

Jackson v OpenCommunications Omnimedia LLC
2015 NY Slip Op 32366(U)
December 7, 2015
Supreme Court, New York County
Docket Number: 151596/2014
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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JOSEPH EARL JACKSON,

Plaintiff,

Index No.: 151596/2014

-against-

OPENCOMMUNICATIONS OMNIMEDIA LLC,
JOHN ANDREW MORRIS, SALLY O'DOWD
and KATHRYN CAMPISANO,

Defendants.

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DONNA MILLS, J.:

In this underlying employment discrimination action, defendants OpenCommunications Omnimedia LLC, John Andrew Morris (Morris) and Kathryn Campisano (collectively, defendants), move for an order, pursuant to CPLR 3126, striking the complaint. In the alternative, defendants seek an order deciding all disputed issues in favor of defendants and/or precluding plaintiff from using the documents improperly obtained, including those containing attorney-client privileged communications and/or work product. Defendants further request costs and attorneys' fees incurred as a result of their efforts to compel discovery, among other things.

BACKGROUND AND FACTUAL ALLEGATIONS

After plaintiff's employment was terminated, he commenced an action against defendants alleging that they engaged in sexual harassment, discrimination and retaliation in violation of the New York State and City Human Rights Laws. In June 2014,

defendants served plaintiff with their first production requests. Part of these included requests for communications between plaintiff and any current or former employees. Defendants' exhibit A at 6. According to defendants, the initial production was incomplete. And, based on the limited documents that defendants did receive, defendants had reason to believe that plaintiff had illegally been provided with information by a coworker, Daniel Cape (Cape), who was Morris's assistant.

According to defendants, plaintiff had been receiving confidential information from Cape after plaintiff was terminated. Cape allegedly continued to provide plaintiff with confidential emails even after Cape too, was terminated. Although, after the document request, plaintiff turned over some of the communications between defendants' current and former employees, defendants maintained plaintiff did not submit all of the requested communications. Defendants also believed that, based on the limited number of documents provided to them, plaintiff had altered communications by removing non-privileged forwarding information.

Based on plaintiff's alleged lack of compliance with the production request, defendants brought a motion to compel (motion seq. no. 002). In their motion to compel, defendants argued that they had not yet received certain requested items, including a flash drive. This flash drive potentially contained improperly

obtained emails, which included possible attorney-client communications between defendants and their attorneys.

As a result of defendants' motion to compel, on October 10, 2014, the court issued a so-ordered stipulation, whereby it was stipulated that plaintiff would produce, among other things, the flash drive identified, and unredacted communications with defendants' former employees, including text messages and emails. Plaintiff was also required to provide an affidavit demonstrating full compliance with this stipulation.

On November 10, 2014, plaintiff submitted an affidavit that he was in full compliance with defendants' discovery demands. He stated that he made a diligent effort to search for all non-privileged responsive documents and that he has turned them over to his attorney. Although he had previously told defendants that he would search for the flash drive, plaintiff changed his deposition testimony via an errata sheet, stating that he did not exchange any sort of flash drive with Cape.

The Current Motion (motion sequence 005)

Defendants are now moving for an order to strike the complaint, due to plaintiff's alleged willful failure to comply with his discovery obligations. After plaintiff had affirmed that he had provided all of the documents requested, defendants performed a forensic examination of his computer. Evidently, plaintiff still had access to thousands of pages of allegedly

improperly obtained information, such as attorney-client communications, yet he did not turn these documents over despite their being on his computer. Although plaintiff had produced some of the documents from off of his computer, he did not produce all of them. According to defendants, some of the documents not produced were located in the exact same folders on his laptop as the documents he had produced.

Defendants claim that, after the search of plaintiff's computer, they were able to find 127 pages of documents containing confidential, privileged attorney-client communications. According to defendants, as plaintiff had affirmed that he had turned over everything, his conduct in not turning over the documents on his computer, was reckless. Defendants claim that they marked over 3000 pages of documents that should have been turned over by plaintiff. Defendants argue that the documents should be precluded due to plaintiff's conduct.

Defendants further argue that certain requested documentation is still outstanding, including certain tax returns. Defendants also surmise that plaintiff's access to confidential and attorney-client privileged information likely exceeds what was retrieved on his computer.

Defendants seek an order precluding plaintiff from using the documents "described in Section II.C, below including, without

limitation, those documents containing attorney/client privileged communications and/or work product." Defendants' motion at 1. According to defendants, as previously mentioned, their emails were improperly accessed by a now former employee and provided to plaintiff. They claim that 664 pages of documents were improperly accessed. Section II.C of defendants' motion refers to the 127 pages of documents allegedly containing confidential, privileged attorney-client communications. Defendants then drop a footnote where they explain, "[t]hese documents are responsive to Defendants' Requests for Production, including but not limited to, request #2, #3, #4, #5, #6, #7, #8, #11, #15, #17, #18, #19, and #20, as well as the Stipulation" Defendants do not specifically address each document.

On reply, plaintiff claims that he did not engage in any outrageous conduct or willfully fail to comply. During his deposition, when plaintiff was questioned about the documents found on his computer that he previously failed to produce, he testified that, in his search, he looked for everything he could. Plaintiff states, among other things, that he is neither an attorney nor a computer expert. Plaintiff's counsel argues that any credibility issues as to whether plaintiff willfully withheld information on his computer should be resolved at trial.

With respect to outstanding discovery, plaintiff contends that only a couple of documents are outstanding, and that they

will be provided to defendants by May 19, 2015. He maintains that defendants have merely speculated that he altered documents or that he has yet to turnover confidential communications. Plaintiff notes that he has been responsive to defendants' requests and that he, too, was required to file a motion to compel defendants to provide outstanding documents.

Plaintiff argues that the alleged "improperly obtained" documents are non-privileged communications. Moreover, as defendants have amended their answer to include a counterclaim for a violation of the Computer Fraud and Abuse Act, defendants will have the opportunity, in a motion for summary judgment or at trial, to prove whether or not plaintiff knowingly accessed defendants' computer without authorization. Plaintiff states, for example, that plaintiff himself was allowed access to defendant Morris's email account and that a question of fact remains as to which other employees had access to Morris's computer.

DISCUSSION

I. Motion to Strike:

Pursuant to CPLR 3126, courts have discretion to impose sanctions "when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection." *Puccia v Farley*, 261 AD2d 83, 85 (3d Dept 1999). "Although the party seeking disclosure

has the burden to show willfulness by the nondisclosing party, the latter must demonstrate an excuse for its failure to disclose" *Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 18 (1st Dept 2000).

Defendants claim that plaintiff exhibited willfulness when he neglected to turn over certain documents on his computer despite a court-ordered stipulation requiring him to comply with discovery requests. The documents were found only after defendants conducted a forensic investigation of plaintiff's computer. Defendants allege that some of the documents found were in the same computer folder from which plaintiff had previously given them other documents. Plaintiff responded that he searched his computer and gave all the documents he could find. Plaintiff further states that he has been compliant with other requests for discovery. The court notes that the parties signed a stipulation, dated June 9, 2015, indicating that the parties have substantially completed discovery on this motion.

The Appellate Division, First Department has held that "even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits." *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 (1st Dept 2002). Even though plaintiff's excuse that he could locate certain documents and not others is "less than compelling," there has been no showing that plaintiff's actions

were willful or contumacious, so the action should be resolved on the merits. In addition, plaintiff claims to have submitted the rest of the outstanding discovery. As a result, defendants cannot meet their burden and the request to strike the complaint is denied.

II. Defendants' Request to Preclude Documents:

Defendants allege that, after they searched plaintiff's computer, they found hundreds of pages of documents evidencing improper access of Morris's email account. At one point defendants argued that plaintiff altered certain documents. One hundred and twenty pages of documents allegedly contained confidential, privileged attorney-client communications. Defendants seek to have these documents precluded as a result of plaintiff's initial refusal to submit them to defendants.

The court has addressed plaintiff's behavior with respect to his initial refusal to turn over documents located on his computer, and concluded that defendants did not sustain their burden demonstrating that the behavior was willful. As a result, neither the complaint nor the additional documents located, will be stricken.

Defendants further claim that the documents they located on plaintiff's computer were improperly obtained. However, plaintiff claims that he and other people had access to Morris's email account. As issues of fact remain as to whether the

documents were improperly obtained, the court cannot preclude them on that basis at this time.

In addition, defendants argue these "improperly obtained" documents contained attorney-client privileged information and/or work product. They then drop a footnote, advising the court that these documents include, but are not limited to, 13 of the documents requested in the defendants' requests for production and also those included in the October 10, 2014 stipulation. Reviewing and determining whether or not documents are immune from disclosure is a "fact-specific" process. *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 381 (1991). Should defendants seek to have certain materials protected and precluded from disclosure, they may make a motion pursuant to CPLR 3103.

After a court-ordered stipulation to produce unredacted communications, including emails, defendants conducted a forensic investigation of plaintiff's computer. This "very expensive forensic examination" of plaintiff's computer alerted defendants to thousands of pages of documents that had not originally been turned over to them. Defendants' motion at 10. Here, defendants sought discovery pursuant to an appropriate request. Plaintiff had every opportunity to provide defendants with the documents off of his computer, yet he failed to do so. This failure prompted defendants to conduct a forensic examination of plaintiff's computer.

The court has concluded that the "drastic remedy of striking the complaint in this case was unwarranted [internal citation marks and citations omitted]." *L&L Auto Distribs. & Suppliers Inc. v Auto Collection, Inc.*, 85 AD3d 734, 736 (2d Dept 2011). Nonetheless, in light of plaintiff's conduct in not producing files located on his computer, a monetary sanction, including attorneys' costs and fees associated with the forensic examination of plaintiff's computer, is warranted to compensate defendants. See e.g. *Id.*, (Complaint was not stricken, but as plaintiff's conduct during discovery could not be "countenanced," defendants were awarded monetary sanctions to compensate them for the "time expended and costs incurred in connection with the plaintiffs' failure to fully and timely comply with discovery"); see also *Einstein v 357 LLC*, 2009 WL 3813777, 2009 NY Misc LEXIS 4950, *38, 2009 NY Slip Op 32611(U), *31 [Sup Ct, NY County 2009] (In light of defendants' "contumacious conduct," court granted plaintiff attorneys' fees and costs associated with the review of documents extracted from the defendants' hard drives), corrected by 2009 WL 4543044, 2009 NY Misc LEXIS 3636, *37, 2009 NY Slip Op 32784 (U), *30 (Sup Ct, NY County 2009).

In its discretion the court will not award any additional requested costs and attorneys' fees.

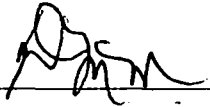
CONCLUSION

Defendants' motion is granted with respect to attorneys' fees and costs associated with the forensic examination of plaintiff's computer, but is otherwise denied.

Defendants shall submit an appropriate bill of costs, affidavit detailing costs incurred and relevant itemized bills from vendors.

SETTLE ORDER

12-7-15
Dated: _____



DONNA M. MILLS, J.S.C.