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N.Y. District Judge Sanctions City for Spoliation of E-mails

November 1, 2012

DMAC LLC, et al., v. City of Peekskil, et al., 2012 U.S. Dist. LEXIS 138605 (S.D.N.Y. Sept. 17, 2012)

On September 17, 2010, Magistrate Judge Yanthis of the Southern District of New York sanctioned the City for spoliation of electronically stored information ("ESI") after it negligently destroyed e-mails related to the case.

In *DMAC LLC v. City of Peekskill*,[1] Plaintiffs, real estate developers and investors, completed a significant amount of construction on various townhouses in the City of Peekskill ("City"). Later that year, members of a local neighborhood association strongly voiced their opposition to the construction, which led to the City issuing a Stop Work Order in March 2007.[2] Plaintiffs then sued the City alleging that the Stop Work Order was motivated solely by political concerns and that the Defendant "engaged in a persistent course of conduct designed to prevent Plaintiffs from completing" the project, which violated the Plaintiffs' substantive due process and equal protection rights. [3]

During discovery, Plaintiffs requested the production of e-mails, but the City was unable to produce the e-mails because they "did not have a formal e-mail retention policy in place during the relevant time period" and that it was "within the 'sole discretion' of the City's staff and elected officials to delete e-mails" during that time; and thus, the e-mails were destroyed. Plaintiffs thereafter brought a motion for sanctions, pursuant to Rule 37 of the Federal Rules of Civil Procedure, premised upon the City's spoliation of those e-mails.

When ruling on Plaintiffs' motion, the Court set forth the factors a party moving for sanctions for spoliation of evidence must prove: "1) that the spoliating party had control over the evidence in question and a duty to preserve it at the time it was destroyed, lost, or significantly altered; 2) that said evidence was destroyed, lost, or significantly altered with a culpable state of mind; and 3) that said evidence was relevant to the moving party's claims or defenses. *Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99, 107 (2d Cir. 2002)."[4]

The Court determined that the City conceded to having a duty to preserve the e-mails by failing to address the first prong in its opposition to the motion. In regard to the City's culpability, the Court found the City "grossly negligent" mainly for two reasons: (1) the City had a duty to preserve the e-mails after it issued the Stop Work Order because "the obligation to preserve evidence arises when "a party has noticed that evidence is relevant to litigation or when a party should have known that evidence may be relevant to future litigation;"[5] and (2) under

Local Government Records Law (*N.Y. Arts and Cultural Affairs Law, Article 57-A*), the City "had a duty to preserve the e-mails in question apart from, and over and above, its obligations arising from the instant litigation."

As to the final prong, the Court determined that Plaintiffs clearly satisfied its burden of proving that a reasonable factfinder could construe the evidence as favorable to the Plaintiffs' case. More specifically, the Plaintiffs' non-party discovery requests revealed that the e-mails actually did exist and that in those e-mails members of the City Common Council openly "voiced their political maneuverings and conspiracy to 'send [the] project back to the drawing board,' to start the land use review process 'anew,'... to devise roadblocks though more stringent laws[,] and to encourage the community to rise up."[6]

Ultimately, since the three factors were satisfied, the Court decided to sanction the City by entitling the Plaintiffs to an "adverse inference" jury instruction, stating that the City negligently destroyed emails which would have been favorable to the Plaintiffs' case.

If you or your company has any questions or concerns regarding your document retention policy or any other e-discovery related issue, please email Bruce Miller at bmiller@cullenanddykman.com or via his direct line at 516-296-9133.

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1. *DMAC LLC v. City of Peekskill*, 2012 U.S. Dist. LEXIS 138605 (S.D.N.Y. Sept. 17, 2012).
2. *Id.* at *2.
3. *Id.* at *2.
4. *Id.* at *5.
5. *Id.* at *8 (citing *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).
6. *Id.* at *4.