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STATE E-DISCOVERY

Recent Decisions Provide Practical Guidance

By **Mark A. Berman**

New York courts recently have issued a series of e-discovery decisions that provide real guidance to practitioners. In *Kennedy Assoc. v. JP Morgan Chase Bank N.A.*,[1] a motion court set forth a detailed analysis of how it determined that cost-shifting was appropriate. It analyzed each of the seven factors set forth in *Zubulake v. UBS Warburg*[2] and then, in part, on the basis that the cost of production was high relative to the estimated recovery costs for plaintiff, authorized limited cost-shifting.

On the other hand, in *Mancino v. Fingar Ins. Agency*,[3] a motion court declined to shift costs to the requesting party, and required the producing party at its expense to provide documents in native format with TIFF images.

The First Department decision in *Pegasus Aviation I v. Varig Logistica S.A.*,[4] provides guidance as to when an entity has sufficient degree of control over a related entity in order to trigger its duty to preserve such related entity's electronically stored information. *Pegasus* and *Roberts v. Corwin*[5] stand for the proposition that the First Department does not require a formal written "litigation hold" in every instance, and whether one is required is fact specific. However, because such judicial determination naturally is predicated, years after the fact, on how discovery proceeds during the course of a litigation, the failure to implement such a hold is fraught with risk.

Lastly, cell phone records can provide a wealth of information, and three motion courts recently issued orders relating to the production of such records.

Cost Shifting

In *Kennedy*,[6] JP Morgan Chase Bank moved "to shift costs of the production of electronically stored information, to toll its time to produce, and for a protective order against production." In support of its application, defendant submitted an affidavit outlining the procedure and costs of production and plaintiff, arguing that defendant should bear the entire cost of production, provided "no expert affidavit of its own" and did "not provide any alternative calculations of the cost of production of the ESI discovery." The motion court noted that the "presumption in New York is that the producing party must bear the costs of discovery for all reasonable requests," and relying upon the test for determining when cost-shifting is appropriate as set forth in *Zubulake*,[7] held:

> The seven *Zubulake* factors weigh more heavily against cost-shifting. The first factor weighs against total cost-shifting because of the relevance of the potentially found information. As noted, this factor is slightly mitigated by plaintiff's failure to provide evidence that makes such a finding more likely. The second factor weighs against cost-shifting, as defendant is the only possessor of the requested emails. The third factor weighs in favor of some cost-shifting, as the cost of production is high relative to estimated recovery costs for plaintiff. However, the fourth factor weighs firmly against cost-shifting, as defendant is a multi-national corporation that can commit significant resources to litigation, including discovery costs. Defendant corporation has the sole ability to control costs of the ESI production, the fifth factor, which militates against cost-shifting. Thus, the balance of the factors requires some cost-shifting here. Three of the five most important factors weigh more heavily against cost-shifting, while only one of the five most important factors (cost versus amount in controversy) weighs strongly in favor of cost-shifting. Combining this analysis with the presumption that the producing party pay, the apportionment must weigh more heavily towards defendant. Therefore, the costs will be apportioned, with 20% ($36,506.40) preliminarily to be borne by plaintiff and 80% by defendant ($146,025.60).

The motion court further held that defendant is "solely responsible for the costs of any legal review of the documents produced, such as for relevance, privilege, or other redaction."

Native Format Required

In *Mancino*,[8] the court found that plaintiff was entitled to the production of documents in native format with TIFF images and declined to shift costs to the requesting party. Plaintiff sought "to view document metadata, which includes information regarding the author(s), dates of creation, and dates of edits to determine whether the Activity Report entries were edited after their date of initial creation or commencement of litigation." Defendant opposed "contending that Plaintiffs are not entitled to such a production as issues concerning metadata are not involved in this lawsuit and electronic document production is therefore not necessary" and to produce in such manner would be a "laborious task."

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Duty Applies to Related Party

In *Pegasus*,[9] at issue was "whether the MP defendants exercised sufficient control over VarigLog during the period from April 1, 2008, until VarigLog's bankruptcy filing on March 3, 2009 to render the MP defendants—who are not alleged to have failed to meet their obligations to preserve or produce their own documents relevant to this action—liable to sanctions for spoliation based on VarigLog's loss of its relevant electronically stored information (ESI) during that period." The First Department "noted that although VarigLog did not implement a "litigation hold" to preserve its ESI, it did install new information technology systems (the month after plaintiffs commenced litigation) that provided for daily, weekly and monthly backing-up of its ESI.

The First Department found that the MP defendants had a sufficient degree of control over VarigLog to trigger their duty to preserve ESI relevant to the litigation where the MP defendants, as the sole shareholders of VarigLog, selected VarigLog's directors, and, during the period in question, employees and consultants of the MP defendants were closely monitoring VarigLog's operations and were formulating its business strategy. The MP defendants admitted that they could obtain documents from VarigLog upon request. The First Department wnoted:

> There seems to be little doubt that [VarigLog]; would have complied with a timely request by [the MP defendants]; to preserve its [ESI], from which we conclude that VarigLog's ESI was sufficiently under the MP defendants' "practical control" to trigger a duty [on their part]; to ensure that those materials were adequately preserved.

Litigation Hold Not Required

The majority in *Pegasus*,[10] however, reversed in part the motion court,[11] and rejected the concept that the "failure to institute a litigation hold, in all cases and under all circumstances, constitutes gross negligence per se." The majority held that, at most, simple negligence had taken place, and therefore "plaintiffs must prove that the lost ESI would have supported their claims," which the majority held that plaintiffs were unable to do. The majority then disagreed with the partially dissenting justice, who would have remitted the issue for a hearing to determine the extent of the prejudice to plaintiffs from the loss of VarigLog's ESI in order to determine whether sanctions should be imposed. The majority indicated that it was unwilling "to give plaintiffs what would amount to a second bite at the apple" where plaintiffs had ample opportunity to attempt to demonstrate the relevance of the lost material to their claims against the MP defendants, but instead chose to rely upon a presumption to satisfy the relevance prong of the showing required on their motion for sanctions.

'Pegasus' and 'Roberts' stand for the proposition that the First Department does not require a formal written "litigation hold" in every instance, and whether one is required is fact specific.

In *Roberts*,[12] the First Department again addressed the consequences of not implementing a "litigation hold" on ESI, and denied spoliation sanctions, as the record did not support that as a result of such failure, there was a "destruction of any evidence, let alone key evidence necessary for the defense of this action." The court noted that plaintiff maintained a folder containing all the electronic documentation and testified that he had produced over 2,800 documents during discovery. The court further noted that plaintiff had "no history of willful noncompliance with discovery, and his attorneys subsequently produced additional emails in response to a subpoena that, inter alia, was different in scope from the demand served on him."[13]

Cell Phone Records

In *Thursby v. LaBarbera*,[14] defendant sought to pursue a defense of distracted driving and sought an order "directing plaintiff to provide copies of, or authorizations to obtain, plaintiff's cell phone records for a twelve hour period." The motion court ruled that defendant failed to establish the need for 12 hours of phone records, but ordered that defendant "is entitled to phone records for an hour prior to the accident until fifteen minutes after the accident" and it shall include "calls, text and data usage."[15]

In *Floribello v. Saul,*[16] the court ordered that plaintiff's cell phone records shall be provided for two hours before and after the incident on the "condition that the information shall be retained by [d]efendant's counsel as confidential and shall not be distributed in any fashion, and upon condition that both the [d]efendants and their attorney shall not act upon any cell phone information provided without first obtaining the Court's permission."

1. 2014 N.Y. Misc. LEXIS 52, 2014 Slip Op 30025(U) (Sup. Ct. N.Y. Co. Jan. 7, 2014).
2. *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003).
3. 2014 N.Y. Misc. LEXIS 30, 2014 Slip Op 30005(U) (Sup. Ct. N.Y. Co. Jan. 2, 2014).
4. 2014 N.Y. App. Div. LEXIS 3981, 2014 N.Y. Slip Op 04047 (1st Dep't June 5, 2014).
5. 2014 N.Y. Slip Op 04563 (1st Dep't June 19, 2014).
6. 2014 N.Y. Misc. LEXIS 52, 2014 Slip Op 30025(U) (Sup. Ct. N.Y. Co. Jan. 7, 2014).
7. 217 F.R.D. 309 (S.D.N.Y. 2003).
8. 2014 N.Y. Misc. LEXIS 30, 2014 Slip Op 30005(U) (Sup. Ct. N.Y. Co. Jan. 2, 2014).
9. 2014 N.Y. App. Div. LEXIS 3981, 2014 N.Y. Slip Op 04047 (1st Dep't June 5, 2014).
10. Id.
11. See Index 603076/2008 (Sup. Ct. N.Y. Co. Dec. 11, 2013) (The motion court noted below in an oral ruling from the bench "that there was no litigation hold in and of itself has been held to constitute gross negligence" and "if there's gross negligence, then relevance is really presumed." It's hard to show that a document is relevant if you don't have a document. If it's destroyed, you can't say what it says, but you can presume there should have been documents that dealt with these issues." The court further noted that with "no litigation hold put on so that the employees did not know what they were supposed to save or what they were not supposed to save, were not told to save things.").
12. 2014 N.Y. Slip Op 04563 (1st Dep't June 19, 2014).
13. The motion court below had noted:

> The asserted discovery default is not a basis for sanctions inasmuch as the emails were produced, albeit by Epstein Becker, well in advance of depositions, dispositive motion practice, and trial preparation.
>
> To the extent that Greenberg Traurig claims that Mr. Roberts' failure to produce the emails indicates that there must have been other documents that were not preserved and that it was therefore prejudiced by the destruction of documents with unknowable content … , this contention is unavailing. Although Greenberg Traurig has completed discovery, it makes no showing, through either deposition testimony or other documents, that any documents were destroyed. This case is therefore distinguishable from VOOM, where the innocent party was able to establish both that identified documents were not preserved and that the adverse party "did not cease the automatic destruction of e-mails until four months after [the] action was commenced."

41 Misc. 3d 1210(A), 980 N.Y.S.2d 278 (Sup. Ct. N.Y. Co. Oct. 3, 2013).
14. Index No. 11945/2012 (Sup. Ct. Nassau Co. May 30, 2014).
15. See *Sentinel Ins. v. Doris*, Index No. 12538/2012 (Sup. Ct. Nassau Co. April 25, 2014) (court directed that a formal motion be required to compel the production of defendant's cell phone records).
16. Index No. 12979/2012 (Sup. Ct. Suffolk Co. March 28, 2014).

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