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State E-Discovery

ESI Evidence: Authentication And Hearsay Issues

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It is remarkable how few New York state court decisions exist addressing the authentication of and hearsay objections to electronically stored information (ESI), and that may be because litigators do not appreciate how vulnerable ESI can be to attack and how to properly frame and then support opposition to its use when it has been relied upon as a basis for a dispositive motion. The relatively recent New York cases discussed below may serve as a starting point for New York litigators when arguing evidentiary issues concerning ESI.

In *People v. Moye*, 2016 NY Slip Op 50669(U), 51 Misc. 3d 1216(A), 38 N.Y.S.3d 832 (Sup. Ct. Queens Co. March 31, 2016), a defendant challenged the admission of an instant message sent via Facebook from an account identified as the defendant's on the basis of its insufficient authentication. The trial court held that authentication can be established "circumstantially by appearance, contents, substance, internal patterns or other distinctive characteristics of the evidence." The trial court then admitted the instant message "given all the circumstances in the case" on the basis that the victim testified to the defendant's screen name and



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his photograph and where the contents of the message made no sense unless it was from the defendant. The "screen shot" provided:

instant message sent to B.S.'s Facebook account viewed by B.S. and her mother, the witness C.S., on the day of the stabbing and slashing of B.S., after they returned from the hospital. B.S. herself logged into her account using her mother's cell phone and showed her mother the message from the account registered as "Preme Low", which C.S. testified was the defendant, Supreme Moye's nickname, and with the defendant's picture on the posting. The contents of the message

to B.S. said "I'm sorry for what I did. I took it too far. Now I got to han (sic) the consequences. The consequence is simple. Live in. Learn trust. ... Hope you could at least forgive me." B.S. responded "I will never forgive you. You scarred me for life. I have lived. My marks. I could of died. Love is really blind."

The court further noted that: [t]he additional circumstances known in this case are that B.S., 15 years old at the time, was dating the defendant, and had called her mother screaming earlier that day saying "Preme. Buck fifty", which her mother understood to mean B.S. was cut by her boyfriend,

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the defendant; that C.S.'s own visit to the hospital shortly after that call, plus the medical records received into evidence at the hearing, showed that B.S.'s neck had been deeply slashed, her face contained a stab wound, that fingers on her right hand had been slashed, and that she had two injuries caused by cutting or stabbing on her back. B.S. told the medical staff treating her that her boyfriend had caused the injuries at a McDonald's in Queens.

The People sought to introduce the apology seeking forgiveness and the admission that what occurred was "taken too far" from an instant message account bearing the defendant's nickname and photo, and which was "sent personally to the victim of the crime, but not posted publicly."

The trial court held that the "circumstantial evidence" needs to "be sufficient to support a finding that there is a reasonable likelihood that the matter in question is what its proponent claims it is." The trial court noted that "defendant's argument concerning knowing exactly who typed out the message, by eyewitnesses or other evidence, does not defeat admissibility, but rather is more appropriately addressed to the weight of the evidence to be given by the fact finder." The trial court also noted that "[a]lthough a message can be traced to a computer, for example, it can almost never be traced to a specific author with any certainty" and that "the same uncertainties exist with traditional written documents, however; they can be forged, or typed on someone else's computer or typewriter." Lastly, the trial court noted that the First Department had previously found instant messages could be authenticated through evidence including a close friend of the defendant (but not through the defendant who had passed away) who testified to the defendant's

screen name, and the defendant's cousin who further testified that she sent an instant message to the same screen name and received a reply, "which would have made no sense unless it came from the defendant."

ESI on Dispositive Motions

- *Kaplan v. New York City Dept. of Health & Mental Hygiene*, 142 A.D.3d 1050, 38 N.Y.S.3d 563 (2d Dep't 2016), (trial court in granting motion to dismiss, pursuant to CPLR 3211(a)(7), "erred in determining that emails from the plaintiff and her temporary employment agency constituted party admissions and were admissible under an exception to the hearsay rule").

In 'People v. Moye', the trial court held that the "circumstantial evidence" needs to "be sufficient to support a finding that there is a reasonable likelihood that the matter in question is what its proponent claims it is."

- *W & G Wines v. Golden Chariot Holdings*, 46 Misc. 3d 1202(A), 7 N.Y.S.3d 245, 2014 N.Y. Misc. LEXIS 5496 (Sup. Ct. Kings Co. Dec. 19, 2014) (trial court in granting cross-motion to dismiss, pursuant to CPLR 3211(a)(1), erred where "Internet printouts proffered by Defendant from Plaintiff's Facebook page, Yelp, and other sources, are subject to interpretation and their reliability and authenticity have not been sufficiently established").

- *AQ Asset Mgt. v. Levine*, 128 A.D.3d 620, 13 N.Y.S.3d 1 (1st Dep't 2015) (defendants' motion for partial summary judgment denied where it "offered only an unsworn email list" of inventory, which none of the affiants authenticated or stated was accurate, and which was therefore inadmissible hearsay).

- *Royal Waste Serv., Inc. v. Interstate Fire & Cas. Co.*, 2014 N.Y. Misc. LEXIS 651, 2014

NY Slip Op 30386(U) (Sup. Ct. N.Y. Co. Jan. 31, 2014) (summary judgment denied where defendant supported its claim that plaintiffs failed to pay their premiums only through an unauthenticated email hearsay communication that plaintiffs' premium deposit was not honored).

ESI at Hearings and at Trial

- *People v. Flanagan*, 132 A.D.3d 693, 17 N.Y.S.3d 178 (2d Dep't 2015) (court affirmed jury's criminal conviction holding that the trial court did not err in "permitting the People to elicit hearsay testimony from a witness relating to an email sent by that witness concerning her belief that, among other things, members of the police department were 'trying to bury the case,' as that testimony was admissible under the 'state-of-mind' exception to the hearsay rule").

- *Matter of Isabella*, 52 Misc. 3d 653, 34 N.Y.S.3d 31 (Fam. Ct. Albany Co. 2014) (court rejected business records exception to the rule against hearsay and denied admission of an email sent by a case worker for the truth of its contents on the grounds that it contained triple hearsay and because the person who sent the email was not the person asked to authenticate it).

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