

2018 WL 2282883 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
New York County

Kemario CHRISTIAN, Plaintiff,

v.

846 6TH AVENUE PROPERTY OWNER, LLC, 846 6th Avenue Venture,
LLC, Alchemy 6th Avenue LLC, Leeding Builders Group LLC, Defendants.

No. 157553/2017.

May 18, 2018.

Decision and Order

Present: Hon. [Kathryn E. Freed](#), Justice.

MOTION SEQ. NO. 001

*1 The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30 were read on this motion to/for *DISCOVERY*.

In this personal injury action under the Labor Law, defendants move, as limited by the compliance conference order of April 26, 2018 (Doc. No. 32), for access to the private portions of plaintiff's Facebook account. Plaintiff opposes to that extent. For the reasons that follow, the motion is granted, in part.

The resolution of this motion is governed by the recently-decided case of [Forman v Henkin](#) (30 NY3d 656 [2018]). Although the decision was handed down on February 13, 2018, while this motion was already pending, plaintiff's opposition was filed on March 6, 2018, giving him more than enough opportunity to find the decision and contemplate its impact on these issues. Furthermore, during the parties' last compliance conference on April 26, 2018, this Court's staff inquired whether additional briefing was necessary in light of the decision. Both parties answered in the negative and permitted this branch of the motion to be submitted without an objection as to the extent of the briefing. Thus, this Court finds it appropriate to turn to the merits.

The Court of Appeals has rejected an approach concerning social media that requires the party seeking disclosure to make a threshold showing that information contained in the public portion of an individual's account contains relevant information before access to the private portion may be granted. ([Forman v Henkin](#), 30 NY3d at 664.) The Court counseled that, when faced with disclosure demands concerning social media, "courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account." (*Id.* at 665.) Next, "balancing the potential utility of the information sought against any specific 'privacy' or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials." (*Id.*; see e.g. [Doe v Bronx Prep. Charter Sch.](#), ___ AD3d ___, 2018 NY Slip Op 02893 [1st Dept 2018]; [Paul v Witkoff Group](#), 2018 WL 1697285 [Sup Ct, NY County 2018].)

Here, the accident is alleged to have occurred on January 12, 2017. (Doc. No. 17.) Plaintiff, who is currently 32 years old, contends in the bill of particulars that he sustained injuries to his cervical, thoracic, and lumbar spine as well as

both shoulders. (*Id.*) He also claims that he is “incapacitated from his employment from the date of the accident to the present time” and that he is “presently partially disabled.” (*Id.*)

Despite these representations, defendants submit several photographs of plaintiff that they recovered from the public section of his Facebook account. In the first photograph, which was posted to Facebook on October 19, 2017, plaintiff is standing upright with a hardhat on his head, and is tying a strap around a stack of objects. (Doc. No. 21.) In the next photo, which was posted on “January 12” but does not specify the year, plaintiff is reaching up and holding the edge of a basketball hoop, looking into the camera. (*Id.*) Finally, the last photograph was posted to Facebook on January 26, 2017, and shows plaintiff posing for the camera with a child who appears to be his son, and is captioned “always there for you.”

*2 Assuming that the photographs were taken about when they were posted, they tend to belie plaintiff's claim that he is presently partially disabled and unable to work. For this reason, there is a basis to believe that additional relevant photographs are to be found on whatever portion of plaintiff's Facebook account he may have made private. While defendants did not have to make a predicate showing with respect to public portions of the account, they have nevertheless done so.

Contrary to defendants' Opposition, nothing in *Forman v Henkin* indicates that a party must wait until after a deposition before demanding disclosure of the private portions of an individual's social media account. Indeed, such a rule has the potential to needlessly delay disclosure of relevant information. Furthermore, since defendants have provided this Court with examples of plaintiff's Facebook posts showing that he uses it to share information about his activities with friends and family, there is already a basis to determine that additional relevant information may be found in the private section.

Accordingly, it is hereby

ORDERED that the motion is granted to the extent that, within 30 days from the date of service of a copy of this order with notice of entry, plaintiff is directed to turn over printouts of Facebook posts as well as the original photographs or videos for six months prior to the date of the accident that show him engaged in any work or social activities that he claims he is now unable to perform, as well as all posts from the date of the accident to present that tend to contradict his claim that he presently is unable to work and that he is partially disabled, excluding any images showing nudity or romantic encounters, and the motion is in all other respects denied.

5/16/2018

DATE

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KATHRYN E. FREED, J.S.C.