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State E-Discovery

New Decisions on Emails And Motion Practice

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ISTOCK

The recent decisions in *Absolute Elec. Contr. v. IBEX Constr.*[1] and *1301 Properties Owner v. Abelson*[2] addressed the use of emails on motions to dismiss and for summary judgment and, in these cases, the courts did not sustain objections directed against their usage where, even without necessarily being accompanied by an affidavit from someone with personal knowledge of the emails, there is sufficient indicia of the emails' authenticity and their content was not in dispute. Then in *Netologic v. Goldman Sachs Group*,[3] as it relates to the production of emails, the court noted what a party opposing the production of ESI always argues—that just because emails concern an action does not mean that they are "material and necessary" to either party's claim or defense.

Courts in two recent decisions, *U.S. Bank N.A. v. Lightstone Holdings*[4] and *Meissner v. Tracy Yun*,[5] ruled that email chains reflecting communications with counsel were not privileged and subject to production because they were not intended to be confidential, reflected the provision of business advice and not predominately legal advice or the client for the purposes of the privilege was the entity and not a principal of the entity who was trying to assert it.

Finally, in *People v. Taylor*,[6] in a criminal case, a trial court was able to work with Twitter in order to obtain certain tweets and the court further found that the failure of the police to preserve a voicemail after it was listened to by the police necessitated the granting of an adverse inference. The First Department in *Chan v. Cheung*,[7] in striking a defendant's answer on spoliation grounds, noted that "[i]n light of the warnings concerning potential loss of data and the prompts to reboot the machine that defendant would have received during the reinstallation process, the deletion of files containing defendant's archived email (like the reinstallation itself) could not be said to have been inadvertent."

Materiality of Emails

In *Netologic*, plaintiff moved for a protective order related to more than 260 pages of emails that included communications between a CPA and an entity's accountant, as well as with an individual working within the public relations field. Plaintiff also moved for a protective order related to 40 pages of emails that included

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communications with another CPA, who had been retained in connection with a divorce proceeding involving the entity's CEO. Defendant opposed and cross-moved to compel, among other things, such email communications. The motion court granted the protective order, specifically noting that "[m]erely because a communication concerns [an] action does not mean that it supports a party's claims or defenses." In so ruling, the motion court found that the documents and communications which post-dated the filing of the complaint by many months were not "material and necessary" to either party's claim or defense to the breach of contract causes of action.

Email Foundation

In *Absolute Elec.*, plaintiff established its prima facie claim to summary judgment on its cause of action for breach of contract upon demonstrating the existence of the agreement between the parties, that plaintiff fully performed under the agreement, that defendant breached the agreement by failing to fully pay plaintiff, and damages as a result of defendant's breach. Plaintiff asserted, among other things, that defendant then failed to raise a material issue of fact because it had not provided an affidavit of someone with personal knowledge of the facts affirming the contents of critical emails. The motion court found this argument to be without merit because it saw "no reason why [the emails] would not be sufficient to raise an issue of fact on a motion for summary judgment" where the "First Department has found that emails, standing alone, constitute documentary evidence for the purposes of a motion to dismiss" pursuant to CPLR 3211(a)(1).[8]

In *1301 Properties*, the landlord of the law firm Dewey & LeBoeuf sued the law firm's partners for payments due under the law firm's lease. In connection with motions to dismiss, defendants, among other things, relied upon two emails sent by a member of the law firm. While the landlord argued that the emails were not proper "documentary evidence" on a motion to dismiss, the motion court held that they qualified for same where their content was "essentially undeniable." The motion court based its finding on the fact that the two emails were retrieved from the law firm's email box by counsel for the trustee and due to an affidavit submitted by the accounting firm that the financial reports attached to the two emails were created and maintained by the law firm.

In 'People v. Taylor', a trial court was able to work with Twitter in order to obtain certain tweets.

Privileged Email Chains

In *Lightstone Holdings*, defendants moved for an order compelling nonparty Cadwalder, Wickersham & Taft to respond to subpoenas duces tecum by producing an unredacted copy of an email chain and billing records that relate to the drafting of a guaranty agreement. At issue was whether senior lenders or junior lenders had priority to a $100 million guaranty payment. Specifically, defendants sought the production of an email chain in which an attorney representing a potential purchaser of the junior loans asked, "Is the Guaranty allocated pro rata among junior lenders only or Senior and Junior Lenders?" That email had been forwarded from the original lenders to Cadwalder for a response. There also were six email chains that stemmed from the attorney's query resulting in 21 individual emails with redactions.

The motion court held that there was "no reasonable expectation of privacy" of the information sought in order to confer the stature of a privileged communication because it was understood that private information conveyed between attorney and client which was to be transmitted to others is not confidential. The motion court also found that the communication was not privileged because it was intended "'to assist counsel in performing other services, such as the provision of business advice or the performance of such functions as negotiating purely commercial aspects of a business relationship'" and thus the subject email chain did not concern predominately legal advice. Finally, the motion court noted that assuming arguendo that the subject email chain was privileged, the privilege had been waived where counsel for the defendants confirmed that a party shared with him the contents of the subject email chain. The motion court further ordered that a special referee hear and report whether additional documents should be produced under the theory of subject matter waiver or selective disclosure. As such, the motion court ruled that based on its findings that the subject email chain concerned business terms and where any privilege, in any event had been waived, counsel could be deposed regarding the meaning and intent of the agreement, as their testimony was material and necessary as it related to the issue of priority.

In *Meissner*, plaintiff moved to compel the production of allegedly privileged email threads among the individual defendant and attorney

Christopher Kelly. The motion court found that the record demonstrated that Kelly represented the defendant's entity and performed work for the benefit of the entity, rather than for the individual defendant. The motion court noted:

> While [defendant] points to the fact that, in most of the emails at issue here, she communicated with Kelly from her personal email address, this course of conduct is insufficient to establish a separate relationship outside of Kelly's representation of [the entity], as she also used this personal email to conduct business.

The motion court ejected counsel's statements that he believed that he had represented the individual defendant as unavailing, noting that "an attorney's statement is insufficient to establish that an attorney-client relationship existed." With respect to another email chain, defendant had informed counsel of a dispute with plaintiff as to the ownership of the entity and then asked for copies of certain documents counsel had filed to establish the entity. In holding the email chain not privileged, the motion court found the undisputed evidence demonstrated that counsel billed the entity for his review of the requested documents and his discussion of same with the individual defendant.

Twitter and Spoliation

In *Taylor*, in a decision addressing the turnover of *Brady* material in a criminal case, the trial court noted that the victim within days of her death had posted a concern about threats over Twitter. The court obtained the subject tweets after it had engaged in in camera negotiations with Twitter attorneys with the parties present. Detectives testified regarding the postings and their subsequent investigation, and did not give credence to the viability of any known threat to the victim. In addition, recovered from the victim's cellphone was a voicemail indicating that the sending number belonged to the former boyfriend of the victim and "profane language toward the [victim] was heard and memorialized in notes" taken by the detective. Defendant heard the voicemail message, but it was not preserved by the police. The trial court ruled that because of the erasure by the police of the voicemail message, which was "contained within [the victim's] cell phone," the defense shall be permitted to introduce the "threat" and its destruction by the police and that "an adverse inference instruction will follow."

In *Chan*, a defamation action, plaintiffs alleged that defendant published a defamatory affidavit via email, and the First Department ruled that upon receipt of correspondence "threatening litigation, and certainly upon service of the complaint herein, defendant should have placed a litigation hold on relevant electronic data in order to preserve it." Plaintiffs' computer expert concluded that defendant had installed new operating systems on the computers after the above dates resulting in the "irrevocable destruction of evidence critical to the litigation." The First Department noted that "[i]n light of the warnings concerning potential loss of data and the prompts to reboot the machine that defendant would have received during the reinstallation process, the deletion of files containing defendant's archived email (like the reinstallation itself) could not be said to have been inadvertent." The court found that defendant "undertook an affirmative course of action resulting in destruction of relevant emails, though she represented otherwise during sworn testimony." Finally, the First Department observed that documents received from third-party recipients confirmed that the files defendant destroyed were "highly relevant" and tended to substantiate plaintiffs' claims. As such, the court held that "[e]vidence of defendant's willful and prejudicial destruction of evidence warrants the sanction of striking her pleadings."

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1. 2016 N.Y. Misc. LEXIS 79, 2016 NY Slip Op 30412(U) (Sup. Ct. N.Y. Co. March 11, 2016).

2. Index No. 653342/2013 (Sup. Ct. N.Y. Co. April 6, 2016).

3. 2016 N.Y. Misc. LEXIS 1210, 2016 NY Slip Op 30584(U) (Sup. Ct. N.Y. Co. April 5, 2016).

4. 2016 N.Y. Misc. LEXIS 1356, 2016 NY Slip Op 30644(U) (Sup. Ct. N.Y. Co. April 12, 2016).

5. 2016 N.Y. Misc. LEXIS 909, 2016 NY Slip Op 30468(U) (Sup. Ct. N.Y. Co. March 17, 2016).

6. Indictment No. 01649-2014 (Sup. Ct. Nassau Co. March 25, 2016).

7. 2016 N.Y. App. Div. LEXIS 2609, 2016 NY Slip Op 02731 (1st Dept. April 12, 2016).

8. Id. at *5-6 (citing *Kolchins v. Evolution Markets*, 128 A.D.3d 47, 58, 8 N.Y.S.3d 1 (1st Dept. 2015) ("We reject Supreme Court's conclusion that correspondence such as the emails here do not suffice as documentary evidence … there is no blanket rule by which email is to be excluded from consideration as documentary evidence.") and *Langer v. Dadabhoy*, 44 A.D.3d 425, 426, 843 N.Y.S.2d 262 (1st Dept. 2007) ("documentary evidence in the form of emails conclusively established that the parties intended to finalize their agreement in a writing … .")).

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