

**Sinrich v Fernwood Enter., Inc.**

2011 NY Slip Op 30165(U)

January 21, 2011

Supreme Court, New York County

Docket Number: 603799/08

Judge: Eileen A. Rakower

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

PRESENT: RAKOWEN  
Justice

PART 15

NORMAN SWIRICH

- v -

FERNWOOD ENTERPRISES INC

INDEX NO. 603799/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 3

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

1
2

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JAN 25 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 1/21/11

[Signature]  
**HON. EILEEN A. RAKOWER**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
NORMAN SINRICH,

Plaintiff,

Index No.  
603799/08

- against -

**DECISION  
and ORDER**

FERNWOOD ENTERPRISES, INC. and NICOLA  
CORNWELL,

Defendants.

**FILED** Met. Seq.  
003 & 004

-----**JAN 25 2011**  
HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Norman Sinrich ("Norman") is the father of William Sinrich ("Bill"), who was the sole shareholder and sole employee of defendant Fernwood Enterprises, Inc. ("Fernwood") until he took his own life in 2007. Norman asserts that he is the 50% beneficiary of two of Bill's retirement benefits plans which are administered by Fernwood: the Fernwood Enterprises, Inc. Money Purchase Pension Plan ("Money Purchase Plan"); the Fernwood Enterprises, Inc. Defined Benefit Plan ("Defined Benefit Plan"). Defendant Nicola Cornwell ("Cornwell") is Bill's wife. Norman claims that, due to a prenuptial agreement entered into by Bill and Cornwell, the latter agreed to forgo any rights to Bill's retirement plans and, in the event that she received any such benefits, she would transfer them to the appropriate beneficiaries within five days. Norman claims that, notwithstanding this agreement, Cornwell has unlawfully retained all the rights and benefits as sole beneficiary of the aforementioned plans.

The court is faced with two related motions. First, Fernwood and Cornwell (collectively "Defendants") move by order to show cause for a protective order quashing Norman's second document request to Fernwood, second set of interrogatories to Fernwood, and Norman's first document request to Cornwell. These requests were all served on November 26, 2010, and mostly pertain to e-mail exchanges between Cornwell and Fernwood concerning Norman's requests or claims for benefits under the subject plans, and document retention policies in effect at relevant periods by Herrick Feinstein, Fernwood's counsel. In addition, Norman

moves for an order extending the time to file a note of issue.

On November 9, 2010, the parties appeared for a compliance conference, wherein Norman sought that the note of issue filed by Defendants be stricken, and that the deadline to file a note of issue be extended in order to conduct limited discovery as to whether there were additional documents in Defendants' custody that were not previously disclosed or otherwise accounted for in Defendants' privilege log, or whether any such evidence was destroyed. The parties agreed that the note of issue would be stricken (and Norman's motion to strike the note of issue withdrawn) in order to conduct the aforesaid discovery, and that the deadline to file a note of issue would be filed by December 13, 2010.

The discovery dispute revolves around e-mails between Elizabeth Holtzman, an attorney at Herrick, and Cornwell. Norman attaches portions of Cornwell's deposition transcript. There, Cornwell testified that Holtzman informed her by e-mail that Norman had made a claim for payment and that Holtzman, as president of Fernwood, was denying the claim. Cornwell also testified that "[f]rom time to time Ms. Holtzman would send [Cornwell] copies of correspondence that had been received from Mr. Sinrich and would send me copies of letters that she in her capacity as president of Fernwood sent back to Mr. Sinrich." Cornwell further testified that, to the best of her recollection, these letters were sent via e-mail, and that, in all but one case, copies of the letters that she sent in response were final copies rather than drafts.

Norman states that although Defendants represented that their document production was complete prior to the depositions of Cornwell and Holtzman, Fernwood had not produced any correspondence between Holtzman and Cornwell concerning Norman's requests for benefits under the retirement plans. After the depositions, Defendants produced additional documents, which included some - but not all, according to Norman - of the correspondence between Cornwell and Holtzman. Further, according to Norman, in an October 14, 2010 telephone conversation between counsel for the parties, Defendants "disclosed that the correspondence between Holtzman and Cornwell identified by Cornwell at her deposition was not produced because it had been deleted by Fernwood." Norman further states that defense counsel advised that, "until late 2008 or early 2009 Herrick ... in the ordinary course of business deleted all e-mails at the end of the calendar year that were not specifically saved to its electronic file management system." Norman

states that defense counsel advised that Fernwood would look for any deleted e-mails by searching Cornwell's e-mails, which it had not previously done.

Defendants state that Norman's allegations concerning the potential spoliation of evidence are "simply unfounded and untrue." Defendants supply an affirmation from Jennifer Smith Finnegan, a partner in Herrick Feinstein's litigation department. Finnegan states that she was tasked with assisting in the collection and production of responsive documents in Herrick's possession. Finnegan states that, in 2008, all e-mail coming to an individual's Herrick e-mail account (*i.e.*, the user's inbox on Microsoft Outlook) was automatically preserved on Herrick's e-mail servers. As for sent items, these were automatically preserved on Herrick's e-mail servers only for a period of 60 days before they were automatically deleted. However, sent items could manually be preserved by the user by either (1) transferring the e-mail to a file under the appropriate client-matter number in Herrick's document management system, which is separate from Outlook; or (2) moving the e-mail from the "Sent Items" folder in Outlook into a separate sub-folder created by a user in his or her Outlook inbox.

Finnegan states that she was advised by Holtzman that she was cognizant of the 60-day period for sent items, and that it was her practice to have her secretary regularly move all items in her Outlook "Sent Items" folder to a separate folder contained in her Outlook inbox. Finnegan states that this was confirmed by her review of Holtzman's archived e-mail files at Herrick, which contained a sub-folder titled "saved Sent Items." This sub-folder, according to Finnegan, contained e-mails sent by Holtzman throughout 2008 and 2009.

Finnegan states that after she was provided with a copy of Norman's November 11, 2010 letter concerning potential missing documents, she conducted a review of Defendants' prior searches and production, and performed a further search. As a result of this search, Finnegan states that she was "able to locate a handful of email correspondence that had not been originally produced or logged by Herrick on behalf of Fernwood." She further states that of these documents recovered upon a further search, all but one of the e-mails was produced by Defendants pursuant to their search of Cornwell's e-mail account. This e-mail was produced to Norman under cover of Defendants' letter dated November 30, 2010 in response to Norman's November 11, 2010 letter.

CPLR §3103 provides that

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Based upon the foregoing, the court finds that Defendants have demonstrated that they have produced all responsive documents (or have otherwise accounted for them in a privilege log); and that there is insufficient evidence in the record to do anything more than speculate that responsive documents have been either lost or destroyed by Defendants. Accordingly, it is hereby

ORDERED that Plaintiff's motion for an extension of time to file the note of issue to conduct additional discovery into issues of potential spoliation is denied; and it is further

ORDERED Defendants' motion for a protective order is granted.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: January 21, 2011

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**

**JAN 25 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**