

Encore I, Inc. v Kabcenell
2016 NY Slip Op 32282(U)
November 4, 2016
Supreme Court, New York County
Docket Number: 157490/12
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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ENCORE I, Inc.,
Plaintiff,

Index No 157490/12

-against-

PETER KABCENELL,

Defendant/Plaintiff
on Counterclaim,

-against-

GREG SELIG,

Defendant on Counterclaim.

-----x
JENNIFER G. SCHECTER, J.:

Plaintiff Encore I, Inc. (Encore) moves to compel defendant Peter Kabcenell (Kabcenell) to produce his laptop computer to a computer forensic expert for the purpose of retrieving America Online (AOL) emails stored on the device. The motion is granted to the extent set forth.

Background

Encore, a consignment store, commenced this action to recover damages purportedly caused by Kabcenell, its former manager. Encore alleges that Kabcenell, through his banking and online accounts, including email accounts, covertly operated his own consignment business, converting Encore's goods, goodwill and proceeds (Affirmation in Support [Supp] at ¶ 3).

Encore repeatedly demanded production of relevant correspondence from Kabcenell's AOL email account (Supp, Exs B [request for emails between Kabcenell and Encore clients in tiff format], E [deposition questioning of Kabcenell on

whether all relevant emails were turned over to Encore and request for email password] and F [post-EBT demands including AOL password and authorization to release emails]).

Kabcenell agreed to search through emails that were to be produced by AOL pursuant to a so-ordered subpoena that Encore prepared. On January 6, 2016, this court ordered Kabcenell to produce responsive materials after he electronically searched emails that he sent or received between 2008 and 2012 for any of the following words: "sale, sales, bag, bags, handbag, handbags, purse, purses, wallet, wallets, shoes, Encore, designer, clothes, clothing, glasses and Selig" (Supp, Ex G). The order required Kabcenell to submit an "affidavit after review of the documents attesting to the nature of the review and whether responsive documents were found" (Supp, Ex G).

On February 1, 2016, AOL informed Kabcenell's attorney that it objected to the subpoena and would not supply any of the information requested "as it would be illegal to do so and any order purporting to require it is invalid" (Supp, Ex H).*

A few weeks later, the court ordered Kabcenell to provide an affidavit of good faith related to his own search of his computer/emails (Supp, Ex I).

On March 10, 2016, Kabcenell swore that he conducted a thorough "third review" of his AOL account "having produced

* The court does not address AOL's position in this motion.

relevant emails in connection with . . . prior reviews" (Supp, Ex J at ¶ 2). Kabcenell then produced an April 2008 email exchange and emails from 2010 (Supp, J).

Based on the piecemeal production--Kabcenell found additional responsive emails after making an additional search--Encore moves to compel him to produce his laptop so that a computer forensic expert can ascertain whether other potentially relevant emails are still stored there (Supp, K). Kabcenell urges that Encore's motion must be denied because:

(1) he only accessed his email through AOL.com, not through a software program; thus, email would not be electronically stored anywhere on his laptop,

(2) in April 2012, before Encore terminated him, he purchased a new computer; therefore, "the emails Encore allegedly seeks could not possibly be stored on [his] computer" (Affirmation in Opposition [Opp] at ¶ 2[B]) and

(3) there is no evidence of any wrongfully deleted emails and no basis to believe that he "ever deleted any relevant emails" (*id.* at ¶ 2[c]).

Analysis

It is well settled that parties are entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action" regardless of the burden of proof (*Andon v 302-304 Mott Street Assoc.*, 94 NY2d 740, 746 [2000]; CPLR 3101[a]). This rule applies to information that is electronically stored on computers.

After considering Encore's expert's affidavit along with Kabcenell's opposition, the court is not convinced that there is no chance that any responsive emails will be found on Kabcenell's laptop. It is undisputed that Kabcenell got his laptop before Encore terminated him so it is certainly possible that 2012 emails could be on the computer regardless of whether he transferred the contents of his old computer to his laptop. Additionally, it does not matter whether Kabcenell deleted emails or not. The fact remains that his searches may not have been sufficient (quite possibly because he does not have technical expertise) as demonstrated by his repeatedly finding more responsive email after conducting more searches. Accordingly, Kabcenell must make his laptop accessible to a computer forensic expert within 45 days under the following terms:

- Encore is to designate a computer forensic expert in Manhattan within 15 days of the e-filing of this Decision and Order. Failure to timely designate an expert will constitute a waiver of the requested disclosure.
- Kabcenell must then make arrangements to have his laptop searched by the expert. The laptop must be produced for a four-hour period. Kabcenell, his counsel or his own computer expert may be present while Encore's expert searches the laptop's hard drive.
- The expert is to search the hard drive of the laptop for emails sent or received by Kabcenell between 2008 and 2012 with the words: "sale, sales, bag, bags, handbag, handbags, purse, purses, wallet, wallets, shoes, Encore,

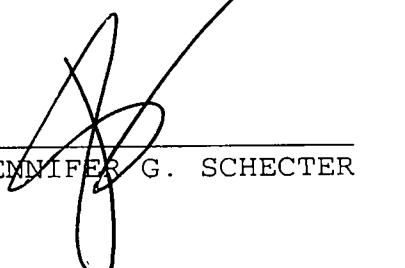
designer, clothes, clothing, glasses and Selig" and email correspondence between Kabcenell and Encore during that time period. Hard copies of any emails found pursuant to the search are to be provided to both parties. Kabcenell may first review all of the emails before they are turned over to Encore to ensure there are no legal grounds for withholding the emails.

- Costs associated with the expert are to be paid by Encore.

Accordingly, it is ORDERED that Encore's motion to compel is granted in accordance with the above-specified conditions.

This constitutes the Decision and Order of the Court.

Dated: November 4, 2016



HON. JENNIFER G. SCHECTER