SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IAN JACK MILLER,

Plaintiff,

-against-

ZARA USA, INC., DILIP PATEL and MOISES COSTAS RODRIGUEZ

Defendants.

Index No. 155512/2015

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER REGARDING PURPORTEDLY PRIVILEGED AND CONFIDENTIAL DOCUMENTS

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Zara USA, Inc. respectfully submits this memorandum of law in opposition to Plaintiff's motion for a protective order regarding the purportedly privileged and confidential documents that he stored on Zara's laptop computer after his termination (Motion No. 5, Docket No. 56).

PRELIMINARY STATEMENT

This motion concerns whether or not Plaintiff, an attorney, is entitled by law to purge from Zara's laptop computer documents that he stored on it while unlawfully retaining the computer for months after his termination. Despite Zara's demands for the return of its computer equipment, Plaintiff kept the laptop and other devices, using them for his own personal ends. He knew he had no lawful right to continue possessing the computer, which belonged to Zara, and no right to anything stored on it. Plaintiff knew this because it was in Zara's equipment policy, which Plaintiff helped create.

Despite the policy's notice that Zara retains exclusive ownership of all data stored on its equipment and that its employees can have no expectation of privacy in any of it, Plaintiff insists that he is somehow exempt from this policy. Plaintiff seeks to purge from the laptop 106 documents, nearly all of which he put onto it *after* Zara let him go on March 5, 2015, while he unlawfully retained Zara's laptop. Even though New York law dictates otherwise, Plaintiff insists he is entitled to them under the attorney-client privilege and attorney-work product doctrine. As this Court held in *Scott v. Beth Israel Med. Ctr.* 17 Misc. 3d 934 (Sup. Ct., N.Y. Cty. 2007), which Plaintiff ignores, the policy's elimination of any reasonable expectation of confidentiality and Plaintiff's full knowledge of the policy vitiates his claim of confidentiality.

To be confidential, privileged communications must be reasonably protected from disclosure. Plaintiff failed to protect the documents at issue by storing them on a device that did not belong to him and which he unlawfully retained after Zara's requests for its return. As an

attorney, with full knowledge of the policy, Plaintiff should not have used Zara's laptop at all, let alone do so repeatedly, storing over 100 files on it, after the termination of his employment.

The Court should deny Plaintiff's motion for a protective order accordingly.

STATEMENT OF FACTS RELEVANT TO THIS MOTION

During his employment, Zara provided Plaintiff with a laptop computer and other devices. Plaintiff's use of the laptop was governed by a company policy entitled, "Use of Company Property and Electronic Communications" (the "User Policy"), which is contained in the employee handbook. (*See* accompanying Affidavit of Belen Quiros-Fillet, sworn to on February 23, 2016 ("Quiros-Fillet Aff."), ¶ 3.) As Zara's attorney, Plaintiff helped prepare and approve the User Policy. (*Id.*, ¶ 2-3.) The User Policy states, in relevant part:

> Any data collected, downloaded and/or created on Zara's electronic communications resources[1] is the **exclusive property of Zara** and may not be copied or transmitted to any outside party or used for any purpose not related to the business of Zara.
>
> . . .
>
> Employees should expect that **all information** created, transmitted, downloaded, received, or **stored in Zara's electronic communications resources may be accessed by Zara at any time**, **without prior notice**.
>
> Employees **do not have an expectation of privacy or confidentiality in any information** transmitted or **stored in Zara's electronic communications resources (whether or not such information is password-protected)** ....
>
> ... All Zara equipment and property must be returned before your last day of work.

(*Id.*, Exhibit 1 (emphasis added).)

On March 5, 2015, Zara terminated Plaintiff's employment. After Plaintiff failed to return Zara's laptop computer, iPhone and iPad, Zara's counsel sent his counsel on March 25,

[1] The User Policy defines "electronic communications resources" to include "Company supplied computers." (*Id.*)

2015, a letter via email demanding the immediate return of these items. (Affirmation of David S. Warner in opposition to Plaintiff's motion for a protective order regarding purportedly privileged and confidential items, sworn to on February 25, 2016 ("Warner Aff."), Ex. 1.) Plaintiff ignored this letter (*see id.*, Ex. 2) and, instead of returning the equipment, he continued to use it for his own purposes, adding more than 70 of the files that he now seeks to delete. (*See* Affidavit of David Tracey in Support of Plaintiff's motion, Ex. 3 [Dkt. No. 62] (listing 106 files, over 70 of which have file names indicating they were created after March 25, 2015).)

After several months of dealing with Plaintiff's resistance to returning the equipment, he proposed a review agreement premised on the representation that he wanted to copy certain files from the hard drive and remove his personal bank statements. (*See* Warner Aff., Ex. 5.) In order for Plaintiff to relinquish the equipment without court intervention, it was agreed that he could deposit the laptop with a computer forensics firm. However, Zara retained its exclusive ownership of the laptop and its contents, stating repeatedly, including in the review agreement:

> As it is Zara's position that Plaintiff can have no confidential information on Zara's devices, Zara reserves its right to challenge any claims of privilege that Plaintiff may assert in a privilege log.

(Warner Aff., Ex. 3, p. 2, point 4.)

Plaintiff thereafter sent a list of thousands of files he wanted to copy from the laptop. His list also included over 100 files that he insisted on deleting permanently from it. Zara acceded fully to Plaintiff's request for copies but could not agree to allow him to remove any files, particularly based on his bald representation of what those files contained.

Notwithstanding the computer policy that Plaintiff helped create, he claims he is exempt from the policy and legally entitled to delete files from the laptop. In other words, Zara's agreement to give Plaintiff a copy of all the files he identified was not enough for him as he insists on deleting over 100 files before giving Zara its computer back.

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER OVER THE FILES HE INTENTIONALLY STORED ON ZARA'S COMPUTER BECAUSE THOSE FILES ARE NOT CONFIDENTIAL

Contrary to Plaintiff's contention, the attorney-client privilege may not be asserted over documents that are not communications with counsel and which were not made confidentially. The attorney-client privilege applies to a party's actual communications with an attorney, in confidence, for the purpose of obtaining legal advice. CPLR § 4503, *Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989). Failure to keep communications with counsel private vitiates any claim of privilege. *See Willis v. Willis*, 79 A.D. 3d 1029, 1030-31 (2d Dep't 2010) (ordering disclosure of emails between the plaintiff and her attorney since the plaintiff failed to keep these communications confidential); *Scott v. Beth Israel Med. Ctr.*, 17 Misc. 3d 934, 938 (Sup. Ct., N.Y. Cty. 2007).

"[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377 (1991) (citations omitted). "As with any other confidential communication, the holder of the privilege and his or her attorney must protect the privileged communication; otherwise, it will be waived." *Scott*, 17 Misc. 3d at 938.

In *Scott*, which is virtually on point and which Plaintiff ignores, Justice Ramos denied the plaintiff's motion for a protective order requiring his former employer to return the correspondence he exchanged with his counsel through the employer's email system. 17 Misc. 3d at 934-943. The Court applied the following test to determine if the plaintiff had a reasonable expectation of privacy over these communications sufficient to render them confidential:

> (1) ... the corporation maintain[s] a policy banning personal or other objectionable use, (2) ... the company monitor[s] the use of the employee's computer or e-mail, (3) ... third parties have a right of access to the computer or e-mails, and (4) ... the corporation notif[ies] the employee, or was the employee aware, of the use and monitoring policies.

Id. at 941.

Application of the relevant factors demonstrates that none of the documents Plaintiff stored on Zara's computer are confidential because he had simply had no reasonable expectation of privacy. *Cf. id.; Medical Directions LLC v. Salamone,* 2010 N.Y. Misc. LEXIS 388, at *34 (Sup. Ct., N.Y. Cty. Feb. 2, 2010) (rejecting applications of the attorney-client privilege to emails sent through the employer's email server because the employee "had no reasonable expectation of privacy in such communications").

A. Zara's User Policy Confirms Its Exclusive Rights Over The Equipment And Its Contents

At all relevant times, Zara had a User Policy governing the use of its computers. (*See* Quiros-Fillet Aff., Ex. 1.) As Zara's in-house counsel, Plaintiff was intimately involved in preparing and approving the User Policy, which states, in relevant part:

> Any data collected, downloaded and/or created on Zara's electronic communications resources[2] is the **exclusive property of Zara** and may not be copied or transmitted to any outside party or used for any purpose not related to the business of Zara.
>
> . . .
>
> Employees should expect that all information created, transmitted, downloaded, received, or stored in Zara's electronic communications resources **may be accessed by Zara at any time**, without prior notice.
>
> Employees **do not have an expectation of privacy or confidentiality** in any information transmitted or stored in Zara's

[2] The User Policy defines "electronic communications resources" to include "Company supplied computers." (*Id.*)

> electronic communications resources (whether or not such information is password-protected) ....
> ... All Zara equipment and property must be returned before your last day of work.

(*Id.* (emphasis added).) Plaintiff was not exempt from this policy. (Quiros-Fillet Aff., ¶ 3.)

The User Policy is clear and unequivocal and, as Zara's counsel, Plaintiff cannot deny that he understood, perhaps better than anyone, its consequences. Nevertheless, Plaintiff used the laptop for his own purposes and placed onto it more than 100 files *after* leaving Zara, approximately 70 of which he added following Zara's demands that he return its equipment immediately. Plaintiff knew he had a duty to return the computer by his last day of employment, as stated in the User Policy. He knew that anything he created or stored on the computer was Zara's "exclusive property" as that, too, was in the User Policy. In short, Plaintiff had no right to expect any privacy in anything he created or stored on Zara's computer. As the Court held in *Scott*:

> [T]he effect of an employer e-mail policy, such as that of BI, is to have the employer looking over your shoulder each time you send an e-mail. In other words, the otherwise privileged communication between Dr. Scott and PW would not have been made in confidence because of the BI policy.

17 Misc. 3d at 938 (emphasis added).

B. Zara Expressly Retained Its Right To Access The Computer's Contents

The second factor, whether "the company monitor[s] the use of the employee's computer or e-mail," is satisfied if the "policy ***allows*** for monitoring." *Scott*, 17 Misc. 3d at 941 (emphasis added). Contrary to Miller's main argument, the employer need not actually monitor, so long as it "retains the right to do so ...." *Id.*

Here, the User Policy states that all information created or stored on Zara's computers "may be accessed by Zara at any time, without prior notice." (Quiros-Fillet Aff., Ex. 1.)

Plaintiff does not dispute that Zara reserved its right to monitor and access its computers at any time, without prior notice. He just fails to acknowledge that, under New York law, reserving the right to monitor is sufficient. *Scott*, 17 Misc. 3d at 941.

Plaintiff misplaces his reliance on *Curto v. Medical World Comm'ns, Inc.*, 2006 WL 1318387 (E.D.N.Y. May 15, 2006), as it was rendered under federal, not New York, law *before* this Court issued the *Scott* decision, which rejected parts of it. *Curto* is also distinguishable because the court relied largely on the undisputed fact that the employee used the laptop exclusively from home and never connected it to the employer's servers. *Id.* at *5. There is no such evidence here.[3] Moreover, the Court in *Scott* considered *Curto* and rejected its actual monitoring requirement. *Scott*, 17 Misc. 3d at 939-41. Other courts have, too. *See, e.g., United States v. Finazzo,* 2013 U.S. Dist. LEXIS 22479, at *26-27 (E.D.N.Y. Feb. 19, 2013) ("Most courts have concluded such reservation of the right to review destroys any reasonable expectation of privacy, whether or not the employer routinely reviews reviewing the e-mails.").

Accordingly, Plaintiff's claim that he "never heard of Zara monitoring any other employee's use of his or her laptop" (Miller Aff., ¶ 6) is immaterial. *See Finazzo,* 2013 U.S. Dist. LEXIS 22479, at *32-33 ("[I]t was unreasonable for Finazzo to deduce that the company does not monitor its e-mail system merely because its CEO was never disciplined for violating Aéropostale's rules about personal usage of e-mail."). As stated in *Scott*, an employer's express reservation of its right to monitor use of its email system is sufficient to show that it does monitor such use. *Scott*, 17 Misc. 3d at 941.

Equally meritless is Plaintiff's bald contention that all communications are confidential unless there has been an "actual disclosure" of them. Actual disclosure is not necessary if the communication was not made confidentially in the first place. *See Matter of Vanderbilt (Rosner-*

[3] Nor can Zara prove these connections occurred as Plaintiff will not allow it to access the laptop.

Hickey), 57 N.Y.2d 66, 77 (1982) (requiring actual disclosure to prove "the confidence arising from the attorney-client relationship has ... been breached…."). Here, by creating and storing documents on a computer owned by another party, which had exclusive, unfettered rights over the contents, Plaintiff failed to take adequate steps to maintain confidentiality in the first place. *See Scott,* 17 Misc. 3d at 940 ("hold[ing] that BI's e-mail policy is critical to the outcome here").

C. Third-Party Access Is No Longer An Applicable Consideration

New York courts no longer need to consider whether "third parties have a right of access" to the computer because CPLR § 4548 preserves the attorney-client privilege even where "persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication." *Scott*, 17 Misc. 3d at 941-42. Before CPLR § 4548 was enacted in 1998, courts had found the attorney-client privilege did not attach to *any* emails because internet service providers could access the content of their customers' messages. Alexander, Practice Commentaries, CPLR § 4548. This amendment was designed to limit these holdings and encourage the use of email as a means of communication. *Id.*

Even if this factor was considered, Zara retained the right to access and monitor its equipment, and Plaintiff was fully aware of that right when he acted.

D. Plaintiff Had Actual Or Constructive Knowledge Of Zara's User Policy

The fourth element of the "privacy" test in *Scott* requires that "the corporation notified the employee, or was the employee aware, of the use and monitoring policies." 17 Misc. 3d at 941. In *Scott,* the Court held that "Dr. Scott had constructive knowledge of the policy" since he was an administrator and "required newly hired doctors under his supervision to acknowledge in writing that they were aware of the policy." *Id.* at 942.

Here, Plaintiff does not (and cannot) dispute that he had full knowledge of the User Policy. He helped create it and ultimately approved it. (Quiros-Fillet Aff., ¶ 2-3.) Plaintiff accordingly had actual or at least constructive knowledge, just like the defendant in *Scott*.

In summary, after applying all four factors, it is clear that Plaintiff had no reasonable expectation of privacy in any documents he created or stored on Zara's computers, extinguishing his claim of confidentiality. It is incredible for Plaintiff to claim he had a "reasonable expectation of privacy" when the User Policy that he helped create confirmed that: (a) had no reason to expect privacy; (b) any material created or stored on Zara's devices shall be Zara's exclusive property; and (c) Zara reserved its right to access the contents. In short, the Court should deny Plaintiff's motion because he failed to take reasonable measures to ensure confidentiality. *Cf. Scott*, 17 Misc. 3d at 943 (finding the plaintiff did not take reasonable precautions to keep his communications with counsel confidential by communicating through his employer's email system).

II. ZARA ACTED IN GOOD FAITH BY CONSIDERING PLAINTIFF'S POSITION AND ALLOWING HIM TO RETAIN A COPY

The Review Agreement states, in pertinent part:

> As it is Zara's position that Plaintiff can have no confidential information on Zara's devices, Zara reserves its right to challenge *any* claims of privilege that Plaintiff may assert in a privilege log.

(Warner Aff., Ex. 4, ¶ 4 (emphasis added).)

Zara carefully reviewed Plaintiff's list of files and ultimately agreed to provide Plaintiff with a copy of all the files he identified. Zara's objection to Plaintiff's secondary effort to remove some of those files hardly suggests bad faith, particularly in light of its oft-stated position and reservation of rights, which it reiterated in its correspondence with Plaintiff. (*See, e.g.,* Warner Aff., Ex. 3.) The Court should accordingly disregard Plaintiff's false expression of

indignation and deny his motion. As discussed, there was no confidentiality in anything created and/or stored on Zara's laptop, particularly while Plaintiff held onto the device unlawfully.

CONCLUSION

For all these reasons, the Court should deny Plaintiff's motion for a protective order.

Dated: February 25, 2016
New York, New York

Respectfully submitted,

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