SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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SUZANNE MANGOLD ZACHARIUS,

Plaintiff,

-against-

KENSINGTON PUBLISHING CORPORATION, STEVEN ZACHARIUS and JUDITH ZACHARIUS,

Defendants.

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Index No. 652460/2012
Motion Date: 6/30/2015
Motion Seq. No. 011

BRANSTEN, J.

In this action, Plaintiff Suzanne Mangold Zacharius challenges the enforceability of a Voting Agreement, which governs the election of Defendant Kensington Publishing Corporation's ("Kensington") directors. Defendants Kensington, Steven Zacharius, and Judith Zacharius now bring the instant motion for discovery sanctions, asserting that Plaintiff intentionally deleted thousands of emails that may be pertinent to the action, particularly to Plaintiff's only surviving claim – that the Voting Agreement should be declared invalid by this Court since the signature of Plaintiff's now-deceased husband on the document allegedly was forged. In addition, Defendants seek renewal of their previously-denied motion to dismiss this surviving claim on the grounds that recently-produced emails are documentary evidence invalidating her claim. Plaintiff opposes and cross-moves for sanctions against Defendants, arguing that their motion is frivolous.

For the reasons that follow, Defendants' motion for sanctions is granted, and the matter is referred to a Special Referee for a determination of the amount of attorneys' fees and costs due to Defendants for the filing of the instant motion and for their review

of Plaintiff's Yahoo email account. Defendants' motion for renewal and Plaintiff's cross-motion for sanctions are both denied.

I. Background

A. *The Amended Complaint*

Kensington is the largest independent publisher of mass-market books in the United States. (Am. Compl. ¶ 15). The company was founded in 1974 by Walter Zacharius. (Am. Compl. ¶¶ 15, 16). In 2005, Walter Zacharius's son, Steven Zacharius, assumed the roles of president and CEO. (Am. Compl. ¶ 16).

The instant action stems from a quarrel over control of Kensington between Steven Zacharius and Plaintiff, his step-mother. Walter Zacharius married Plaintiff, his second wife, in June 2006. (Am. Compl. ¶ 36). When Walter Zacharius died on March 2, 2011, Plaintiff became the largest single shareholder of Kensington stock, holding 59% of the voting equity. (Am. Compl. ¶ 20). Plaintiff received her shares under the terms of the Walter Zacharius Revocable Trust Agreement), dated October 29, 2010. (Am. Compl. ¶ 19). However, Plaintiff never has voted her shares due to the existence of a document entitled "Voting Agreement," which allegedly was entered into by Walter Zacharius and his two children, Steven and Judith Zacharius ("Voting Agreement"). (Am. Compl. ¶ 28).

The instant action centers around the enforceability of the Voting Agreement. The Voting Agreement, dated December 16, 2005, states that the three "Initial Stockholders," Walter, Steven and Judith Zacharius, will vote on Kensington directors as "may be agreed upon by all of the Initial Stockholders." (Am. Compl. Ex. A at 1). The Voting Agreement further provides that if only two Initial Stockholders are alive, such as Steven and Judith, then those two surviving Initial Stockholders will elect directors for all the shares representing the three Initial Stockholders. (Am. Compl. Ex. A at 1). Under the Voting Agreement, Plaintiff alleges that she has not been entitled to vote for directors under the shares she received from Walter Zacharius because Plaintiff is not an Initial Stockholder, and the Voting Agreement is binding on the Initial Stockholders' heirs and assigns. (Am. Compl. Ex. A at 3). Plaintiff's inability to vote for directors, who control the corporation, allegedly has greatly reduced the value of the shares. (Am. Compl. ¶ 124).

Plaintiff brought this action on July 16, 2012, seeking to invalidate the Voting Agreement. Plaintiff filed the Amended Complaint on February 5, 2013. After the Court's January 6, 2014 decision on Defendants' motion to dismiss the Amended Complaint, only one cause of action remains – Plaintiff's request for a declaratory judgment that the Voting Agreement is void as invalidly executed.

B. *Discovery*

The course of discovery in this matter has been slow and fraught with numerous disputes necessitating Court intervention. To put the matter in context, a brief overview of discovery, as pertinent to the instant motion, follows.

Shortly after the commencement of this action, Defendants sent a litigation hold notice to Plaintiff, dated August 6, 2012, directing her, among other things, to "preserve or cause to be preserved all documents, … including, for example, e-mail…" (Affirmation of Daniel A. Schnapp Ex. S at 1.) The hold notice further explained that "[a]ll documents, data and information, in any form, relating to the allegations in the Complaint must be preserved without change, in their existing format(s), until all subsequent legal proceedings have been exhausted and finally concluded." *Id.* at 2.

After Defendant filed a motion to dismiss Plaintiff's Amended Complaint in its entirety, Plaintiff requested limited discovery "on the issue of the agreement itself [the Voting Agreement], which is the cornerstone, because all of the other legal theories are based upon the predicate that this document exists." *Id.* Ex. D at 26:25-27:6 (6/7/13 Oral Arg. Tr.) The Court granted this request.

The parties then began depositions. During their August 12, 2013 deposition of Plaintiff, Defendants requested the production of Plaintiff's journals and diaries. *Id.* Ex. I at 139:20-22. In the ensuing weeks, Defendants repeated this request, noting that Plaintiff

had failed to comply. *See* Docket No. 190 (including 10/9/13 email from Defendants to Plaintiff).

On October 10, 2013, Plaintiff submitted her opposition to the motion to dismiss, which attached several documents that had never been produced to Defendants in the action. During the October 17, 2013 oral argument on the motion to dismiss, Defendants objected to Plaintiff's failure to respond to their discovery requests, as well as to Plaintiff's use of documents that had not been produced to Defendants in discovery. The Court explained to Plaintiff during this oral argument that discovery "goes both ways," and in response, Plaintiff's counsel stated that he would "undertake to complete everything that is within Ms. Zacharius' control by Monday." (Schnapp Affirm. Ex. I at 21:17-22.) The Court later granted Defendants' motion to dismiss as it pertained to all counts in the Amended Complaint except for Count I.

On November 8, 2013, Defendants served their First Request for the Production of Documents and Tangible Things on Plaintiff.[1] These requests demanded that Plaintiff "produce and identify all [responsive] documents ... that are in your possession, custody

[1] Defendants previously had sought to stay further discovery pending resolution of their motion to dismiss, which was taken under submission on October 17, 2013. This request to stay further discovery was denied by the Court in a Decision and Order dated October 29, 2013. These requests were served shortly thereafter.

or control, or subject to your control, wherever they may be located." *Id.* Ex. K at 1. The definition of "Document" expressly includes emails. *Id.* at 4.

Thereafter, Defendants served their first set of interrogatories on Plaintiff. Notably, interrogatory number 23 asked Plaintiff to identify "each and every email account … used during the relevant time period." (Schnapp Affirm. Ex. U at ¶ 23.) Plaintiff identified only two email accounts in her response – a Yahoo account and an account with Kensington.

On July 14, 2014, Defendants wrote to the Court, requesting, among other things, that Plaintiff conduct additional searches of her email accounts, after Plaintiff was unable to confirm that all responsive documents had been produced. *See* Defs.' July 14, 2014 Letter at Ex. C (citing to Pl.'s June 23, 2014 Deposition Tr. at 34:4-8) (Docket No. 246 & 247.) In particular, Defendants noted Plaintiff's deposition testimony that she may have "inadvertently" deleted discoverable documents. *See* Pl.'s June 23, 2014 Deposition Tr. at 18:7-13.

In response to Plaintiff's deposition answers and following an attempt to resolve the issue by meeting and conferring, Defendants sought to compel Plaintiff to conduct additional searches of her email accounts, including searches for inadvertently deleted emails, and to make any computers, hard drives, and communication devices under Plaintiff's possession, custody or control available for inspection. On October 7, 2014, the parties entered into a stipulation whereby Plaintiff agreed to "make available to

Defendants at a mutually convenient time and date within six (6) days … all of Plaintiff's computers, hard drives, back-up storage devices, personal digital assistant devices and mobile phones." (Docket No. 267)

Nearly one year after Defendants' first document requests were served, and following letters to the Court and discovery conferences, Plaintiff allowed Defendants access to her computers and Yahoo e-mail account. Defendants contend that they discovered "numerous" documents in Plaintiff's Yahoo account that were responsive to their discovery requests, as well as to the limited pre-motion to dismiss discovery regarding the Voting Agreement and Count I granted by the Court for the purpose of Defendants' motion to dismiss.

