

# The NY Court of Appeals Holds Social Media Discovery “Material and Necessary”

March 8, 2018

Blog Post

On a motion to compel that remarkably made its way all the way to the Court of Appeals, New York’s high court holds that even materials deemed “private” by a Facebook user are subject to discovery, if relevant.

*Forman v. Henkin*, 2018 NY Slip Op. 01015 (Feb. 13, 2018), involved a personal injury where the plaintiff alleged severe harm, such as cognitive and memory defects, including trouble using a computer. After the plaintiff admitted at deposition to maintaining a Facebook account that she posted to frequently, but not as often since her injury, Defendant demanded the entire “private” portion of her account. Plaintiff refused, and a motion to compel ensued.

The Supreme Court issued an order allowing disclosure of all pre-accident photographs that the plaintiff intended to use at trial, all post-accident photos from the “private” portion of her Facebook account, and social media records displaying each time she posted a private message, with the number of characters and words in the message. Plaintiff appealed to the Appellate Division, First Department, which limited disclosure to photos that plaintiff intended to introduce at trial, and eliminated the defendant’s ability to obtain data relating to post-accident messages. A trip to the Court of Appeals followed.

At the outset, the Court of Appeals emphasized that CPLR 3101(a) provides: “There shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof.” Emphasizing its prior holdings that the words “material and necessary” must be interpreted liberally to allow disclosure, the high court found “nothing so novel about Facebook materials that precludes application of New York’s long-standing disclosure rules.”

The Court of Appeals held that the Appellate Division erred by employing a heightened (but precisely unclear) standard that took into account the public and private designations of material. It reasoned that such a rule would allow litigants to obstruct discovery unilaterally by manipulating privacy settings, or curating materials on the public portion of the site. Going back to basic principles, the Court of Appeals held that courts must consider the nature of litigation and injury claimed, and when true privacy concerns are at issue, implement a tailored order with relevancy in the balance.