

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MARCIA CROSSMAN,)	
)	
Plaintiff,)	
)	
v.)	CASE NO.: 3:19-cv-01081-BJD-PDB
)	
CARRINGTON MORTGAGE SERVICES, LLC,)	
)	
Defendant.)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO COMPEL
PLAINTIFF TO RESPOND TO DISCOVERY REQUESTS**

COMES NOW, the PLAINTIFF, by and through her undersigned counsel, and pursuant to Rules 26 of the Federal Rules of Civil Procedure and Local Rule 3.01(b), submits her Response to Defendant’s Motion to Compel Plaintiff to Respond to Discovery Requests. PLAINTIFF requests this Honorable Court deny the Defendant’s Motion, or in the alternative, enter an Order directing Defendant to submit narrower, more tailored Requests for Production.

I. Defendant’s Discovery Requests Numbers 46 and 47 are Overly Broad “Fishing Expedition(s)” with No Showing Proportional Need to the Current Claims or Defenses.

Defendant’s Requests for Production, Numbers 46 and 47, require the Plaintiff to download, create, and produce archives of Plaintiff’s entire accounts on Facebook and Instagram. The Requests are not limited, in any way, to factual allegations in the Complaint, or elements of alleged damages. Complete downloads will involve disclosure of information that simply has no bearing on any issue within this matter. A complete download of social media accounts will include a multitude of material, including but not limited to: photographs, posts, location data, friends,

search histories, private messages, payment histories, metadata relating to adverts and other marketable interests, etc.

Defendant has not demonstrated a wholesale production of the entire Facebook and Instagram accounts is likely to yield any relevant information. Defendant's Request Numbered 50, sub-requests (a) and (d), are distinguishable and instructive at this point. Defendant requested copies of materials, described in relevant part:

“online profiles, postings (including without limitation, tweets, replies, retweets, direct messages, status updates, wall comments, groups joined, activity streams, and blog entries), messages, photographs, videos, and online communications or emails that Plaintiff authored or otherwise contributed to that:

(a) refer or relate to the allegations set forth in the Complaint;

[...]

(d) relate to the Defendant, or any employees or former employees of Defendant;”

Upon receiving Defendant's Rule 37 Letter, Plaintiff responded directly to these more tailored Sub-Requests, affirmatively stating: “There are None”. Since there are no social media materials that relate to the allegations in the Complaint or relate to the Defendant and its employees or former employees, the wholesale production of the social media accounts will serve no other purpose, than to enable the Defendant to probe Plaintiff's relations with disinterested, uninvolved third parties. These third parties have not invoked the jurisdiction of the Court and should not be subjected to the discovery tools of the Defendant.

The Defendant argues that there is no right of privacy regarding information stored on a social media account like Facebook and/or Instagram, but, this simply is not true. Facebook and Instagram are password protected accounts that contain much more data than publicly or quasi-publicly shared photographs, posts, and status updates. The fact that the Plaintiff chooses to use

these accounts maintained by a third-party corporation does not immediately mean the Plaintiff has waived any and all rights of privacy secured by the U.S. and Florida Constitution. Facebook and Instagram can, and do, function as virtual storage cabinets. To require a complete download of these accounts is analogous to requiring the Plaintiff open the doors to her home, or a hypothetical self-storage unit rented by her, and permit the Defendant to rummage through everything with no restriction.

The Defendant has not proffered anything to show social media content should be discoverable in the instant action. The only reason given for needing such unfettered access into Plaintiff's social media accounts is the speculation that "social media content are likely to include information about Plaintiff's daily life, significant life events (both positive and negative) and, Plaintiff's emotions, feelings, and mental states related thereto." *See Defendant's Motion to Compel* at page 7 (Doc. 19). This is pure speculation and assumes the nature of the Plaintiff's use of such password protected sites without any support whatsoever. There has been no showing, or suggestion, that Plaintiff has concealed photographs depicting potentially relevant information. There has been showing that Plaintiff used social media to communicate with the Defendant or its current/former employees. There has been no showing that Plaintiff used social media to communicate anything related to the Complaint's allegations. As discussed below in the Memorandum of Legal Authority, this lack of showing of any potential relevance to a claim or defense readily distinguishes the case law relied upon by the Defendant.

II. Defendant's Request #50 Sub-Requests (b) and (d) are Overly Broad and Vague

Defendant's Request #50, sub-requests (b) and (d) are too broad and vague to form a response. The requests demand the Plaintiff cull through five years of multiple forms of media and

apply the extremely nebulous criteria of “any emotion, feeling, or mental state” and/or “significant emotion, feeling, or mental state” and produce those items Defendant.

In particular, Defendant’s Request #50 require production of:

“online profiles, postings (including without limitation, tweets, replies, retweets, direct messages, status updates, wall comments, groups joined, activity streams, and blog entries), messages, photographs, videos, and online communications or emails that Plaintiff authored or otherwise contributed to that:

(b) reveal, refer or relate to *any emotion, feeling, or mental state* Plaintiff has experienced in the last five (5) years (e.g., reflect Plaintiff’s happiness, sadness, anger, disappointment, etc.);

[...]

(d) reveal, refer or relate to events that could reasonably be expected to produce *significant emotion, feeling, or mental state* (e.g., a significant illness or surgery of Plaintiff, a family member, or friend; the passing of a friend, family member, or pet; divorce; the loss of a home/residence (by fire or otherwise); or other traumatic events; or, alternatively, marriage, childbirth, or other joyful events) and reflect any reaction to such events.

[Emphasis added]

Plaintiff’s responses to these requests, following Defendant’s Rule 37 letter, were appropriate objections, to wit:

Plaintiff maintains and supplements her objections as follows: this Request for social media posts relating to “any emotion, feeling, or mental state” is far too nebulous and ambiguous description for the Plaintiff to comply with this request. Additionally, even if the Plaintiff were to speculate what posts fit this ambiguous qualification, the resulting production would include items with no relevance, no materiality, and no bearing on the issues in Complaint. It is therefore too invasive, and Plaintiff would assert there are more tailored, efficient ways to investigate potential alternative sources of mental anguish, such as interrogatories or via deposition.

Plaintiff maintains and supplements her objections as follows: this Request for social media posts relating to “events that could reasonably be expected to produce significant emotion, feeling, or mental state” is far too nebulous and

ambiguous description for the Plaintiff to comply with this request. Additionally, even if the Plaintiff were to speculate what posts fit this ambiguous qualification, the resulting production would include items with no relevance, no materiality, and no bearing on the issues in Complaint. It is therefore too invasive, and Plaintiff would assert there are more tailored, efficient ways to investigate potential alternative sources of mental anguish, such as interrogatories or via deposition.

As noted in the Plaintiff's discovery responses, there are more tailored means to pursue to the ostensible discovery goal of "alternative sources of mental anguish." In particular, the Plaintiff has disclosed the potential witnesses that can testify to relevant aspects of the claims and defenses in her answers to the Interrogatories. Multiple aspects of her life, such as her divorce, including her ex-husband's name and her foreclosure action, were disclosed in the Interrogatories. Utilizing this information, the Defendant has the ability to inquire further of the witnesses, request the court records, and question the Plaintiff directly at her upcoming deposition. The examination, selection, and production of five years of social media content requires the Plaintiff to undertake an uncertain endeavor of guessing what Defendant might deem related to "any emotion, feeling, or mental state." These sweeping requests are patently disproportional to the needs of the Defendant.

Memorandum of Legal Authority

Florida Courts have held blanket requests for access to computer systems and electronic correspondence are improperly overbroad and violate a litigant's right to privacy. *See, Menke v. Broward County School Bd.*, 916 So.2d 8 (Fla. 4th DCA, 2005). In *Menke*, the Court analogized electronic data to a traditional filing cabinet and explained the danger of open-ended full access:

Today, instead of filing cabinets filled with paper documents, computers store bytes of information in an "electronic filing cabinet." Information from that cabinet can be extracted, just as one would look in the filing cabinet for the correct file containing the information being sought. In fact, even more information can be extracted, such as what internet sites an individual might access as well as the time spent in internet chat rooms. In civil litigation, we have never heard of a discovery request which would simply ask a party

litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation.

Id. at 10.

The Court should adopt the reasoning of *Menke*. As argued above and below herein, requiring downloads of Plaintiff's full Facebook and Instagram accounts allows the Defendant to mine a vast array of data, correspondence, relationships, and other non-public information. This should not be permitted by the Court unless the Defendant can make a sufficient showing that such data contains relevant information. As the Florida Fourth District Court of Appeals aptly concluded, "Curiosity about the contents of the... file does not satisfy the relevancy requirement." *Toledo v. Publix Super Markets, Inc.* 30 So.3d 712 (Fla. 4th DCA 2010).

Legal authority cited by the Defendant in its Motion to Compel is readily distinguishable and does not apply in the instant matter. The Defendant relies on *Nucci v. Target Corp.*, 162 So. 3d 146, 152 (Fla. Dist. Ct. App. 2015) to argue it should be entitled to Plaintiff's social media accounts because it might offer evidence of alternative sources of mental anguish. This reliance is misplaced. The *Nucci* case involved evidence of a personal injury, slip-and-fall plaintiff evidently destroying or concealing photographs. *Id.* at 148-149. The Court found that,

"Before the deposition, Target's lawyer viewed Nucci's Facebook profile and saw that it contained 1,285 photographs. At the deposition, Nucci objected to disclosing her Facebook photographs. Target's lawyer examined Nucci's Facebook profile two days after the deposition and saw that it listed only 1,249 photographs.") *Id.*

In addition to above showing, the *Nucci* defendant also obtained surveillance video demonstrating plaintiff carrying two purses and two jugs of water. *Id.* at 149. These facts appear to weigh in heavily in the Court's decision to permit the defendant in *Nucci* to obtain social media discovery. In other words, the *Nucci* defendant demonstrated a concrete, tangible likelihood of relevant evidence. No such showing has been made here. The

Defendant merely speculates that there could be relevant items, despite Plaintiff's response to Request #50, sub-requests (b) and (d), indicating no such items existed.

In a similar vein, the Court should consider the ruling of *Root v. Balfour Beatty Const.* 132 So.3d 867 (Fla. Dist. Ct. App. 2014). In *Root*, the Florida Second District Court of Appeals disallowed social media discovery directed to Facebook posts of a Plaintiff seeking a loss of consortium relating to subjects such as: the Plaintiff's relationships with other family members not subject to the lawsuit, her mental health before and after a subject accident, and posts relating to other lawsuits. *Id.* at 869. The Court noted that this type of probing, *carte blanche* discovery into a Plaintiff's various relationships with others was prohibited by the Florida Supreme Court. *Id.* at 870. The Court then quoted the underlying defendant's attorney's concession as to why such discovery would be inappropriate without a showing or predicate as to why it would yield relevant evidence to a claim or defense, "These are all things that we would like to look under the hood, so to speak, and figure out whether that's even a theory worth exploring." *Id.* at 870.

This is precisely what the Defendant is seeking to do in the instant matter. Speculating there may be other sources of mental anguish, the Defendant wants to raid the Plaintiff's cabinets without showing a tangible need to do so. At this juncture, there is no justification to permit such discovery.

III. Conclusion

For the foregoing reasons, the Plaintiff respectfully requests the Court enter an Order denying the Defendant's Motion to Compel Plaintiff to Respond to Discovery Requests, or in the alternative, an Order directing the Defendant to serve submit narrower, more tailored Requests for Production.

Dated: April 24, 2020.

/s/ Damon Pichoff
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CERTIFICATE OF SERVICE

The undersigned certifies that on April 24, 2020, a copy of the foregoing was served on the following counsel of record listed below via electronic mail:

- Jackie Gessner, Esq. at jackie.gessner@btlaw.com;
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/s/ Damon Pichoff
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