2019 WL 132527 (N.Y.Sup.), 2019 N.Y. Slip Op. 30070(U) (Trial Order)
Supreme Court of New York.
New York County

**1 Deborah H. ISRAELI and Avi Israeli, Plaintiffs,
v.
David P. RAPPAPORT, M.D., Facs, Defendant.

No. 805309/15.
January 8, 2019.

Trial Order

Joan A. Madden, J.

*1 Defendant moves for an order precluding plaintiffs from offering certain evidence at trial based on their failure to provide discovery or, in the alternative, compelling plaintiffs to produce discovery including plaintiffs' private Facebook and other social media account records. [1] Plaintiffs oppose the motion and cross move for various relief, including a protective order with regard to defendant's demands for their social media accounts, arguing that the demands are overly broad.

Background

This medical malpractice action arises out of allegations that defendant negligently performed a breast implant procedure on plaintiff Deborah Israeli on February 20, 2015. The supplemental bill of particulars dated September 5, 2018, alleges that Ms. Israeli suffered permanent injuries, including nerve damage, irregular breast size, deformity of breasts, decreased **2 range of motion, tingling/radiating pain down her neck and back, muscle damage, torn tendons and ligaments across the chest and armpit, inability to lift 10-15 lbs., mental anguish, and loss of confidence. With respect to Ms. Israeli's husband plaintiff Avi Israeli, plaintiffs assert claims for loss of services, including *inter alia*, loss of Ms. Israeli's care, affection, and companionship.

By compliance conference order dated May 25, 2017, plaintiffs were directed to respond to, *inter alia*, defendant's May 16, 2017 demand for social networking information. Plaintiffs provided defendant with authorizations signed by Ms. Israeli on September 2, 2017, for "social networking information/photos" for Linkedin, Instagram, MySpace, Facebook, and Twitter. By letter dated December 4, 2017, defense counsel wrote to plaintiffs' counsel that the authorizations for these social media accounts (with the exception of Twitter) were rejected as they were not originals and Ms. Israeli failed to initial section 9(a) of the form, and that Linkedin responded that it requires account holders to request their own information. By letter dated December 18, 2017, defense counsel informed plaintiffs' counsel that Facebook also rejected the authorization on the ground that account holders were required to release their own information.

Defense counsel sent letters to plaintiffs' counsel dated February 9, 2018, March 9, 2018, April 27, 2018, seeking social media information. By letter dated May 8, 2018, plaintiffs responded that they had provided authorizations for the requested social media accounts, and that Ms. Israeli is not a member of a Linkedin and therefore does not have any data from the site. In his letter dated May 15, 2018, defense counsel reiterated that as stated in his letter dated December 18, 2017, Facebook does not accept authorizations and requires the account holder to provide the information and therefore

plaintiffs should be directed "to download their Facebook account, including any and all photographs, postings, etc and provide same to our office."

***2** ****3** When plaintiffs did not provide the requested information, defendant made the instant motion, arguing that he is entitled to this discovery based on the Court of Appeals decision in *Forman v. Henkin*, 30 NY3d 656 (2018), which held that social media materials are subject to the same policies of broad disclosure as other materials.

Plaintiffs oppose the motion and cross move for a protective order, noting that in *Forman v. Henkin*, the Court of Appeals found that the commencement of a personal injury action did not make the entirety of a plaintiff's Facebook or other social media accounts discoverable. Plaintiffs further argue that as per the holding in *Forman v. Henkin*, discovery of social media information should be narrowly tailored and take into account plaintiffs' privacy concerns, and that in camera inspection may be appropriate for certain of the materials sought.

In defense counsel's letter dated September 21, 2018, [2] defendant clarifies that it is seeking an order directing plaintiffs to provide him "with a copy of [their] private Facebook account content and records, limited to all photographs, pictures, videos and other 'postings' such as status updates that Ms. and/or Mr. Israeli uploaded or 'shared' to their Facebook accounts or were 'tagged' in, as well as other private Facebook messages between the plaintiffs, ...from 2012 (three years before the malpractice) to the present." [3] At the court conferences held on October 25, 2018, defense counsel agreed that the time period would be limited to one year before the alleged malpractice, that is from February 2014 to the present.

In further support of his motion, defendant attaches copies of photographs that defense ****4** counsel found on plaintiffs' public Facebook account, including photographs which defendant argues call into question the permanent nature of Ms. Israeli's injuries and contradicts Mr. Israeli's claims of loss of services, companionship and affection of his wife. Defendant asserts that based on the relevancy of the content of plaintiffs' public Facebook accounts, "there is a reasonable likelihood that the private portions of plaintiffs' Facebook accounts may contain further evidence such as information regarding Ms. Israeli's pre and post surgical activities and limitations, the permanency of her injuries, her loss of confidence claim, and/or Mr. Israeli's claims for loss of services and companionship, all of which are material and relevant to the defense of this action." [4]

***3** In response, in their supplemental letter dated October 4, 2018, plaintiffs assert that the materials on their private Facebook accounts are not relevant including to Mr. Israeli's claim for loss of services, as photographs on a Facebook account "cannot accurately depict the affection, companionship, or state of [plaintiffs'] marital relationship," and note that there is no claim that ****5** Mr. Israeli does not love his wife but, rather, that Ms. Israeli is "permanently injured, deformed, suffering from pain and mental anguish due to the loss of her breasts ...[and this] cannot be portrayed in a photograph of a party." Plaintiffs also argue that their claims as to Ms. Israeli's physical and emotional injuries can be assessed through medical records and deposition testimony.

Discussion

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial." *Roman Catholic Church of Good Shepherd v. Tempco Systems*, 202 AD2d 257, 258 (1st Dept 1994). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings." *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 408 (1968). That said, however, "unlimited disclosure is not permitted" *(Harris v. Pathmark, Inc.*, 48 AD3d 631, 632 [2d Dept 2008]), and "under ... discovery statutes and case law, ... the need for discovery must be weighed against any special burden to be

bourne by the opposing party." *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 (1998)(citations omitted).

In *Forman v. Henkin*, the Court of Appeals held that these principles governing disclosure apply "in the context of a dispute over disclosure of social media materials," and thus found that the Appellate Division "erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account." 30 NY3d at 663-664. At the same time, the court "rejected the notion that ****6** commencement of a personal injury action renders a party's entire Facebook account automatically discoverable." Id at 664-665 (citations omitted).

With respect to the appropriate method for addressing disputes regarding discovery of social media information, the court wrote that:

> 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. Second, 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. In a personal injury case ... it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate--for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (see CPLR 3103[a]).

Id. at 665.

In applying these principles here, it should be considered that this action involves a allegations that as a result of defendant's negligence in performing a breast implant procedure, Ms. Israeli suffered permanent physical injuries, including nerve damage and injuries which affected her ability to lift, decreased range of motion, as well as emotional injuries, and that her husband is seeking to recover for loss of Ms. Israeli's care, affection, and companionship.

***4** In light of these allegations and the nature of the action, the court finds that defendant is entitled to discovery of plaintiffs' private Facebook accounts from date of the alleged malpractice to date, limited to all photographs, pictures, videos and other "postings" such as status updates ****7** that Ms. and/or Mr. Israeli uploaded or "shared" to their Facebook accounts or were "tagged" which depict or illustrate (i) Ms. Israeli's physical activities and abilities which relate to her asserted injuries, including her claim of limited range of motion, injuries to her neck, back and chest area, and her inability to lift heavy objects, and (ii) Ms. Israeli's relationship or interactions with Mr. Israeli, as such discovery is reasonably calculated to yield evidence relevant to plaintiffs' allegations of physical injuries and loss of services and companionship. That said, however, as to those Facebook materials within the above categories that relate to communications between the plaintiffs which were not shared or made available to any third party, or any photographs depicting nudity or romantic encounters, plaintiffs shall produce these materials to the court for *in camera* inspection so it can be determined if the usefulness of such information is outweighed by any privacy concerns. *See Forman v. Henkin*, 30 NY3d at 665 (upholding the trial court's exercise of "its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy").

Next, the court finds that the utility of Facebook materials as a measure of mental or emotional anguish is not sufficiently useful to require plaintiffs to release private Facebook materials showing photographs of Ms. Israeli's demeanor and social interactions. *Id.* ("the potential utility of the information sought [must be balanced] against any specific 'privacy' or other concerns raised by the account holder") *See generally Doe v. The Bronx Preparatory Charter School*. 160 AD3d 591 (1st Dept 2018)(finding that it was within the trial court's discretion in personal injury action against school to limit disclosure of plaintiff's social media and cell phone history to a period of two months before the date when the plaintiff was allegedly attacked on the school premises).

****8** As for photographs and other postings made by plaintiffs before the alleged malpractice, defendant fails to provide a particularized basis for, or the relevance of, this request. Under these circumstances, the court finds that the probative value of such postings is outweighed by the potential invasion of privacy, unless plaintiffs intends to introduce such photographs or other postings from their Facebook accounts at trial, in which case defendant would be entitled to such material. *See* *Forman v. Henkin*, 2014 WL 1162201, *2 (Sup Ct NY Co. 2014), *aff'd as modified* 134 AD3d 529 (1st Dept 2015), *reinstated* 30 NY3d 656 (finding that photographs of personal injury plaintiff posted on Facebook prior to the subject accident were of "little probative value" and would not be required to be produced unless plaintiff intended to introduce the photographs at trial). Such determination is without prejudice to renewal of any request for such information in the event that further discovery indicates that the potential relevance of such information outweighs the privacy concerns arising from its production.

Conclusion

In view of the above, it is

ORDERED that with the exception of those materials which are subject to a protective order as specified below, defendant's motion is granted to the extent of directing that within 15 days of efiling this order, plaintiffs shall provide to defendant from their private Facebook accounts from date of the alleged malpractice to date, all photographs, pictures, videos and other "postings" such as status updates that plaintiffs uploaded or "shared" to their Facebook accounts or were "tagged" which depict or illustrate (I) Ms. Israeli's physical activities and abilities which relate to her asserted injuries, including her claim of limited range of motion, injuries to her neck, back and chest area, and her inability to lift heavy objects, and (ii) Ms. Israeli's relationship or ****9** interactions with Mr. Israeli; and it is further

ORDERED that plaintiffs' cross motion for a protective order is granted to the extent that (I) the materials to be provided from plaintiffs' private Facebook accounts is limited to that set forth in the immediately preceding paragraph, (ii) plaintiffs are not required to provide any materials from their private Facebook accounts preceding the date of the alleged medical malpractice, and (iii) any Facebook materials directed to be produced in the immediately preceding paragraph that involve communications between plaintiffs which were not shared or made available to any third party, or any photographs depicting nudity or romantic encounters, shall be provided to the court for *in camera* inspection within 20 days of efiling of this order; and it is further

***5** ORDERED that any further discovery issues shall be resolved at the status conference to be held on January 17, 2019 at 10:00 am in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: January 8, 2019

<<signature>>

J.S.C.

Footnotes

1 Although the motion and cross motion raise discovery issues beyond those related to plaintiffs' social media accounts, these issues are either moot or will be resolved at the previously scheduled January 17, 2019 status conference. In this connection, the court notes that Ms. Israeli's deposition was taken while the motion and cross motion were pending, and any issues as to the necessity of her further deposition will be resolved at the January 17, 2019 status conference.

2 Defendant's supplemental letter and that of plaintiffs' counsel were submitted at the court's direction.

3 It thus appears that discovery from other social media sites is no longer at issue.

4 In *Forman v. Henkin*, 30 NY3d at 663, the Court of Appeals noted the difference between public and private portions of Facebook accounts. It wrote that:

Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder--in fact, the viewer need not even be a fellow Facebook account holder (see Facebook, Help Center, What audiences can I choose from when I share? *https://www.facebook.com/help/211513702214269?* helpref=faq content [last accessed Jan. 15, 2018]). However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (id.).

Id at 662.

Notably, the court held that a defendant is not required to use materials from a social media site's public accounts as a predicate for obtaining private account information. *Id.* at 663-664.

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