17 Misc.3d 934 (2007)

847 N.Y.S.2d 436

W. NORMAN SCOTT, Plaintiff,
v.
BETH ISRAEL MEDICAL CENTER INC. et al., Defendants.

Supreme Court, New York County.

October 17, 2007.

CHARLES EDWARD RAMOS, J.

In motion sequence 10, plaintiff Dr. Scott moves pursuant to CPLR 3103 for a protective order requiring defendants Beth Israel Medical Center and Continuum Health Partners Inc. (collectively BI) to return to plaintiff all e-mail correspondence between plaintiff and his attorney.

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The court presumes familiarity with the background of the case which is set forth in its prior decision dated May 12, 2006 in which the court granted summary judgment to BI and dismissed the case rendering all other pending motions moot. By decision dated June 19, 2007, the Appellate Division, First Department, reversed and restored all six causes of action (41 AD3d 222 [2007]).

Under the contract at issue here, BI agreed to pay Dr. Scott $14,000,000 in severance pay if he was terminated without cause. BI asserts that Dr. Scott was terminated for cause while Dr. Scott, believing that he was terminated without cause and without receiving any of the specified severance pay, commenced this action for breach of contract against BI.

Dr. Scott's Motion for a Protective Order
On August 10, 2005, BI's counsel, Marvin Wexler of Kornstein Veisz Wexler & Pollard, LLP, sent a letter to plaintiff's counsel, Stuart Kagen of Paul Weiss Rifkind Wharton & Garrison LLP (PW), asserting that BI was in possession of e-mail correspondence between Dr. Scott and PW pertaining to Dr. Scott's dispute with BI, as well as e-mails written between Dr. Scott and Cohen Lans LLP regarding a separate dispute. The letter further stated that although no one at BI had read the e-mails yet, BI believed that any potential privilege attached to the communications had been waived by use of BI's e-mail system.

Mr. Kagen responded on August 15, 2005 informing Mr. Wexler that the documents are privileged communications belonging to Dr. Scott for which there had been no waiver of privilege and requesting the immediate return of the e-mails to Dr. Scott.

When BI refused to return the documents, the parties called Andrea Masley, the judge's court attorney, who instructed BI to provide copies of the e-mails to Dr. Scott, place copies of the

documents into a sealed envelope and bar anyone from reviewing the e-mails pending a resolution by the court. Thereafter, Dr. Scott filed this motion for a protective order seeking the return of the documents.

Dr. Scott argues that the e-mails are privileged under both the attorney-client privilege and work product doctrine. BI counters that the e-mails were never protected by the attorney-client privilege because Dr. Scott could not have made the communication in confidence when using BI's e-mail system in violation of BI's e-mail policy. BI also argues that both privileges were waived by Dr. Scott's use of BI's e-mail system.

The e-mails in question were all written between February 2004 and August 3, 2004 using Dr. Scott's employee e-mail address and were all sent over BI's e-mail server.

BI's e-mail policy states:

"This Policy clarifies and codifies the rules for the use and protection of the Medical Center's computer and communications systems. This policy applies to everyone who works at or for the Medical Center including employees, consultants, independent contractors and all other persons who use or have access to these systems.

"1. All Medical Center computer systems, telephone systems, voice mail systems, facsimile equipment, electronic mail systems, Internet access systems, related technology systems, and the wired or wireless networks that connect them are the property of the Medical Center and should be used for business purposes only.

"2. All information and documents created, received, saved or sent on the Medical Center's computer or communications systems are the property of the Medical Center.

"Employees have no personal privacy right in any material created, received, saved or sent using Medical Center communication or computer systems. The Medical Center reserves the right to access and disclose such material at any time without prior notice."

This policy is contained in the BI Human Resources Policy and Procedure Manual. According to Bart Metzger, vice-president of human resources for BI, it was available in hard copy and maintained in the office of the administrator for each department and on BI's intranet. (Metzger affidavit, Sept. 23, 2005, ¶ 4.) Dr. Scott was the chairman of the orthopedics department and worked closely with the administrator of that department. In 2002, BI distributed to every employee an employee handbook that contained a brief summary of the BI e-mail policy. (Metzger affidavit ¶ 8.) From 2002 on, newly hired doctors were required to sign a form acknowledging that they had read and were familiar with BI's e-mail policy. (Kathleen Lenhardt affidavit, Oct. 8, 2005.) Dr. Scott never signed such an acknowledgment and denies knowledge of the policy.

Every e-mail that PW sent to Dr. Scott included the following notice:

"This message is intended only for the use of the Addressee and may contain information that is privileged and confidential. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this

communication in error, please erase all copies of the message and its attachments and notify us immediately."

PW never received any notification from BI that its e-mails to Dr. Scott were monitored by BI.

BI argues that Dr. Scott's e-mails are not protected by the attorney-client privilege at all as they were not made in confidence since Dr. Scott used his BI e-mail to communicate with his attorney.

The attorney-client privilege is codified in CPLR 4503. The test for privilege is whether the client communicates with an attorney, in confidence, for the purpose of obtaining legal advice. (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593 [1989].)

Dr. Scott claims that the e-mails were made in confidence, relying on CPLR 4548 which states: "No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication." The purpose of CPLR 4548 was to recognize the widespread commercial use of e-mail. (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4548, at 848.) "The new CPLR provision, in effect, constitutes a legislative finding that when the parties to a privileged relationship communicate by e-mail, they have a reasonable expectation of privacy." (*Id.* at 849.) However, some supporters of the bill warned that there are some types of information that are just too sensitive to be transferred over e-mail, such as confession of a crime or trade secret, and thus could not expect to retain the privilege. (NY St Bar Assn supporting statement Jan. 24, 1997.) Accordingly, this statute does not absolve an attorney of his or her responsibility to assess the risk of communicating by e-mail with a client. (NY State Bar Assn Comm on Prof Ethics Op 782 [Dec. 8, 2004].) As with any other confidential communication, the holder of the privilege and his or her attorney must protect the privileged communication; otherwise, it will be waived. For example, when a spouse sends her spouse a confidential e-mail from her workplace with a business associate looking over her shoulder as she types, the privilege does not attach. (Alexander, *supra.*)

Here, the court is not prepared to determine that attorney-client discussions about suing the client's employer would rise to the same level as confessing by e-mail to a crime. However, the effect of an employer e-mail policy, such as that of BI, is to have the employer looking over your shoulder each time you send an e-mail. In other words, the otherwise privileged communication between Dr. Scott and PW would not have been made in confidence because of the BI policy.

Dr. Scott relies on *People v Jiang* for the proposition that under CPLR 4548 BI's e-mail policy is irrelevant. (33 Cal Rptr 3d 184 [Ct App 2005].) Like New York's CPLR 4548, California Evidence Code § 917 (b) provides that privileged communications do not lose their privileged character because they are communicated electronically.

In *Jiang*, defendant was committed to state prison for 19 years after his conviction for rape, among other crimes. (*Jiang* at 188.) At his attorney's request, he prepared documents which he saved on the hard drive of his laptop provided to him by his employer. (*Id.*) The prosecutor used

these documents against him. (*Id.*) Jiang's employer had an e-mail policy, which Jiang 939*939 signed, but it did not prohibit personal use. (*Id.* at 198.) The California Court of Appeals, Sixth District, determined that Jiang had a reasonable expectation of privacy in the documents so as to make them privileged by the attorney-client privilege. (*Id.* at 205.) Significant to the court was the fact that the documents were never transmitted over his employer's e-mail server. (*Id.* at 204.) Furthermore, Jiang "made substantial efforts to protect the documents from disclosure by password-protecting them and segregating them in a clearly marked and designated folder" called "attorney." (*Id.*) The employer's e-mail policy was irrelevant because it was designed to protect the employer's intellectual property not to bar personal use. (*Id.* at 205.) Although the court held that California Evidence Code § 197 (b) was inapplicable because there was no "electronic transmission" of documents, it was persuasive to the court which determined that today's technology should not destroy confidentiality. (*Id.* at 205; *see also* *Curto v Medical World Communications Inc.*, 2006 WL 1318387, 2006 US Dist LEXIS 29387 [ED NY 2006] [upholding privilege because e-mails were sent to attorney from employee's home office on employer issued laptop that was not connected to the employer's e-mail system and employee deleted the e-mails before returning the laptop to her employer but employer's forensic consultant was able to restore them].)

The court rejects Dr. Scott's argument that CPLR 4548 invalidates BI's policy and holds that BI's e-mail policy is critical to the outcome here. First, *Jiang* is not at all persuasive. The e-mail policy in *Jiang* is significantly different than the policy here which prohibits personal use. A "no personal use" policy combined with a policy allowing for employer monitoring and the employee's knowledge of these two policies diminishes any expectation of confidentiality, while the policy in *Jiang* would not have such an effect. (*See* John Gergacz, *Employees' Use of Employer Computers to Communicate with Their Own Attorneys and the Attorney-Client Privilege,* 10 Comp L Rev & Tech J 269, 282 [2006].)

Second, CPLR 4548 does not preclude an employer from adopting a no personal use policy. Indeed, the language of the statute ("[n]o communication . . . shall lose its privileged character for the sole reason") contemplates that there may be other reasons that an electronic communication may lose its privileged character. Therefore, the court must determine whether Dr. Scott's use of BI's e-mail system to communicate with his attorney in violation of BI's policy renders the communication not made in confidence and thus destroys the attorney-client privilege if it ever applied.

As there is no New York case on point to determine whether the communication here was made in confidence or not, we look for guidance to *In re Asia Global Crossing, Ltd.,* which is a federal bankruptcy case virtually identical to this case and a case upon which both parties rely. (*In re Asia Global Crossing, Ltd.*, 322 BR 247 [SD NY 2005]; *see also* *Long v Marubeni Am. Corp.*, 2006 WL 2998671, 2006 US Dist LEXIS 76594 [SD NY 2006] [held no attorney-client privilege or work product protection for e-mails exchanged over employer's e-mail system where employer had formal no personal use policy].) In *Asia Global,* executives used their employer's e-mail system to communicate with their personal attorney concerning actual or potential litigation with the employer, the owner of the e-mail system. (322 BR at 256.) The issue in the

case was identical to the issue here. (*Id.*at 251.) The court looked at a variety of federal cases which addressed whether an employee had a reasonable expectation of privacy in his or her office e-mail, but where attorney-client privilege was not an issue. (322 BR at 257-258.) The *Asia Global* court concluded that the attorney-client privilege would be inapplicable if

"(1) . . . the corporation maintain[s] a policy banning personal or other objectionable use, (2) . . . the company monitor[s] the use of the employee's computer or e-mail, (3) . . . third parties have a right of access to the computer or e-mails, and (4). . . the corporation notif[ies] the employee, or was the employee aware, of the use and monitoring policies?" (322 BR at 257.)

BI's policy clearly satisfies the first requirement. The court rejects Dr. Scott's argument that his contract supersedes BI's policy. Paragraph 12 of the contract provides that it will supersede conflicting BI policies. Dr. Scott argues that implicit in BI's contractual obligation to provide computer equipment is Dr. Scott's right to use that equipment for personal reasons. However, there is no conflict where BI agrees to provide Dr. Scott with computer equipment and simultaneously regulates its use. BI has the right to regulate its workplace including the usage of its computers and resources. (*See Cardace v Hume,* Sup Ct, Nassau County 2003, index No. 000077/02 [allowing for employers to monitor employee e-mails to protect employees from harassment, to prevent legal liability for hostile workplace environment or for security of trade secrets].) The second requirement is satisfied because BI's policy allows for monitoring. Although BI acknowledges that it did not monitor Dr. Scott's e-mail, it retains the right to do so in the e-mail policy.

Dr. Scott challenges the policy of a hospital retaining the right to review its employees' e-mails based on HIPAA, the federal statute that protects patient health information. First, the court rejects this argument because the e-mail at issue is between Dr. Scott and his attorney and has nothing to do with patients. Second, a hospital can certainly have access to its patients' information. Dr. Scott's suggestion otherwise is preposterous.

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The final factor is whether Dr. Scott had notice of the policy. Dr. Scott had both actual and constructive knowledge of the policy. BI disseminated its policy regarding the ownership of e-mail on its server to each employee in 2002, including Dr. Scott, and provided Internet notice. (*See Garrity v John Hancock Mut. Life Ins. Co.*, 2002 WL 974676, *1, 2002 US Dist LEXIS 8343, *2 [D Mass 2002] [company e-mail policy precluded reasonable expectation of privacy despite employee's claim that policy was hard to find on company intranet].)

Dr. Scott's effort to maintain that he was unaware of the BI e-mail policy barring personal use is rejected. As an administrator, Dr. Scott had constructive knowledge of the policy. (*Moya v City of New York*, 9 Misc 3d 332 [Sup Ct, Kings County 2005] [superintendent's knowledge of the residency of child imputed to the City]; *Polidori v Societe Generale Group,* NYLJ, Dec. 12, 2006, at 22, col 1 [Sup Ct, NY County 2006] [knowledge of sexual harassment will be imputed to employer if supervisor of a sufficiently high level is aware of the harassment], *affd*39 AD3d 404 [1st Dept 2007].) He required newly hired doctors under his supervision to acknowledge in

writing that they were aware of the policy. Under these circumstances, Dr. Scott is charged with knowledge of the BI e-mail policy.

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Accordingly it is ordered that Dr. Scott's motion for a protective order is denied[.]