In addition, Defendants contend that the emails recovered from Plaintiff's Yahoo account contain admissions by Plaintiff that she intentionally – not "inadvertently" – deleted thousands of other emails and had a separate Gmail account that was not disclosed to Defendants in her sworn interrogatory responses. *See* Schnapp Affirm. Ex. B (11/7/13 email from Plaintiff to Yvonne Moritz with the subject "Just deleted over 3,000 emails!!!!!" and stating "I feel free. Have to go through about 2,000 more. I'm just pressing delete. I'm keeping only important ones that have to do with my case…"); *id.* Ex. T (10/2/10 email from Gmail Team to Plaintiff with the subject "Your Gmail address … has been created.").

II. Discussion

In response to these documents containing admissions about email deletion and the existence of an undisclosed email account, Defendants filed the instant sanctions motion. The motion requests dismissal of Plaintiff's Amended Complaint pursuant to CPLR § 3126. In the alternative, Defendants seek renewal of their previously-denied motion to dismiss the first count of the Amended Complaint, arguing that documents produced from Plaintiff's Yahoo account "reveal important new facts that were not available to Defendants while the motion to dismiss was pending." (Defs.' Moving Br. at 20.) Finally, Plaintiff has filed a cross-motion for sanctions against Defendants based on the filing of Defendants' motion. These requests will be addressed in turn.

A. *Defendants' Motion for Discovery Sanctions*

Defendants seek spoliation sanctions against Plaintiff pursuant to CPLR § 3216, which provides that "[i]f any party … refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: … 3. an order striking out pleadings or parts thereof … or dismissing the action or any part thereof…" Defendants contend here that they have been irreparably harmed by Plaintiff's evasion of discovery in this action, including the

concealment and potential deletion of relevant emails, and that Plaintiff's pleading therefore should be stricken in its entirety.

A party seeking sanctions based on spoliation of evidence must demonstrate that "(1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45 (1st Dep't 2012); *see also Ahroner v. Israel Discount Bank of N.Y.* 79 A.D.3d 481, 482 (1st Dep't 2010).

1. Spoliation Elements

The first element of the spoliation analysis is easily satisfied by Defendants. There is no dispute that Plaintiff had control over both her Yahoo email account as well as the emails at issue when they were destroyed. In fact, Plaintiff concedes – and documents produced in discovery confirm – that she deleted thousands of emails from her Yahoo account. *See* Schnapp Affirm. Ex. B (11/7/13 email from Plaintiff to Yvonne Moritz with the subject "Just deleted over 3,000 emails!!!!!" and stating "I feel free. Have to go through about 2,000 more. I'm just pressing delete. I'm keeping only important ones that have to do with my case…"). While Plaintiff contends that she had

no obligation to preserve the emails at issue because she did not deem them relevant to the instant action, "[i]t is well settled that a party must suspend its automatic-deletion function or otherwise preserve e-mails as part of a litigation hold." *VOOM HD Holdings LLC*, 93 A.D.3d at 44. The litigation hold notice was sent by Defendants to Plaintiff on August 6, 2012. Plaintiff admits to deleting emails in her subsequent November 7, 2013 email. *See* Schnapp Affirm. Ex. B. There is also no dispute that Plaintiff had control over her Gmail account during the entirety of the discovery period.

Defendants next satisfy the "culpable state of mind" element as to the Yahoo account. Plaintiff concedes that she intentionally deleted emails from her Yahoo account while this action as pending. *See* Affidavit of Suzanne Zacharius at ¶ 7 ("These are two emails – one to a friend and one to my cousin – where I openly refer to my intentional deletion of emails.").

Plaintiff makes no such concession as to her Gmail account. Instead, Plaintiff attests that she never "used" the account and that the only emails to be found therein are "all from Google or the Gmail offices regarding the setting up of the account, a change in Gmail privacy policy, and also two emails from April 2, 2015 regarding answering security questions and resetting my password in order to be able to access the account." *Id.* ¶ 62. Therefore, the "culpable state of mind" requirement is not satisfied as to the Gmail account.

