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Order on Motion to Compel and for Sanctions (BARTON PROTECTIVE SERVICES, LLC)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY

BARTON PROTECTIVE SERVICES, LLC And SPECTAGUARD ACQUISITION, LLC,	)	**Civil Action No.: 2006CV115190**
Plaintiffs,	)	
v.	)	
CHARLES BARTON RICE, SR., CHARLES BARTON RICE, JR. TRUST, KIMBERLY ANN RICKEY TRUST, KATHRYN PROULX, and THE BANK OF NEW YORK TRUST COMPANY, N.A.	)	
Defendants.	)	

FILED IN OFFICE
JUN 24 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON MOTION TO COMPEL AND FOR SANCTIONS

On June 4, 2008, counsel for both parties presented oral argument and evidence to the Court on Shareholder Defendants' Motion to Compel and for Sanctions. After reviewing the arguments of counsel and the briefs submitted, the Court finds as follows:

This case arises from a 2004 merger between Shareholder Defendants on behalf of their former company, Barton Protective Services LLC ("Barton"), and Spectaguard Acquisitions, LLC (doing business as "Allied"). After the merger, Plaintiffs (the surviving company which is referred to herein as "AlliedBarton"), sued the former shareholders of Barton for violations of several provisions of the Merger Agreement.

At the time of the merger, the two companies had different email systems and servers. Soon after the merger, Plaintiffs made the business decision to convert and integrate the Barton system and the Allied system into a new, unified system. After the systems were converted, Barton's old email servers were destroyed, thus permanently deleting historical emails.

Shareholder Defendants' allege that the destruction servers (*e.g.* emails) amounted to an intentional spoliation of evidence. Spoliation refers to the destruction or failure to preserve evidence "that is necessary to contemplated or pending litigation." Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 544 (2008); O.C.G.A. § 24-4-22. In evaluating spoliation claims, a trial court

must make factual findings of relevant factors such as "(1) whether the [party seeking sanctions] was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good or bad faith; and (5) the potential for abuse if the evidence was not excluded." Chapman v. Auto Owners Ins., 220 Ga. App. 539, 542 (1996). Shareholder Defendants allege that the destruction of the emails impairs their ability to defend claims against them, thus causing them prejudice which warrants sanctions.

DESTRUCTION OF EVIDENCE

Shareholder Defendants seek many of Barton's pre-merger email documents, thus they seek documents that were in the control of Barton prior to the merger. While Barton outsourced disaster recovery services which stored electronic information for a limited number of days in the event of a disaster, Barton did not, as a matter of business practice, generate back-up tapes of emails. Of course, individuals could save emails and documents to their hard drives. Thus, when Allied purchased Barton, it inherited the company without backup tapes.

Several months after the merger, AlliedBarton did, in fact, create backup tapes of the Barton email servers, but did so only as a precaution when moving the servers by trucks from Georgia to Pennsylvania. After the trucks and the servers arrived safely in Pennsylvania, those backup tapes were destroyed consistent with their original purpose.

After the conversion to the new system, users had two months in which to save emails to their hard drives before the old Barton servers were destroyed. Thereafter, the emails, unless specifically saved to an individual user's hard drive, were irretrievably lost as a result of the conversion. At the time of the conversion, this lawsuit was not pending, but AlliedBarton was actively contemplating pursuing litigation against Shareholder Defendants.

In Wal-Mart Stores, Inc., the Court of Appeals upheld a spoliation and sanction order where Wal-Mart had, consistent with its business policy, reused (thus destroying) a surveillance tape that evidenced a crime before a civil suit was filed, but after Wal-Mart should have been on

notice of the suit. Wal-Mart Stores, Inc., v. Lee, 290 Ga. App. at 544. Similarly, in R.A. Seigel Company v. Bowen, 246 Ga. App. 177 (2000), the Georgia Court of Appeals upheld a spoliation and sanction order where a defendant in a civil action involving a car accident disregarded the trial court's preservation order and destroyed one of the cars involved in the accident.

Although it is undisputed that the emails sought in this case were destroyed, the facts alleged here are not analogous to those spoliation cases. The destruction here was uniform (*i.e.*, not performed with an eye towards litigation or limited to a particular type of evidence), was performed consistent with business practices, and was performed pursuant to an information system conversion contemplated in the merger negotiations between the parties. Additionally, the non-existence of backup tapes is due, in part, to Shareholder Defendants' own practices while operating Barton.

DUTY TO PRESERVE

Citing federal case law, Shareholder Defendants argue that AlliedBarton should have issued and enforced a litigation hold on discoverable evidence once it anticipated litigation. See, e.g., Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) (award of spoliation sanctions for failure to issue, communicate, or enforce a litigation hold to preserve discoverable evidence once litigation is reasonably anticipated). In evaluating spoliation claims because of a failure to issue a litigation hold, the central question is whether all relevant data was preserved. If not, then the court must determine if the destroying party acted willfully in the destruction. If, however, the destroying party merely acted negligently or recklessly, the party seeking sanctions must demonstrate the relevance of the missing evidence. Zubulake, 229 F.R.D. at 431.

The parties do not dispute that old Barton emails were destroyed in the course of the conversion which occurred after litigation was reasonably anticipated by AlliedBarton. As discussed above, the Court does not find that AlliedBarton acted willfully or with bad faith in the destruction of the emails, rather they were destroyed for business reasons. Thus, the Court must

evaluate the relevance of the information sought in relation to each count on which Shareholder Defendants allege prejudice.

CUMA CLAIM

Plaintiffs contend that prior to the merger, Barton was not in compliance with a California labor regulation requiring it to pay uniform maintenance allowances to certain types of employees ("CUMA"). Shareholder Defendants rely upon a 2007 California decision for their argument that they complied with CUMA by paying a higher wage and notifying employees through email correspondence that their wages reflected the CUMA payments. See, Gattuso v. Harte-Hanks Shoppers, Inc., 169 P.3d 889, 900 (Cal. 2007). Thus, Defendants claim that the destroyed emails are relevant to their defense to the CUMA claim. The California Supreme Court case that authorized this evidence of compliance with CUMA was decided after the Barton emails were destroyed. Thus, this Court finds that AlliedBarton was under no obligation at the time of the conversion to preserve emails for a possible CUMA claim.[1] In addition, AlliedBarton has retained the Barton payroll and personnel records, which are relevant for the CUMA claims.

COUSINS CLAIM

Plaintiffs allege that Barton modified a security guard services contract with Cousins Properties, Inc., without Allied's authorization between the time the merger agreement was signed and the closing. The deposition testimony of Kristine Berry Morain, former General Counsel of Barton, stated that she did not recall receiving any email communications notifying her of the modification of the Cousins contract. Ms. Morain, who would have been told of such a change because of her position, testified that she first learned of the Cousins claim while reading the Complaint in this case. Additionally, allegations that Barton communicated via email about the Cousins contract has been challenged by the deposition testimony of Keith

1. Even the California Court of Appeals opinion in the same case was issued after the emails were destroyed.

Kepler and Brian MacKay, whose pre-merger emails have already been produced to Shareholder Defendants. Therefore, the Court finds that the destroyed emails, if any, would not be relevant to the Cousins claim.

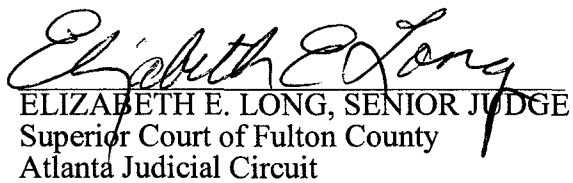
AAFES CLAIM

Plaintiffs allege that Barton failed to pay certain employees' holiday and vacation compensation as required under their contract with the Army & Air Force Exchange Service ("AAFES"). The best evidence regarding this claim will be payroll and personnel records, not old Barton emails. Therefore, the Court finds that any destroyed emails are not sufficiently relevant to the AAFES claims to warrant a spoliation finding and related sanctions.

CONCLUSION:

The Court hereby **DENIES** Shareholder Defendants' Motion to Compel and for Sanctions.

SO ORDERED this 23rd day of June, 2008.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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