SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

AT LAST SPORTSWEAR, INC.,

Plaintiff,

-against-

LAURIE FISHMAN, ERLYN IKEDA, and MARK LAVENDER, and XYZ Co.,

Defendants.

----------X

DECISION AND ORDER

Index No.: 652176/2014
Motion Sequence No.: 003

O. PETER SHERWOOD, J.:

I. BACKGROUND

At Last Sportswear, Inc. (At Last) designs knitwear. Erlyn Ikeda and Laurie Fishman left the employ of At Last to join Mark Lavender in starting a competing apparel company. At Last started this action, claiming that Fishman and Ikeda took proprietary information from At Last. There are eight claims as follows: trademark infringement, breach of the employment agreement, unfair competition, unjust enrichment, intentional interference with contractual relations, intentional interference with prospective business relations, conversion, and breach of the duty of loyalty.

Previously, the court allowed targeted discovery, which proved unavailing. As part of its discovery, plaintiff demanded documents from certain of the defendants' private e-mail accounts, including AOL and Gmail accounts. A court-ordered subpoena addressed to Google yielded no responsive e-mails. Subsequently, At Last produced a group of documents to the defendants which were printed copies of e-mails which had been stored in Ikeda's personal Gmail account. It appears that At Last accessed the documents and printed them out on February 25, 2014, after Ikeda and Fishman left At Last. It also appears that At Last gained access by having found Ikeda's Gmail password on the company's computers.

In the motion before the court, Ikeda moves to suppress the e-mails as evidence pursuant to CPLR 3103. She claims the documents were obtained in violation of the Stored Communications Act (*see* 18 USCA 2701 and 2707). CPLR 3103 provides:

> "(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance,

> expense, embarrassment, disadvantage, or other prejudice to any person or the courts
> . . . .
> (c) Suppression of information improperly obtained. 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 information be suppressed."

The Stored Communications Act provides:

> "Unlawful access to stored communications
> (a) Offense.--Except as provided in subsection (c) of this section whoever--
> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or
> (2) intentionally exceeds an authorization to access that facility;
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section."

(18 USCA § 2701). Section 2707 creates a private right of action under that statute.

II. ARGUMENTS

Ikeda claims that At Last obtained the documents by accessing her private Gmail account in violation of the Stored Communications Act. She seeks to suppress the documents, citing as an example the suppression of e-mails from a departing employee's personal account described in *Pure Power Boot Camp v Warrior Fitness Boot Camp* (587 F Supp 2d 548 [SDNY 2008]).

Ikeda acknowledges that At Last had an Employee Handbook, but the version of the handbook which was produced in discovery by At Last post-dates her start date. It is not clear whether the version of the handbook she received had a policy on the monitoring of electronic communications, or what the terms of that policy were. In any event, the version of the policy provided to the court allows At Last to monitor communications made over its own system, but does not claim to allow At Last to extend its surveillance to third-party resources (*see* Employee Handbook, attached as Exhibit E to Connolly Aff, p 30). Accordingly, Ikeda argues that At Last had no authority or consent to access her Gmail account.

Ikeda claims she was prejudiced by At Last's accessing her e-mail and by the "disclosure of her private information" (Reply at 13). She argues that suppression of the information is necessary to maintain the court's integrity and to address At Last's misconduct (Memo at 9). Ikeda also

attributes misconduct to At Last's counsel for failing to reveal the existence of these documents earlier (*id.* at 10). Additionally, Ikeda claims these documents are not relevant to the allegations in this action (*id.*).

At Last argues that Ikeda should be denied relief under CPLR 3103 because she has unclean hands, having destroyed the documents, which otherwise should have been produced during discovery. At Last states that shortly after Ikeda left At Last, on February 21, 2014, prior counsel for At Last sent Ikeda a communication raising the specter of litigation for unlicensed use of At Last's designs. On April 15, 2014, At Last sent Ikeda a "Cease and Desist" letter, including "litigation hold" language, instructing her to maintain relevant documents, including e-mails (Opp at 3). The complaint in this action was served on Ikeda on August 23, 2014. She has not produced any e-mails in response to At Last's request. (Opp at 4). At Last contends, therefore, that she has acted in bad faith by spoliating or withholding evidence (*id.* at 5). At Last argues that the court should not "exercise its equitable powers to preclude the use of information improperly obtained where the party seeking the order destroyed the evidence or failed to take the steps required for its preservation" (*Fayemi v Hambrecht and Quist, Inc.*, 174 FRD 319, 326-27 [SDNY 1997]). At Last also points blame at Ikeda's counsel for failing to monitor Ikeda's compliance with the litigation hold (Opp at 6).

At Last claims that the Employee Handbook gave it the right to monitor voicemail and e-mail messages, including login information, and allowed for its review of Ikeda's Gmail account, because her Gmail account had been accessed from her company computer (Opp at 7). At Last argues that, even barring authorization, there is nothing in the statute that allows for suppression of the documents, and that "absent some constitutional, statutory, or decisional authority mandating the suppression of otherwise valid evidence, such evidence will be admissible [in a civil action] even if procured by unethical means" (Opp at 8, quoting *Radder v CSX Transp., Inc.*, 68 AD3d 1743, 1744-45 [4th Dept 2009] quoting *Heimanson v Farkas*, 292 AD2d 421, 422 [2nd Dept 2002]). As to CPLR 3103, At Last claims Ikeda was not prejudiced, the documents were not privileged, and it would have been entitled to the documents in discovery. Accordingly, to deny At Last the use of these documents would be to provide Ikeda a "windfall strategic advantage" (Opp at 9).

Further, At Last argues that this not the kind of "hacking" that the SCA was intended to

punish. Ikeda had no reasonable expectation of privacy in her work computer. Moreover, Ikeda has waived any privacy right related to these documents by consenting to the production of records by Google (*id.* at 10-11). At Last also contends that, even if it is prohibited from using these documents affirmatively at trial, it should be allowed to use them during discovery and for impeachment purposes (*id.*).

Ikeda replies that there is no evidence of either spoliation or unclean hands in her deletion of these e-mails, because the e-mails are not relevant to At Last's claims. Ikeda argues that the e-mails do not include proprietary or confidential information, and do not support At Last's claims. Accordingly, the deletion of the e-mails was not "unconscionable conduct" (Opp at 4-6, citing *Fayemi*, 174 FRD at 326 ["[C]ourts apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks" quoting *Keystone Driller Co. v General Excavator Co.*, 290 US 240, 245 (1933)]).

Ikeda also contends that the provided handbook is irrelevant, as Ikeda received her handbook on September 20, 2007 (Receipt, attached as Exhibit F to Connolly Aff), and the handbook in the record is dated November 1, 2008. So, there is no evidence that the handbook which was provided to her contained even this, insufficient, language (Reply at 8). Further, the language in the version of the Employee Handbook before the court does not allow At Last to access Ikeda's personal Gmail account, as its language states that At Last may monitor its own systems. It does not suggest that At Last may search the contents of a third-party server. Ikeda also claims she did not agree to the production of her e-mails from Google, but only to header information, so she has not waived any rights to keep her e-mails private (Reply at 10-11). As to prejudice, Ikeda claims that she not only had her private information exposed, but also lost the opportunity to object to the disclosure of documents (Reply at 13).

III. DISCUSSION

Pure Power Boot Camp is the leading case on this issue, and the facts are very close to those here (*see* 587 F Supp 548 [SDNY 2008]). In *Pure Power Boot Camp*, the plaintiff/employer (PPBC) sued former employees who resigned to create their own, competing gym. After the employees left, PPBC accessed their work computers. One employee had saved his username and password on the company computer. PPBC was able to use that information, and information found in the e-mail

stored in that account, to access personal e-mail accounts stored on outside servers - including Gmail and Hotmail accounts. None of the e-mails were drafted on the work computer, although they may have been viewed on it. Some of the e-mails were privileged (*id.* at 553-54). The employees sought the preclusion of the e-mails, based on violations of the Electronic Communications Privicy Act (18 USC § 2510), the SCA (18 USC § 2707) and other reasons which do not apply here (*id.* at 554). The court ruled that the employer's action in logging into the remote server to access the e-mail accounts was a violation of the SCA (*id.* at 556).

That court also considered whether the employer was authorized to access those accounts, as the SCA only prohibits unauthorized access. The court reviewed the employer's technology policy and whether the employee had an expectation of privacy as to those accounts (*id.* at 559). The court summarily rejected the employer's arguments that the employee "gave implied consent to unlimited access to all of [the employee's] personal e-mail accounts, based on [the] assertion that [he] accessed his personal Hotmail account, at least once, on Plaintiff's computer" *(id.)*.

The court noted that if a company's computer use policy makes it clear that the company may monitor the employee's computer, the employee then has no expectation of privacy as to the workplace computer (*id.* at 550-60). This language did not protect the company because the e-mails at issue were not stored on the company equipment, nor did the company have any business relationship to those accounts (*id.* at 560). The court also refused to accept the plaintiffs' argument that leaving a username and password stored on the computer constituted authorization (*id.* at 561). The court added that the plaintiff would have been able to obtain these e-mails through the discovery process (*id.* at 569). The court determined that the appropriate sanction for plaintiffs' conduct was to preclude the affirmative use of the e-mails, but to allow their use for impeachment purposes, noting the challenge of crafting a solution where the plaintiff obtained information to which it would otherwise have been entitled, where defendants were accused of having "unclean hands", by nature of the allegations in the action, and where precluding the evidence would provide the defendants an "evidentiary windfall" (*id.* at 570-71).

Here, the facts are similar. The employer accessed a private, personal e-mail account hosted on a third-party-owned server. The data accessed was not saved on company equipment. There is no evidence of authorization to access Ikeda's personal e-mail account. Plaintiff provided an

employee handbook with a policy regarding the monitoring of company computers. The policy does not require employees to authorize the company to monitor data stored in their personal e-mail accounts, and certainly not post-employment. Additionally, there is no evidence that defendant Ikeda was aware of this supposed policy, as the policy was provided in an employee handbook that post-dated the receipt showing Ikeda received a handbook. Moreover, there is no evidence such a policy was included in the Employee Handbook Ikeda received. At Last violated the SCA in obtaining these documents. Moreover, its actions in holding them back in the face of the court's repeated inquiries about the basis for its case, indicate attempts to conceal its conduct. Some sanction is appropriate.

However, as in *Pure Power Boot Camp*, At Last would have been entitled to these documents. Unlike *Pure Power Boot Camp*, At Last was unable to obtain these documents through discovery, as they apparently had been deleted, despite notice to Ikeda and Fishman of the pending dispute and potential litigation, although it is unclear exactly when the emails were deleted.

As far as defendants argue that there was no spoliation of evidence because the e-mails are irrelevant, and so not discoverable, the documents supplied by counsel for Ikeda appear relevant to this action. There are e-mails from Ikeda's At Last e-mail account to her personal account with attachments showing different designs, and with what At Last claims is proprietary information. It is not clear how probative these e-mails will be, but it is likely they would be subject to production during discovery. These documents are not sensitive medical documents, nor are they protected by any recognized privilege. Accordingly, despite At Last's bad acts, on the record before me, complete preclusion of these documents would be excessive, in that preclusion may provide a significant evidentiary windfall to Ikeda and the other defendants. It would also reward Ikeda for her own bad acts, specifically destruction of evidence.

At Last shall turn over all copies of the e-mails it obtained to Ikeda, and shall destroy or delete all digital copies. At Last states that it has already demanded production of the documents. If that is so, defendants shall respond, using proper procedure. Counsel may contest the demand and the responses using the procedures set forth in the Rules of the Commercial Division and the Part 49 Rules. At trial, plaintiff shall be precluded from use of these e-mails in its affirmative case. However, it may use these documents at depositions and for impeachment purposes at trial.

This constitutes the decision and order of the court.

DATED: March 11, 2016

E N T E R,

O. PETER SHERWOOD
J.S.C.