Finally, the third element of the spoliation analysis requires a showing that the destroyed evidence was relevant to the parties' claim or defense. No such destruction has been demonstrated for the Gmail account. Therefore, Defendants have not satisfied the third element – and therefore, have no established spoliation – as to the Gmail account.

However, in light of the Plaintiff's admittedly intentional destruction of the Yahoo account emails, relevance in this instance may be presumed as to the Yahoo documents. *See id.* at 45 ("The intentional or willful destruction of evidence is sufficient to presume relevance.").

However, a presumption of relevance is rebuttable:

> When the spoliating party's conduct is sufficiently egregious to justify a court's imposition of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants permitting the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

Id.; *see also AJ Holdings Grp., LLC v. IP Holdings, LLC*, 129 A.D.3d 504, 505 (1st Dep't 2015) (discussing rebuttable presumption of relevance and deeming that spoliating party successfully rebutted the presumption by demonstrating that the deleted emails were not relevant to the contract claim at issue).

Here, while Plaintiff admits deleting Yahoo emails, she also states that she refrained from deleting emails "important" to her case. *See* Affirmation of Daniel Schnapp, Ex. B at 1. Further, Plaintiff attests that she only deleted notifications regarding blog postings, news alerts, and other minutiae that had no relevance to the instant action. *See* Affidavit of Suzanne Zacharius at ¶ 13.

2. Spoliation Sanctions

While Plaintiff's self-serving attestations give the Court some pause, particularly in light of her failure to provide timely discovery at other junctures in this drawn-out disclosure process, the Court nonetheless feels constrained to deem the presumption of relevance partially rebutted as to the Yahoo documents. To the extent that Plaintiff indeed deleted only junk emails having no conceivable relevance to the issues presented in this case from that account, *ZOOM HD Holdings LLC* counsels that Plaintiff should not be subject to the "extreme sanction" of striking her pleading or the imposition of an adverse inference charge. *See id.* at 45 ("If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required").

Moreover, Plaintiff's conduct has not deprived Defendants of the ability to establish their defense. *See Melcher v. Apollo Medical Fund Mgmt. L.L.C.*, 105 A.D.3d 15, 24 (1st Dep't 2013) ("Striking a party's pleading would be too drastic a remedy where

[the opposing party is] not entirely bereft of evidence tending to establish [its] position."); *Iannucci v. Rose*, 8 A.D.3d 437, 438 (2d Dep't 2004) (denying request to strike pleading as a sanction for spoliation as "[a] less severe sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case.").

Indeed, Defendants point to several documents that they characterize as undermining her forgery allegations. For example, while Plaintiff contends that the Voting Agreement was a fabrication, Defendants argue that emails produced from her Yahoo account demonstrate that the Plaintiff and Walter Zacharius may have received drafts of the agreement in advance of her husband's death. *See* Defs.' Moving Br. at 21-23. According to Defendants, these documents contradict Plaintiff's assertion that Walter Zacharius knew nothing of the Voting Agreement and that the Agreement therefore was fabricated after his death. Defendants also point to a December 26, 2011 email, sent by Plaintiff several months before the commencement of this litigation, in which she states that her "angle" is a forgery and that "[i]t might be far fetched but it's worth the examination." (Schnapp Affirm. Ex. C.) Finally, Defendants highlight a December 11, 2011 email, in which Plaintiff states "I am the majority SH [shareholder] without voting rights." *Id.* Ex. P. Defendants assert that this email suggests that Plaintiff always understood the impact of the Voting Agreement and only now questions its authenticity as a strategy to negate its effect. Therefore, Defendants highlight emails in their papers

on this motion demonstrate that Plaintiff's conduct has not deprived them of the ability to present their defense.

