



New York Continues to Permit Discovery of Social Media

November 25, 2011

With Thanksgiving (and the biggest party night of the year – Thanksgiving Eve) this week, I figured it would be a good time to address social media once again, since I know that many people will take photos and post them all over the Internet. Before you upload those photos to Facebook, I wanted to remind you to be careful what you post, especially in lieu of a recent New York decision pertaining to the use of social media during discovery.

On October 11, 2011, the New York Appellate Division for the Fourth Department reversed and remanded a lower court's grant of discovery in order to clarify an over-broad discovery request.

In *Patterson v. Turner Const. Co.*, 88 A.D.3d 617, 931 N.Y.S.2d 311 (2011), the plaintiff alleged damages for physical and psychological injuries. During the lawsuit, the defendant filed a motion to compel an authorization for "all of plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived[.]" The New York County Supreme Court granted the defendant's request, but the Appellate Division reversed and remanded the case in order to clarify such a broad discovery request. The Appellate Division directed that the matter go back to the lower court to provide: "a more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims."

However, the Appellate Division left the lower court with some advice on how to handle any issues involving privacy settings on the Facebook account:

The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access (Romano v. Steelcase Inc., 30 Misc.3d 426, 433–434, 907 N.Y.S.2d 650 [2010]), just as relevant matter from a personal diary is discoverable (see Faragiano v. Town of Concord, 294 A.D.2d 893, 894, 741 N.Y.S.2d 369 [2002]).

So, when you are out having a few drinks this weekend, make sure you are cautious when you sit down on Monday morning and decide what pictures you are going to upload to social media websites or even worse, add to the album "Mobile Uploads". Some of those photos may end up being discoverable during a law suit, even if you have privacy settings on.

Enjoy the holiday everyone!