Comm'n on Human Rights ex rel. Politis v. Marine Terrace Assocs.

OATH Index Nos. 1673/11 & 1674/11, mem. dec. (Nov. 25, 2011)

On respondents' motion for sanctions for spoliation of evidence, ALJ denied the motion as evidence failed to prove e-mails were intentionally or negligently deleted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS EX REL. IRENE POLITIS
Petitioner
-against-
MARINE TERRACE ASSOCIATES LLC AND WEN MANAGEMENT CORP.
Respondents

MEMORANDUM DECISION

TYNIA D. RICHARD, *Administrative Law Judge*

This memorandum decision resolves respondents' motion for sanctions for the spoliation of evidence by petitioner's expert witness. This proceeding was commenced by the New York City Commission on Human Rights ("Commission"), pursuant to section 8-119 of the Administrative Code and section 1-71(a) of the Commission's Rules. The verified complaint alleges that respondents Marine Terrace Associates LLC and Wen Management Corp. are discriminating on the basis of disability, in violation of sections 8-107(5)(a)(2) and 8-107(15) of the Administrative Code ("Human Rights Law"). The proceeding commenced trial on August 1, 2011.

Respondents moved on July 18, 2011, for sanctions against RAND Engineering & Architecture, P.C. ("RAND"), Leon Geoxavier, and the Commission for the spoliation and intentional destruction of evidence in this case. Mr. Geoxavier, an architect formerly employed by RAND, is proffered as an expert witness for the Commission. He was still employed by RAND when engaged by petitioner to work on this case on a pro bono basis in an arrangement that did not involve RAND. However, he did have documents and information regarding the project on his computer at RAND, including e-mail. By subpoena dated June 7, 2011, Geoxavier

was noticed for deposition, which was conducted on July 1, 2011 (Ex. B to Resp. Motion). At the deposition under questioning by respondents' counsel, Avery Mehlman, Esq., Geoxavier revealed that he had not produced a number of documents that he knew to exist and that had been requested in the deposition subpoena served on him (*See* Ex. B to Resp. Reply). These documents included photographs of Ms. Politis' building (Ex. B at 15:15), e-mail transmissions with the Commission (Ex. B at 17:8; 18:21-19:4, 31:20-21; 60:3), and even a second version of a letter he wrote to the Commission on March 9, 2011, expressing his opinion of a modification to make the premises wheelchair-accessible (Ex. B at 26:6-27:8). Geoxavier admitted he had failed to consider the document request contained in the subpoena, stating "I guess I was unclear" (Ex. B at 64:6). When questioned by the tribunal as to her preparation of this witness for deposition, petitioner's advocate, Olivia Cuggy, Esq., stated that she gave him no instructions regarding his obligation to produce documents for the deposition (Tr. 60-61), despite his importance as petitioner's only expert witness.

On July 6, Mehlman sent Geoxavier a written document request formalizing the requests made at the deposition (Ex. D to Resp. Motion). Petitioner produced the responsive documents on July 8 and 15 (Exs. III & VI to Pet. Opp.).

On July 18, RAND's counsel sent an e-mail transmission to Mehlman and Cuggy stating that Geoxavier had left RAND's employ days before the deposition, that he had "deleted his working files prior to leaving," and that RAND had been able to restore only a few of the deleted files (Ex. A to Resp. Motion). This communication was the catalyst for this sanctions motion, which was made later that same day. The following day, however, RAND's counsel clarified the July 18 e-mail and submitted a zip drive containing "all of the records in its possession responsive to the subpoena" (*see* Schwartzberg e-mail, July 19, 3:08 p.m.). Counsel's July 19 e-mail explained that RAND had uncovered a way to obtain the deleted files and that Geoxavier's actions had not been "intentional":

> Because Mr. Geoxavier handled this project pro bono and outside of RAND's normal (*i.e.*, non-pro bono/compensated for projects) project handling procedures, the typical RAND electronic filing system was not used for the filing of electronic documents with regard to this project which initially made it difficult to retrieve the documents. My client has advised me that Mr. Geoxavier did not intentionally delete any electronic records. Rather, he cleaned up his personal files which is what every departing RAND employee does before they leave RAND's employ.

