

**Eastern Consol. Props., Inc. v Waterbridge Capital
LLC**

2020 NY Slip Op 30310(U)

February 4, 2020

Supreme Court, New York County

Docket Number: 652994/2015

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

EASTERN CONSOLIDATED PROPERTIES, INC.,
Plaintiff,

INDEX NO. 652994/2015

MOTION DATE 04/11/2019

MOTION SEQ. NO. 007

- v -

WATERBRIDGE CAPITAL LLC, WB BERRY STREET LLC,
JOEL SCHREIBER,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 127, 128, 129, 130,
131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 152, 165, 166, 167, 168, 169,
170, 171, 172

were read on this motion to/for SANCTIONS.

Upon the foregoing documents and for the reasons set forth on the record (2/4/2020),
Waterbridge Capital LLC, WB Berry Street LLC, and Joel Schreiber (the Defendants)'s motion
for sanctions is denied.

The Relevant Facts and Circumstances

Eastern Consolidated Properties, Inc. (the Plaintiff) commenced this action for breach of
contract and unjust enrichment concerning the recovery of a brokerage commission on a property
purchased by the Defendants. The Plaintiff alleges that in August 2013, it first introduced the
premises at 186 - 96 Berry Street, Williamsburg, Brooklyn, New York (the Property) to David
Kessler, then Director of Acquisitions at Waterbridge Capital LLC (Waterbridge) (NYSCEF
Doc. No. 39, ¶ 9). Subsequently, the Plaintiff asserts that an oral agreement was formed between
Nicole Rabinowitsch and Gabriel Saffioti, each a licensed real estate sales person for the

Plaintiff, and Joel Schreiber, Chief Executive Officer of Waterbridge on January 6, 2014, pursuant to which the Plaintiff agreed to accept a half commission of 1/2% for Waterbridge's purchase of the Property (*id.*, ¶ 14). After the sale of the Property closed on April 30, 2015, the Plaintiff demanded its commission, which the Defendants refused to pay.

The Plaintiff filed a Summons and Complaint on August 31, 2015 (NYSCEF Doc. No. 1) and subsequently filed an Amended Complaint on April 14, 2016 (NYSCEF Doc. No. 39). The Defendants' First Demand for the Production of Documents, dated December 22, 2016, requested, in part, "All Documents and Communications concerning the Property that mention or concern the January 6, 2014 meeting by and among Schreiber and Plaintiff" (NYSCEF Doc. No. 130).

The Defendants deposed Mr. Saffioti on December 4, 2017, wherein he stated that he believed his phone may have backed up to the Plaintiff's storage:

Q. That calendar would show you every time you went to the building?

A. No, not every time. Many things were done at the last minute. Some of it would be located within the calendar and some of it could have been on text and e-mail records and telephone records, but the majority of appointments were generally added to the calendar

Q. The text records, you have those, right?

A. I don't know.

Q. Were they on your phone?

A. They were on my phone, but I have no idea if they are still there today. ***I have replaced my phone six times since then. This was 2013.***

...

Q. Since 2013, have you ever backed up your phone?

- A. I believe, but I'm not sure, that the phone is backed up through an iCloud and then I believe that it backs up to the company storage in my office. But ***I have never had cause to go back and look through any of that over the phone.***

Mr. Shapiro: I am going to ask you to produce whatever documents you have, whatever e-mails you have between yourself and David Marantz from March 2013 and any other communications that you had with him, by letter, anything at all.

(NYSCEF Doc. No. 138, 25:20-26:12, 30:24-31:14 [emphasis added]).

Mr. Saffioti also stated that he contacted David Kessler, Director of Acquisitions for Waterbridge:

- Q. After that first meeting in March 2013, did you ever contact anybody from Joel Schreiber or Waterbidge [sic] Capital LLC with respect to trying to sell the building, the property that's involved here?

- A. I was in contact with David Kessler on a daily basis, as well as Nancy Hom probably on a biweekly basis. I didn't mention it to David at that time on the phone because David Marantz wasn't ready to ...

(*Id.*, 31:15-25).

However, Mr. Saffioti could not recall whether he had exchanged text communication with Mr. Schreiber:

- Q. Did you have any communications with Joel Schreiber in 2013 regarding this property; e-mails, texts?

- A. Not that I have a recollection of.

(*Id.*, 53:18-22).

The Defendants deposed Ms. Rabinowitsch on March 5, 2018, pursuant to which she stated that she exchanged text messages with Mr. Saffioti:

- Q. Do you erase texts?

A. Yes, absolutely.

Q. Did you erase texts between you and Gabe Saffioti with respect to the sale of this property?

A. *I lost my phone and I got a new phone*, and I'm missing - - and there was a particular text that was very important that I don't have, not in respect to Gabe, but I'm saying yes, there are some texts unfortunately that I needed and I don't have.

Q. Well, do you have the text messages between you and Gabe about the sale of this property from February of 2013 through, say - -

A. I'm missing.

Q. - - through, say, February 2014?

A. Yea, I'm missing it, I know it already.

...

Q. Did you ever text [Mr. Saffioti] concerning the sale of this property?

A. Yes.

Q. On how many occasions would you say you texted reach [sic] other?

A. A lot.

(NYSCEF Doc. No. 137, 112:9-113:4, 114:15-20 [emphasis added]).

Ms. Rabinowitsch also stated that she exchanged texts with Mr. Schreiber:

Q. When did you start texting [Mr. Schreiber]?

A. After - - after I met him the first time.

Q. So it was after January 6th?

A. Yea, and the day of the closing, he texted me also, like by the closing, but I don't have those texts, but we can get those texts, let's pull up all the texts that he texted me on the day of closing or that I texted him.

(*Id.*, 265:25-266:10).

By email, dated August 3, 2018 (i.e., approximately five years after these alleged text messages took place), Defendants' counsel wrote Plaintiff's counsel to request certain text messages from Ms. Rabinowitsch and Mr. Saffioti concerning the Property (NYSCEF Doc. No. 132, at 15-16). Defendants' counsel responded by email dated August 27, 2018, advising that he no longer represented Ms. Rabinowitsch and Mr. Saffioti, but that he had "polled Ms. Rabinowitsch as a courtesy" and she reported that she had no responsive texts (*id.*). The Defendants then served non-party subpoenas duces tecum, dated August 28, 2018, on Ms. Rabinowitsch and Mr. Saffioti (NYSCEF Doc. Nos. 139-140).

The Defendants proceeded to subpoena Verizon in November 2018 for text messages sent by Ms. Rabinowitsch and Mr. Saffioti, which concerned this litigation (NYSCEF Doc. No. 141). By letter dated December 12, 2018, Verizon advised that text message content was only maintained for "3-5 days from the date of transmission/receipt" (*id.*).

The Defendants' Second Demand for the Production of Documents, dated January 15, 2019, requested documents and communications related to any litigation hold issued by the Plaintiff and instructions for the preservation of electronic data issued to Ms. Rabinowitsch and Mr. Saffioti (NYSCEF Doc. No. 131, the **Second Demand**). By email, dated January 28, 2019, Mr. Saffioti advised Defendants' counsel that he "possessed no further records pertaining to the subpoena" (NYSCEF Doc. No. 142).

Pursuant to a so-ordered stipulation, dated February 14, 2019, the Plaintiff was to serve a response and responsive documents to the Second Demand by March 1, 2019 (NYSCEF Doc.

No. 143). Pursuant to a conference order, dated March 15, 2019, the Plaintiff was to provide a lawyer's affirmation regarding what search was performed for the requested text messages within two weeks of the conference date (NYSCEF Doc. No. 145).

On April 11, 2019, the Defendants moved pursuant to CPLR § 3126 and 22 NYCRR 130.1-1 for (i) sanctions against the Plaintiff for spoliation and discovery misconduct in the form of striking the Amended Complaint's First Cause of Action, or alternatively preclusion or an adverse inference, and (ii) reimbursement of the Defendants' attorneys' fees and costs related to the Plaintiff's failure to preserve the communications at issue.

Discussion

Pursuant to CPLR § 3126, a court has broad discretion to provide relief if a party has destroyed evidence that ought to have been disclosed. Such relief includes the preclusion of evidence, costs for replacement evidence, an adverse inference, or the striking of pleadings (*Ortega v City of NY*, 9 NY3d 69, 76 [2007]).

In the context of electronically stored information (**ESI**), the First Department in *VOOM* adopted the standard for the preservation of ESI from *Zubulake v UBS Warburg LLC*, 220 FRD 212 [SDNY 2003]. A party can only be sanctioned for the destruction of evidence if that party had a duty to preserve it (*Zubulake*, 220 FRD at 216). When a party **reasonably anticipates litigation**, that party must institute a litigation hold that, at minimum, directs appropriate employees to preserve all relevant records, electronic or otherwise, and creates a mechanism for collecting the

preserved records so they may be searched by someone other than the employee (*id.*, 220 FRD at 218; *VOOM*, 93 AD3d at 41).

A party that seeks sanctions for spoliation of evidence must demonstrate “(1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a ‘culpable state of mind’; and finally, (3) 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” (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). Under the second element of the test, a culpable state of mind includes ordinary negligence (*id.*). When the duty to preserve electronic data is triggered, factors that support a finding of gross negligence concerning a party’s state of mind include “(1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail” (*id.*). Under the third element of the test, the party seeking sanctions bears the burden of showing prejudice resulting from the destroyed evidence (*Baldwin v Gerard Ave., LLC*, 58 AD3d 484, 485 [1st Dept 2009]).

The Defendants assert that that Plaintiff should have implemented a litigation hold as early as January 6, 2014, because the parties allegedly reached an agreement that the Plaintiff would receive a half commission in “settlement.” However, there is insufficient evidence to suggest that at this stage, the Plaintiff should have reasonably anticipated litigation on January 6, 2014 as opposed to accepting a reduced commission of \$500,000 as the Plaintiff alleges (NYSCEF Doc. No. 39, ¶ 14). Significantly, the Defendants never inquired at what point Mr. Saffioti or Ms.

Rabinowitsch reasonably anticipated litigation – i.e., that they would not be paid in this matter. And, the timeline instead reveals that the earliest point the Plaintiff should have reasonably anticipated litigation occurred when the Defendants refused to pay any commission after closing on the Property on April 30, 2015. As a result, the Plaintiff was obliged to institute a litigation hold as early as May 1, 2015, which it did not.

Notwithstanding the Plaintiff’s failure to implement a litigation hold, the record does not establish that any relevant text messages were necessarily destroyed or that the alleged destruction occurred after a litigation hold became necessary (*see Zubulake*, 220 FRD at 216). Although Ms. Rabinowitsch attested that she erased text messages she sent to Mr. Saffioti, the record is silent as to when any text messages from 2013 and 2014 may have been erased. Put another way, Ms. Rabinowitsch’s behavior is not sanctionable if she erased texts contemporaneously or lost her phone before the litigation hold should have been instituted in May 1, 2015. There is also no evidence of whether Ms. Rabinowitsch erased texts exchanged with Mr. Schreiber or when she might have done so.

During deposition, Mr. Saffioti could not recall whether he had exchanged any text messages with Mr. Schreiber and it was not clear how he communicated with Mr. Kessler. Significantly, the record is silent as to whether Mr. Saffioti had ever deleted any text messages and when this might have occurred. In fact, Mr. Saffioti testified that his texts were on his phone, but that he had replaced his phone six times since 2013. Although he speculated that his phone was backed up to the company storage, he stated that he “never had cause to go back and look through any of that over the phone.” Accordingly, there is simply no evidence that Mr. Saffioti did anything to

compromise any alleged text messages after May 1, 2015, the date on which the Plaintiff should have reasonably anticipated litigation.

Altogether, the Plaintiff cannot be sanctioned for Ms. Rabinowitsch and/or Mr. Saffioti's conduct because the record does not support a finding that either party destroyed the text messages after the Plaintiff should have reasonably anticipated litigation (*see Zubulake*, 220 FRD at 216 [explaining that “[i]f [defendant] had no such duty [to preserve the evidence], then [defendant] cannot be faulted.”]; *contra VOOM*, 93 AD3d at 39-46 [imposing spoliation sanctions upon finding that the defendant acted with gross negligence and in bad faith by failing to suspend the automatic deletion of emails until nearly one year after it was on notice of anticipated litigation]; *Zest IP Holdings, LLC v Implant Direct Mfg., LLC*, 2013 US Dist LEXIS 169014, at *17-21 [SD Cal Nov. 25, 2013, No. 10-0541-GPC(WVG)] [sanctioning the defendants, in part, because one of its senior employees “indisputably destroyed email communications due to Defendants’ failure to put in place a litigation hold.”]).

The Defendants nevertheless argue that the Plaintiff should be sanctioned for spoliation of evidence because the three elements of the *VOOM* test are met. The Court disagrees.

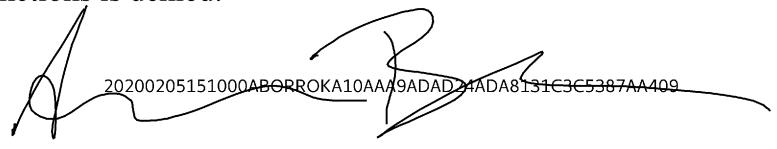
On the first element, it is not clear that the Plaintiff had the requisite control over Ms. Rabinowitsch and Mr. Saffioti as employees as opposed to independent contractors, or that the Plaintiff could control the contents and/or disposition of Ms. Rabinowitsch and Mr. Saffioti's personal phones.

On the second element, there is simply insufficient evidence to determine that either Ms. Rabinowitsch or Mr. Saffioti acted with a culpable state of mind because (i) it is unknown whether Mr. Saffioti erased or deleted any text messages at all and (ii) there is no evidence that both Ms. Rabinowitsch and Mr. Saffioti erased any texts during the relevant time period after a litigation hold should have been in place (*see Zubulake*, 220 FRD at 220 [stating that it is only after the duty to preserve attaches, that the destruction of documents is at minimum, negligent]).

As there was no intentional or willful destruction of the text messages, there is no presumption of relevance under the third element of the test for spoliation (*VOOM*, 93 AD3d at 45). In any event, the Defendants cannot establish that the absence of text message evidence prejudices their ability to defend the Plaintiff's claim. A primary defense of the Defendants is that the Plaintiff was not the procuring cause of the sale but that the Property was introduced to the Defendants by another party at earlier date. In their answer, the Defendants assert this as an affirmative defense (NYSCEF Doc. No. 40, at 2), which defense was initially raised in the Defendants' motion to dismiss (Mtn. Seq. 001). Neither Ms. Rabinowitsch nor Mr. Saffioti have attested that they exchanged any text messages with any party concerning the Plaintiff's initial efforts to advise Waterbridge of the Property in August 2013 or as to any such alleged other parties prior introduction to the party. As a result, the allegedly destroyed text messages are not prejudicial to that portion of the Defendants' defense that the Plaintiff was not the cause of the purchase of the Property and the Defendants' motion for sanctions is denied.

Accordingly, it is

ORDERED that the Defendants' motion for sanctions is denied.


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2/4/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		SUBMIT ORDER	<input type="checkbox"/>
				FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE