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Are Litigation Hold Letters Discoverable?

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Tracy v. NVR, Inc., 2012 U.S. Dist. LEXIS 44350 (W.D.N.Y. Mar. 26, 2012)

To answer that question briefly: typically, no litigation hold letters are not discoverable. However, there is catch, which the Western District of New York ("WDNY") has recently adopted. On March 26, 2012, the WDNY adopted the *Major Tours, Inc.*[1]principle that litigation hold letters are generally not discoverable as they are ordinarily protected by either attorney-client privilege or work product protections, unless a preliminary showing of spoliation is made.

In *Tracy v. NVR, Inc.*, 2012 U.S. Dist. LEXIS 44350 (W.D.N.Y. Mar. 26, 2012), the Plaintiff commenced a collective action against the defendant, a public corporation engaged in the construction of homes, alleging similarly-situated employees of NVR were unlawfully denied overtime pay under the Fair Labor Standards Act and the New York Labor Law. After almost eight years of litigation and dozens of discovery disputes, the Plaintiffs moved to compel the Defendant to produce its litigation hold letters and a list of employees who received those notices.

Under the well-established *Zubulake* principle, a party must preserve "what it knows, or reasonably should know, is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." Often this duty of preservation leads to spoliation issues due to parties failing to completely preserve evidence or forgetting to issue litigation hold letters to its key players in the case. Unlike most cases, however, in this case, the Plaintiffs did not seek a finding that Defendant spoliated such evidence. Rather, the Plaintiff requested that the Court issue an order requiring defendant to produce its litigation hold letters, presumably as part of its assessment whether a full-blown spoliation motion is justified.

In this matter of first impression, the Court looked to precedent established in aNew JerseyDistrict court:

> *In seeking disclosure of NVR's litigation hold notice and a list of its recipients, plaintiffs rely primarily on Major Tours, Inc. v. Colorel, 2009 U.S. Dist. LEXIS 68128, 2009 WL 2413631 (D.N.J. 2009). In Major Tours, the court held that litigation hold letters are generally protected from discovery as privileged or attorney-work product unless a preliminary showing of spoliation is made. 2009 U.S. Dist. LEXIS 68128, 2009 WL 2413631 at *2. The court further held that a party need not prevail on a separate spoliation motion in order to compel production of litigation hold letters. 2009 U.S. Dist. LEXIS 68128, [WL] at *2. Rather, a party need only make a preliminary showing of spoliation, which may be established by deposition testimony demonstrating the destruction of documents or the absence of a preservation*

order. Id.

The Court agreed with the reasoning of *Major Tours*; however, the court ultimately denied the Plaintiffs' motion seeking to compel the Defendants' litigation hold letters. The court, however, noted that the Second Circuit has not addressed whether such a motion required a lesser standard of proof than a motion seeking spoliation sanctions. The court did not rule affirmatively on the applicable standard as there was no need to answer that particular question because "even under the more relaxed 'preliminary showing of spoliation' standard, [P]laintiffs' motion should be denied."

A special thanks to Sean Gajewski for helping with this post. Sean is a third-year law student at Hofstra University School of Law. You can reach him by email at sean [at] sgajewski [dot] com. Bio: www.sgajewski.com.

1. **[1]***Major Tours, Inc. v. Colorel*, 2009 U.S. Dist. LEXIS 68128 (D.N.J. Aug. 4, 2009) (holding that litigation hold letters are generally protected from discovery as privileged or attorney-work product unless a preliminary showing of spoliation is made.)