

Forman v Henkin

2020 NY Slip Op 30239(U)

January 6, 2020

Supreme Court, New York County

Docket Number: 113059/2011

Judge: George J. Silver

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

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KELLY FORMAN

Index No.:113059/2011

-against-

Hon. GEORGE J. SILVER

MARK HENKIN

Justice Supreme Court

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ORDER

In the above-captioned action, plaintiff KELLY FORMAN ("plaintiff") is suing for injuries allegedly sustained following a fall from defendant MARK HENKIN's ("defendant") horse. During the pendency of discovery, defendant moved to compel plaintiff to provide authorizations to obtain records of her private Facebook postings and loans she has received to be repaid from this action's proceeds.¹ By an order dated February 28, 2014, the Hon. Lucy Billings ordered that plaintiff provide to defendant the following:

1. all photographs of her privately posted on Facebook before her injury claimed in this action that she intends to introduce at trial;
2. all photographs of her privately posted on Facebook after her injury that do not show nudity or romantic encounters; and
3. authorizations to obtain records from Facebook, including archived or deleted records, showing each time plaintiff posted a private message and the number of characters or words in the text of each private message, since her injury.

(*Forman v. Henkin*, 2014 N.Y. Slip Op. 30679[U][Trial Order][New York Cnty][Feb. 28 2014]).

Plaintiff appealed that directive to the Appellate Division, First Department. On appeal, the Appellate Division, First Department, modified Justice Billings' order by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial, and eliminating the authorization permitting defendant to obtain data relating to post-accident messages (*Forman v. Henkin*, 134 AD 529 [1st Dept 2015]). Two Justices dissented, concluding that defendant was entitled to broader access to plaintiff's Facebook account (*id.*). The Appellate Division, First Department, subsequently granted leave to appeal to the Court of Appeals. That appeal culminated in the Court of Appeal's decision in *Forman v. Henkin*, 30 NY3d 656 (2018), wherein the Appellate Division, First Department's decision was reversed, and Justice Billings' original order was reinstated.

¹
The latter request is not relevant to the instant order.

The matter was then remanded back to this court. At a conference held on June 17, 2019, I instructed the parties to work together with counsel for Facebook to obtain plaintiff's records for *in camera* inspection to ensure compliance with the limitations set forth in Justice Billings' order. Following that conference, the parties had difficulty facilitating disclosure due to plaintiff's purported troubles accessing her Facebook account. Defendant's counsel then articulated a desire to have a third-party expert present once plaintiff regained access to her account to ensure that none of the contents had been altered. Subsequently, when the parties presented for another conference on July 15, 2019, it was relayed to the court that plaintiff had regained access to her account, and had downloaded the contents of her account with her counsel present, but not defendant's counsel or the requested third-party expert. Plaintiff's counsel subsequently forwarded the contents of plaintiff's downloaded account information to the court, with defendant's counsel present, following the initial calendar call on July 15, 2019. Those are the contents that the court examined to issue its present finding.

DISCUSSION

CPLR §3101(a)(1) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" in this statute "must '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'" (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Here, the Court of Appeals found that "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" (*Forman*, 30 NY3d at 666, *supra*). Moreover, the Court of Appeals observed that Justice Billings' order as a whole 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" (*id.* at 667). Finally, the Court of Appeals notably mentioned that "the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and [the] 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" (*id.*).

Having reviewed the content of Judge Billings' order in the wake of Court of Appeal's holding to ensure compliance with the directives therefrom, this court finds that the entirety of plaintiff's Facebook account disclosed to the court is discoverable. Illustratively, within the contents divulged are lists of friends plaintiff confirmed on Facebook after the accident, a post that plaintiff "liked" on July 9, 2012, and a message chain with an individual between July 23, 2012 and July 24, 2012. Such interactions go to the heart of Justice Billings' directive that plaintiff disclose private messages on her Facebook account that reveal whether plaintiff was unable to compose messages after her accident.² Moreover, the contents that were submitted to the court do not contain photographs showing nudity or romantic encounters. As such,

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Plaintiff testified at her deposition that since her injury she has been unable to compose emails and text messages.

the court finds that entirety of plaintiff's Facebook account disclosed to the court for *in camera* inspection must be divulged to defendant forthwith. Accordingly, it is hereby

ORDERED that defendant is directed to serve a copy of this order, with notice of entry, upon plaintiff and the Clerk of Court no later than February 3, 2020; and it is further

ORDERED that plaintiff is directed to disclose to defendant the entirety of the content of plaintiff's Facebook account submitted to the court for *in camera* inspection no later than March 16, 2020; and it is further

ORDERED that the parties are directed to appear in Part 40, Room 422, of the courthouse located at 60 Centre Street on January 13, 2020 to set a trial date; and it is further

ORDERED that defendant's pending Orders to Show Cause are hereby deemed moot.

This constitutes the order of the court.

Dated: 1-6-20

Hon. George J. Silver
GEORGE J. SILVER, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT