SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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ADAM BROOK, ADAM BROOK M.D., PH.D., P.L.L.C.,

Plaintiff,

- v -

PECONIC BAY MEDICAL CENTER, RICHARD KUBIAK, DANIEL MASSIAH, AGOSTINO CERVONE, JAY ZUCKERMAN, JOAN HOIL, ANDREW MITCHELL

Defendant.

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**INDEX NO.** 650921/2012

**MOTION SEQ. NO.** 010

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 296, 297, 298, 299, 300, 301, 302, 303, 304

were read on this application to/for Strike Pleadings

HON. SALIANN SCARPULLA:

Plaintiff Dr. Adam Brook, M.D., Ph.D. ("Dr. Brook") and plaintiff Adam Brook M.D., Ph.D., P.L.L.C. move, pursuant to CPLR § 3126, for an order awarding sanctions, specifically striking defendants' answer.

Background

This action arises from an Adverse Action Report ("AAR") that Peconic Bay Medical Center ("PBMC") filed with the National Practitioner Databank after Dr. Brook resigned from PMBC following a surgery he performed in early October 2009. The circumstances underlying his resignation and the AAR are contested factual issues, and

Dr. Brook asserts causes of action for, *inter alia*, fraud, breach of contract, and tortious interference with economic advantage based on defendants' alleged wrongful conduct.

Dr. Brook initially learned about the AAR in June 2010, and his former counsel demanded PMBC withdraw the report in July 2010, stating that if the AAR was not withdrawn Dr. Brook would "pursue his administrative and civil remedies." Dr. Brook's former counsel again demanded PMBC withdraw the report in November 2010, and specifically threatened PMBC with a lawsuit "next week." Dr. Brook commenced this action on March 23, 2012 after initially filing, but later voluntarily dismissing, a federal lawsuit in December 2010.

Defendants' counsel issued two formal litigation hold letters on: 1) January 21, 2011, and 2) June 20, 2012. Both letters provide detailed instructions regarding the content to be preserved and the individuals who must preserve. The letters also gave advice on how to ensure preservation.

During discovery in this action, Dr. Brook identified missing documents that he believed defendants should have produced. Of the identified missing documents, defendants were unable to locate any of the emails from 2009 and certain additional emails from subsequent years.

Of the emails defendants produced, Dr. Brook notes that most were produced from their counsel's email account and not the account of the original sender or recipient. Dr. Brook argues that PMBC's failure to produce emails from the original custodian's account indicates that there must have been relevant emails that were deleted, which

would have clearly demonstrated defendants' wrongful conduct. Dr. Brook therefore seeks to strike defendants' answer for their alleged willful spoliation of the documents.

Discussion

"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015) (quotations and citations omitted). "Where the evidence is determined to have been intentionally [] destroyed [or as the result of gross negligence], the relevancy of the destroyed documents is presumed." *Pegasus*, 26 N.Y.3d at 547; *see also VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45 (1st Dep't 2012). Generally, the decision whether to impose sanctions, including to what extent, are matters within the discretion of the trial court. *Pegasus*, 26 N.Y.3d at 605.

Dr. Brook asserts that defendants should have reasonably anticipated litigation as early as October 2009, when the conduct underlying this litigation occurred, or at least in July 2010 or November 2010, when plaintiff's former counsel demanded PMBC withdraw the AAR or otherwise be subject to litigation. Based on plaintiff's letters in July and November 2010, I find that the defendants should have begun preserving and preventing the destruction of documents, including emails, at that time.

Defendants' failure to institute a formal litigation hold as early as July, 2010, does not necessarily amount to gross negligence per se and is instead "one factor that [I] consider in making a determination as to the alleged spoliator's culpable state of mind." *Pegasus*, 26 N.Y.3d at 553. In evaluating this factor, counsel for defendants submits a letter, dated January 21, 2011, sent to PMBC, which issued a formal litigation hold, provided PMBC with detailed preservation instructions, and identified key players. This occurred approximately six months after defendants should have reasonably anticipated litigation, and one month after Dr. Brook instituted his initial lawsuit against defendants.

Other "[f]ailures which support a finding of gross negligence, when the duty to preserve electric data has been triggered, include . . . the failure to cease the deletion of e-mail." *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45 (1st Dep't 2012); *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 A.D.3d 607, 609 (1st Dep't 2016). Here, Dr. Brook presents circumstantial evidence demonstrating that defendants continued to delete emails because defendants were unable to produce missing documents from the original custodian's account. Defendants point out that most of the missing emails were maintained in other forms, but that does not disprove that defendants deleted emails after the formal litigation hold.

Dr. Brook has shown that defendants did not sufficiently protect and preserve emails from July, 2010, the latest time defendants should have been on notice to do so, till January, 2011, when the first litigation hold was placed. However, defendants have shown that documents, other than emails, from that period were preserved and have been produced. Accordingly, I find that defendants did not act with purpose or with gross

negligence. Instead, defendants were simply negligent in failing to preserve emails from July, 2010 till the formal litigation hold was placed by defendants' counsel, and were negligent in failing to ensure that the litigation hold was thereafter stringently enforced.

With respect to whether the "destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense," Dr. Brook has submitted some evidence to show that emails supporting his claim were created between July, 2010 and January, 2011. For example, Dr. Brook submits an email non-party Dr. Richard Rubenstein sent to defendant Jay Zuckerman's PMBC email account, dated August 7, 2011, which defendants are unable to produce. In the email, Dr. Richard Rubenstein objects to signing a statement about the investigation he found inaccurate and raises "concern[] of possible criminal actions[.]" The deleted communication supports Dr. Brook's allegation of wrongdoing regarding PMBC's investigation leading to the AAR.

However, Dr. Brook has identified many other emails as missing which do not support his claims and, in any event, Dr. Brook already has copies of these emails. Production of the same emails would merely be cumulative. Where, as here, independent evidence exists that allows the affected party to adequately prepare its case, a less severe sanction is appropriate. *Merrill v Elmira Hgts. Cent. School Dist.*, 77 A.D.3d 1165, 1167 (3d Dep't 2010). Also, many of the emails Dr. Brook submits as evidence of ESI destruction reference oral communications between the parties. Depositions of the individuals sending and receiving those emails may produce sufficient, alternative evidence of the subject matter of the discussions.

Based on the foregoing, and to impose a sanction commensurate with the defendants' conduct, I find that an adverse inference charge is appropriate solely for emails concerning Dr. Brook created by defendants between July, 2010 and January, 2011. This sanction is particularly appropriate because defendants were unable to produce the Rubenstein email or any other communication between PMBC administrators and physicians relating to the investigation into Dr. Brooks made during that time frame.

In accordance with the foregoing, it is

ORDERED that plaintiffs motion is granted to the extent set forth above.

This constitutes the decision and order of the Court.

8/14/17
DATE

SALIANN SCARPULLA, J.S.C.
HON. SALIANN SCARPULLA

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | X | GRANTED | | DENIED | | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | DO NOT POST | | | | FIDUCIARY APPOINTMENT | | REFERENCE |