Accordingly, the Court retains broad discretion to provide appropriate relief to the party injured by destroyed evidence. *Ortega v. City of New York*, 9 N.Y.3d 69, 76 (2007). In determining the appropriate relief, the Court considers, in particular, the delays and costs to Defendants resulting from Plaintiff's testimony that she may have inadvertently deleted emails related to this litigation,[2] and the motion practice required in order to obtain the Yahoo emails revealing Plaintiff's deletions in the first instance. Based on these considerations, the Court deems that Plaintiff's actions compel the determination that she pay the attorneys' fees and costs incurred by Defendants in reviewing Plaintiff's Yahoo account, as well as the attorneys' fees and costs incurred by Defendants in preparing the instant motion. *See Dean v. Campagna*, 44 A.D.3d 603, 605 (2d Dep't 2007) (imposing a monetary sanction against plaintiff based on its spoliation of evidence where the spoliation did "not deprive its opponent of a means to present or defend against a claim.").

[2] "Q. Have you deleted e-mails regarding this action? A. Not intentionally, no. Q. Did you inadvertently delete any e-mail? A. I may have. I don't – you know, when you – I don't know. Q. And did you, could you have inadvertently deleted e-mails since the receipt of our litigation hold notice? … A. Possible." *See* Schnapp Affirm. Ex. R at 18:10-19.

B. *Defendants' Motion to Renew*

Defendants also seek leave to renew their motion to dismiss Count I, arguing that the emails produced from Plaintiff's Yahoo account would have altered the Court's decision to deny the motion to dismiss Count I. In support, Defendants point to the emails addressed above, which Defendants view as rebutting Plaintiff's forgery allegations.

A motion to renew allows a party to "draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention." *See William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992). Relevant to the instant motion, CPLR 2221(e) requires the movant to demonstrate that the new facts offered "would change the prior determination." The documents cited by Defendants do not satisfy this test.

Defendants argue that dismissal would have been warranted under CPLR 3211(a)(1), since the factual allegations of the Amended Complaint are "flatly contradicted by documentary evidence" – namely the emails discussed above in which Plaintiff allegedly received drafts of the Voting Agreement before her husband's death, referred to her forgery allegations as "far fetched," and stated that she had no voting rights.

However, where a motion to dismiss is based on documentary evidence under CPLR 3211(a)(1), "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). Contrary to Defendants' interpretation, the documents at issue do not "conclusively establish" that the Voting Agreement at issue contained a valid signature by Walter Zacharius and that the document was not fabricated after his death. While these emails may suggest that the forgery and fabrication allegations are not well-founded, they do establish that these allegations "have been negated beyond substantial question." *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999).

Accordingly, Defendants' motion to renew is denied.

C. *Plaintiff's Cross-Motion for Sanctions*

Plaintiff seeks an order directing Defendants to reimburse her for all counsel fees incurred in defending against Defendants' motion for sanctions and leave to renew. In support, Plaintiff contends that Defendants' arguments as to both motions are frivolous and that she could have addressed their spoliation concerns in a deposition. The Court disagrees. As already addressed, Defendants' motion for discovery sanctions was meritorious. While Defendants' motion for leave to renew was denied, Plaintiff has

made no viable showing that the motion is "completely without merit in law" or has been "undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another." *See* 22 NYCRR 130-1.1(c) (defining frivolous conduct). In the absence of such a showing, Plaintiff's cross-motion is denied.

III. Conclusion

For the foregoing reasons, it is

ORDERED that Defendants' motion for spoliation sanctions is granted insofar as Plaintiff shall pay the attorneys' fees and costs incurred by Defendants in reviewing Plaintiff's Yahoo account, as well as the attorneys' fees and costs incurred by Defendants in preparing the instant motion; and it is further

ORDERED that Defendants' request to dismiss Plaintiff's Amended Complaint pursuant to CPLR 3126 is denied; and it is further

ORDERED that Defendants' motion for leave to renew their motion to dismiss Count I of Plaintiff's Amended Complaint is denied; and it is further

ORDERED that Plaintiff's cross-motion for sanctions is denied; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the amount of costs and attorneys' fees due to Plaintiffs; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646–386–3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for defendant shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212–401–9186) or email an Information Sheet (which can be accessed at http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk

subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on October 27, 2015 at 10:00 am.

Dated: New York, New York
September 21, 2015

ENTER

Hon. Eileen Bransten, J.S.C.