

Kohl v Trans High Corp.
2019 NY Slip Op 33110(U)
October 15, 2019
Supreme Court, New York County
Docket Number: 655200/2016
Judge: Andrea Masley
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INTERIM ORDER
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY

PART 48

Justice

-----X

INDEX NO. 655200/2016

KOHL,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 007

- v -

TRANS HIGH CORPORATION,

DECISION + INTERIM ORDER ON
MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 284

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER

Defendant moves, pursuant to CPLR 3124, to compel plaintiff to produce emails from his personal email account (Account) for the period of February 15, 2016 to March 16, 2016 (incorrectly denoted 2019 in defendant's order to show cause) (see NYSCEF 271; see NYSCEF 270 [6/18/19 tr]). The court directed plaintiff to provide a third-party vendor with access to the Account to examine it for the February 15, 2016 to March 16, 2016 timespan (Period). Plaintiff provided access to the Account, which the vendor, KLDDiscovery (Vendor) remotely accessed (NYSCEF 274 [Vendor aff]). Vendor determined, according to its assistant manager of forensic services, Steven Shakespeare, that, of the 144 total emails in the Account, none of those emails were from 2016 (*id.* ¶ 7).

Defendant now seeks to forensically search plaintiff's personal cell phone(s) and laptop(s) to determine whether responsive emails in the Account exist or may have existed but were not produced and/or not preserved (NYSCEF 272 [defendant's aff]). Defendant asks the court to order

INTERIM ORDER

plaintiff to produce his personal devices to be imaged and forensically examined by Vendor on the basis that: (1) a singular email, among hundreds of thousands of documents produced in this action, was sent by plaintiff to a defendant board member on February 27, 2016, but that email was not found in the Account; (2) a letter was sent to plaintiff by former defense counsel (Preservation Letter) on December 7, 2016 instructing him to “preserve all evidence located on individual personal . . . devices,” including mobile phones and computers; “irrespective of whether Plaintiff believes the file, document, equipment or device contains any relevant information” (NYSCEF 272 [Preservation Letter]); and (3) Vendor opines that “the next appropriate step would be to image Plaintiff’s devices . . . and conduct a further search” (NYSCEF 274, ¶ 8).

Defendant argues that taking and searching a digital image of plaintiff’s devices (the entirety of each devices data) “may” result in discovery of responsive emails saved to the devices, screenshot images of responsive emails, or saved attachments to such emails (NYSCEF 272, ¶ 5; see NYSCEF 274, ¶¶ 9-10 [stating that emails can be saved to device as .pdf files, .olm files, and/or screenshot photos, and attachments may be stored in the local file system]). Alternatively, imaging the devices may provide evidence of spoliation (NYSCEF 272, ¶ 7).

Plaintiff opposes this request and identifies his April 10, 2019 affidavit (NYSCEF 119), in which he stated that he did not use the Account in his employment but believes that he may have occasionally sent employment-related emails from the Account by mistake on his mobile phone (*id.* ¶ 7). He further stated that he “conducted a diligent search” of the Account and found no emails in the “sent folder” from any time prior to April 2017 (*id.* ¶¶ 8-9 [stating further that he was unable to retrieve any earlier emails in the Account with help from an employee at an Apple store but was informed that “Apple might be able to run a search of their servers”]).

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The court declines to grant the highly-intrusive request to direct plaintiff to turn over all mobile phone(s) and laptop(s) to be imaged and searched by Vendor based on the submissions before the court on this motion. Defendant speculates that more emails may exist or have existed based on the existence of a solitary email, the contents of which are not explicitly relevant to this action beyond the fact that it was sent by plaintiff to a board member asking that board member to call him (*see* NYSCEF 88).

It is apparent, however, that plaintiff failed to preserve, at least, that February 27, 2016 email from his Account. Accordingly, plaintiff is directed to file, within five days of entry of this order on NYSCEF, an affidavit setting forth the following information:

(a) all devices, including mobile phones, computers, laptops, tablets, etc., on which he has accessed or had access to his Account from the date of the Preservation Letter to present, whether he still owns those devices (or, if not, when and the manner in which he lost, destroyed, or otherwise disposed of those devices);

(b) the manner in which he used his Account during the 2016 Period;

(c) why there are no emails dating from 2016 in the Account, and the manner of and date on which the loss or destruction of any 2016 Period emails occurred; and

(d) what efforts, if any, he took to preserve the contents of the Account and when he made such efforts.

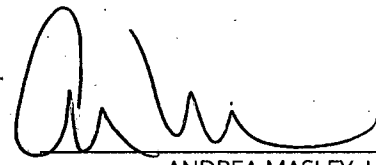
Following filing of plaintiff's affidavit, the court will determine an appropriate penalty for plaintiff's failure to preserve emails—or, at least, one potentially responsive email—in the Account after receiving the Preservation Letter or notice of its contents from his counsel in/around December 2016.

Accordingly, it is

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ORDERED that plaintiff shall provide an affidavit as described above within five days of entry of this interim order on NYSCEF by the court.

10/15
/ 2019
DATE



ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE