Auffarth v Harold Natl. Bank
2016 NY Slip Op 31169(U)
June 21, 2016
Supreme Court, New York County
Docket Number: 600800/2010
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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PATRICIA AUFFARTH as the Executor of the estate of HENRY AUFFARTH, MARSHALL PERRIN, COSTAS ZIOZIS, CARL BRONSTEIN, JOSEPH BARNETT, and LAWRENCE GORE,

Plaintiffs, -against-

HERALD NATIONAL BANK,

Defendant.

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DECISION AND ORDER

Index No. 600800/2010

HON. ANIL C. SINGH, J.:

Plaintiff Patricia Auffarth, as executor of the estate of Henry Auffarth (the "estate") moves for spoliation sanctions pursuant to CPLR 3126 precluding defendant Herald National Bank (the "bank") from offering evidence at trial as to Mr. Auffarth's alleged lack of performance; an adverse inference charge; and attorneys' fees incurred in making the instant motion. Defendant opposes the motion.

BACKGROUND

On March 29, 2010, plaintiffs commenced this action seeking damages for the alleged breach of their employment contracts. Henry Auffarth began working for the bank on March 2, 2009. On February 12, 2010, the bank terminated a number of employees for cause, including Mr. Auffarth, based on their alleged failure to perform.

At close of discovery, the bank moved for summary judgment dismissing the estate's claims for breach of contract and claims under New York Labor Law sections 193 and 198. The court denied the motion as an issue of fact was raised as to whether Mr. Auffarth was terminated for cause. The court noted that "[t]he bank has offered substantial evidence that Auffarth failed to perform at the level of other similarly situated employees with respect to volumes of deposits and loans. The plaintiffs argue otherwise. This will be determined by the fact-finder." (Memorandum Opinion dated September 30, 2015, at p. 18)

DESTRUCTION OF MR. AUFFARTH'S E-MAILS

On February 12, 2010, Nicholas Schiralli, the bank's Senior Vice President and Chief Information Officer, e-mailed Brian Subbs of Rackspace, the server hosting the bank's e-mails, requesting that Rackspace preserve to DVD or CD the e-mails of a number of individuals who had been terminated that day. The list, which is in alphabetical order by last name, started with Jerry Barber. The list did not include Mr. Auffarth. Subsequently, on February 25, 2010, Mr. Schiralli requesting that Rackspace remove the e-mail boxes from the bank's account. As a result, Mr. Auffarth's e-mails were not preserved.

Mr. Schiralli testified at his deposition that he would have received the list of names from Mary Ann Sleece, the bank's Vice President for Human Resources, by e-mail with a spreadsheet (Schiralli transcript at p. 140). He would have cut-

and-pasted the names and added the e-mail addresses for each person (Id., at p. 141). He admitted that he deleted Mr. Auffarth's e-mails because his name did not appear on the list. He did not provide Mr. Auffarth's name to Rackspace (Id., at p. 170). He made the mistake of leaving Mr. Auffarth's name off the list (Id., at p. 189).

Mr. Auffarth died on August 22, 2011, while the parties were engaged in discovery proceedings. His administrative assistant, Donna Lagatta, states by affidavit that Mr. Auffarth had a computer that he used to send and receive e-mails. E-mails were sent by Mr. Auffarth to officials at the bank and customers. In addition, Mr. Auffarth utilized his bank-issued Blackberry to send and receive e-mails.[1]

DISCUSSION

The Court of Appeals addressed the spoliation of electronically stored information in Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543 (2015). There, the Court stated:

> A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed

[1]The estate retained a Blackberry issued by the bank to Mr. Auffarth. The password for the device is not known to the parties. While the spolation motion was sub judice the Court directed defendant to retain a forensic expert to recover the password. Defendant's experts were unsuccessful in their attempts to retrieve the e-mails stored on the Blackberry.

> evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support the claim or defense. Where evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed document were relevant to the party's claim or defense (at p. 547).
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> . . .
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> [A] party's failure to institute a litigation hold is but one factor that a trial court can consider in making a determination as to the spoliator's culpable state of mind (at p. 552)

(internal quotation marks and citations omitted).

In general, the decision whether to impose sanctions, as well as the nature and severity of any sanctions to be imposed, are matters within the discretion of the trial court (Hartford Fire Ins. Co. v. Regenerative Bldg. Constr., 271 A.D.2d 862 [3rd Dept., 2000]). The drastic remedy of striking a pleading generally is not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability (Melcher v. Apollo Med. Fund Mgt. L.L.C., 105 A.D.3d 15 [1st Dept., 2013]).

Where independent evidence exists that permits the affected party to adequately prepare its case, striking the spoliator's pleading is unwarranted, and a less drastic sanction, such as imposition of costs, an adverse inference charge or a spoliation charge, is appropriate (Merrill v. Elmira Hgts. Cent. School Dist., 77 A.D.3d 1165 [3rd Dept., 2010]).

Here, the bank fired 29 employees on February 12, 2010. Ms. Sleece took immediate steps to preserve their e-mails by delegating that task to Mr. Schiralli. On February 22, 2010, the bank began to have communications with its attorneys which were designated as privileged attorney-client communications (Exh. G to Welzer Aff. in Support of Spoliation Sanctions, Privilege Log to Defendant's June 9, 2011 production). The attempt to place a litigation hold and subsequent communications with counsel establish that the bank reasonably anticipated litigation as a result of its termination the employees (Voom HD Holdings LLC v. EchoStart Sateliite LLC, 93 AD3d 33, 36 [1st Dept., 2012]).

The destruction of Mr. Auffarth's e-mails does not support a finding of gross negligence. Gross negligence is "conduct that evinces a reckless disregard of the rights of others or smacks of intentional wrongdoing" (Sommer v. Federal Signal Corp., 79 NY2d 540, 554 [1992]). First, there is no evidence that the e-mails were intentionally or willfully destroyed. Second, the bank attempted to preserve the e-mails of all terminated employees, including Mr. Auffarth. His name was left off the list based on an error made by Mr. Schiralli in failing to copy and paste all of the names properly. Mr. Schiralli's mistake was inadvertent and establishes that he was negligent by failing to take reasonable care after being instructed to preserve the e-mails of all employees terminated on February 12, 2010.

The estate has the burden of establishing that the destroyed e-mails are relevant to the claim that Mr. Auffarth was terminated without cause. Plaintiff contends that the e-mails are central to the following issues: "the nature and extent of Mr. Auffarth's efforts at work"; whether "[d]ecedent adequately performed"; and "that there was no cause to terminate him" (Memorandum of Law in Support of Spoliation Sanctions at p. 3).

The bank's justification for terminating Mr. Auffarth is not that he did not put sufficient or his best efforts into his work. The destroyed e-mails may show Mr. Auffarth's attempts at soliciting business. However, it is defendant's position that Mr. Auffarth's performance metrics did not measure objectively to the achievements of other similarly situated employees in generating volumes of deposits and loans. The estate disputes this contention which was the basis for denying defendant summary judgment.

In short, there has been no showing by the estate how the e-mails are relevant to establishing that the bank acted in bad faith or engaged in fraud or arbitrary action in terminating Mr. Auffarth for his alleged failure to perform.

The destroyed e-mails do not foreclose the estate from presenting evidence that Mr. Auffarth was thwarted in his attempt to develop the loan and deposit business because of the bank's inability to handle the size of the deals it represented

that it could undertake as its capital and financial condition declined. This contention can be established by other evidence, including financial records.

Moreover, while Mr. Auffarth's e-mails were destroyed, the estate received all e-mails from custodians at the bank that were sent by plaintiff or mentioned Mr. Auffarth by name. The estate has not drawn to the Court's attention evidence from this category of e-mails that is relevant to whether or not the termination was for cause.

Here, granting plaintiff's motion by an order of preclusion or adverse inference charge is tantamount to finding that Mr. Auffarth was discharged for cause. The bank's conduct in destroying the e-mails does not call for such a drastic remedy, especially where there is no showing that the e-mails are crucial to the estate's case.

However, given the destruction of the e-mails, some sanction is warranted. The court will give a missing document charge under PJI 1:77.1 in the event the bank contests issues relating to Mr. Auffarth's efforts at work in contacting potential clients and his attempts to develop the loan and deposit business.

The estate's request for attorneys' fees incurred in making the instant motion is denied.

This decision constitutes the order of the court.

Date: June 21, 2016
New York, New York

Anil C Singh