Individual's "Private" Social Networking Sites Are Not Exactly Private, New York Court Rules

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In a suit for personal injuries, a New York court has determined that information designated as "private" on a plaintiff's social networking sites may be accessed by the defendants in pre-trial discovery. Rejecting the plaintiff's argument that production of this information would violate her right to privacy, Supreme Court Justice Jeffrey Spinner granted the defendants' discovery request and ordered that the plaintiff consent to the defendants' access to information posted on her Facebook and MySpace pages. *Romano v. Steelcase, Inc.,* __ Misc. 2d. __, 2010 NY Slip Op. 20388 (Sup. Ct., Suffolk County 2010). This decision provides defense counsel with precedent upon which to argue that information designated as "private" on a plaintiff's social networking site is relevant and subject to discovery.

The Facts

In 2003, Kathleen Romano fell off her chair in her workplace and claimed that she sustained "serious permanent personal injuries" that required multiple surgeries. She alleged that, as a result of the fall, she suffered restricted movement of her neck and back and "pain and progressive deterioration with consequential loss of enjoyment of life." Claiming the chair was defective, she sued Steelcase, Inc., the chair's manufacturer, and Educational & Institutional Cooperative Services, Inc., the alleged distributor, for personal injuries.

As part of its defense, in pre-trial discovery, Steelcase subpoenaed Facebook and MySpace to obtain copies of Romano's Facebook and MySpace profiles, including the portions that were not publicly available and marked as private by Romano using the sites' privacy settings. Facebook objected to the request on the basis that it cannot release the information without the user's consent because to do so would violate the federal Stored Communications Act ("SCA"). Romano refused to provide her consent and sought to quash the subpoena on privacy-related grounds.

The defendants argued that the publicly available information from these sites revealed information that seemed inconsistent with Romano's claims concerning the extent and nature of her injuries, especially her claim for loss of enjoyment of life. The publicly available information showed she had an active lifestyle and had even traveled away from home, to Florida and Pennsylvania, during the time period in which she claimed her injuries prohibited such activity. Therefore, believing that her private pages may contain information that also may be relevant to her claims, the defendants sought access to Romano's current and historical Facebook and MySpace pages, including all deleted pages, designated by her as accessible not to the general public, but to "friends" or connections only.

Romano argued that the production of this information would violate her right to privacy.

Argument Rejected

Observing that "no New York case law directly address[es] the issues raised," the Court reviewed precedent in other jurisdictions, including a recent decision from a Canadian Court. In the Canadian case, *Leduc v. Roman,* defense counsel was permitted to view information designated by the plaintiff as "private" on her Facebook page. That court explained:

> 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.

Similarly, in *Romano*, Justice Spinner determined the plaintiff had no reasonable expectation of privacy in her Facebook and MySpace pages. The Court pointed to language in the privacy policies of both Facebook

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and MySpace, which state, *inter alia*, "this information may become publicly available," and said:

> 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."**

In any event, the Court continued, such concerns were outweighed by the defendants' need for the information. Accordingly, the Court ordered Romano to execute an authorization permitting the defendants' access to the requested information from Facebook and MySpace.

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Defendants and their counsel should not overlook a plaintiff's social networking sites as possible avenues to relevant information. Information on social networking sites may be particularly useful in certain cases, such as those that include allegations of emotional distress, and may offer insights into a plaintiff's activities and psyche.

Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments.