

New York Law Journal

Technology Today

WWW.NYLJ.COM

VOLUME 260—NO. 89

An ALM Publication

TUESDAY, NOVEMBER 6, 2018

State E-Discovery

Creative Uses of Social Media In Litigation

By
**Mark A.
Berman**



Social media evidence is not only about using it in a personal injury action to impeach the injured party's testimony as to what caused the accident or his or her injuries; it can be used by defendants against the "poster" in many other types of litigations. As the recent decisions discussed below make clear, counsel simply needs to be creative and "think outside of the box" as to how to effectively utilize social media. Social media is also frequently the basis for defamation claims, and where public posts go too far, as in *Carey v. Ripp*, 2018 NYLJ LEXIS 2405 (Sup. Ct. Nassau Co. July 16, 2018), a court may order the destruction, deletion and/or removal of defamatory informa-



SHUTTERSTOCK

tion in defendant's possession, custody and control, including posts on defendant's Facebook page.

In landlord-tenant proceedings, where the issue may be whether the person lived in an apartment during a certain period of time, social media evidence has been ordered to be produced in redacted form to the extent it identifies where a person is living, which electronically stored informa-

tion might include critical geolocal meta data. Similarly, in a Labor Law case, where the issue was which defendant entity was entitled to summary judgment, the injured worker's social media post which identified plaintiff's location and what piece of equipment was used proved important evidence on summary judgment. Social media evidence can also be critical in breach of restrictive covenant cases.

MARK A. BERMAN is a partner at Ganfer Shore Leeds & Zauderer and chair of the New York State Bar Association's Committee on Technology and the Legal Profession.

Social media evidence must be requested where there is a need to demonstrate evidence of other employee's use of social media. In a recent discrimination case, *Emmanuel v. Cushman & Wakefield*, 2018 N.Y. Misc. LEXIS 3738, 2018 NY Slip Op 32135(U) (Sup. Ct. N.Y. Co. Aug. 27, 2018), where the claim was that similarly situated non-pregnant co-workers allegedly were not disciplined for posting on Facebook during business hours, the court rejected such claim where "there was no evidence of comparators to the plaintiff being treated differently."

Location Evidence

In a licensee holdover proceeding, the court in *Renaissance Equity Holdings v. Webber*, 2018 N.Y. Misc. LEXIS 3260, 2018 NY Slip Op 28241 (Civ. Ct. Kings Co. July 27, 2018), ordered the production of certain social media relevant to proving or disproving respondent's defense that she primarily resided with her deceased's relative at the premises for at least two years and petitioner's claim that respondent had permanently vacated the apartment. As such, the court ordered that respondent produce all online posts, whether in her legal name, Benze Lohan, or any other aliases, on social media including, but not

limited to, Instagram, Twitter, YouTube and Facebook under the following conditions:

(a) if the post contains a location and date, then respondent shall redact all content, including photographs and third-party statements, except for the location and date stated on the post;

In landlord-tenant proceedings, where the issue may be whether the person lived in an apartment during a certain period of time, social media evidence has been ordered to be produced in redacted form to the extent it identifies where a person is living, which electronically stored information might include critical geo-locational meta data.

(b) if the post contains any comment or statement made by respondent in which she states a location, then respondent shall redact only the photograph contained within the post; and

(c) if the post contains a comment or statement made by respondent which contains the word "home," "house," "apartment" or any other synonym of the word "residence," then the entire content of the post shall be produced with no redaction.

Similarly, in *3212-16 Decatur Realty v. Hernandez*, 2018 N.Y. Misc. LEXIS 4224, 2018 NY Slip Op 51367(U) (Civ. Ct. Bronx Co. Sept. 25, 2018), a holdover proceeding predicated on the claim that the respondents sublet and/or assigned their rent stabilized apartment in violation of their lease, the landlord used a Facebook post of one respondent to demonstrate that respondent had left the apartment and moved to another state.

In *Banegas v. RSL Bowling*, 2018 N.Y. Misc. LEXIS 2970, 2018 NY Slip Op 31606(U) (Sup. Ct. N.Y. Co. July 9, 2018), a Labor Law case, defendant moved for summary judgment and its counsel had attached to its reply papers copies of plaintiff's Facebook page posts from the day of the accident. The post was a photo of a circuit board and a caption stating "this is where we were working at the time con Edison [sic] turn[ed] on power without notification." The court relied on such post in its decision where plaintiff did not submit an "affidavit describing how the accident occurred, where he was in the basement at the time of the accident, and what equipment he was working on at the time of the accident, despite the fact that it appears from his social media posts, that plaintiff

knew exactly what equipment he was operating at the time of the accident.”

Breach of Restrictive Covenant Evidence

In *Matter of RevitaLife Therapy v. Petersel*, 2018 N.Y. Misc. LEXIS 3123, 2018 NY Slip Op 31693(U) (Sup. Ct. N.Y. Co. July 20, 2018), plaintiff sought a preliminary injunction enjoining defendant during the pendency of an arbitration from violating the restrictive covenants contained in the parties' agreement, and supported such application with a screen shot from a Facebook therapist group community page which showed defendant soliciting therapists for her company and with testimony that every person in this Facebook group is important to plaintiff's business as referrals.

Discrimination Evidence

In *Emmanuel*, plaintiff alleged that defendants were liable to her for discrimination on the basis of sex and disability, and that the defendants retaliated against her and created a hostile work environment. Plaintiff received a warning that her employer had “received a report of an insulting nature that you posted on a social networking site during

work hours” and that company policy prohibited “participation in social networking during business hours, unless there is a specific definable business function associated with such participation.” Plaintiff had posted to her Facebook page that “[t]he day my pregnancy was announced ppl at my job started to try and make my life a living hell. They don't realize it's a mission impossible. Thanks Jesus.” The posting also complained that “[o]ld bitter ppl with no education, no kids, no man, no lives, no future are a joke!!” and that “[w]hen ppl at work try to make your job harder than it needs to be, just count-down till your blessed to no longer be there. 142 days left.” The court ultimately dismissed the complaint on collateral estoppel grounds and, in relying upon such prior decision, it rejected the claim that “similarly situated non-pregnant co-workers were not disciplined for posting on Facebook during business hours” as “there was no evidence of comparators to the plaintiff being treated differently, collateral estoppel precludes these claims.”

Defamation Evidence

In *Carey*, a defamation action, the court stated that this case

is an “illustration of the modern phenomena of the abuse and limits of the Constitutional right to freedom of speech in the context of narcissistic defamatory statements, fueled by the ease of public dissemination and compulsive amplification to the world, of unfiltered, angry thoughts and feelings in spaces created by ubiquitous social media such as Facebook.” The motion court granted plaintiff's preliminary injunction: (1) enjoining defendant from any further dissemination of defamatory information about the plaintiff, and (2) directing the destruction, deletion and/or removal of any defamatory information in defendant's possession, custody and control, including two posts on defendant's Facebook page containing defamatory information regarding the plaintiff.

Reprinted with permission from the November 6, 2018 edition of the NEW YORK LAW JOURNAL © 2018 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. #070-11-18-06



**Ganfer Shore
Leeds & Zauderer LLP**

360 Lexington Avenue
New York, New York 10017
212.922.9250
mberman@ganfershore.com