

**Shawe v Elting**

2018 NY Slip Op 30241(U)

February 14, 2018

Supreme Court, New York County

Docket Number: 155890/2014

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DEBRA A. JAMES**

**PART 59**

*Justice*

-----X

PHILIP SHAWE,

**INDEX NO. 155890/2014**

Plaintiff,

**MOTION DATE 01/30/2018**

- v -

ELIZABETH ELTING,

**MOTION SEQ. NO. 010**

Defendant.

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 419, 420

were read on this application to/for STRIKE PLEADINGS.

ORDER

Upon the foregoing documents, it is

As explained below in the Decision, the court, pursuant to and in accordance with Part 216 of the Uniform Rules for the Trial Courts, having determined that good cause exists for the sealing in part of the file in this action and the grounds therefor having been specified, it is now

ORDERED that the County Clerk, upon service on such Clerk of a copy of this order, is directed permanently to seal documents numbered 350, 356, 357, 358, 361, 363, 365, 371, 377, 378, 379, 382, 384, 386 submitted in support of this motion and to separate these papers and to keep them separate from the balance of the file in this action; and it is further

ORDERED that plaintiff, his attorneys and agents must disgorge and return all copies of the sealed documents to defendant and are permanently enjoined from using or disseminating for any purpose the information contained in the sealed documents; and it is further

ORDERED that thereafter, the County Clerk shall deny access to such sealed records to anyone (other than the staff of the County Clerk or the court); and it is further

ORDERED that to the extent defendant seeks sanctions, including dismissal of the complaint and recovery of attorneys' fees incurred in seeking the herein protective order, such motion is denied.

#### DECISION

Defendant Elizabeth Elting moves to seal certain confidential documents, specifically her personal email (G-mail) communications that remained on the TransPerfect corporation's network, and that plaintiff Philip Shawe secured from such company by subpoena and uploaded to the electronic files for the herein action, in contravention of the January 2016 Protocol Order (the Protocol Order), which was issued in a separate action between the parties in the Delaware Chancery Court.

Plaintiff opposes the motion arguing that the privileged G-mail communications in question were not the subject of the Protocol Order, or alternatively, that defendant waived the

privilege when she failed to ensure that her G-mails were no longer on the TransPerfect network, and made no motion with respect to either of two subpoenas, such subpoenas comprising an "ordinary channel [] of discovery" as set forth in the Protocol Order.

Uniform Rules for Trial Courts (22 NYCRR) § 216.1 provides that "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof."

"A finding of "good cause" presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant' ". Mosallem v Berenson, 76 AD3d 345, 349 (1<sup>st</sup> Dept 2010).

The Protocol Order of the Chancery Court was very broad in scope, ruling that the G-Mail correspondence sent and received through defendant's personal G-Mail account were privileged communications with her attorneys and precluding plaintiff from either using or maintaining such e-mails, notwithstanding that they were located on TransPerfect's server. It would be harmful to defendant's interest to allow plaintiff to circumvent the Protocol Order, which was crafted to protect defendant's confidential communications with her lawyers and to preserve her

right to attorney-client privilege, by obtaining production of such G-mail correspondence through the discovery process in the instant lawsuit. This is particularly true as such G-mails are wholly immaterial to the herein lawsuit, which is a simple assault case involving the alleged abrasion of plaintiff's ankle, and considering the recent so-ordered discontinuance of defendant's counterclaims sounding in defamation in this lawsuit.

As the preservation of defendant's privilege outweighs the public interest in such communications, the court finds good cause to grant a permanent sealing of the subject G-mails.

When granting its Protocol Order, the Chancery Court found that based upon the deposition testimony of defendant, plaintiff had purloined defendant's personal e-mail communications by burglarizing her computer and converting its hard drive. In contrast, defendant does not claim that plaintiff served

each of the two subpoenas on non-party TransPerfect without  
notice upon her, which would be in violation of CPLR 3120(3).  
On that basis, defendant has not prevailed on her claim that  
plaintiff abused the subpoena process (compare Matter of Beiny,  
129 AD2d 126 [1<sup>st</sup> Dept 1987]).

2/14/2018  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	