Paykin, Richland & Falkowski, PC v Paykin
2016 NY Slip Op 33122(U)
July 25, 2016
Supreme Court, Queens County
Docket Number: Index No. 700983/16
Judge: Timothy J. Dufficy
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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PAYKIN, RICHLAND & FALKOWSKI, PC,

Plaintiff,

Index No.: 700983/16
Motion Date: 6/21/16
Mot. Cal. No. 126
Mot. Seq. 2

ALEXANDER PAYKIN, THE LAW OFFICE OF ALEXAANDER PAYKIN, P.C., RICHARD GENNA, PAUL JAMIE SOLSKI A/K/A JAMIE SOLSKI and MARK PAYKIN,

Defendants.

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JUL 26 2016
COUNTY CLERK
QUEENS COUNTY

The following papers read on this motion by plaintiff for an order imposing spoliation sanctions upon defendants **ALEXANDER PAYKIN, RICHARD GENNA, and JAMIE SOLSKI**

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.	EF 41-77
Answering Affidavits - Exhibits	EF 118-120
Reply Affidavits	EF 121-129

Upon the foregoing papers it is ordered that the motion is denied.

Plaintiff Paykin, Richland & Falkowski, PC, alleges the following:

Daniel H. Richland, Esq. (Richland), Michael Falkowski, Esq. (Falkowski), and defendant Alexander Paykin, Esq. (Paykin) are equal one-third shareholders in the plaintiff corporation which was engaged in the practice of law. The three shareholders served as the directors and officers of the corporation. Defendant Paykin also acted as the managing attorney, and, as such, he had sole control over the corporation's finances and information technology.

On July 31, 2015, the three shareholders agreed to dissolve the corporation, pursuant to BCL § 1001, and Richland requested that Paykin provide financial

information to him (there was dissatisfaction with Paykin's low billing and other matters.) On August 1, 2015, the corporation terminated the employment of defendant Richard Genna, a bookkeeper, and defendant Paul Jamie Solski, a paralegal.

On August 18, 2015, the shareholders tried to determine how much each of them had charged to the law firm in personal expenses so that the amount could be deducted from a $15,000 annual bonus promised to each shareholder. By the end of the evening, Paykin had admitted to charges in excess of $15,000 for 2015, and the two other shareholders decided to terminate him as an officer and director of the corporation. On August 19, 2015, they called Paykin and informed him of his removal, and Paykin promised to turn over the corporation's Google administrative access.

Richland and Falkowski discovered that between July 15, 2013 and July 31, 2015 defendant Paykin, defendant Genna, and defendant Solski improperly spent $201,034.03 of the firm's money for their own personal benefit.

The corporation's e-mails contained much information about improper purchases made by the defendants from on-line vendors. Paykin, Genna, and Solski accessed the corporation's e-mail servers, downloaded all of their e-mails, and deleted those e-mails from the firm's e-mail server. Paykin turned off the Google Apps Vault on August 20, 2015 and deleted the backups therein.[1]

Defendant Alexander Paykin alleges the following: The plaintiff corporation used Google Premium Services to manage its e-mails and calendar, and Google Premium Services had Google Vault, a feature that preserves e-mails. The plaintiff corporation also had a secondary backup system for its e-mails called Google Spanning.[2] Paykin terminated Google Premium Services when the shareholders decided to dissolve the

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[1]According to Google, "Google Apps Vault is an add-on for Google Apps that lets you retain, archive, search, and export your organization's email and chat messages for your eDiscovery and compliance needs."

[2]A Google website states: " Use Spanning Backup for Google Apps to back up your data automatically every day – or on demand. With enterprise-grade, robust backup and recovery capabilities, it protects all of your Gmail, Drive, Calendar, Contacts and Sites data from costly, and sometimes catastrophic, data loss – allowing users to get data back exactly the way it was in just a few clicks."

plaintiff corporation, but all of the corporation's data would be preserved by Google Spanning. Paykin, Richland, and Falkowski all downloaded their e-mails from the corporation's account, and Paykin set up his new e-mail account to "auto-remove" his e-mails from the corporation's account. The corporation paid for the Spanning backup service on an annual basis, and it continued to hold the corporation's e-mails. Richland and Falkowski either renewed the Spanning service or downloaded all of the material held by Spanning. "Therefore, the plaintiff either possesses or has access to every single PRF [plaintiff] email that was sent or received by the defendants." (Emphasis in the original.) Moreover, the plaintiff does not need the e-mails to determine what charges were made by credit card since the plaintiff has (1) the statements for the credit cards and (2) the Quickbooks files which recorded all of the payments made for the credit card bills.

Richland states in a reply affirmation: "Even after giving Falkowski and myself 'SuperAdmin' access on April 11, 2016, we still did not have direct access to the Firm's Spanning Backup." But he adds: "More recently, we have been able to access the Firm's Spanning Backup access and have attempted to restore emails." He also adds that somestimes Spanning encounters problem and does not backup an e-mail.

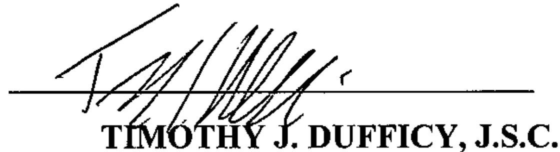
The motion lacks merit. It is true that where a party's destruction of evidence deprives his opponent of the means to present or defend a claim, the spoliator may be sanctioned by the dismissal of his pleading. (*See Friel v Papa* 36 AD3d 754; *DiDomenico v. C & S Aeromatik Supplies*, 252 AD2d 41.) A party requesting sanctions for spoliation has the burden of demonstrating that an opposing party intentionally or negligently disposed of crucial evidence, thereby impairing the former's ability to prosecute or defend his case. (*See Lentini v Weschler*, 120 AD3d 1200; *Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 AD3d 717.) In other words, a party seeking spoliation sanctions must demonstrate that (1) evidence has been lost (*see Abe v New York Univ.*, - AD3d -, 32 NYS3d (506) and (2) that he has been prejudiced by the alleged destruction of evidence. (*See Gunzburg v Quality Bldg. Servs. Corp.*, 137 AD3d 424; *Kantor v 75 Worth St., LLC*, 118 AD3d 622.) In the case at bar, because the e-mails were preserved on the Spanning backup feature (although a few may have been lost), the plaintiff failed to establish either of these elements. (*See Abe v New York Univ., supra*,

["The computer drive that was erased was a back-up of a drive that remained available. Thus, there is no showing that evidence was destroyed in the first instance."].) Moreover, the plaintiff failed to show prejudice from the alleged destruction of e-mails because its claims that the defendants wrongfully charged personal expenses on the company's credit cards may be proven by other evidence such as the credit card statements themselves and the Quickbooks files. (*See Myers v. Sadlor*, 16 AD3d 257; *Ecor Sols., Inc. v State, Dep't of Envtl. Conservation*, 17 Misc3d 1135[A] [Table], 2007 WL 4225413.[Text].) The plaintiff did not adequately show that the e-mails are needed for any purpose other than to establish the amount of the allegedly wrongful charges, and the amount may be determined by other means.

Accordingly, it is

ORDERED, that the the motion by plaintiff is denied.

Dated: July 25, 2016



TIMOTHY J. DUFFICY, J.S.C.

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