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NY Appellate Court Holds Trial Court Erred In Forcing Defendant To Turn Over iPhone

November 29, 2012

AllianceBernstein L.P. v Atha, 2012 N.Y. App. Div. LEXIS 7693 (N.Y. App. Div. 1st Dep't Nov. 15, 2012)

On November 15, 2012, the New York Appellate Court for the First Department held in *AllianceBernstein L.P. v. Atha* that production of an iPhone was beyond the scope of the discovery request.

The Plaintiff, an investment firm, brought an action against the Defendant, a former financial analyst for the Plaintiff, after the Defendant left the firm to go work for a competing financial firm. The Plaintiff alleged that the Defendant breached his employment contract by misappropriating Plaintiff's confidential information, including client contact data, and using the information to solicit Plaintiff's clients on behalf of his new employer.

After commencing the action, the Plaintiff sought and obtained a temporary restraining order ("TRO"), which prohibited the Defendant from retaining or using the Plaintiff's confidential information. During the Plaintiff's deposition of the Defendant, the Defendant admitted that his personal iPhone contained multiple clients' contact information because he sometimes used it to reach out to the clients. Plaintiff subsequently requested that the Defendant turn over his iPhone to comply with the TRO.

The Defendant did not turn over the iPhone on the ground that, among other things, production would infringe on his privacy rights, so the Plaintiff wrote a letter to the Court stating that a discovery dispute had arisen and requesting that the Court hold a pre-motion discovery conference pursuant to its rules. The Court then issued an Order directing Defendant to deliver the iPhone to opposing counsel within five days of the Order without giving Defendant a chance to respond to Plaintiff's letter and without holding a conference. Consequently, the Defendant appealed the Court's Order.

Although the Court's Order was not appealable as of right because no motion was made, the Appellate Court held that "in the interest of judicial economy" they will deem the "notice of appeal to be a motion for leave to appeal." Accordingly, when ruling on the appeal, the Appellate Court held,

The TRO adequately addressed plaintiff's concern that defendant may have retained confidential information about plaintiff's clients. However, ordering production of defendant's iPhone, which has built-in applications and Internet access, is tantamount to ordering the production of his computer. The iPhone would disclose irrelevant information that might include privileged communications or confidential information.

Therefore, in order to determine whether any of the data on the iPhone was responsive to the Plaintiff's discovery request, the Appellate Court ruled that "the iPhone and a record of the device's contents shall be delivered to the court for an *in camera review*". The "*in camera review* will ensure that only relevant, non-privileged information will be disclosed. (internal citations omitted.)"

At this time, the Court has not provided any other updates as to whether the iPhone contained any relevant information. Check back soon as we continue to cover this case. In the meantime, if you or your company has any questions or concerns regarding what is required to be produced to opposing counsel during a discovery dispute or any other e-discovery related question, please contact Bruce Miller at bmiller@cullenanddykman.com or via his direct line at 516-296-9133.

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