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STATE E-DISCOVERY

N.Y. Courts Embrace Use Of E-Communication Discovery

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With the expense of conducting e-discovery ever present in determining litigation strategy, it is imperative that litigators be aware of the recent Commercial Division decision in *MBIA Ins. Corp. v. Countrywide Home Loans Inc.*, which denied e-discovery "cost shifting."[1]

Moreover, where business people now rely on electronically transmitted means of communication, including e-mails, instant messaging, and text messaging, New York courts have embraced this fact, and decisions addressing the discovery and use of e-communications relating to motions for summary judgment, trial and settlement are now increasingly being issued.

Cost Shifting

In *MBIA*, the court, in denying e-discovery "cost-shifting," relied on *Clarendon Natl. Ins. Co. v. Atlantic Risk Mgt. Inc.*, 59 A.D.3d 284, 286, 873 N.Y.S.2d 69, 70 (2009), where the Appellate Division, First Department "directed plaintiff to produce all of its claims files, adding that it saw 'no reason to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests.'" The trial court held that:

> *Clarendon Natl. Ins. Co.* should be viewed as an anomaly. Far from being an anomaly, it is consistent with [*Waltzer v. Tradescape & Co., L.L.C.*, 31 AD3d 302, 819 N.Y.S.2d 38 (1st Dep't 2006)] in that application of the relevant rule in both resulted in cost allocation determinations only when the electronically-stored information to be produced was not readily available. While producing readily-available electronically-stored information (*Clarendon*—all of an insurance company's claims files; *Waltzer*—data stored on 2 compact discs) will not warrant cost-allocation, the retrieval of archived or deleted electronic information has been held to require such additional effort as to warrant cost allocation [citations omitted] Furthermore, under CPLR 3103 (a), the lodestar in granting a protective order granting allocation of discovery costs is the prevention of "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Hewing to this principle and the applicable case law, it is eminently reasonable to refrain from allocating discovery costs at this juncture.

E-Mail Evidence

E-mails frequently provide the documentary evidence that will result in the grant or denial of a motion for summary judgment. For instance, in *Coldwell Banker Hunt Kennedy v. Wolfson*,[2] the First Department reversed the grant of summary judgment to plaintiff, finding that defendant's affidavit raised issues of fact concerning, inter alia, "whether e-mail exchanges relied on by plaintiff, which admittedly reflect agreement as to the selling price and commission rate, were intended by the parties to constitute the entire brokerage agreement."

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Further, in *R.P.I. Professional Alternatives Inc. v. Kelly Services Inc.*,[3] the court found e-mails annexed to counsel's affidavit in opposition to plaintiff's motion for summary judgment as admissible evidence, where they were discussed and presented as an exhibit at plaintiff's principal's deposition.

In *Alpha Capital Anstalt v. Qtrax Inc.*,[4] in granting summary judgment, the court found an agreement to have been executed based on an exchange of e-mails, where defendant affixed his name in the form of an electronic signature.

In *Matter of Elizabeth S.*,[5] the court required a hearing after reviewing a person's e-mail messages that sought to contradict a claim that she had no knowledge of sexual abuse, as prima facie evidence that there had been abuse.

In *Darshan Singh Bagga, LLC v. Spava LLC*,[6] petitioner began a non-payment proceeding against respondent to recover a sum of money for rent due and owing. Respondent's counsel, however, contended the parties reached a settlement agreement, and moved to compel petitioner to adhere to the terms of the agreement that allegedly had been reached, albeit never executed. In support of its argument that no settlement had been achieved, petitioner's attorney relied on a letter sent to respondent's counsel indicating that a written agreement was needed to effectuate a settlement, and then followed with an e-mail which indicated that "no written settlement agreement has been reached at this time."

The court reviewed the documentary submissions and held that no binding agreement was reached as required by CPLR §2104.

Instant Message Evidence

The Third Department in *People v. Clevenstine*[7] found that a computer disk copy of instant messages that had been downloaded on to a hard-drive from the social networking site MySpace was properly authenticated as evidence at trial. Reiterating the principle that "authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it," and "the foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted,"[8] the court found the disk authentic where: (i) the victim testified that such instant message communications had taken place with defendant; (ii) a police investigator from the computer crime unit testified that he retrieved the conversations from the hard drive of the computer used by the victims; (iii) a legal compliance officer from MySpace testified that the messages were exchanged by users of the accounts created by the defendant and the victims; and (iv) defendant's wife testified that she viewed the instant message conversations in defendant's MySpace account while on their computer. Based on the above, the court rejected defendant's argument that it was possible that someone else had "accessed" his MySpace account and sent messages under his user name, and held that such defense was a factual issue for the jury.

E-Amendment of Agreements

In *Merrill Lynch Int'l Finance Inc. v. Donaldson*,[9] defendant, who received a loan from Merrill Lynch while employed as a broker, was sued for repayment, pursuant to a promissory note, by plaintiff, a different Merrill Lynch entity that had funded the loan. The original promissory note contained an arbitration clause, but plaintiff sought to amend the note to eliminate the arbitration clause and require exclusive jurisdiction in Supreme Court. The court rejected plaintiff's attempt to find that defendant was bound by the amended note that was only provided to defendant electronically through Merrill Lynch's Web site and where defendant had only been given an option, when going to such site, to either reconfirm or not confirm his prior loan agreement.

The court found that the "electronically-confirmed amendment to the employment benefit cannot be used to nullify the commitment to arbitrate."

Parties should be mindful of the significance of their electronic communications, whether it be an e-mail, instant message or text message, as they are retrievable and courts are accepting such electronic communications as authenticated evidence on motions for summary judgment, at hearings and at trial.

Additionally, litigators should remember that e-mails to and from counsel may carry the same weight as a written letter, and such communications should not be treated casually.

1. Index No. 602825/2008, Feb. 4, 2010, NYLJ, 27 (col. 3) (Sup. Ct. N.Y. Co. Jan. 14, 2010).

2. 69 A.D.3d 492, 892 N.Y.S.22d 758 (1st Dep't 2010).

3. 26 Misc. 3d 1213(A), 2010 WL 276700 (Sup. Ct. N.Y. Co. Jan. 19, 2010).

4. Index No. 602256/2009 at *6 (Sup. Ct. N.Y. Co. Feb. 1, 2010).

5. 2010 WL 431511, 2010 N.Y. Slip Op. 00906 (1st Dep't Feb. 9, 2010).

6. 26 Misc. 3d 1212(A), 2010 WL 254902, No. SP4445/2009 (1st Dist. Nassau Co., Jan. 25, 2010).

7. 68 A.D.3d 1148, 891 N.Y.S.2d 511 (3rd Dep't 2009).

8. 68 A.D.3d at 1451, 891 N.Y.S.2d at 514 (citing *People v. McGee*, 49 N.Y.2d 48, 424 N.Y.S.2d 157 (1979)).

9. 2010 WL 42401, Index. No. 601175/2009 (Sup. Ct. N.Y. Co. Feb. 5, 2010).

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