(Ex. IX to Pet. Opp.). On July 25, RAND's counsel submitted the affidavit of RAND's chief administrative officer, attesting that the zip drive produced to respondents contained all of Geoxavier's records relating to this case that "were able to be retrieved from RAND's electronic server" and that such records were "all the records . . . on RAND's server regarding the project." (Walsh Aff. at ¶3). As a result of the representations set forth in the Walsh affidavit, respondents agreed to withdraw the sanctions motion as against RAND (*see* Mehlman e-mail, July 21, 5:12 p.m.).

At the same time, Mehlman asked petitioner's counsel to provide an affidavit containing a similar statement on behalf of Geoxavier. RAND's counsel did not wish to draft such an affidavit because he was no longer employed there in a full time capacity (see Schwartzberg e-mail, July 20, 4:17 p.m.). However, petitioner's counsel, who did not represent Geoxavier but had called him as their witness, also refused to provide an affidavit.

During the course of several e-mail transmissions on July 21, Cuggy stated that "Petitioner does not feel that it is necessary" for its expert to rebut "statements he has not made" and that he had never stated "that he had deleted e-mails pertinent to this matter." (Cuggy e-mail, July 21, 11:48 a.m.). Geoxavier's statements were not in issue; his actions were and his former employer had stated that he had deleted e-mails and he had not disputed it. Cuggy further stated that RAND's affidavit should be sufficient as it indicated that "the discrepancy was due to a problem with [RAND's] document retrieval process" (*id*.). Again, there is no dispute that documents were deleted since a "document retrieval process" was employed to find them. Although RAND had recovered some records, it remained unclear whether those recovered constituted all that had been in Geoxavier's possession. Cuggy stated that respondents would have an opportunity "to confront [Geoxavier] with the veracity of his statements" at the hearing and declared that the "LEB will not permit Respondents to continue their cross examination by baseless pre-trial motions" (*id*.).

In response, the tribunal reminded counsel that an allegation of spoliation is "a serious one" that was prompted by her expert's admission to the existence of documents that were not produced and the subsequent revelation that documents had been deleted had opened a door that "required our investigation." Finding it in counsel's "ethical interest to participate in this search for the truth," I asked her to indicate whether she could "obtain an affidavit that states that Geoxavier has reviewed the documents produced and [that] they are all the documents in his

possession that are responsive to the document request." (ALJ Richard e-mail, July 21, 12:30 p.m.). Cuggy replied that petitioner, instead, wished to answer the motion because "Petitioner considers statements regarding Mr. Geoxavier's credibility and the production of documents to be bound up in the substance of such a reply and do not believe it is equitable to our interests to respond in an incomplete fashion." (Cuggy e-mail, July 21, 2:10 p.m.). I repeated my request for an affidavit that would state that the expert had produced all responsive documents (ALJ Richard e-mail, July 21, 2:23 p.m.), a reasonable assurance that petitioner had provided in answer to other discovery requests (*see* Ex. VI to Pet. Opp.). Rather than provide such a statement and release the parties from further motion practice, Cuggy insisted on responding to the motion and asked for eight days to respond (Cuggy e-mail, July 21, 5:01 p.m.), which would have been one business day before the scheduled trial date. I granted time for briefing on an expedited schedule due to the immediacy of trial: petitioner would respond by July 26 and respondents would reply by July 27. However, petitioner's response to the motion was inadequate and prevented a decision prior to trial.

Petitioner's response consisted of a letter brief attaching 10 exhibits. Of the 175 pages submitted, none of them offered a decisive statement that all of the documents responsive to the subpoena request had been produced. Petitioner submitted an affidavit from Geoxavier that made only one statement pertaining to the motion:

> At no point during my full time employment with RAND, or subsequent thereto, did I destroy any communications or documents, electronic or otherwise, with respect to the above captioned matter.

(Ex. IX to Pet. Opp., ¶6). The statement avoids the question of whether Geoxavier "deleted" e-mails, as RAND stated. Rather, the affidavit appeared to offer a legal conclusion (on whether documents were "destroyed") rather than a fact statement about what happened. Deleted e-mails might qualify as destroyed communications, even if those communications were subsequently restored. Cuggy submitted no attorney affirmation. Thus, we are not told by Geoxavier or by Cuggy in what way Geoxavier disagrees with the statements made by RAND.

In fact, Cuggy appears not to know whether Geoxavier deleted e-mails relevant to this case, because she instead argues, speculatively, that the deletions were not intentional ("RAND's counsel further represented that Mr. Geoxavier had not intentionally deleted any relevant e-mails, but merely erased personal e-mails upon leaving his full time position at RAND, unrelated

to the present matter."). (Pet. Opp. at p. 3). Mr. Schwartzberg's belief about Geoxavier's intent could not reasonably be relied upon while Geoxavier in his own affidavit stands silent on his intent.

At the end of this motion practice, the question of whether documents were deleted and whether the documents now produced encompass the world of responsive documents that exist remains an open one. It can be answered, simply, by Geoxavier reviewing what RAND produced via zip drive and reviewing what he produced separately and vowing that all has been produced. This is the information I requested on July 21 and as of August 1, the first day of trial, Geoxavier could not answer it.

Before trial commenced, I called Mr. Geoxavier to testify. Mr. Mehlman and Ms. Cuggy questioned him, seriatim (Tr. 41-52). He testified that he had made a production pursuant to respondents' document request and he was aware of RAND's separate production of documents sent by zip drive; however, he had not reviewed all the documents produced by RAND and could not attest to their contents, and he had never compared the documents he produced to those produced by RAND (Tr. 43-45). Thus, even at this late date the witness was unprepared to answer the question that formed the sole basis for respondents' outstanding motion for sanctions. Further, despite his acknowledgement that he had not reviewed all of RAND's production, Geoxavier went on to affirm that "all" relevant documents had been provided (Tr. 48) – a representation that cannot be accorded any weight given his admission that he failed to review all the documents Rand submitted (Tr. 64). These statements undermined his credibility. After further argument on the motion, petitioner's counsel offered to have Geoxavier review the RAND documents so that an appropriate representation regarding a complete production could be made.

Mr. Geoxavier was called to testify on the issue of the document production once again. When specifically asked by the tribunal, he denied that he had deleted any computer files, as stated by Schwartzberg (Tr. 489). He stated that all his computer files on this project were saved and archived on the RAND server and, although he no longer holds a full time position at RAND, he still works there as a consultant and continues to maintain computer files there which he can access remotely (Tr. 490). He attributed Schwartzberg's statement to a miscommunication with IT staff (Tr. 491-92). He did not, however, offer a satisfactory explanation for failing to produce all the responsive documents in his possession prior to the deposition (Tr. 493); Mr.

Geoxavier provided three responsive documents prior to his deposition and failed to provide approximately 35 documents that he knew existed that were later produced to respondents (Tr. 47, 58).

Nevertheless, based on his testimony that he did not in fact delete pertinent e-mail transmissions, I did not find evidence of willful destruction of evidence. *See Kirkland v. NYC Housing Auth.*, 236 A.D.2d 170, 173 (1st Dep't 1997) (sanctions for spoliation, or the destruction of evidence, are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence before the adversary has an opportunity to inspect them); *Comm'n on Human Rights ex rel. Manning v. HealthFirst, LLC*, OATH Index No. 462/05 at 4-5 (March 15, 2006), *adopted*, Comm'n Dec. (May 10. 2006). Finding no proper basis for awarding spoliation sanctions, respondents' motion is denied.

I could find no good reason for the failure of petitioner's counsel to supply an affidavit from Mr. Geoxavier providing this simple explanation at the time that I requested it, and counsel offered none (Tr. 494-97). Counsel's decision to expend time and resources to respond to a motion for sanctions had a domino affect, causing respondents to expend additional time and resources preparing reply papers and then offering further argument prior to the commencement of trial, delaying the commencement of trial with testimony and argument on the motion and inconveniencing a number of witnesses, including complainant, who had to wait to testify, and causing the tribunal to consider the papers and write a decision when time would have been better spent focused on trial. To follow this course of action when a simple affidavit could have been prepared to satisfy all parties (as occurred with the RAND affidavit) is difficult to comprehend. Counsel's stated reason appeared to be debunked. The opposition papers not only failed in counsel's own stated goal of protecting the credibility of its expert witness, as the bare bones Geoxavier affidavit offered no substance and therefore no support for his credibility.

Tynia D. Richard
Administrative Law Judge

November 25, 2011

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