Kaminski v Sirera
2017 NY Slip Op 33079(U)
May 5, 2017
Supreme Court, Orange County
Docket Number: 0103/2016
Judge: Catherine M. Bartlett

ORIGINAL

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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JILL KAMINSKI,

Plaintiff,

-against-

CHRISTINA SIRERA, ALLYSON AVILA, ESQ., WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, CHAR & HERZBERG, LLP, and ED CHAR, ESQ.,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 0103 / 2016
Motion Date: April 26, 2017

The following papers numbered 1 to 6 were read on the motion of Defendants Allyson Avila, Esq. and Wilson, Elser, Moskowitz, Edelman & Dicker, LLP ("Wilson Elser") to compel disclosure of e-mails as to which Plaintiff asserts the attorney-client privilege:

Notice of Motion - Affirmation / Exhibits 1-2

Affirmation in Opposition - Affidavit 3-4

Affirmation in Response (Char) 5

Reply Affirmation / Exhibits 6

Upon the foregoing papers, the motion is disposed of as follows:

This action arises out of a dispute between plaintiff Jill Kaminski and defendant Christina Sirera over the operation of the Melange Med Spa, LLC (the "Spa"), a New York limited liability company engaged in the business of providing customers with various medical and non-medical

beauty remedies. Plaintiff, a former employee and alleged 50% owner of the Spa, utilized the Spa's "Brinkster" e-mail system to communicate with the attorney representing her in this action. In response to Plaintiff's demand for discovery, defendant Sirera, the sole Member of the Spa, produced copies of Plaintiff's e-mails from Brinkster, including those containing communications between Plaintiff and her attorney. Co-defendant Wilson Elser sought disclosure of those e-mails. Plaintiff having objected that the e-mails are protected by the attorney-client privilege, they have been withheld from Wilson Elser pending this court's determination whether they are in fact privileged from disclosure.

Wilson Elser, with Sirera's concurrence, now moves for disclosure of those e-mails. Wilson Elser contends that the communications between Plaintiff and her attorney were not confidential because she had no reasonable expectation of privacy in communications made via the Spa's Brinkster e-mail system. In support of this contention, Wilson Elser proffers:

(1) Paragraph 45(n) of Plaintiff's Amended Verified Complaint,[1] which states: "Upon information and belief, Sirera would monitor Plaintiff's company email account without Plaintiff's permission or authority."

(2) Plaintiff's deposition testimony that she was locked out of her Brinkster e-mail account "maybe one or two times a month, from the time that Ms. Sirera and I became disgruntled with each other, and then it happened permanently."[2]

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[1]As Wilson Elser has not tendered the verification page, it is unclear whether Plaintiff herself or Plaintiff's attorney verified the amended complaint.

[2]Asked to explain what she meant when she testified that she was "shut out" of her business e-mail account "with frequency," Plaintiff testified: "I would not [be] able to get into my e-mail, but other people who used the e-mail could, so –." Read literally, this testimony is ambiguous: was Plaintiff saying that "other people" were able to access *Plaintiff's* account or

In opposition to Wilson Elser's motion, Plaintiff submitted an affidavit averring that:

(1) Plaintiff was provided with a confidential login for the Brinkster system and she created her own confidential password.

(2) She did not "willingly" provide her confidential login or password to anyone, including defendants Sirera and Avila.

(3) If her password had to be disclosed to reset the Brinkster system, she would immediately create a new confidential password.

(4) The Spa had no electronic communications policy regarding the use of the Brinkster system. Its use for personal reasons was not discouraged, and Plaintiff was aware that defendant Sirera used Brinkster for personal reasons.

(5) She was never advised that the e-mail system was monitored, or that she did not have an expectation of privacy regarding her e-mail.

(6) At no time during the existence of the Spa did she give anyone permission or authority to read her private e-mails on the Brinkster system.

(7) She used the Brinkster system to communicate with her attorney in this action, to seek legal advice, and to discuss legal strategy under the assumption that these communications were confidential.

(8) Plaintiff had no warning that the Spa or defendant Sirera would have access to her Brinkster e-mails.

