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***SHORT FORM ORDER***

***SUPREME COURT - STATE OF NEW YORK***

***Present: HON. R A L P H P. F R A N C O, Justice***

TRIAL/IAS,PART **12**

**SILVERBERG & HUNTER, L.L.P.**

Plaintiff(s),

-against-

INDEX No.: 002976/02

MOTION SEQ. NO: 1

**AARON FE. FUTTERMAN**

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause..... 1 - 2

Answering Affidavits.....

Replying Affidavits.....

Motion by attorney for Defendant for an Order pursuant to CPLR Sec. 4506, to suppress the contents of a certain communication [or conversation or discussion] between the Defendant herein and the following individuals: Cann, Capra, Costillo, Karnbad, Nelson, Posa, Franey, Drake, Pressman and Semrod, and any evidence derived therefrom, on the ground that the communication [or conversation or discussion] was unlawfully overheard or otherwise intercepted or

accessed; and upon granting of said relief or otherwise, the Defendant additionally seeks an Order pursuant to CPLR Sec. 3211(a)(1), (3), (5) and/or (7), dismissing the Complaint in its entirety is determined as hereinafter set forth.

The Defendant, Aaron Futterman, Esq., began working for the Plaintiff, Silverburg & Hunter, L.L.P., in February of 2000. On October 22, 2001, the Plaintiffs' laid off the Defendant. On October 23, 2001, while cleaning out the office of the Defendant, the Plaintiff alleges it discovered several password-protected files on the hard drive of the computer of the Defendant, as well as an e-mail account of the Defendant. After deciphering the passwords and accessing both the hard drive and the e-mail account, the Plaintiff alleges that the Defendant had been servicing his own clients while billing the clients of the Plaintiff. Defendant claims that all such evidence should be suppressed under N.Y.C.P.L.R. Sec. 4506, and that all the causes of action should be dismissed.

In **Muick v. Glenayre Electronics,** 280 F.3d 741, also 743 (7th Cir. 2002), the Court found that an employee "had no right of privacy in the computer that [his employer] had lent him for use in the workplace ... [the computers were the employer's] property and it could attach whatever conditions to their use it wanted to. They didn't have to be reasonable conditions...." . The Court went on to recognize that "the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction)."

Protecting files with a password may not be used to bootstrap a privacy claim where (a) the recognized expectation is that none exists. See: **O'Connor v. Ortega,** 480 U.S. 709, 715-16, 107 S. Ct. 1492, 1496-97 (1987), in the Fourth Amendment context, as a general proposition, areas within the employer's control do not have or create an expectation of privacy for employees); and (b) the act purportedly

used to create it is wrongful to begin with.

Plaintiff alleges that the discovery of the files occurred not from the desktop computer used by the Defendant but by a secretary working at her own desktop computer. See: Affidavit of Esther Bertocci at Par. 3.

If the Defendant's position is accepted, then no employer can view the contents of an employee's computer without the consent of the employee. This would grant to the employee a level of privacy specifically rejected by the Seventh Circuit and contrary to the Supreme Court's elaboration of the reasonable expectation of privacy, Ortega Supra. The expectation of privacy for data placed on an office network computer hard drive shared by all personnel with access to it is inconsistent with any reasonable expectation of privacy. And, the subjective belief, based upon the unauthorized creation and use of an exclusive password, cannot create a reasonable expectation where none exists to begin with. The Plaintiff did not do anything other than

view files on its shared hard drive. This was not a violation of CPLR Sec. 250.05. The motion to suppress is **denied** because the Plaintiff's evidence was not acquired through eavesdropping and should **not** be suppressed pursuant to CPLR Sec. 4506.

Defendant's motion to dismiss the First Cause of Action alleging fraud is **denied.** The First Cause pleads the elements of fraud with particularity. (Graff Affirmation, Pgs. 5-6).

Defendant's application to dismiss the Second Cause of Action on the ground that there is no independent cause of action for damage to reputation unless part of a defamation claim is **denied.** In **Morrison v. National Broadcasting,** 24 A.D.2d 284 at pgs. 287-88, the Court found that injury to a person's reputation is as harmful as that sustained from defamation, albeit induced by neither slander nor libel. Thus, the causative acts are different from those in defamation, but the effect, that is, the harm to reputation is the same." **Reversed on other grounds by 19 N.Y.2d 453.**

Plaintiff's Third Cause of Action is **dismissed.** "A violation of a disciplinary rule does not generate a cause of action." See: **Kaufman Org. V. Graham & James,** 269 A.D.2d 171 at page 173.

Defendant's application to dismiss the Fourth Cause of Action on the ground that absent a special agreement, an employer may not recover back wages or equivalent drawings paid during a period of completed employment is **denied.** See: **Western Electric Company v. Bremer,** 41 N.Y.2d 291.

On a motion to dismiss under CPLR 3211(a)(7), the Court's review is limited, as "the pleading is to be afforded a liberal construction, its allegations are accepted as true, Plaintiffs are accorded the benefit of every possible favorable inference and [the Court] determine[s] only whether the facts as alleged fit within any cognizable legal theory", (**Weimer v. City of Johnstown,** 249 A.D.2d 608, 610, lv app den 92 N.Y.2d 806). The concern is not whether a Plaintiff can prove its cause of action, "but only whether one has been

Plaintiff can prove its cause of action, "but only whether one has been stated" **(Roland Pietropaoli Trucking v. Nationwide Mut. Ins. Co.,** 100 A.D.2d 680).

Failure of all counsel to appear in my Courtroom, **Part 12, on July 26, 2002, at 9:00 A.M.,** to enter into a Preliminary Conference Order (22 NYCRR 202.12), may be deemed a default within the meaning of 22 NYCRR 202.27.

The within Conference may not be adjourned without prior Court consent.

Counsel for Plaintiff shall serve a copy of this Order, with Notice of Entry, on all counsel.

**Dated: July 3, 2002**

**Hon. Ralph P. Franco, J.S.C.**

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