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Romano v Steelcase Inc.
2010 NY Slip Op 20388
Decided on September 21, 2010
Supreme Court, Suffolk County
Spinner, J.
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Decided on September 21, 2010

Supreme Court, Suffolk County

Kathleen Romano, Plaintiff,

against

Steelcase Inc. and EDUCATIONAL & INSTITUTIONAL COOPERATIVE SERVICES INC., Defendants.

2006-2233

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Jeffrey Arlen Spinner, J.

ORDERED, that Defendant STEELCASE's motion is hereby granted as set forth herein below.

Defendant STEELCASE moves this Court for an Order granting said Defendant access to Plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information upon the grounds that Plaintiff has placed certain information on these social networking sites which are believed to be inconsistent with her claims in this action concerning the extent and nature of her injuries, especially her claims for loss of enjoyment of life.

The present application was brought on by Order to Show Cause. The Court has reviewed the submissions both in favor of and in opposition to the relief sought, as well as the applicable federal statutory law, specifically the Stored [*2]Communications Act, 18 U.S.C. ¶ 2701 *et seq.*, which prohibits an entity, such as Facebook and MySpace from disclosing such information without the consent of the owner of the account (*see*, 18 U.S.C. ¶ 2702(b)(3); ***Flagg v City of***

Detroit, 252 FRD 352 [ED Mich 2008]).

SCOPE OF PERMISSIBLE DISCOVERY

Pursuant to CPLR 3101, there shall be full disclosure of all non-privileged matter which is material and necessary to the defense or prosecution of an action. To this end, trial courts have broad discretion in the supervision of discovery, and in determining what is "material and necessary" (*see:* ***Allen v Crowell-Collier Pub Co***, 21 NY2d 403 [1968]; ***Andon v 302-304 Mott Street Assocs***, 94 NY2d 740 [2000]; ***Cabellero v City of New York***, 48 AD3d 727 (2 Dept 2008). Within the context of discovery, "necessary" has been interpreted as meaning "needful and not indispensable" (*see:* ***Allen*** at 407, 453). The "material and necessary"standard is to be interpreted liberally requiring disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*see:* ***Allen***, *supra ;* ***Andon***, *supra ;* ***Hoening v Westphal***, 52 NY2d 605 [1981] (pre-trial discovery is to be encouraged, limited only by the test of materiality of "usefulness and reason")).

Each discovery request is to be decided on a case-by-case basis keeping in mind the strong public policy in favor of open disclosure (*see:* ***Andon*** at 747, 878). If the information sought is sufficiently related to the issues in litigation so as to make the effort to obtain it in preparation for trial reasonable, then discovery should be permitted (*see:* ***Allen*** at 406-407, 452; ***In re Beryl***, 118 AD2d 705 [2 Dept 1986]). It is immaterial that the information sought may not be admissible at trial as "pretrial discovery extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof" (*see:* ***Twenty Four Hour Fuel Oil Corp v Hunter Ambulance Inc***, 226 AD2d 175 [1 Dept 1996]; ***Polygram Holding Inc v Cafaro***, 42 AD3d 339 [1 Dept 2007] (disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof including materials which may be used in cross-examination")).

INFORMATION SOUGHT FROM INTERNET SITES

Plaintiffs who place their physical condition in controversy, may not shield from disclosure material which is necessary to the defense of the action (*see:* ***Hoening v Westphal***, *supra*). Accordingly, in an action seeking damages for personal injuries, discovery is generally permitted

with respect to materials that may be relevant both to the issue of damages and the extent of a plaintiff's injury (*see:* ***Walker v City of New York***, 205 AD2d 755 [2 Dept 1994]) including a plaintiff's claim for loss of enjoyment of life (*see:* ***Orlando v Richmond Precast Inc***, 53 AD3d 534 [2 Dept 2008] (in an action to recover damages for personal injuries, records sought were material and necessary to the defense regarding plaintiff's claim of loss of enjoyment of life); ***Vanalst v City of New York***, 276 AD2d 789 [2 Dept 2000); ***Mora v St Vincent's Catholic Med Ctr***, 8 Misc 3d 868 [Sup Ct NY Co 2005).

Thus, in ***Sgambelluri v Recinos***, 192 Misc 2d 777 (Sup Ct Nassau Co 2002), an action arising out of a motor vehicle accident, the court held that plaintiff's wedding video taken two years after the incident was clearly relevant to the claim of permanency of injuries. As a result of the accident, plaintiff alleged that she sustained permanent injuries to her neck and back, and testified at her deposition that she can no longer participate in certain activities such as running or horseback riding. Defendant sought a copy of her wedding video on the basis that it might have shown plaintiff in various activities such as dancing, which would be relevant to the claims. Plaintiff objected on the basis of the personal nature of the video. The court decided in favor of disclosure noting its relevancy to the claim of permanency of injuries. In so finding, the court reasoned that although the video is not a surveillance tape, as contemplated by CPLR § 3101(i), its :

> [L]anguage is broad enough to encompass any film, photograph or videotape... involving a person referred to in paragraph one of subdivision (a), i.e., a party. This is consistent with the general policy of New York courts allowing liberal disclosure. Moreover, the 1993 addition of subdivision (i) only strengthens the argument for open disclosure. *Id.* at 779, 332 [*3](*internal quotations omitted*).

Like the plaintiff in ***Sgambelluri***, Plaintiff herein also claims she sustained permanent injuries as a result of the incident and that she can no longer participate in certain activities or that these injuries have effected her enjoyment of life. However, contrary to Plaintiff's claims, Steelcase contends that a review of the public portions of Plaintiff's MySpace and Facebook pages reveals that she has an active lifestyle and has traveled to Florida and Pennsylvania during the time period she claims that her injuries prohibited such activity. In light of this, Defendant sought to question Plaintiff at her deposition regarding her MySpace and Facebook accounts, to no avail and following those depositions, served Plaintiff with a Notice for Discovery & Inspection requesting, *inter alia*, "authorizations to obtain full access to and copies of Plaintiff's current and

historical records/information on her Facebook and MySpace accounts." Plaintiff has refused to provide the requested authorizations.

Both Facebook and MySpace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking. Indeed, Facebook policy states that "it helps you share information with your friends and people around you," and that "Facebook is about sharing information with others."[FN1] Likewise, MySpace is a "social networking service that allows Members to create unique personal profiles online in order to find and communicate with old and news friends;" and, is self-described as an "online community" where "you can share photos, journals and interests with your growing network of mutual friends,"[FN2] and, as a "global lifestyle portal that reaches millions of people around the world."[FN3] Both sites allow the user to set privacy levels to control with whom they share their information.

The information sought by Defendant regarding Plaintiff's Facebook and MySpace accounts is both material and necessary to the defense of this action and/or could lead to admissible evidence. In this regard, it appears that Plaintiff's public profile page on Facebook shows her smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed. In light of the fact that the public portions of Plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action. Preventing Defendant from accessing to Plaintiff's private postings on Facebook and MySpace would be in [*4]direct contravention to the liberal disclosure policy in New York State.

Although there is no New York case law directly addressing the issues raised by this application, there are instructive cases from other jurisdictions. Recently, in ***Ledbetter v Wal-Mart Stores Inc***, (06-cv-01958-WYD-MJW [D Colo April 21, 2009]), defendant store sought, via subpoena, production of the content of plaintiffs' social networking sites.[FN4] Information contained on the public access areas contradicted plaintiffs allegations regarding the effect of their injuries on their daily lives. When the networking sites refused to provide the information absent plaintiffs' consent or request, defendant moved to compel production and plaintiffs moved for a protective order. Both plaintiffs had claimed physical and psychological injuries as a result of the accident which gave rise to lawsuit. By Order dated April 21, 2009, Magistrate Judge Watnabe denied plaintiffs' motion and held that the information sought by the subpoenas was "reasonably calculated to lead to the discovery of admissible evidence and is relevant to the issues in the case."

Likewise, in ***Leduc v Roman***, 2009 CarswellOnt 843 (February 20, 2009), a matter pending in the Superior Court of Justice, Ontario, Canada, defendant also requested production of the plaintiff's Facebook pages, including, private pages. Plaintiff claimed that as a result of injuries allegedly sustained in a car accident, his enjoyment for life had lessened. Canadian law requires that each party disclose every document relating to any matter in the action over which he has possession or control absent a claim of privilege. Plaintiff had failed to disclose the information which defendant only learned about following a defense psychiatric examination. After only being able to access the limited portions of plaintiff's public profile page, defendant sought an order requiring production of all site materials as well as preservation of the materials. The decision denying the request was reversed on appeal, with the appellate court disagreeing that defendant was on a fishing expedition. In this regard, Judge Brown noted that it was "beyond controversy" that a person's Facebook pages may contain relevant documents (at ¶ 23); that other Canadian cases had permitted into evidence photographs posted on a person's Facebook page showing them engaged in activities despite their claim to the contrary; and, it is reasonable to infer from the social networking purpose of Facebook, that even if a person only maintains a private profile with the public profile merely listing their name, that relevant information exists on their limited-access private pages (at ¶ 36). In deciding to permit the examination into the private Facebook profile, the court set forth:

> To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.

(see also: ***Kent v Laverdiere***, 2009 CanLII 16741 (ON S.C., April 14, 2009) (as plaintiff asserted that accident disfigured her and lessened her enjoyment of life, any photos on Facebook or [*5] MySpace showing her in healthy state, enjoying life, would be relevant); ***Bishop v Minichiello***, 2009 BCSC 358 (CanLII, April 7, 2009) (defendant's motion for production of plaintiff's computer's hardrive so it could analyze how much time plaintiff spent on Facebook granted as the information sought was relevant to the issues in the case); ***Goodridge v King***, 2007 CanLII 51161 (ON S.C. October 30, 2007)(in action in which plaintiff claimed various injuries including loss of enjoyment of life and disfigurement following a car accident, photos posted by plaintiff on her Facebook account was evidence to the contrary, showing her socializing and dating); ***Kourtesis v Horis***, 2007 CanLII 39367 (ON S.C. September 24, 2007) (in proceeding concerning costs, court noted that during trial, Facebook photos of plaintiff were important element of case; apparently plaintiff testified that she no longer had a social life because of her injuries, yet the photographs taken after the accident, showed her at a party)[FN5].

Thus, it is reasonable to infer from the limited postings on Plaintiff's public Facebook and MySpace profile pages, that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence. To deny Defendant an opportunity access to these sites not only would go against the liberal discovery policies of New York favoring pre-trial disclosure, but would condone Plaintiff's attempt to hide relevant information behind self-regulated privacy settings.

PLAINTIFF'S PRIVACY CONCERNS

Production of Plaintiff's entries on her Facebook and MySpace accounts would not be violative of her right to privacy [FN6], and any such concerns are outweighed by Defendant's need for the information.

The Fourth Amendment's right to privacy, protects people, not places (*see:* ***Katz v United States***, 389 US 347 [1967]) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.") In determining whether a right to privacy exists via the Fourth Amendment, courts apply the reasonableness standard set forth in the concurring opinion of Justice Harlan in ***Katz***: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." *Id.* at 361, 516 (Harlan, J. concurring) (internal quotations omitted).

New York courts have yet to address whether there exists a right to privacy regarding what one posts on their on-line social networking pages such as Facebook and MySpace. However, [*6] whether one has a reasonable expectation of privacy in internet postings or e-mails that have reached their recipients has been addressed by the Second Circuit, which has held that individuals may not enjoy such an expectation of privacy (*see:* ***US v Lifshitz***, 369 F3d 173, 2004 U.S. App. LEXIS 9071 [2 Cir 2004) citing ***Guest v Leis***, 255 F3d 325 [6 Cir 2001]):

> Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting. They would lose a legitimate expectation of privacy in an e-mail that had already reached its recipient; at this moment, the e-mailer would be analogous to a letter-writer whose expectation of privacy ordinarily terminates upon delivery of the letter."

Likewise, whether one has a reasonable expectation of privacy in e-mails and other writings that have been shared with others, including entries on Facebook and MySpace, has been addressed by the United States District Court of New Jersey, which ordered such entries produced in ***Beye v***

Horizon Blue Cross Blue Shield of New Jersey, 06-5337 (D NJ December 14, 2007). In this regard, the court stated that "[t]he privacy concerns are far less where the beneficiary herself chose to disclose the information." As to the entries which had not been shared with others, they were to be preserved. At issue in ***Beye***, were on-line journals and diary entries of minor children who had been denied health care benefits for their eating disorders (*see also:* ***Moreno v Hanford Sentinel Inc***, 2009 Cal App. LEXIS [Ct App. 5 Dist 2009) (no person would have reasonable expectation of privacy where person took affirmative act of posting own writing on MySpace, making it available to anyone with a computer and opening it up to public eye); ***Dexter v Dexter***, 2007 Ohio App LEXIS 2388 (Ohio Ct App Portage Co 2007) (no reasonable expectation of privacy regarding MySpace writings open to public view).

Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy. In this regard, MySpace warns users not to forget that their profiles and MySpace forums are public spaces [FN7], and Facebook's privacy policy set forth, *inter alia*, that:

> You post User Content . . . on the Site at your own risk. Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable.

Further that:

> When you use Facebook, certain information you post or share with third parties (e. g., a friend or someone in your network), such as personal information, comments, messages, photos, videos . . . may be shared with others in accordance with the privacy settings you select. All such sharing of information is done at your own risk. Please keep in mind that if [*7]you disclose personal information in you profile or when posting comments, messages, photos, videos, Marketplace listing or other items, this information may become publicly available.[FN8]

Thus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, "[i]n

this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."[FN9]

Further, Defendant's need for access to the information outweighs any privacy concerns that may be voiced by Plaintiff. Defendant has attempted to obtain the sought after information via other means e.g., via deposition and notice for discovery, however, these have proven to be inadequate since counsel has thwarted Defendant's attempt to question Plaintiff in this regard or to obtain authorizations from Plaintiff for the release of this information. The materials including photographs contained on these sites may be relevant to the issue of damages and may disprove Plaintiff's claims. Without access to these sites, Defendant will be at a distinct disadvantage in defending this action.

ORDERED, that Defendant STEELCASE's motion for an Order granting said Defendant access to Plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information, is hereby granted in all respects; and it is further

ORDERED, that, within 30 days from the date of service of a copy of this Order, as directed herein below, Plaintiff shall deliver to Counsel for Defendant STEELCASE a properly executed consent and authorization as may be required by the operators of Facebook and MySpace, permitting said Defendant to gain access to Plaintiff's Facebook and MySpace records, including any records previously deleted or archived by said operators; and it is further.

ORDERED, that Counsel for the moving party herein is hereby directed to serve a copy of this order, with Notice of Entry, upon Counsel for all the remaining parties and Non-Party FACEBOOK, within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

[*8]Dated:Riverhead, New York

September 21, 2010

HON. JEFFREY ARLEN SPINNER, JSC

Footnotes

Footnote 1: Facebook Principles-http:www.facebook.com/policy.php (last visited April 3, 2009).

Footnote 2: About Us-MySpace.com/index.dfm?fuseaction=misc.aboutus (last visited June 16, 2009).

Footnote 3: MySpace Safety Highlights-http://www.myspace.com/index.cfm?frseaction=cms. veiwpage & placement=safety (last visited June 18, 2009).

Footnote 4: Facebook, MySpace and Meetup.com

Footnote 5: See, Charles Foster, *Uncovering the Truth:Social Networks are a Treasure Trove of Information*, Claims Canada, October/November 2008, http:www.claimscanada.ca. (last viewed June 18, 2009).

Footnote 6: In New York, there is no common law right to privacy. *See, Cordero v. NYP Holdings, Inc.*, 20 Misc 3d 1108A, 866 NYS2d 90 (Sup. Ct. NY Co. 2008).

Footnote 7: MySpace General Tips-http://www.myspace.com/index.cfm?frseaction=cms. veiwpage & placement=safety_pagetips (last visited June 18, 2009).

Footnote 8: Facebook Principles-effective as November 26, 2008-http://www.facebook.com/ policy.php. last viewed June 18, 2009.

Footnote 9: Dana L. Flemming and Josheph M. Herlihy, *Department: Heads Up: What Happens When the College Rumor Mill Goes OnLine? Privacy, Defamation and Online Social Networking Sites*, 53 B.B.J. 16 (January/February, 2009).

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