

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Justice

PART 45

PRAMER, SCA

INDEX NO. 603336/04

ABAPLUS International

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff for spoliation sanction is granted per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 21, 2011

Richard L. ... J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X
PRAMER, SCA.,

Plaintiff,

- against -

ABAPLUS INTERNATIONAL CORPORATION

Defendant.
-----X

Index No. 603336/04

DECISION AND ORDER

Motion Seq. Nos. ~~001, 002~~

011

MELVIN L. SCHWEITZER, J.:

In this breach of contract action, plaintiff Pramer, S.C.A. (Pramer) brings a spoliation motion alleging that defendant Abaplus International Corporation (Abaplus) intentionally or recklessly destroyed the hard drives of six computers containing relevant electronic evidence after it was notified of the likelihood of litigation and after this litigation was commenced, and failed to produce four other computers allegedly containing relevant electronic evidence. Pramer seeks sanctions pursuant to CPLR 3216, including entry of a judgment against Abaplus, or an adverse inference jury instruction at trial.

The court grants Pramer's motion for the reasons set forth below.

Background

Pramer based in Buenos Aires, Argentina, is a supplier of programming to cable television and satellite distributors in Latin America, Spain and some Spanish speaking markets in the United States. See Amended Complaint, ¶ 1, Ex 4 to the Affirmation of Kenneth J. Rubinstein in Opposition to Plaintiff's Motion for Sanctions, dated July 1, 2010 (Opposition

Affirmation). Abaplus, also based in Buenos Aires and also in Montevideo, Uruguay, and Miami, Florida, is a producer of programs which it sells to suppliers such as Pramer. Pramer is alleged to be Abaplus's principal client. *Id.*, ¶ 2.

This action was commenced by Pramer in October 2004. In the original complaint, Pramer asserted claims for breach of contract and declaratory relief against Abaplus, seeking a declaration that Pramer properly terminated a December 2002 agreement between Abaplus and Pramer (the 2002 Agreement) related to the supply of television programming. Pramer alleges that Abaplus breached the 2002 Agreement by failing to provide Pramer with the full 300 hours of programming as required under the agreement and offered to supply to Pramer programming from RM Associates for which Abaplus did not have distribution rights, thus damaging Pramer. *Id.*, Ex 4, ¶ 9. In November 2004, Abaplus answered the complaint and asserted a counterclaim against Pramer for breach of the 2002 Agreement seeking \$14,915,508.19, plus interest, in damages. Opposition Affirmation, ¶ 5.

In March 2007, Pramer filed an amended complaint in which it named two additional defendants – Vargas Distribution, Inc. (VDI)¹ and Mr. Arturo Vargas (Mr. Vargas) – and added three causes of action against Abaplus for fraud, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. In its amended complaint, Pramer alleged that Abaplus breached the 2002 Agreement by failing to deliver programming which it committed to Pramer, by attempting to sell Pramer rights to programming which Abaplus did not itself have, and that

¹ VDI was a company engaged in the distribution of television programming to Latin American broadcasters, which had a relationship with Pramer dating back to the late 1990s. VDI was owned and operated by Alvaro and Eduardo Vargas, who were the majority shareholders and officers, as well as Arturo Vargas who was a minority shareholder. VDI ceased its business activities in or around 2002 and was later formally dissolved. Opposing Affirmation., n. 1.

Claudio Bevilacqua (Mr. Bevilacqua) (Pramer's then-CEO) entered into agreements with VDI (in January 2001) and Abaplus (in December 2002) that committed Pramer to pay "grossly inflated prices for programming" due to a scheme through which Mr. Bevilacqua received kickbacks in 2001 from VDI (which, like Abaplus, was controlled by Mr. Vargas). *Id.*, ¶¶ 6-7.

In November 2007, Abaplus and Arturo Vargas moved to dismiss the amended complaint. Mr. Vargas moved to dismiss the entire amended complaint for lack of personal jurisdiction and for failure to state any viable claims for relief, while Abaplus moved for partial dismissal of the amended complaint, seeking to dismiss the claims for fraud, unjust enrichment, and breach of the implied covenant of good faith and fair dealing.² Opposing Affirmation, ¶ 8.

The court referred the motions to dismiss (as they related to the issue of personal jurisdiction over VDI and Mr. Vargas) to a Special Referee, and by his report dated August 15, 2008, the Special Referee issued a recommendation that the court grant VDI's and Mr. Vargas' motions in their entirety, on the basis that "plaintiff has failed to sustain its burden of proving that the movants are subject to the jurisdiction of the courts of the State of New York." The Special Referee also opined that: (i) the claims for fraud, breach of the implied covenant of good faith and fair dealing, and unjust enrichment against Abaplus were ripe for dismissal; and (ii) even if there were sufficient grounds for the exercise of personal jurisdiction over VDI and Mr. Vargas, Pramer's claims for fraud, breach of the implied covenant of good faith and fair dealing and unjust enrichment were ripe for dismissal. *Id.*, ¶ 9.

² In January 2008, VDI similarly moved to dismiss the entire amended complaint for lack of personal jurisdiction and for failure to state any viable claims for relief. Opposition Affirmation., n. 2.

Thereafter, Abaplus moved to confirm the Special Referee's report and Pramer cross-moved to reject it. By order dated March 24, 2009 (the Dismissal Order), the court dismissed VDI and Mr. Vargas as defendants, and dismissed the claims for fraud, unjust enrichment, and breach of the implied duty of good faith and fair dealing against Abaplus.³ *Id.*, ¶¶ 10-11.

On or about May 11, 2009, Abaplus answered the amended complaint and re-asserted its counterclaim. *Id.*, ¶ 12.

In September 2008, Pramer filed a motion to compel the production of certain categories of documents through the analysis and inspection of computers via forensic imaging and subsequent searching of those computers. At a December 4, 2008 conference relating to Pramer's motion to compel, Justice Herman Cahn referred the unresolved part of Pramer's motion to Special Referee John A. K. Bradley, who, on February 23, 2009, issued an order appointing a forensic expert, Gary Haas of Kroll OnTrack to conduct an analysis of Abaplus's computers identified as possibly containing data relating to Pramer.⁴ According to Pramer, Mr. Haas has determined that every Abaplus computer hard drive in existence at the time this litigation was commenced appears to have been either discarded or reformatted so that the data that was on the hard drive is not accessible. Pramer asserts the following:

- (1) Abaplus had a duty to preserve data when it anticipated litigation in August 2004, and certainly after this case was filed in October of 2004;

³ By decision dated June 10, 2010, the Appellate Division, First Department, affirmed this court's dismissal of VDI and Mr. Vargas as parties as well as the dismissal of plaintiff's claim for breach of the implied covenant of good faith and fair dealing, but reinstated plaintiff's claims of fraud and unjust enrichment against Abaplus. Opposition Affirmation, n. 3.

⁴ On September 23, 2009, after the court granted VDI and Mr. Vargas' motion to dismiss them out of the case and dismissed certain claims against Abaplus, Special Referee Bradley issued an order modifying his February 23, 2009 order. Opposition Affirmation, ¶¶ 17-19.

- (2) Abaplus housed all its relevant electronic data on personal computer hard drives (not on servers), and there is no evidence Abaplus forensically imaged or ghosted any drives to preserve data;
- (3) In June 2008, Abaplus identified 10 personal computers as having held relevant information in this case – after Pramer’s motion to compel was granted, Abaplus produced only 6 hard drives for analysis;
- (4) For each of the 6 hard drives, the forensic expert determined the first day that hard drive was used (either as a new hard drive or as the result of reformatting an old hard drive that wiped out old data);
- (5) As to the six computers, all of them have first use dates after the litigation commenced – so that no original hard drives extant at the time the litigation began remain in a condition with any significant data; and
- (6) Three critical hard drives (Mr. Vargas, his key assistant, and Eduardo Vargas, his brother) all have first use dates after the parties were focused on the preservation issue.

Pramer S. C. A.’s Memorandum of Law in Support of its Motion for Sanctions, dated May 6, 2010 (Moving Memorandum), pp. 1-2, 8.

Pramer’s motion focuses on three areas of what it contends are destroyed emails and other documents: (1) alleged improper communications between Abaplus and Pramer’s in-house counsel, Esteban Falcon (Mr. Falcon), after litigation commenced, (2) documents and communications with third party Neil Mundy (Mr. Mundy) of RM Associates, and (3) both internal communications among staff at Abaplus and communications with Pramer’s then-CEO Mr. Bevilacqua and other documents relating to banking issues. *Id.*, pp 11-12.

Abaplus responds by contending that no relevant emails that refer to Pramer were lost, deleted or destroyed since October 2004, when Mr. Vargas became aware that Pramer had filed this lawsuit and instructed his personal assistants to preserve all documents (including emails) within Abaplus’s possession, custody or control. Memorandum of Law in Opposition to Pramer, S. C. A.’s Motion for Sanctions, dated July 1, 2010 (Opposition Memorandum), p. 9

Discussion

In order to prevail with a spoliation motion involving electronic evidence, Pramer must meet a three-prong test; “(1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed, (2) the records were destroyed with culpable state of mind, and (3) the destroyed evidence was relevant to the parties[’] claim or defense.” *Ahroner v Israel Discount Bank of New York*, 2009 WL 2135164, at *8 (NY Sup Ct July 9, 2009) (quoting *Zubulake v USB Warburg LLC*, 220 FRD 212, 220 (SDNY 2003). In order to obtain sanctions for spoliation, Pramer has the burden of demonstrating that Abaplus intentionally or negligently disposed of crucial items of evidence before Pramer had an opportunity to inspect them, thus depriving Pramer of a means of proving its case. *See Kirkland v City of New York*, 236 AD2d 170, 173 (1st Dept 1997). It is essential that Pramer establish prejudice as a result of the disposal of evidence. *Kirshen v Marino*, 16 AD3d 555, 555-56 (2d Dept 2005).

During oral argument, Pramer limited its spoliation argument to the six laptop computers that were produced by Abaplus and inspected by Mr. Haas. (As to the other four computers identified as possibly containing communications with or about Pramer, Abaplus asserts it never represented that it possessed or controlled such computers, and the whereabouts of them is not known. Opposition Memorandum, pp 11-12. Pramer has not challenged Abaplus’s assertion.) Pramer cites to what it refers to as the “first use” date, which essentially indicates that either (1) a new hard drive was installed on that computer on that date or (2) the old hard drive was reformatted, wiping all its information. Mr. Haas determined the “first use” date of each hard drive of the six laptops is as follows:

- a. Arturo Vargas’ Primary Laptop: January 6, 2009
- b. Magdalena Sapelli’s (Arturo Vargas’ long-time assistant) Computer: November 7, 2008

- c. Eduardo Vargas' New Hard Drive: August 29, 2008
- d. Arturo Vargas and his assistants' computer in Buenos Aires: January 9, 2009
- e. Alvaro Vargas Computer No. 1: March 27, 2005
- f. Alvaro Vargas Computer No. 2: for two different sections of the hard drive – March 28, 2008 and August 29, 2008

E-mail from R. Meuer to R. Harper and K. Rubinstein, dated Nov. 4, 2009, annexed to Ex. 19, Affirmation in Support of Motion for Sanctions of Richard B. Harper, dated May 6, 2010 (Supporting Affirmation); Kroll OnTrack Initial Findings Report: A02 Use Dates, dated March 22, 2010, Ex. 20 to Supporting Affirmation.

During oral argument, Pramer's counsel concentrated on three hard drives, which are also highlighted in its Moving Memorandum at pages 9-11. These are:

Arturo Vargas' Primary Computer: Mr. Vargas' primary hard drive was replaced or reformatted in the middle of the briefing process for the February 23 Order – after Justice Cahn granted Pramer's motion to compel. See E-mail from R. Meuer to R. Harper and K. Rubinstein, Ex. 19 to Supporting Affirmation; Feb. 23, Discovery Order, *Id.*, Ex. 10. According to Pramer, despite uncontroverted evidence that Vargas had direct communications with Mundy and Falcon, the total number of pages produced from his hard drive (after the Kroll analysis) was less than 100 pages – none of which were these direct communications. See E-mail from C. Bauman to R. Harper, dated March 16, 2010, annexed as Ex. 23 to Supporting Affirmation. As Pramer sees it, this meager production combined with the evidence of improper communications with

Falcon, as discussed below, establishes that relevant evidence was destroyed on Mr. Vargas' original hard drive.

Magdalena Sapelli's Computer (Key Arturo Vargas Assistant): Abaplus replaced or reformatted Magdalena Sapelli's hard drive on November 7, 2008 – the same day that Pramer filed its final brief in support of the motion to compel production. E-mail from R. Meuer to R. Harper and K. Rubinstein, Ex. 19 to Supporting Affirmation; Pramer S.C.A.'s Reply Brief in Support of its Cross-Motion to Modify the court's February 23, 2009 Order (Pramer Cross-Motion Reply), dated July 7, 2009, Ex. 24 to Supporting Affirmation. Ms. Sapelli testified in her deposition just a few months before that she (1) had worked with Mr. Vargas since 2001, (2) did not delete any e-mail relating to Abaplus or VDI business, (3) believed she still had e-mails from 2001 forward, and (4) specifically believed that she had e-mails with Mr. Falcon from the start of the litigation. Sapelli Dep. 13:21-23, 38:9-12, 53:13-17, 38:23-39:2, 92:4-14 (July 14, 2008), Ex. 25 to Supporting Affirmation. As such, she was the likeliest source to have many, if not all, of the missing e-mail correspondence. However, according to Pramer, after the Kroll forensic analysis was completed, there was no production of Mr. Falcon or Mr. Mundy communications of any note. See E-mail from C. Bauman to R. Harper, Ex. 23 to Supporting Affirmation. Based on Ms. Sapelli's testimony, Pramer contends Abaplus destroyed a vast array of relevant e-mail when it replaced or reformatted her hard drive during briefing of the motion to compel.

Eduardo Vargas' Computer: Facing a Pramer document production in March 2008 showing improper contacts between Pramer's in-house counsel Mr. Falcon and Abaplus through Mr. Falcon's personal Yahoo account, Abaplus responded by producing what Abaplus believed to be a favorable e-mail on the issue from Mr. Eduardo Vargas' hard drive. Moreover, at Mr. Eduardo Vargas' deposition in July 2008, he testified that he believed he had e-mails related to Mr. Falcon on his computer hard drive, but also that he had not been asked to preserve any documents related to the litigation. Eduardo Vargas Dep. 10:14-20, 13:10-14:9 (July 14, 2008), Ex. 26 to Supporting Affirmation. On August 29, 2008, only one day after Pramer obtained permission from the court's law clerk to file its motion to compel, Mr. Eduardo Vargas' two hard drives were replaced. See E-mail from R. Meuer to R. Harper and K. Rubinstein, Ex. 19 to Supporting Affirmation. Only one additional e-mail was apparently produced relating to Mr. Falcon and that had already been produced – all the rest of the e-mails regarding Falcon-Abaplus contacts have been destroyed.

The court finds that Pramer has made a clear and convincing showing that after the litigation was commenced, the hard drives on these computers were reformatted or otherwise deleted so as to raise a strong inference that access to data that existed prior to the reformatting or deletion is no longer available to Pramer. As noted, Mr. Haas found that *all six hard drives* had been reformatted wiping out whatever was on the drives. The hard drives on two computers, Mr. Arturo Vargas' computer and his brother Eduardo Vargas' computer, were wiped out after Pramer filed its motion compelling their production with this court. The court further finds that

Abaplus has proffered no explanation for how this happened and concludes that the deletion was done intentionally or at least recklessly.

