of the "material and necessary" standard to all individuals, regardless of their status, would render the distinction drawn in the statute between parties and non parties meaningless. Such an interpretation of CPLR 3101would violate the "rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided" (citations omitted).... we adhere to our precedent holding that "something more than mere relevance or materiality must be shown to obtain disclosure from a nonparty witness".[19]

In terms of assessing the defendant's ability to hurdle these high thresholds, *Karim v. Natural Stone Indus.*,[20] which denied a similar request, is instructive.

Given the computer's access by several members of plaintiff's household, it would not be possible for third-party defendant to discern plaintiff's computer usage beyond the use plaintiff testified to at the deposition. As such, this court does not find it appropriate to order disclosure of the hard drive. The court notes that the issue of plaintiff's employability is ascertainable by other means, including an examination by an occupational therapist. Furthermore, the hard drive has private communications and actions of plaintiff and his family that have nothing to do with the limited issue of plaintiff's employability. Notwithstanding any possible limiting orders regarding items copied from the hard drive to the clone, it would be improperly invasive to order this discovery. Accordingly, the court denies third-party defendant's request for disclosure of a hard drive clone.

In a typical personal injury lawsuit, the defendant may have authorizations to obtain copies of virtually all of the plaintiff's medical, school, employment and insurance records, and frequently other records (such as Social Security disability, no-fault pleadings from other cases). The defendant has the ability to have the plaintiff and her records and diagnostic films examined by handpicked "expert" medical specialists, and possibly a vocational rehabilitation expert. It is commonplace for defendants to retain liability experts, accident reconstruction experts, seat belt experts and biomechanical experts, and engage in surreptitious surveillance of the plaintiff. And there may be eyewitnesses, lay witnesses, police officers, ambulance and treating health care providers that can give pertinent testimony.

The defendant may testify, and make use of the plaintiff's prior sworn testimony, given in an Examination Before Trial, and sometimes an Examination Under Oath, and a Gen. Mun. Law 50-h hearing. Against this backdrop, a defendant is hard pressed to meet its heavy burden of proving that it also requires the personal and private emails of nonparty Facebook friends or it will allegedly suffer undue prejudice in defending the case, and that it is not unduly burdensome for Facebook to produce these records, and that the disclosure will not cause unreasonable annoyance, embarrassment or other prejudice to any person.

While not addressing the rightsof the nonparties whose records would be disclosed, the appellate courts have found the defendants' lesser burden of proving mere relevance lacking when attempting to obtain such records.

In *McCann v. Harleysville Ins. Co. of N.Y.*,[21] the court affirmed the denial of the defendant's request for production of an authorization to obtain records of a social network site.

Although defendant specified the type of evidence sought, it failed to establish a factual predicate with respect to the relevancy of the evidence (citation omitted). Indeed, defendant essentially sought permission to conduct "a fishing expedition" into plaintiff's Facebook account based on the mere hope of finding relevant evidence (citation omitted).

In *Abrams v. Pecile*,[22] the lower court was reversed for permitting discovery of plaintiff's social networking accounts, holding that no showing has been made that discovery of the information will

result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.

In *Kregg v. Maldonado*,[23] the lower court was reversed for permitting broad disclosure of social media accounts, and noted that a specific narrowly tailored discovery request seeking only that social-media-based information that relates to the claimed injuries arising from the accident may be requested. The Fourth Department also noted that there was no contention that the information in the social media accounts contradicts plaintiff's claims for the diminution of the injured party's enjoyment of life.

In *Patterson v. Turner Constr. Co.*,[24] the Appellate Division, First Department, reversed the lower court for ordering a plaintiff to furnish an authorization for all of plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived, and remanded the matter for a more specific determination.

Plaintiff claims damages for physical and psychological injuries, including the inability to work, anxiety, post traumatic stress disorder, and the loss of enjoyment of life. Although the motion court's in camera review established 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 bearing on the claims" (internal quotation marks and citation omitted), it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action (see *Offenback v. L.M. Bowman*, 2011 WL 2491371, *2, 2011 US Dist LEXIS 66432, *5-8 [MD Pa 2011]). Accordingly, we reverse and remand for a more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims.

In *Richards v. Hertz Corp.*,[25] the Second Department reviewed these cases and agreed with their holdings.

The Dunn defendants demonstrated that McCarthy's Facebook profile contained a photograph that was probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to that issue. Thus, with respect to McCarthy's Facebook profile, the Dunn defendants made a showing 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 bearing on her claim (see *Patterson v. Turner Constr. Co.*, 88 AD3d 617, 618; cf. *Abrams v. Pecile*, 83 AD3d 527, 528; *McCann v. Harleysville Ins. Co. of N.Y.*, 78 AD3d 1524, 1525). While the Supreme Court directed the injured plaintiffs to provide the Dunn defendants with copies of photographs depicting them participating in sporting activities, McCarthy's Facebook profile may also contain other items such as status reports, e-mails, and videos that are relevant to the extent of her alleged injuries. However, due to the likely presence in McCarthy's Facebook profile of material of a private nature that is not relevant to this action, the Supreme Court should conduct an in camera inspection of all status reports, e-mails, photographs, and videos posted on McCarthy's Facebook profile since the date of the subject accident to determine which of those materials, if any, are relevant to her alleged injuries (see *Patterson v. Turner Constr. Co.*, 88 AD3d at 618). Accordingly, we remit the matter to the Supreme Court, Kings County, to conduct such an in camera inspection, and thereafter for a new determination of that branch of the injured plaintiffs' cross motion which was for a protective order pursuant to CPLR 3103 striking so much of the demand for authorizations dated March 30, 2010, as related to McCarthy.

With respect to the contents of the Facebook profile of Jadeen Richards, however, the Dunn defendants failed to make a showing that the disclosure of such materials will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on her claim (see *Kregg v. Maldonado*, 98 AD3d 1289, 1290; *Abrams v. Pecile*, 83 AD3d at 528; *McCann v. Harleysville Ins. Co. of N.Y.*, 78 AD3d at 1525). Accordingly, the Supreme Court properly granted that branch of the injured plaintiffs' cross motion which was for a protective order striking so much of the demand dated March 30, 2010, as related to Richards.

Conclusion

When a party seeks to obtain social media records, it needs a good faith basis for the request and may not engage in an improper "fishing expedition"; a factual predicate must be established. Under the more stringent standards required to obtain discovery from a nonparty, it must establish more than mere relevance and materiality; it must prove that it requires the necessary disclosure, that it cannot obtain equivalent records elsewhere, that it has placed the nonparties ("friends") on notice that it seeks records, which specific records are being sought and why. The court may still find that the requesting party is not entitled to these nonparty records where the request is unduly burdensome or may cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person.

1. 18 U.S.C. 2702(a)(1).
2. 18 U.S.C. 1030 et seq.
3. 18 U.S.C. 2511(3)(a).
4. 18 U.S.C. 2701-2702 et seq.
5. 550 F.Supp.2d 606 (E.D. Va 2008).
6. 631 F.3d 266, 288 (6th Cir. 2011).
7. 45 M.J. 406, 417 (C.A.A.F. 1996).
8. 29 A.D.3d 104, 108-113 (1st Dept. 2006).
9. 29 A.D.3d at 108.
10. *Tannenbaumv. City of New York*, 30A.D.3d 357 (1st Dept. 2006)(special circumstances required to obtain nonparty disclosure); *Reich v Reich*, 36 A.D.3d 506 (1st Dept. 2007).
11. 29 A.D.3d at 109-110.
12. 74 A.D.3d 6 (2d Dept. 2010).
13. 74 A.D.3d at 10.
14. 74 A.D.3d at 11.
15. 74 A.D.3d at 17-18.
16. 74 A.D.3d at 13.
17. 80 A.D.3d 199 (3d Dept. 2010).
18. 80 A.D.3d at 201.
19. 80 A.D.3d at 202.
20. 19 Misc.3d 353, 356 (Sup. Queens 2008).
21. 78 A.D.3d 1524 (4th Dept. 2010).
22. 83 A.D.3d 527 (1st Dept. 2011).
23. __A.D.3d ___, 2012 NY Slip Op 06454 (4th Dept. 2012).
24. 88 A.D.3d 617-618 (1st Dept. 2011).
25. ___A.D.3d ___, 2012 NY Slip Op 07650 (2d Dept. Nov. 14, 2012).