Defendants have submitted no evidence in response to Plaintiff's affidavit.

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their own accounts? In context, however, it is clear enough that Plaintiff meant to say that other employees had access to the Brinkster system during times when she herself was "shut out."

In *Willis v. Willis,* 79 AD3d 1029 (2d Dept. 2010), the Second Department wrote:

> The attorney-client privilege, which is codified in CPLR 4503(a), "fosters the open dialogue between lawyer and client that is deemed essential to effective representation" *Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 NY2d 371, 377...). Since the attorney-client privilege "constitutes an 'obstacle' to the truth seeking process" (*Matter of Priest v. Hennessy,* 51 NY2d 62, 68...), however, the "protection claimed must be narrowly construed" *(Spectrum Sys. Intl. Corp. v. Chemical Bank,* 78 NY2d at 377...). The scope of the privilege is to be determined on a case-by-case basis (*see Matter of Priest v. Hennessy,* 51 NY2d at 68...), and "the burden of proving each element of the privilege rests upon the party asserting it" (*People v. Osorio,* 75 NY2d 80, 84...).

Willis, 79 AD3d at 1030.

The key issue here is whether Plaintiff had "the reasonable assurance of confidentiality that is an essential element of the attorney-client privilege." *See, Peerenboom v. Marvel Entertainment, LLC,* 148 AD3d 531 (1st Dept. 2017) (citing *Matter of Priest v. Hennessy, supra,* 51 NY2d 62, 69 [1980]). "The attorney-client privilege does not attach unless there is a confidential communication between counsel and his or her client." *Matter of Vanderbilt,* 57 NY2d 66, 76 (1982) (emphasis added).

New York courts have held that an employee's expectation of privacy in connection with her personal use of a business e-mail system should be evaluated in light of four factors:

(1) Does the corporation maintain a policy banning personal or other objectionable use ?

(2) Does the company monitor the use of the employee's computer or e-mail ?

(3) Do third parties have a right of access to the computer or e-mails ?

(4) Did the corporation notify the employee, or was the employee aware, of the use and monitoring policies ?

See, In re Asia Global Crossing, Ltd., 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005); *Peerenboom v.*

Marvel Entertainment, LLC, supra; *Scott v. Beth Israel Medical Center Inc.*, 17 Misc.3d 934, 940-941 (Sup. Ct. N.Y. Co. 2007). These factors are addressed seriatim below.

(1) Does the corporation maintain a policy banning personal or other objectionable use?

Plaintiff avers that the Spa had no policy banning personal use of the Brinkster e-mail system, and that defendant Sirera herself used the business e-mail system for personal reasons. There is no evidence to the contrary.

(2) Does the company monitor the use of the employee's computer or e-mail?

There is no direct evidence as to whether the Spa monitored its employees' use of the Brinkster e-mail system. Plaintiff avers that her e-mail account was password protected and that she was never advised that the e-mail system was being monitored. She acknowledges that the Spa was able to, and periodically did, freeze her out of her account. It further appears from defendant Sirera's ultimate production of the e-mails in question that the Spa was able to access Plaintiff's account notwithstanding her password protection. However, it cannot from such premises be reasonably inferred that Plaintiff knew or should have known that the Spa was monitoring her e-mail account. The fact that the Spa had to request her password in order to reset the Brinkster system may, if anything, have suggested that it had no ability to pierce the password protection.

Wilson Elser relies heavily on the allegation in Plaintiff's Amended Verified Complaint that, "Upon information and belief, Sirera would monitor Plaintiff's company email account without Plaintiff's permission or authority." However, this allegation does not constitute a judicial admission because (A) it is made only "upon information and belief", (B) it concerns

a matter of which Plaintiff would naturally have lacked direct knowledge, and (C) it lacks any meaningful supporting factual detail. (Additionally, Wilson Elser has not established that the complaint was verified by Plaintiff herself.) *See, Young v. NYC Health & Hospitals Corp.*, 147 AD3d 509 (1st Dept. 2017); *Smith v. Das,* 126 AD3d 462, 463 (1st Dept. 2015); *Empire Purveyors, Inc. v. Weinberg,* 66 AD3d 508, 509 (1st Dept. 2009); *Scolite Intl. Corp. v. Vincent J. Smith, Inc.*, 68 AD2d 417, 421 (3d Dept. 1979).

By way of contrast, in *New Greenwich Litigation Trustee, LLC v. Citco Fund Services (Europe) B.V.,* 145 AD3d 16 (1st Dept. 2016), the Court found that allegations made on information and belief were properly deemed admissions because they were "factual in nature, highly detailed, and [] not consistent with the lack of direct knowledge that [is] ordinarily found in allegations that are truly made on information and belief." *Id.*, at 26. *See also, Farage v. Ehrenberg,* 124 AD3d 159, 166 (2d Dept. 2014) (allegations not made upon mere information and belief and directly verified by the plaintiff constituted formal judicial admissions); *Jack C. Hirsch, Inc. v. Town of North Hempstead,* 177 AD2d 683, 684 (2d Dept. 1991) (same).

Therefore, the "information and belief" allegation that defendant Sirera was monitoring Plaintiff's e-mails is not binding on Plaintiff, and was effectually countered by Plaintiff's averment that she was never advised that the e-mail system was monitored. Defendants have produced no evidence to the contrary.

(3) Do third parties have a right of access to the computer or e-mails?

Plaintiff avers that her e-mail account was password protected, and that at no time during the existence of the Spa did she give anyone permission or authority to read her private e-mails on the Brinkster system. Defendants have produced no evidence that any third party had a right

of access to Plaintiff's e-mail account. Insofar as persons necessary for the delivery of these communications may have had access to their contents, CPLR §4548 provides that:

> 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.

(4) Did the corporation notify the employee, or was the employee aware, of the use and monitoring policies ?

Plaintiff avers that the Spa had no electronic communications policy regarding the use of the Brinkster system, that its use for personal reasons was not discouraged, that she was aware that defendant Sirera used Brinkster for personal reasons, and that she was never advised that the e-mail system was monitored or that she did not have an expectation of privacy regarding her e-mail. As set forth in the discussion of Factor No. 2 above, the "information and belief" allegation in Plaintiff's complaint that defendant Sirera was monitoring her e-mail account is not a judicial admission, and Defendants have adduced nothing else to contradict Plaintiff's affidavit.

Conclusion

In view of the foregoing, all four factors set forth in *In re Asia Global Crossing, Ltd., supra,* and its progeny militate in favor of the conclusion that Plaintiff enjoyed a reasonable expectation of privacy in personal communications made via the Spa's Brinkster e-mail system, and hence, that the confidentiality of her electronic communications with her attorney was not compromised.

Finally, Wilson Elser objects that Plaintiff's opposing papers were not timely served and should accordingly be disregarded. CPLR §2214(c) provides that "[o]nly papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the

motion, unless the court for good cause shall otherwise direct." It appears that despite due service by Wilson Elser of its moving papers via U.S. Mail, Plaintiff's attorney may not have received them until they were forwarded to him by e-mail on April 17, 2017. While it would have been better practice for Plaintiff to have secured a formal adjournment of the motion return date, the court has received and considered Wilson Elser's reply papers, and Wilson Elser does not assert that it has in any way been prejudiced in making its reply. Under the circumstances, the court for good cause considers all papers submitted by all parties on this motion.

It is therefore

ORDERED, that the motion of Defendants Allyson Avila, Esq. and Wilson, Elser, Moskowitz, Edelman & Dicker, LLP to compel disclosure of e-mails as to which Plaintiff asserts the attorney-client privilege is denied, and defendant Christina Sirera and her attorneys are prohibited from disclosing any of the e-mails from Plaintiff's business e-mail account pending an application by Plaintiff for a protective order supported by a privilege log specifically identifying the particular e-mails as to which she claims the attorney-client privilege.

The foregoing constitutes the decision and order of this Court.

Dated: May 5, 2017 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE