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State E-Discovery

Forensic Computer Reviews and Emails as Documentary Evidencee

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Forensic reviews of an opposing party's computer to obtain electronically stored information (ESI) have been recently addressed in a number of state court decisions. The request is sometimes initially denied, as courts first want to see if the requesting party can obtain the sought after ESI from another source, as formed part of the rationale for the denial for such a review in the recent decision *Genger v. Genger,* 2016 N.Y. App. Div. LEXIS 7835, 2016 NY Slip Op. 07988 (1st Dep't Nov. 29. 2016). The disclosure to the requesting party of irrelevant, confidential or privileged information resulting from such a review can be prevented through reviewing protocols that are often standard, and in *Matter of Nunz*, 2016 N.Y. Misc. LEXIS 2891, 2016 NY Slip Op. 51185(U) (Surr. Ct. Erie Co. Aug. 9, 2016), the Surrogate's Court, in fact, heightened those protections. Finally, where it is demonstrated that a party after multiple attempts has not adequately reviewed and produced its ESI, despite an affidavit of a good faith search, a trial court in *Encore I v. Kabcenell*, 2016 N.Y. Misc. LEXIS 4267, 2016 NY Slip Op. 32282(U) (Sup. Ct. N.Y. Co. Nov. 4, 2016), opted to order a forensic examination of a party's computer to seek to ensure a fulsome ESI production.

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Motions to dismiss predicated upon "documentary evidence," pursuant to CPLR 3211(a)(1), are increasingly using emails to support dismissal. While the First Department has long held that under certain circumstances emails *may* constitute "documentary evidence," recent decisions have provided detailed guidance—fact specific to the situation—as to what constitutes a "conclusive fact, which often it is not, as is required to be "documentary evidence" for purposes of Rule 3211(a)(1).

Forensic Computer Reviews

The First Department in *Genger* affirmed a trial court's order that plaintiff had not made ample showing to warrant the replication and search of defendant's counsel's computer. The court held plaintiff had "failed to clearly articulate what alleged missing documents prompted such a search, and why those documents could not be obtained from [defendant] or other sources." In denying relief, the court relied on the statement by defendant's counsel that he "acknowledged that he had not yet looked for responsive documents, he offered to do so, and it is unclear why this was not a viable option."

After hearing testimony from a forensic computer expert, the Surrogate's Court in *Nunz* held that there was a "proper basis" to order the production of counsel's computer on which decedent's will was drafted and to

permit a forensic analysis of its hard drive. However, to address issues of confidentiality, the court ordered that the expert "shall not communicate in any manner whatsoever either with the [] objectants, or with their attorney, or with [counsel who drafted the will] or with the attorney for this estate (except to return the computer), … and [the expert] shall direct any and all communications, including any reports about its findings, directly and only to this Court, by confidential correspondence only."

After a piecemeal ESI production and additional searches by defendant continued to result in the production of responsive emails, the court in *Encore* granted plaintiff's motion to compel defendant to produce his laptop to a computer forensic expert at plaintiff's expense for the purpose of ascertaining whether other potentially relevant emails are still stored on his laptop. The court stated that it "does not matter whether [defendant] deleted emails or not" and that defendant's searches "may not have been sufficient (quite possibly because he does not have technical expertise) as demonstrated by his repeatedly finding more responsive emails after conducting more searches." The court, however, permitted defendant "to first review all of the emails before they are turned over to [plaintiff] to ensure there are no legal grounds for withholding the emails."

Emails as 'Documentary Evidence'

In *Berardi v. Phillips Nizer*, 2016 N.Y. Misc. LEXIS 1747, 2016 NY Slip Op. 30860(U) (Sup. Ct. N.Y. Co. May 6, 2016), the motion court, in denying a CPLR 3211(a)(1) motion, stated:

> The First Department has declined to posit a blanket rule excluding all correspondence from the definition of documentary evidence. Thus, although it has on occasion deemed certain letters and email correspondence to constitute documentary evidence, it has done so only under circumstances where the course of correspondence, viewed as a whole, created or refuted the existence of a contractual relationship, and the various individual messages merely constituted an offer, a counteroffer, an acceptance, or a rejection, or set forth the terms of the subject contract.

The emails primarily reflected communications between plaintiff and the attorneys at the firm concerning legal advice and strategy; updates on the course of the litigation; and communications among the attorneys at the firm, between the firm's attorneys and their adversaries, and between the firm's attorneys and retained experts. The motion court concluded that such "writings do not establish any unassailable fact and, hence, are not to be characterized as 'documentary evidence'" pursuant to CPLR 3211(a)(1).

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In *Greuner v. Center for Specialty Care*, 2016 N.Y. Misc. LEXIS 4412, 2016 NY Slip Op. 32343(U) (Sup. Ct. N.Y. Co. Nov. 21, 2016), the motion court denied a motion to dismiss, pursuant to Rule 3211(a)(1), noting that "emails are generally not considered documentary evidence if they represent an overview of testimony." The court held that the email correspondence and text messages cannot be "characterized as documentary evidence [as they] … present the correspondence of each party's position throughout the series of negotiations, and their discussions about terms …. [and] can best be characterized as letters or summaries of the parties' conclusions, and thus "raise issues of credibility for a jury to decide."

Other notable cases include:

- *Calpo-Rivera v. Siroka*, 2016 N.Y. App. Div. LEXIS 7705, 2016 NY Slip Op. 07860 (1st Dep't Nov. 22, 2016) (affirmed denial of a motion to dismiss pursuant to CPLR 3211(a)(1) where the emails were "not conclusive, and did not preclude a finding, upon further discovery, that the plaintiffs held themselves out as performing architectural services for the defendants");
- *Barr v. Bentley Motors*, 2016 N.Y. Misc. LEXIS 4139 (Sup. Ct. Nassau Co. Nov. 4, 2016) (emails annexed to the moving papers do not constitute documentary evidence within the contemplation of Rule 3211(a)(1));
- *Taboola v .Aitken*, 2016 N.Y. Misc. LEXIS 2638, 2016 NY Slip Op. 31340(U) (Sup. Ct. N.Y. Co. July 14, 2016) (email that stated that plaintiff "is not accusing you of violating the agreement because you no longer are employed at Ketchum" is not "valid documentary evidence" for the purpose of a CPLR 3211(a)(1) motion where "letters, summaries, opinions, and/or conclusions" of one party are not "essentially undeniable"); and
- *West Flooring & Design v. K. Romeo*, 2016 N.Y. Misc. LEXIS 3854, 2016 NY Slip Op. 31967(U) (Sup. Ct. Suffolk Co. July 1, 2016) ("Resolution of the pending motion thus seeks credibility assessments concerning documentary evidence (emails sent and received by principals for the parties …) not appropriate for a motion to dismiss").

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