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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Gipe, Ian, et al.

-v-

Monaco Reps LLC

INDEX NO. 156707/2012

MOTION DATE 5.17.2013

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 002 and 003 are consolidated for joint disposition herein as follows:

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiffs' motion pursuant to CPLR 3103(c) and 3101(b) to dismiss the counterclaims and third-party complaint of Monaco Reps, LLC, Claudia Monaco and David Monaco for discovery violations, to disqualify defendants' counsel, to suppress all pages of Ben's emails obtained by defendants, to enjoin defendants and their attorneys from disclosing information obtained from such emails, and to direct defendants and their attorneys to purge any record of such emails and to provide an account of all information they reviewed, plus attorneys' fees and costs plaintiffs incurred in connection with this motion and with plaintiffs' response to defendant's document production is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendants and third party plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7.2.2013

A.C. E J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

IAN GIPE,

Plaintiff,

Index No.: 156707/2012

-against-

DECISION/ORDER

MONACO REPS, LLC, CLAUDIA MONACO and DAVID MONACO,

Defendants.

-against-

CARTEL & CO., LTD.,

Third-Party Defendant.

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JONATHAN BEN-YOSEF

Plaintiff,

Index No.: 156746/2012

-against-

MONACO REPS, LLC, CLAUDIA MONACO and DAVID MONACO,

Defendants.

-against-

CARTEL & CO., LTD.,

Third-Party Defendant.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

In this action for, *inter alia*, non-payment of commissions, plaintiffs Ian Gipe ("Gipe")

[1] Motion sequence 002 and 003 are consolidated for joint disposition herein. In motion sequence 003, plaintiffs seek to, *inter alia*, dismiss defendants' answers and counterclaims for failure to provide discovery or to compel defendants to provide outstanding discovery. By order dated April 17, 2013, the Court stayed discovery pending a determination on motion sequence 002, and indicated that such a determination would include a date on which the parties are to appear for a discovery conference.

and Jonathan Ben-Yosef ("Ben") (collectively, "plaintiffs") move pursuant to CPLR 3103(c) and 3101(b) to dismiss the counterclaims and third-party complaint of Monaco Reps, LLC, Claudia Monaco and David Monaco (collectively, "Monaco" or "defendants") for discovery violations, to disqualify defendants' counsel, to suppress all pages of Ben's emails obtained by defendants, to enjoin defendants and their attorneys from disclosing information obtained from such emails, and to direct defendants and their attorneys to purge any record of such emails and to provide an account of all information they reviewed, plus attorneys' fees and costs plaintiffs incurred in connection with this motion and with plaintiffs' response to defendant's document production. (Motion sequence 002)

Factual Background

Monaco, an agency that represents professional photographers, is operated by Claudia and David Monaco. Gipe and Ben began working at Monaco as agents representing photographer talent in 2004 and 2011, respectively, pursuant to agreements which set forth their compensation, restricted them from using Monaco's proprietary or confidential information,[2] and restricted them from working with Monaco's talent for one year after their resignation.[3]

According to the complaints, both plaintiffs resigned in July 2012 when Monaco allegedly failed to pay plaintiffs their commissions. Monaco then allegedly agreed to pay them their respective commissions for jobs in production, recently completed or already invoiced, and

[2] Gipe's agreement provides that "During the term of his Agreement and thereafter, Ian Gipe shall not disclose to anyone or otherwise make use of any proprietary or confidential information of Monaco Reps, unless required by law. . . ." (¶13). Ben's agreement, dated August 1, 2011, contains the same restriction (¶2).

[3] Gipe's agreement requires that upon his termination, "should Ian Gipe wish to open his own agency or work for a different agency in the same business, he may not represent or work with any of the talent then represented by Monaco . . ., or any talent that has separated from Monaco . . .less than one year prior to the termination of this Agreement, for a period of one year from the date of termination of this Agreement." (¶12). Ben's agreement contains the same restriction (12).

for any repeat client developed by plaintiffs. However, Monaco withheld the commissions, despite plaintiffs' demands for payments. Further, after Gipe's termination, Monaco allegedly accessed his personal Gmail email account, without his consent, accessed his email and documents hosted on Gmail's secure server, and Monaco's attorney reviewed all communications between Gipe and his then retained counsel, Stacey DeKalb (Gipe's complaint, ¶¶72, 74). Ben alleges that after his termination, defendants accessed his private email communications with Gipe, and Monaco's attorney reviewed all communication between Ben and his then retained counsel, Stacey DeKalb (Ben's complaint, ¶¶40, 42). Consequently, plaintiffs commenced these now consolidated actions, alleging 12 causes of action for, *inter alia*, non-payment of the commissions, conversion, defamation and hostile work environment.

In response, defendants served counterclaims against plaintiff for breach of contract, breach of fiduciary duty and loyalty, misappropriation, unfair competition, tortious interference with contract, conversion, unjust enrichment, and *quantum meruit*. Simultaneously, defendants brought a third-party action for, *inter alia*, misappropriation and unfair competition, against Cartel & Co., Ltd. ("Cartel") the new company started by plaintiffs. Defendants claim that while working at Monaco, plaintiffs used Monaco's money, resources, company time, proprietary information, and photographers to form a competing company, Cartel in 2012 (third-party defendant). When plaintiffs allegedly hired an attorney to review their written agreements with Monaco, the attorney advised them *via* emails to refrain from soliciting photographers while still employed at Monaco. Plaintiffs waived any lawyer-client privilege concerning these communications when Gipe forwarded the emails to Ben, and when Ben downloaded them to Monaco's office computer. Other emails from either Gipe or Ben indicate that they had been

planning to start Cartel as far back as September 2011, and used the company funds and time to promote Cartel instead of Monaco.

During the course of discovery, defendants served their response to plaintiffs' document demands, which included 32,000 pages of documents from Ben's personal Gmail email account (scubademon@gmail.com) from August 1, 2008 through March 18, 2013, well before and after his employment with defendants. The emails contained attorney-client communications.

In support of their motion, plaintiffs contend CPLR 4503(a) exempts from disclosure attorney-client communications unless the privilege is waived. CPLR 3101(b) shields attorney-client communications with absolute immunity. And, CPLR 4548 provides that the communication does not lose its privileged character by virtue of its mere transmission by email. The communications between plaintiffs and their lawyer, Stacey DeKalb (and her partner Bob Donnelly) were privileged. Ben never authorized defendants or their attorneys to access and view his personal email account, and defendants did not have any written policy showing their authority to access and view his personal email account. There was no corporate policy indicating that defendants would monitor the use of employees' computer or email or that third parties would do so. Further, there was no waiver of the attorney-client privilege when Gipe forwarded his email to Ben because counsel represented both plaintiffs at the time, for the same common purpose thereby triggering the common interest exception to waiver. Defendants' counsel's action deviates from his duties as an officer of the Court, violated Ben's privacy and the privacy of those who sent him emails. Defendants' attorneys' correspondence show that their and their attorneys' actions are prejudicial, in that they have utilized the information from the emails to file their claims against plaintiffs and extort a settlement from plaintiffs.

Defendants forced plaintiffs to prepare, at great expense and time, a privilege log in response to defendants' request for plaintiffs' retainer agreements, legal bills, and correspondence between plaintiffs' and their counsel, with full knowledge that defendants had already obtained the privileged information. According to plaintiffs' counsel, defendants' counsel have threatened to use this lawsuit to "destroy" defendants' business and threatened to "make it known to everyone in the industry that they would be dragged into this litigation if they did business with" defendants. (Exhibit M). Defendants' counsel's actions were violative of the Rules of Professional Conduct, and are sanctionable.

In opposition, plaintiffs contend that defendants' motion is unsupported by any affidavit by Gipe or anyone else is therefore defective, and only Ben has standing to move for relief. When defendants first discovered the emails, they notified their then counsel Melvin Berfond, who then entered into discussions with plaintiffs' counsel and explored settlement. The emails were also discussed at an in-court conference. Thus, plaintiffs' awareness of defendants' possession of the emails well before they commenced this action, and failure to assert any privilege until after the court dismissed many of plaintiffs' claims and on the eve of depositions, shows that their motion is a delay tactic.

As to the attorney-client privilege, plaintiffs' reliance on CPLR 3101(b) is misplaced, since this section entitles the holder of the privilege to refrain from producing privileged matter, as opposed to the holders' request for the production of privileged matter from defendants. Defendants' conduct in pursuit of their claims are proper and not violative of the Rules of Professional Conduct.

Ben waived any applicable privilege by downloading the emails onto Monaco's computer

in Monaco's office *via* Monaco's server, and leaving them out in the open for weeks after resigning from Monaco, without any password protection. The emails existed as separate files on Monaco's computer, and were not on a website. Further, Gipe's retainer was solely on his behalf, and Ben did not sign his retainer until May 27, 2012. Thus, Gipe's email copied/sent to Ben prior to Ben's retention of any legal counsel constituted a waiver by Gipe. And, Gipe's transmission of the email to Ben was not protected under the narrowly construed common interest privilege, as claimed by plaintiffs, because Gipe's and Ben's interest were not identical. They had different contracts with Monaco, there was no "jointly consulting parties" at the time of Gipe's transmission to Ben, and there was no pending action or reasonably anticipated litigation. At best, the common interest privilege would apply to communications after May 27, 2012, when both parties were represented by the same counsel. In any event, Ben's actions and inactions undertaken after the transmission of the email from Gipe, constituted a waiver. Also, Ben's retainer agreement with counsel warned against communicating with counsel on a workplace computer. And, the fraud exception provides a ground for waiver.

Defendants have merely produced what Ben copied to the computer and such production does not mean that defendants have read the emails. Although defendants' counsel has read some emails which were brought to his attention, a personal review of all of the emails was not necessary in order to produce them in response to plaintiffs' document requests. A preclusion of the emails pursuant to CPLR 3101(c) and a protective order under CPLR 3103(c) are unwarranted, as the information has not been improperly obtained, the information would have been uncovered through discovery in any event, and no substantial right of a party has been prejudiced.

Defendants further argue that disqualification of their counsel would severely prejudice defendants. Counsel is uniquely qualified in handling legal matters in this industry and has worked on this matter for 10 months. No other attorney would be as suited to this litigation as counsel, and a change in counsel would require defendants to expend significant resources and time to bring any new counsel up to speed. Therefore, plaintiffs failed to establish their burden to disqualify counsel.

And, attorneys' fees are unwarranted, in light of plaintiffs' unclean hands.

Defendants also request that the Court strike the scandalous statements made by plaintiffs and their counsel from the record and require plaintiffs to pay defendants their costs in defending plaintiffs' motion.

In reply, plaintiffs argue that the opposition papers establish that defendants violated Gipe's attorney-client privilege concerning documents directly related to this case. According to Ben, it was his "expectation and belief that Mr. Gipe and [he] were jointly represented by Stacey DeKalb's law firm when [they] began the process to retain her law firm on or about March 29, 2012" (Ben's Affidavit in Reply ¶11). Plaintiffs were jointly represented by counsel at all relevant times, and waiving the joint privilege requires consent of all joint clients. Thus, Gipe's forwarding of his email to Ben did not waive any privilege. Defendants' attorneys were required to notify plaintiffs that they possessed plaintiffs' privileged communications. Plaintiffs have not waived their privilege given that defendants do not have a corporate policy granting them rights to access the emails. Ben attests that he "believed" he loaded his scubademon email to the computer when he first started working and on his last day in the office, he believed he removed all of his personal emails accounts from the computer. Ben contends that he has never seen a

computer monitory display 32,000 pages of emails, and thus, defendants' claim that his emails were left in open view lacks merit. Plaintiffs promptly moved for relief, and the fraud exception is inapplicable. Neither suppression nor disqualification is a sufficient, realistic alternative.[4]

Discussion

CPLR 3101(b) exempts from disclosure, upon objection, all "privileged matter."

The attorney-client privilege, upon which plaintiffs' request for relief is based, exempts from disclosure confidential communications between clients and their attorneys made "in the course of professional employment" (*New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 752 NYS2d 642 [1st Dept 2002] *citing* CPLR 4503(a)(1)[5] and *Spectrum Systems International Corp. v Chemical Bank*, 78 NY2d 371, 377, 575 NYS2d 809 [1991] [such privileged confidential communications between clients and their attorneys are absolutely immune from discovery]). Further, CPLR 3103(c), entitled "Suppression of information improperly obtained," provides that "If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the

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[4] Defendants' object to the Court's consideration of plaintiffs' reply papers and request an opportunity to address plaintiffs' claim, purportedly raised for the first time in reply, that there was a joint representation of Ben and Gipe. However, plaintiffs' arguments regarding joint representation is raised in furtherance of their common interest privilege *and* in response to defendants' argument in opposition that the common interest exception is inapplicable to plaintiffs who were not "jointly consulting parties." (Memorandum in Opposition, p. 18). Therefore, the Court proceeds to consider plaintiffs' reply papers, without further submissions by defendants.

[5] CPLR 4503(a) pertaining to "Attorneys," provides:

> Unless the client waives the privilege, an attorney . . .or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action . . . . (CPLR 4503[a]).

information be suppressed."

When deciding whether an attorney-client privilege attaches to a document, "the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes of the underlying immunity" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]; *see also, Ambac Assur. Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451, 939 NYS2d 333 [1st Dept 2012]). Thus, plaintiffs must establish that the privilege exists and that it has not been waived (*New York Times Newspaper Div. of New York Times Co., supra* at 172, *citing John Blair Communications, Inc. v Reliance Cap. Group, L.P.*, 182 AD2d 578, 582 NYS2d 720 [1st Dept 1992]).

Here, it is undisputed that Gipe's *initial* email communications between him and Stacey DeKalb are privileged and protected from disclosure. Thus as to Gipe, "The fundamental questions in assessing whether waiver of the privilege occurred are, whether the client [Gipe] intended to retain the confidentiality of the privileged materials and whether he [Gipe] took reasonable precautions to prevent disclosure" (*Forward v Foschi*, 27 Misc 3d 1224(A), 911 NYS2d 692 (Table) [Supreme Court, Westchester County 2010]). As "the waiver inquiry depends heavily on the factual context in which the privilege was allegedly waived," courts should review the particular circumstances of each case to determine whether, and to what extent, waiver occurred (*In re Grand Jury Proceedings*, 219 F3d 175, 188 [2d Cir2000]). Gipe did not submit an affidavit or any sworn testimony explaining his intent in transmitting the email communications to Ben. Therefore, ascertaining whether Gipe intended to retain the confidentiality of the privileged materials and whether he took reasonable precautions to prevent

disclosure is impossible, and plaintiffs failed to meet their burden in this regard.

Thus, the remaining issues are whether plaintiffs have established that Gipe's email communications lost their protection under the waiver doctrine when (1) Gipe transmitted/forwarded the emails to Ben, and (2) in the event they did not lose their protection, whether the privilege protecting such emails was later waived by Ben's actions.[6]

It is noted that with respect to electronic transmissions, CPLR 4548 states:

> "No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."

Therefore, the mere fact that Gipe "emailed" his protected communication does not, in and of itself, constitute a waiver.

Attorney-client communications shared with a third-party generally are not privileged (*Gama Aviation Inc. v Sandton Capital Partners, L.P.*, 99 AD3d 423, 951 NYS2d 519 [1st Dept 2012]). However, the "common interest privilege is an exception to the waiver of attorney-client privilege where information is shared with third-parties" (*In re Out-of-State subpoenas issued by New York Counsel for State of California In re Out-of-State subpoenas issued by New York Counsel for State of California Franchise Tax Bd.*, 33 Misc 3d 500, 929 NYS2d 361 [Supreme Court, Westchester County 2011]). "The common interest privilege applies to communication between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest (*The OMNI Health &*

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[6] As to those email communications which were *not* made between Ben and attorney Stacey DeKalb and his mother who he claims is an attorney, such as those containing Ben's personal financial information, social media communications, and emails involving his personal relationships, such non-attorney communications do not fall within any legally cognizable privilege, and thus, do not support plaintiffs' motion for sanctions.

Fitness Complex Of Pelham, Inc. v P/A Acadia The OMNI Health & Fitness Complex Of Pelham, Inc. v P/A Acadia Pelham Manor, LLC, 33 Misc 3d 1211(A), 939 NYS2d 742 (Table) Supreme Court, Westchester County 2011] *citing Fewer v GFI Group*, 78 Ad3d 412, 413 [1st Dept 2010]). It does not protect business or personal communications" (*The OMNI Health & Fitness Complex Of Pelham, Inc., supra, citing* Carmody–Wait 2d, Common Interest, or Joint Defense, Exception § 56:190).

Since "the clearest indication of common interest is dual representation" *(American Re-Insurance Co. v U.S. Fidelity & Guar. Co.*, 40 AD3d 486, 491, 837 NYS2d 616 [1st Dept 2007]), and plaintiffs argue that Ben shared a "common interest" with Gipe, so that the privilege was preserved when Gipe transmitted the email to Ben, and/or that Stacey DeKalb also represented Ben when Gipe contacted her in the process of retaining her firm for advice, the Court addresses whether Ben was "represented" by Stacey DeKalb at the time of Gipe's the email transmissions.

"To determine whether an attorney-client relationship exists, a court must consider the parties' actions (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 851 NYS2d 19 [1st Dept 2008] *citing Wei Cheng Chang v Pi*, 288 AD2d 378, 380, 733 NYS2d 471 [2001], lv. denied 99 NY2d 501, 752 NYS2d 588, 782 NE2d 566 [2002]). "An attorney-client relationship 'arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services'" (*Talansky v Schulman*, 770 NYS2d 48 [1st Dept 2003]). "Formality is not essential to create a legal services contract" (*id.*). Indeed, an "attorney-client relationship can encompass a preliminary consultation even where the prospective client does not ultimately retain the attorney" (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d at 99).

Here, DeKalb's partner, Bob Donnelly, attests that on March 27, 2013, Gipe contacted

him "on behalf of both himself and Mr. Ben Yosef regarding their employment with Monaco Reps and related issues" ((Donnelly Affidavit, ¶ 2). He and DeKalb were "being contacted about representation and advice to both Mr. Gipe and Mr. Ben-Yosef in connection with their work for Monaco Reps" (Donnelly Affidavit, ¶ 4). Donnelly then referred Gipe to DeKalb who handled employment law issues. Ben and Stacey DeKalb both attest that her firm was contacted by "Mr. Gipe seeking counsel for both himself and Mr. Ben-Yosef regarding their [Gipe's and Ben's] employment with Monaco Reps" (DeKalb affidavit, ¶3). DeKalb likewise attests that her firm was "contacted to advise both Mr. Gipe and Mr. Ben-Yosef in connection with their employment with Monaco Reps" (id. ¶5).

It is uncontested that Gipe then signed a Retainer Agreement (dated March 29, 2012), on April 22, 2012 which expressly indicates that:

> "No Third Party Beneficiaries"
>
> It is agreed that the legal services rendered under this Agreement are intended solely for your benefit. Accordingly, there is no direct or implied intent to benefit third parties from our legal services. Further, no third party shall have the right to rely upon our legal services without our prior written consent.

Further, it is uncontested that the DeKalb's and Donnelly's law firm expressly advised Gipe that it would not communicate with Ben unless and until Ben entered into a retainer agreement.

The record demonstrates that on May 19, 2012, Ben contacted DeKalb *via* email to engage her services, and that Ben signed his Retainer Agreement on May 27, 2013.

Based on the above, the Court finds that plaintiffs failed to establish that Ben had an attorney-client relationship prior to May 27, 2012. There is simply no record of any direct communications or contact between Ben and either DeKalb or Donnelly so as to indicate that an

attorney-client relationship existed before this date.

It is noted that Ben attests that he expected and believed that he was "jointly represented by Stacey DeKalb's law firm when we began the process to retain her law firm on or about March 29, 2012" (Ben Reply Affidavit, ¶11). However, it has been held that although "the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions" (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 851 NYS2d 19 [1st Dept 2008] *citing Jane St. Co. v Rosenberg & Estis*, 192 AD2d 451, 597 NYS2d 17 [1993], *lv. denied* 82 NY2d 654). Thus, Ben's mere belief that he was in an attorney-client relationship with DeKalb and/or Donnelly, where such lawfirm declined to communicate with Ben until he signed a retainer agreement, is insufficient to establish that he had an attorney-client relationship as of March 27, 2013.

Further, the Court has yet to locate any caselaw that imputes the attorney-client privilege to a third party not directly engaged with counsel. Indeed, "the fact that an attorney's services for a client benefitted a third party does not establish an attorney-client relationship" *(American Re-Insurance Co. v U.S. Fidelity & Guar. Co.*, 40 AD3d 486, 837 NYS2d 616 [1st Dept 2007]).

Consequently, since the common interest privilege does not apply to Ben, and Ben did not have an attorney-client relationship with DeKalb (or Donnelly) prior to May 27, 2012, Gipe waived any privilege attached to the emails he sent to Ben prior to May 27, 2012.

In any event, even assuming Ben and Stacey DeKalb had an attorney-client relationship prior to May 27th, Ben waived any such privilege concerning the emails he left on Monaco's computer. Claudia and David Monaco, and their employee Brittany Raynor, attest that as a matter of office policy, Ben shared his office computer with interns and that all office employees

accessed his office computer in order to view projects stored thereon. Ben's office computer was purchased by Monaco, and like the other office computers, had the same log-in information to allow all employees access to the computers. After plaintiffs resigned on July 20, 2012, defendants' employee Brittany monitored their work emails to address any client concerns delivered to such emails. Once a certain email came in concerning a photographer, Brittany went to Ben's computer and saw copies of Ben's "scubademon" emails indicating plaintiffs' plan to form a competing company. Specifically, Brittany attests that she "clicked on the keyboard to 'wake' the computer, and the Apple computer's mac mail application was open. Without even having to move the mouse or type anything on the keyboard, I immediately saw emails that referred to 'Cartel', 'Kenji', and 'Monaco Reps'. . . The emails were technically copies of emails. They were not on a website or a server. They were on the company's desktop computer. They were open in a viewing application on the desktop, as Yoni [Ben] had set them up." Brittany denies reading any of the emails pertaining to Ben's finances, health, personal relationships, or his family members.

Although CPLR 4548 provides that privileged communication does not lose its privileged character "because persons necessary for the . . . facilitation of such electronic communication may have access to the content of the communication," as explained in *Scott v Beth Israel Medical Center Inc.*, 17 Misc 3d 934, 847 NYS2d 436 [Supreme Court, New York County 2007]), "[t]he purpose of CPLR 4548 was to recognize the widespread commercial use of e-mail. . . . As with any other confidential communication, the holder of the privilege and his or her attorney must protect the privileged communication; otherwise, it will be waived. For example, a spouse who sends her spouse a confidential e-mail from her workplace with a

business associate looking over her shoulder as she types, the privilege does not attach." (Internal citations omitted).

Although the employer in *Scott* had an email policy, which advised that employees have no personal privacy right in any information created or saved on the employer's computer system,[7] the absence of such a "written" policy at Monaco does not preclude a finding of waiver under the circumstances herein, where all employees, including Ben, were aware that the information stored on Monaco's computers were viewable and accessible without limitation to all office employees. Such office practice is tantamount to a policy advising employees that their computers were subject to monitoring and/or viewing and that "third parties have a right of access to the computer or emails" (*In re Asia Global Crossing, Ltd.*, 322 BR 247 [Bkrtcy SDNY 2005] ("An employee's expectation of privacy in his office, desk and files "may be reduced by virtue of actual office practices and procedures, or by legitimate regulation. . . . In light of the variety of work environments, whether the employee has a reasonable expectation of privacy must be decided on a case-by-case basis") *citing*, *cf.*, *Leventhal v Knapek*, 266 F 3d 64, 74 (2d Cir 2001] ("employee had reasonable expectation of privacy in contents of workplace computer where the employee had a private office and exclusive use of his desk, filing cabinets and computers, the employer did not have a general practice of routinely searching office computers, and had not 'placed [the plaintiff] on notice that he should have no expectation of privacy in the

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[7] "1. All Medical Center computer systems, . . . electronic mail systems, Internet access systems, related technology systems, and the wired or wireless networks that connect them are the property of the Medical Center and should be used for business purposes only.

2. All information and documents created, received, saved or sent on the Medical Center's computer or communications systems are of the Medical Center. Employees have no personal privacy right in any material created, received, saved or sent using Medical Center communication or computer systems. . . .

contents of his office computer'")). In light of the open configuration of Monaco's offices, and the widespread, open and notorious use of Ben's work computer by co-employees, under such circumstances, any attorney-client privilege was waived (*Scott v Beth Israel Medical Center Inc.*, 17 Misc 3d at 941, *citing In re Asia Global Crossing, Ltd.*, 322 BR 247, *supra*).

And, Ben took no measures to protect from exposure his personal emails saved on the "public" work computer. In fact, by his May 27, 2013 Retainer Agreement, DeKalb advised him "of the importance of communicating with us in a manner that protects the confidentiality of electronic communications (email, text, etc.) and instruct you to avoid using any device or system for such communication where there is a significant risk that the communications will be read by your employer or another third party. By signing this retainer, you acknowledge our advice regarding electronic communications and agree to the exchange of electronic documentation with us, not withstanding [sic] these risks." (Page 2). Having stored, saved, and made his emails on a shared work computer available for public viewing, Ben waived any privilege associated with the attorney communications reflected in such emails *(Byrne v Byrne*, 168 Misc 2d 321, 650 NYS2d 499 [Supreme Court, Kings County 1996] ("The computer memory is akin to a file cabinet"); *see also, Silverberg & Hunter, LLP v Futterman*, Index No. 992976/02 (Supreme Court, Nassau County 2002] (after the employer terminated defendant the employee, the employer accessed defendant's password protected hard drive and e-mail account and determined that defendant was serving defendant's own clients while billing plaintiff's clients; motion to suppress e-mails denied.)).

Contrary to plaintiffs' contention and caselaw they cite, this is not an instance where an employee's email were stored on a *third-party server* and accessed *via* the employee's personal

email and password information. The emails were stored on the computer itself by Ben, himself, and accessed without the use Ben's email account (*cf., Forward v Foschi*, 27 Misc 3d 1244 (plaintiff accessed defendant's emails by going online and accessing her emails stored on the third party systems and forwarded such emails to counsel); *Stengart v Loving Care Agency, Inc.* 201 NJ 300, 990 A2d 650 [NJ 2010] (directing sanctions for reading employees' emails with her attorney where defendant accessed work computer and retrieved employee's e-mails which "had been *automatically* saved on the hard drive" (emphasis added)).

Furthermore, the crime-fraud exception gives rise to a waiver of any attorney-client communications. The crime-fraud exception encompasses "'a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct'" (*In re New York City Asbestos Litigation*, --- NYS2d ----, 2013 WL 2435565 [1st Dept 2013] *citing Art Capital Group LLC v Rose*, 54 AD3d 276, 277, 862 NYS2d 369 [1st Dept 2008], *quoting Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept 2003]). "[A]dvice in furtherance of a fraudulent or unlawful goal cannot be considered 'sound.' Rather advice in furtherance of such goals is socially perverse, and the client's communications seeking such advice are not worthy of protection" (*In re New York City Asbestos Litigation, supra citing In re Grand Jury Subpoena Duces Tecum*, 731 F2d 1032, 1038 [2d Cir1984]). Based on an *in-camera* review of the relevant emails, it can be argued (though this Court does not find at this juncture) that the communications show plaintiffs' attempt and intent to form Cartel in a manner that arguably conflicted with their duty to their employer herein.

Consequently, in the absence of any finding that Ben's emails were privileged and protected from disclosure, sanctions against defendants and counsel for accessing such

communications is unwarranted. The caselaw cited by plaintiffs in support of disqualification, sanctions, suppression, and dismissal of defendants' counterclaims are factually distinguishable (*cf. Lipin v Bender*, 84 NY2d 562, 620 NYS2d 744 [1994] (dismissing plaintiff's complaint where plaintiff, a paralegal, took defense counsel's documents during a pre-trial hearing, made copies and forwarded a set to her counsel, who read them based on the premise that plaintiffs' counsel failed to secure the documents from view at the conference); *Pure Power Boot Camp v Warrior Fitness Boot Camp*, 587 F Supp2d 548 [SDNY 2008] (employer accessed employee's personal e-mails, which were stored and maintained by outside electronic communication service provider)).

It is also noted that plaintiffs failed to show any abuse by defendants' counsel of the alleged confidential information, or that an attorney-client privilege is compromised so as to warrant disqualification of defendants' counsel (*cf., Matter of Beiny*, 129 AD2d 126, 517 NYS2d 474 [1st Dept 1987] (disqualification warranted "to prevent the offending lawyer or firm from deriving any further benefit from information obtained and used in violation of basic ethical precepts and statutory obligations")). The record indicates that on August 21, 2012, approximately one month after plaintiffs resigned, defendants' counsel communicated with plaintiffs' then counsel, Melvin Berfond, Esq., and commented on plaintiffs' failure to "listen to their lawyer's advice with respect to their planned 'retreat.'" (Defendants' counsel's email to Berfond, dated August 24, 2012). Defendants' counsel's reference to plaintiffs' communications with an attorney did not trigger, at that juncture, any motion for relief or other objection to defendants' counsel's purported intrusion into plaintiffs' communications with an attorney. And, defendants' counsel's use of such non-privileged information to advance a settlement of this

matter does not rise to the level of "extortion," or a violation of the New York Rules of Professional Conduct, Rule 4.4., as characterized by plaintiffs' counsel.[8]

Conclusion

Therefore, based on the above, it is hereby

ORDERED that plaintiffs' motion (sequence 002) pursuant to CPLR 3103© and 3101(b) to dismiss the counterclaims and third-party complaint of Monaco Reps, LLC, Claudia Monaco and David Monaco for discovery violations, to disqualify defendants' counsel, to suppress all pages of Ben's emails obtained by defendants, to enjoin defendants and their attorneys from disclosing information obtained from such emails, and to direct defendants and their attorneys to purge any record of such emails and to provide an account of all information they reviewed, plus attorneys' fees and costs plaintiffs incurred in connection with this motion and with plaintiffs' response to defendant's document production is denied; and it is further

ORDERED that plaintiff's motion (sequence 003) to, *inter alia*, dismiss defendants' answers and counterclaims for failure to provide discovery or to compel defendants to provide outstanding discovery shall be resolved at an in-court conference on August 6, 2013, 2:15 p.m.; and it is further

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[8] According to the parties, this Rule prohibits lawyers from using "means that have not substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person." As indicated above, the record fails to establish that defendants' counsel violate any "attorney-client privilege" or rights belongin to Ben in obtaining the subject emails.

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendants and third party plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 2, 2013

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD