

RSM US LLP v Notes

2022 NY Slip Op 34434(U)

December 22, 2022

Supreme Court, New York County

Docket Number: Index No. 650401/2022

Judge: Margaret Chan

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
 COUNTY OF NEW YORK: PART 49M

-----X
 RSM US LLP,

Plaintiff,

- v -

RANDOLF NOTES,

Defendant.

INDEX NO. 650401/2022

MOTION DATE 10/25/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
 MOTION**

-----X
 HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for

Discovery

Plaintiff RSM US LLP (RSM) moves, by order to show cause, for an order (i) allowing plaintiff's forensic expert, Kroll Associates, Inc. (Kroll) to search defendant Randolph Notes' iCloud drive using search terms proposed by RSM, (ii) allowing Kroll to identify all devices that Notes connected to the iCloud drive, and (ii) directing Notes to present all identified devices to Kroll so that the devices can be imaged and searched for RSM's documents. Notes opposes the motion.

Background

This action arises out of allegations that Notes, a former partner of RSM who resigned to join a competitor, violated the terms of his partnership agreement and his duties of loyalty, good faith, and full disclosure, by diverting corporate opportunities to the competitor, soliciting RSM's employees, failing to return RSM's confidential information and misappropriating such information (NYSCEF #1-Complaint). The parties' discovery dispute arises out of RSM's efforts to obtain information from Notes' iCloud drive which Notes' counsel acknowledges contains information that Notes obtained from RSM.

By order dated August 3, 2022, the court directed the parties to meet and confer with their experts to determine a protocol to recover RSM documents from Notes' iCloud drive (NYSCEF # 38). After the court-ordered meet and confer, the parties and their experts agreed upon a protocol originally proposed by RSM, and Notes signed a release related to the obtaining of the information on August 30,

2022 (NYSCEF #'s 52-Release). Kroll successfully imaged and downloaded Notes' iCloud Drive on September 21, 2022, (NYSCEF # 58-Kassar Aff., Kroll Vice Pres. Risk Management ¶¶ 9, 10). Thereafter, counsels for the parties were unable to agree as to the appropriate search terms (NYSCEF # 42, ¶¶ 19-26; NYSCEF #'s 54-57; NYSCEF # 73-Byrne Affirm., ¶¶ 2-22) In addition, after Kroll accessed his iCloud drive, Notes maintained that Kroll did not follow the agreed upon protocol and downloaded additional data, including metadata (NYSCEF # 73, ¶ 12). RSM countered that the protocol called for the downloading of the contents of Notes' iCloud drive which included metadata (NYSCEF # 42-Kaplan Aff, ¶¶12-13; 17-18). Another dispute arose after Notes' counsel declined to retain an expert to identify all devices that Notes connected to his iCloud, and Notes' counsel refused to permit RSM to review the metadata that was downloaded from the iCloud drive by Kroll to determine if RSM documents had been transferred to other devices (NYSCEF # 42, ¶¶ 15-18; NYSCEF # 53).

On October 25, 2022, RSM efiled this order to show cause, which was issued by the court, and included an order, restraining Notes from using or accessing his iCloud drive pending further order of the court (NYSCEF #'s 41, 60). RSM argues that Notes should be required to run the search terms proposed by it because an underinclusive search could result in Notes' retention of confidential RSM documents in violation of the subject partnership agreement and trade secrets, and that its proposed search terms, including the client names objected to by Notes, will lead to relevant information. RSM further argues that Notes should be required to permit a metadata analysis of the iCloud drive, which will allow RSM to determine if Notes connected any devices to the drive, and to permit the identified devices to be imaged for RSM documents.

Notes opposes the motion, arguing that RSM seeks to recover personal and irrelevant information, including Apple Media Services Information which includes movies, podcasts, books accessed by Notes and his family. Regarding the search terms, Notes asserts that RSM seeks to search for the names of clients who are not subject to the restrictive covenant, that the search is being used by RSM to obtain Notes' proprietary information, and that RSM's counsel has not conferred in good faith as to the terms. In addition, Notes argues that the existence of RSM documents on his iCloud drive is not evidence of misappropriation since throughout his employment, RSM had Notes back up his work files on the iCloud drive that could be accessed via Notes' Apple iCloud account on various devices, which account includes information that is irrelevant to this litigation.

In reply, RSM submits the affidavit from Kroll's Vice President, who states that contrary to Notes' argument, the iCloud drives do not automatically back up information but, instead, are a separate portion of a user's iCloud account and that documents are only saved to a user's iCloud drive (as opposed to the iCloud backup) when the user specifically and intentionally selects the iCloud drive as a destination

(NYSCEF # 75-Kassar Reply Aff., ¶¶ 3, 4). Moreover, she states that in accordance with the protocol, Kroll's downloaded Notes' iCloud drive and associated metadata but not content containing personal information (*id.*, ¶ 14). As for the metadata, it comes prepackaged by Apple in four categories, including Apple Media Services information; however, the metadata download is necessary to identify the devices that were connected to the iCloud drive and the only information that will be provided to RSM are the serial numbers of connected devices (*id.*, ¶¶ 8, 9, 12). Regarding the search terms, RSM asserts that Notes' proposed terms exclude terms encompassing twenty RSM clients and change modifiers and connectors, for example, by using "and" as opposed to "or" so that documents referencing one client but not the other would not be identified in the search.

Discussion

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial" (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258 [1st Dept 1994]). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 408 [1968]). At the same time, "unlimited disclosure is not permitted" (*Harris v Pathmark, Inc.*, 48 AD3d 631, 632 [2d Dept 2008]), and "under [New York] ... discovery statutes and case law, ... the need for discovery must be weighed against any special burden to be borne by the opposing part" (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998][citations omitted]; *see also* Preamble to Rule 11 of the Commercial Division ["It is important that counsel's discovery requests... are both proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action"]).

Under these standards, the court finds that RSM is entitled to the relief it seeks on this motion. Regarding the search terms, as argued by RSM, the elimination the option of "or" between clients would unnecessarily limit the documents identified by the search. Moreover, contrary to Notes' position, even assuming certain RSM clients in the proposed search terms are not subject to the restrictive covenant at issue, whether the clients' names or information was saved to Notes' iCloud drive is potentially relevant, including to RSM's misappropriation claim, particular in view of RSM's submission of evidence that the information to be stored on the iCloud drive must be intentionally placed there. Moreover, Notes' assertion that RSM's proposed search terms may result in the disclosure of his confidential information does not warrant denial of discovery. Instead, Notes' confidentiality concerns may be addressed through protective measures such as the

parties' confidentiality stipulation which has been so-ordered by the court (NYSCEF # 37).

In addition, the record does not support Notes' position that Kroll violated the parties' protocol for the search by downloading metadata. And, to the extent the downloading of metadata yielded certain irrelevant information, such information will remain confidential and its retrieval does not render RSM's discovery requests related to the iCloud drive unreasonable or irrelevant. In this connection, RSM is entitled to discovery to determine if Notes connected any devices to the iCloud drive, including through metadata analysis, and if such devices were connected, to have the identified devices imaged for RSM documents based on RSM's proposed search terms.

In view of the above, it is

ORDERED that within 20 days of efileing this order, plaintiff's forensic expert, Kroll Associates, Inc., shall be permitted to (i) search defendant Randolph Notes' iCloud drive using search terms proposed by RSM, and (ii) identify all devices that Notes connected to the iCloud drive; and it is further

ORDERED that to the extent that devices are identified that were connected to the iCloud drive, such devices shall be presented to Kroll within 14 days of their identification so that the devices can be imaged and searched for RSM's documents based on the search terms proposed by RSM.



MARGARET CHAN, J.S.C.

12/22/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE