

**L-3 Communications Corp. v Kelly**

2007 NY Slip Op 31081(U)

April 23, 2007

Supreme Court, Suffolk County

Docket Number: 0014971/2005

Judge: Elizabeth H. Emerson

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 11-1-06  
SUBMITTED: 12-13-06  
MOTION NO.: 012-MG  
013-XMD

\_\_\_\_\_ x  
L-3 COMMUNICATIONS CORPORATION,

Plaintiff,

-against-

STEVEN L. LEVITT & ASSOCIATES, P.C.  
Attorneys for Plaintiff  
Two Hillside Avenue, Bldg. F  
Williston Park, New York 11596

ALEXANDER KELLY, MARK D-SQUARED, MARK-  
DSQUARED, INC. and JOHN DOES 1-10, (said names  
being false and fictitious, as the names of these other  
Defendants are unknown at this time),

BRACKEN & MARGOLIN, LLP  
Attorneys for Defendants  
One Suffolk Square, Suite 300  
Islandia, New York 11749

Defendants.  
\_\_\_\_\_ x

Upon the following papers numbered 1 to 54 read on this motion for protective order and cross-motion to punish for contempt; Order to Show Cause and supporting papers 1-20; Notice of Cross Motion and supporting papers 21-37; Answering Affidavits and supporting papers 38-45; Replying Affidavits and supporting papers 46-52; 53-54; it is,

**ORDERED** that the motion by the defendants for a review of an order of the Judicial Hearing Officer appointed to supervise discovery in this case dated September 28, 2006, and for a protective order is granted; and it is further

**ORDERED** that the cross motion by the plaintiff to punish the defendant Alexander Kelly for contempt; for disclosure of all documents and e-mails on his personal computer; for access to such computer; and for sanctions and attorney's fees is denied.

By an order dated May 24, 2006, this court recommended to the Administrative Judge of Suffolk County that this action be referred to a Judicial Hearing Officer for the purpose of supervising all remaining aspects of discovery. The Honorable Harry E. Seidell was subsequently appointed for that purpose. The record reveals that, since his appointment, Judge Seidell has worked diligently to try to resolve the parties' outstanding discovery disputes. It appears that the root of the parties' differences lies in their approach to disclosure of the confidential and proprietary business information of third-parties Datapath and Gigastat. Throughout the pendency

of this action, the plaintiff has sought unfettered access to such information, as well as the defendant Alexander Kelly's personal computer. The plaintiff has steadfastly refused to enter into a confidentiality agreement with the defendants. In the absence of such an agreement, the defendants have refused to provide the plaintiff with disclosure concerning Datapath and Gigastat. However, throughout the course of this litigation, the defendants have demonstrated an obligation to maintain the confidentiality of Datapath and Gigastat's proprietary information. Moreover, the defendants have represented to the court that they are working with Datapath and Gigastat to provide discovery without violating their obligation to these potential competitors of the plaintiff.

On September 28, 2006, the parties appeared before Judge Seidell, who ordered Mr. Kelly to appear on October 12, 2006, to answer questions concerning his claim that correspondence, e-mails, and other documents he exchanged with Datapath and Gigastat are confidential. Judge Seidell also ordered Mr. Kelly to produce an affidavit that he has maintained and preserved all electronic files and other data generated by and/or stored on his computer. The defendants have moved for review of Judge Seidell's order and for a protective order. The plaintiff has cross moved to punish Mr. Kelly for contempt for failing to comply with Judge Seidell's order.

Preliminarily, the court finds that the defendants' motion was timely made. CPLR 3104(d) provides that an application to review an order of a judicial hearing officer appointed to supervise disclosure shall be made within five days after such order is made. The rules of the Commercial Division require that, in order to resolve issues before motion practice ensues, pre-motion conferences must be held (Rule 24[a]). Contrary to the plaintiff's contentions, a pre-motion conference is required before a disclosure motion is made when, as here, the parties' are unable to resolve their dispute without court intervention (Rule 14). When a motion must be made within a certain time pursuant to the CPLR, the submission of a motion notice letter within the prescribed time is deemed the timely making of the motion (Rule 24[h]). By a letter dated October 3, 2006, the defendants advised the court that they intended to move pursuant to CPLR 3104(d) for review of Judge Seidell's September 28, 2006, order and requested a pre-motion conference in accordance with Rule 24(a). Since that letter was submitted to the court within five days after Judge Seidell made his order, the motion is timely.

In a prior order dated May 24, 2006, this court noted that the plaintiff's discovery requests would require the defendants to produce a tremendous amount of confidential information regarding a competitor of the plaintiff. Moreover, no procedures had been developed to safeguard such confidential information and to prevent the plaintiff from using it. Approximately one year later, the parties still have not entered into a confidentiality agreement despite the compelling need therefor. The documentary evidence submitted by the defendants demonstrates that both Datapath and Gigastat, in letters to counsel, object to the disclosure of their confidential and proprietary business information to the plaintiff and that such disclosure would be in violation of the terms of Mr. Kelly's consulting agreement with Datapath. Accordingly, the court finds that the defendants have established the need for a protective order (*see*, CPLR 3103[a]). The protective order annexed to the defendants' order to show cause, which has been signed by the court, strikes a reasonable balance between the parties' need for disclosure and the need to keep certain information confidential. Throughout the pendency of this action, the plaintiff has sought unrestricted access to Mr. Kelly's personal computer. In an order dated May 31, 2006, the court denied a prior request by

the plaintiff for such relief. The plaintiff again seeks disclosure of all documents and e-mail messages contained on Mr. Kelly's personal computer, as well as all passwords and access codes in order to impound, clone, and inspect such computer. The plaintiff has failed to provide the court with a compelling reason for such broad relief. The plaintiff's contention that Mr. Kelly is deleting and destroying evidence on his personal computer is not supported by the record. Contrary to the plaintiff's contention that Mr. Kelly admitted destroying evidence at his depositions, the record reveals that Mr. Kelly admitted deleting a blank form that contained no factual information and some unspecified e-mails. The court previously dealt with this issue and determined that the plaintiff had failed to meet its burden of proving how the document and e-mails in question were crucial to the prosecution of this matter or how the plaintiff was prejudiced by their loss. The plaintiff has not produced any additional evidence in support thereof. The defendants have already provided the plaintiff with the e-mails relating to L-3 Communications Corp. Moreover, Mr. Kelly testified about the deleted e-mails at his July 22, 2005 deposition. Thus, they were deleted well before this court's March 24, 2006, order enjoining Mr. Kelly from destroying or deleting from his computer any documents, including e-mails, that relate to the business conducted by the defendants. The plaintiff's contention that Mr. Kelly continues to delete information from his computer in violation of this court's order is entirely speculative. Accordingly, the court finds that the plaintiff still has not established its entitlement to the broad disclosure of documents and e-mails stored on, as well as the broad access to, Mr. Kelly's personal computer that it seeks.

The plaintiff seeks to hold Mr. Kelly in contempt of court for failing to produce an affidavit, as ordered by Judge Seidell, that he has maintained and preserved all electronic files and other data generated by and/or stored on his computer. Mr. Kelly objected to the production of such an affidavit on the ground that it was overly broad because it was unlimited in time and scope. Mr. Kelly does not object to the production of an affidavit that he is in full compliance with this court's March 24, 2006, order, and he has now produced such an affidavit. The court finds that Mr. Kelly's affidavit is sufficient and that any contempt based on his failure to produce it has now been purged.

The plaintiff also seeks to hold Mr. Kelly in contempt of court for failing to appear October 12, 2006, and again on October 19, 2006, as ordered by Judge Seidell, to answer questions concerning his claim that correspondence, e-mails, and other documents he exchanged with Datapath and Gigastat are confidential. The court finds that Mr. Kelly's failure to appear on October 12, 2006, was not willful or contumacious. Sean Conway represented the defendants on September 28, 2006, before Judge Seidell. Bracken & Margolin, LLP, was substituted as attorneys of record for the defendants on October 3, 2006. The record reveals that Bracken & Margolin was uncertain whether the appearance before Judge Seidell on October 12, 2006, was for a hearing or for a conference. In fact, Bracken & Margolin telephoned chambers for clarification and was advised to appear for a conference. Bracken & Margolin then advised Mr. Kelly that he did not have to appear on October 12, 2006. When Mr. Kelly did not appear, the matter was adjourned until October 19, 2006, and Judge Seidell ordered Mr. Kelly to appear on the adjourned date. However, on October 17, 2006, the defendants moved by order to show cause for review of Judge Seidell's September 28, 2006, order and for a protective order. CPLR 3104(d) provides, in pertinent part, that service of a notice of motion for review of an order of a judicial hearing officer appointed to supervise disclosure shall suspend disclosure of the particular matter in dispute. An

order to show cause may be served in lieu of a notice of motion (CPLR 2214[d]). Since the order to show cause was served on October 17, 2006, Mr. Kelly's appearance was suspended. Under these circumstances, the court declines to punish Mr. Kelly for contempt of court and declines to award the plaintiff sanctions and attorney's fees.

DATED: April 23, 2007

**HON. ELIZABETH HAZLITT EMERSON**

J. S.C.