Abaplus argues that the destruction of the hard drives is of no moment because the data on the computers was manually transferred to the new hard drives. Opposition Memorandum, pp 7-8. However, courts have routinely rejected that argument because there can be no assurance that all the data, both emails that are “live” and “deleted” but still capable of being retrieved from the hard drive, have been transferred. See *Green (Fine Paintings) v McClendon*, 262 FRD 284, at *288 (SDNY 2009) (holding that an examination of files manually transferred from an original hard drive would be a “useless exercise”); see also *Am. Family Mutual Ins. Co. v Roth*, 2009 WL 982788, at *6, 8 (ND Ill Feb. 20, 2009) (replacement of hard drive does not account for failure to retain what was on computer); *Great Am. Ins. Co. of New York v Lowry Devel. LLC*, 2007 WL 4268776, at *2, 4 (SD Miss Nov. 30, 2007) (duty to preserve evidence housed on the original, discarded computer hard drive); *Teague v Target Corp.*, 2007 WL 1041191, at *2 (WD NC April 4, 2007) (plaintiff’s disposal of a computer hard drive that had “crashed” was sanctionable).

Abaplus argues that these cases only apply where no emails were actually produced from the old hard drives, and, in this case, many emails have been produced by Abaplus (Abaplus says all of them). But, aside from the fact that the cases do not say what Abaplus says they say, Pramer points out that Judge Cahn in his ruling granting Pramer’s motion to compel pointed to some one hundred emails between the parties, copies of which were produced by Pramer or non-parties that should have been in the possession of Abaplus, but were not produced by Abaplus. So it appears that the manual transfers Abaplus is relying upon were faulty.

The most difficult issue relates to the third element of proof necessary to establish sanctionable spoliation: prejudice to Pramer, because it lost evidence crucial to its case. Pramer relies on a presumption of prejudice and relevance. Reply Memorandum, p13. However, in the principle case Pramer relies upon for that proposition, *Pension Committee v Banc of America Securities, LLC*, 685 F Supp2d 456 (SDNY 2010), Judge Scheindlin noted there were alleged to be “substantial gaps” in the electronic discovery produced by plaintiffs. *Id.* At 462. Before Pramer can rely upon a presumption of prejudice, it must make a showing that the deletion and reformatting of the laptops’ hard drives resulted in the destruction of discovery that was called for and not produced. Pramer focuses on three categories of alleged missing emails.

Communications with Esteban Falcon

Pramer contends that in granting Pramer’s original motion to compel, Judge Cahn established that Abaplus destroyed over 100 relevant emails and documents, including those relating to Mr. Falcon and RM Associates. Reply Memorandum, p 14. During oral argument, the court verified that this is Pramer’s contention and it was not refuted by Abaplus. Abaplus argues that Pramer should have all the emails between Mr. Falcon and Abaplus, and that there are no post litigation emails in any event. *Id.* pp 13-14. Pramer counters that all it has is a Yahoo screen on Mr. Falcon’s personal computer and Pramer cannot access the emails from that. Pramer S.C.A.’s Reply Memorandum in Support of its Motion for Sanctions, p 2 and fn 10. Pramer directs the court to the following evidence it has obtained from non-party productions and electronic forensic findings:

1. **Fragments of Missing E-Mails.** Screen shots of Mr. Falcon’s personal e-mail account establish the existence and relevance of communications between Falcon and Abaplus personnel. *See* Screen Shots from Esteban Falcon Inbox (PRA 8273-8331), at PRA 8275-76, Ex. 34 to Supporting Affirmation.

2. Secret E-Mail Account Created by Abaplus for Mr. Falcon. One captured image on an e-mail to Mr. Falcon shows Mr. Arturo Vargas forwarding him information indicating the creation of an e-mail account for his use through the Vargas-headed Internet service provider Dedicado. E-mail from Mr. Arturo Vargas to Mr. Esteban Falcon, dated October 15, 2004, Ex. 42 to Supporting Affirmation. No e-mails from this secret e-mail account were produced and were presumably destroyed.
3. Testimony of Magdalena Sapelli (Arturo Vargas' Key Assistant). Abaplus cannot and has not contradicted the fundamental points about Magdalena Sapelli's testimony in July 2008: (i) she preserved all e-mails relating to VDI and Abaplus from 2001 forward; (ii) she specifically had e-mails relating to Pramer and Mr. Falcon, and (iii) she had not been asked to gather or produce e-mails relating to Mr. Falcon. Sapelli Dep. 13: 20-24, 38: 9-12, 53: 13-17, 38: 23, 39: 2, 92: 4-14 (July 14, 2008), Ex. 25 to Supporting Affirmation. Within five months after the testimony, Abaplus wiped out her hard drive and the relevant e-mails on it that goes directly to contract and fraud issues in this case. Opposition Memorandum, p 7.

Communications with Mr. Bevilacqua

Pramer alleges that Mr. Bevilacqua and Mr. Arturo Vargas schemed to enrich themselves at Pramer's expense and that Mr. Bevilacqua was given kickbacks in exchange for committing Pramer to pay exorbitant prices for programming. Amended Complaint, ¶¶ 12-22. Abaplus argues that Pramer has not pointed to any communications or documents by or to Mr. Bevilacqua that are supposedly missing and that this is consistent with Mr. Bevilacqua's deposition testimony that he rarely if ever used emails to communicate with Abaplus. Opposition Memorandum, p 14. Pramer contends, correctly in the court's view, that Abaplus' failure to keep books and records renders it impossible in the circumstances to identify missing e-mails.

Communications with RM Associates

In its amended complaint, Pramer alleges that Abaplus did not have rights to certain programming owned by RM Associates that was offered to Pramer by Abaplus, and that Pramer was harmed by this. See Amended Complaint, ¶ 31. Moving Affirmation, Ex 4. Abaplus asserts that it produced all communications with RM Associates in its possession, custody and control.

Id., p 15. Abaplus also contends that none of the communications it supposedly has not produced are relevant to the pending claims as none of them relates to the programming actually selected by Pramer, about which it complains. *Id.* In the circumstances, Abaplus' contention is not persuasive.

Conclusion

Having concluded that Abaplus intentionally or recklessly deleted emails from the six lap hard drives identified in its response to Pramer's discovery request and analyzed by Mr. Haas of Kroll, that Abaplus had an obligation to preserve those emails which it failed to meet by supposedly transferring data and that the deleted emails were relevant to Pramer's claims, the court turns to the issue of the appropriate sanction. Pramer requests that the court strike Abaplus' answer, or, in the alternative, order that the jury be given an instruction that it may draw an adverse inference due to the deletions of the hard drives, or for monetary sanctions. The court concludes an adverse inference instruction is appropriate. Pramer does not point to a specific loss of evidence which if preserved would render Pramer entitled to the declaratory judgment it seeks. Thus, striking Abaplus' answer would be inappropriate.

On the other hand, it is clear that relevant emails were deleted, albeit it is not as clear what impact their deletion is likely to have. The court believes that this is best left to the jury to consider after it is given a proper instruction containing a statement of Pramer's contention. This will allow the jury to draw an adverse inference, if it deems it proper to do so under the circumstances.

Accordingly, it is

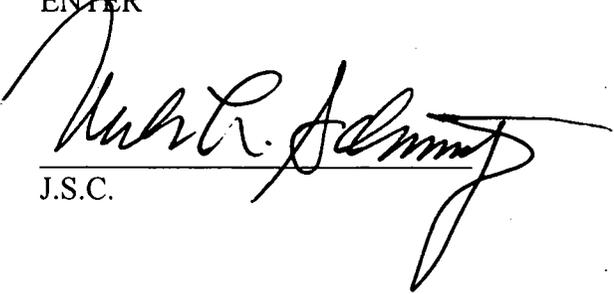
ORDERED that plaintiff's motion is granted; and it is further

ORDERED that within 30 days of the entry of this Order and Decision, plaintiff is to submit a proposed jury instruction; and it is further

ORDERED that the parties are to appear for a pre-trial conference on March 17, 2011 at Noon at 60 Centre Street, Rm. 218.

Dated: January 21, 2011

ENTER



J.S.C.