

2010 NY Slip Op 50876(U)

KEVIN FORWARD, INDIVIDUALLY AND KEVIN FORWARD AS A MEMBER OF HEALTH SOS RE MANAGEMENT ARDSLEY, LLC, ON BEHALF OF HIMSELF AND IN THE RIGHT OF SAID LIMITED LIABILITY COMPANY, Plaintiff,

v.

SANDRA FOSCHI AND HEALTH SOS PT, P.C., Defendants, AND HEALTH SOS RE MANAGEMENT ARDSLEY LLC, Nominal Defendants.

KEVIN FORWARD, INDIVIDUALLY AND KEVIN FORWARD AS A MEMBER OF HEALTH SOS REALTY BABYLON LLC ON BEHALF OF HIMSELF AND IN THE RIGHT OF SAID LIMITED LIABILITY COMPANY, ERIC LOUGHMAN, INDIVIDUALLY AND ERIC LOUGHMAN AS A MEMBER OF HEALTH SOS REALTY BABYLON LLC, ON BEHALF OF HIMSELF AND IN THE RIGHT OF SAID LIMITED LIABILITY COMPANY AND HEALTH SOS REALTY BABYLON LLC. Plaintiffs,

v.

SANDRA FOSCHI HEALTH SOS PT, P.C AND HEALTH SOS REALTY BABYLON LLC, Defendants, AND

HEALTH SOS REALTY BABYLON LLC, Nominal Defendant.

KEVIN FORWARD, INDIVIDUALLY AND KEVIN FORWARD AS A MEMBER OF HEALTH SOS REALTY LLC, ON BEHALF OF HIMSELF AND IN THE RIGHT OF SAID LIMITED LIABILITY COMPANY, Plaintiffs,

v.

SANDRA FOSCHI AND HEALTH SOS PT, P.C. Defendants, AND HEALTH SOS REALTY LLC, Nominal Defendant. IN THE MATTER OF THE APPLICATION OF KEVIN FORWARD, Petitioner,

PURSUANT TO LLC 702, FOR A JUDICIAL DISSOLUTION OF

v.

HEALTH SOS REALTY LLC AND SANDRA FOSCHI, Respondents.

9002/08.

Supreme Court, Westchester County.

Decided May 18, 2010.

SAVAD CHURGIN, Susan Cooper, Esq., Paul Savad, Esq., 55 Old Turnpike Road, Suite 209, Nanuet, New York 10594, Attorneys for Plaintiff.

THE ROSS LAW FIRM, Donna Ross, Esq., 14 Penn Plaza, Suite 2116, New York, New York 10122, Attorneys for Defendants.

ACKERMAN, LEVINE, CULLEN, BRICKMAN & LIMMER, LLP, Andrew J. Luskin, Esq., 1010 Northern Boulevard, Suite 400, Great Neck, New York 11021, Attorneys for Defendants.

ALAN D. SCHEINKMAN, J.

Defendants Sandra Foschi ("Foschi"), Health SOS PT P.C. ("Health P.C."), and Health SOS Realty LLC, Health SOS Realty Babylon LLC and Health SOS Re Management Ardsley LLC (the "LLC Defendants") move to disqualify Plaintiffs' counsel, Savad Churgin (the "Savad Firm") from representing Plaintiffs, Kevin Forward, individually and as a member of the LLC Defendants ("Plaintiffs").^[1] Alternatively, Defendants move to suppress from evidence all privileged and confidential communications Forward allegedly accessed from Foschi's personal and business e-mail accounts. Defendants also seek an award of costs and counsel fees associated with bringing this motion. Plaintiffs oppose the motion.

FACTS AND PROCEDURAL HISTORY

These four dissolution and derivative proceedings arise from the disintegration of the personal and business relationships between Kevin Forward ("Forward") and Sandra Foschi. Once Forward and Foschi became estranged personally, their professional relationship also deteriorated. To obtain a recovery on account of his claimed interest in various LLCs,^[2] Forward brought these dissolution/derivative proceedings.

Forward's legal representation in these actions has rotated. Initially, he was represented by Paul Savad & Associates. He was then represented by Daniel E. Bertolino, P.C. ("Bertolino") and Grey Street Legal LLC ("Grey Street"), until they moved to be relieved as counsel, an application granted by this Court on November 5, 2009. Forward then returned to his original counsel, Paul Savad, Esq. ("Attorney Savad"), in his newly reconstituted firm, the Savad Firm.

DEFENDANTS' MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL OR TO SUPPRESS PRIVILEGED E-MAILS

The present application involves Foschi's claim that Forward unlawfully gained access to her personal and business e-mail accounts, downloaded e-mails and documents, secreted these documents from the offices of the LLCs and then turned them over to his counsel to be used as a tactical weapon in these litigations. Foschi's counsel, Donna Ross, Esq., affirms that she first learned of Forward's actions when she received copies of privileged communications between Ross and Foschi as a part of Plaintiffs' voluminous document production, which documents "had not been called to the attention of Defendants' counsel by any of Mr. Forward's attorneys, despite their possession of the material" (Affirmation of Donna Ross, Esq. dated January 23, 2010 ["Ross Aff."] at ¶ 4).

The issue was first raised with this Court on September 23, 2009, when Bertolino and Grey Street were still counsel to Plaintiffs and two days before they moved by Order to Show Cause to be relieved as counsel because, *inter alia*, there had been a breakdown in the attorney-client relationship. At that time, Defendants' counsel requested that this Court prevent Forward from disclosing the allegedly privileged communications to any new counsel. The Court granted Defendants' request and directed Forward, Grey Street and Bertolino not to disclose or discuss the privileged communications with anyone (Ross Aff., Ex. C, Tr. of September 23, 2010 conference at 18).

On November 5, 2009, this Court granted the motion of Bertolino and Grey Street to be relieved as counsel. Ms. Ross affirms that "in or about the first week in December 2009, Mr. Forward, acting *pro se*, informed [her] that he was about to retain new counsel, stating that he intended to retain Savad to represent him again. [Ross] explained to Mr. Forward that [she] would move to disqualify Savad. Mr. Forward responded that Savad was aware of the disqualification issues and was willing to appear on his behalf nonetheless" (Ross Aff. at ¶ 10). Ross states that she wrote to Attorney Savad on December 6, 2009 to advise him of the Court's order concerning the privileged communications and to further warn him that she intended to move to disqualify him if he resumed his representation of Forward (*id.* at ¶ 11 and Ex. F thereto).

Ross contends that "Savad was aware, or could not have been unaware, of Forward's unauthorized access and transmission of Foschi's privileged and confidential communications. The firm's complicity with Forward's wrongful conduct amounts to actual attorney misconduct on the part of Plaintiffs' counsel" (*id.* at ¶ 12). Ross contends that even before they received the privileged communications as part of the document production, Defendants believed Forward had accessed Foschi's e-mails, which was the basis for Defendants' sixth counterclaim for violation of the Stored Wire and Electronic Communications Act (18 USC § 2710). The Sixth Counterclaim alleges that "without Foschi's authorization Mr. Forward intentionally accessed and read Foschi's e-mails on her Go Daddy Health SOS' e-mail account" and "transmitted some or all of Foschi's Health SOS' e-mails to Mr. Forward's attorneys in this litigation, without Foschi's knowledge or authorization" (*id.* at ¶ 13, and Ex. I thereto). Defendants also served: (1) document demands requesting all correspondence between Foschi and third parties (including her counsel) that had been forwarded to Attorney Savad, or an agent of the Attorney Savad; and (2) a preservation letter on Attorney Savad and Forward requesting that they preserve any and all such correspondence (*id.* at ¶ 14, and Ex. J thereto). Ross asserts that Attorney Savad never produced a single document prior to their being discharged in the Spring 2009 (*id.* at ¶ 15).

Ross submits Forward's examination before trial testimony wherein he admitted that he accessed Foschi's e-mails on her GoDaddy account and forwarded them to Attorney Savad. He further explained that he accessed them by going online to GoDaddy to access the sandra@healthsos.com account (*id.* at ¶ 18, and Ex. H thereto at 619-620, 632-633). Further, that he knew that the e-mail account belonged to Foschi and that she had not authorized him to access her account (*id.* at ¶¶ 19-20, and Ex. H thereto at 623, 633-634).

Ross states that Defendants do not know how many privileged and confidential communications were seen and/or transmitted to Attorney Savad although Ross estimates that there were dozens of e-mails between Ross and Foschi during this period (*id.* at ¶¶ 21-22). The confidential e-mails are described by Ross to be "e-mails between Foschi and her employees, accountant and vendors" that Forward admitted to reading and forwarding to Attorney Savad (*id.* at ¶ 23).

Ross claims that Forward further admitted at his deposition to having forwarded e-mails he accessed on " the GoDaddy account under healthsos.com domain name to Mr. Savad's office" (*id.* at ¶ 28, and Ex. H thereto at 635). Ross points out that Joseph Churgin, Esq. of the Savad Firm has admitted on the record of a conference held before this Court on January 8, 2010 that he saw the privileged e-mails when Paul Savad & Associates was first counsel (*id.* at ¶ 29, and Ex. G thereto at 63).

Ross argues that by relieving Bertolino and Grey Street as counsel, this Court was attempting "to sanitize the proceedings and prevent the spreading of the issues that led to the disqualification issue to anybody else. Less anybody else be tainted" (*id.* at ¶ 30, and Ex. C thereto at 8-11).

It is Defendants' position that the Savad Firm's disqualification will not unfairly prejudice Forward because the Savad Firm did not participate in most of the document discovery and depositions which occurred and because Churgin admitted that he was not up to speed on everything that had occurred on this case during the one-year period Forward was represented by Bertolino and Grey Street (*id.* at ¶ 33). By contrast, Defendants argue that to allow "Savad to resume representation of the Plaintiff would unjustly penalize Ms. Foschi, cause irreparable harm to her, reward a Plaintiff who is a wrongdoer himself and his attorney who failed to take appropriate remedial action ... More importantly, there is no way of ensuring that the tainted knowledge obtained will not influence the Savad Firm's future conduct.^[3] Disqualification is the only means of sanitizing the proceedings and preventing the offending lawyer from further using the illegally-obtained privileged and confidential communications to the detriment of Defendants" (*id.* at ¶ 34).

In their memorandum of law, Defendants state that, because it is undisputed that Forward shared an unknown number of illicitly obtained e-mails with Attorney Savad during the initial period of representation, it was incumbent upon Attorney Savad, upon receipt of these e-mails, to notify and turn over these e-mails to Defendants' counsel. However, rather than acting in accordance with the Rules of Professional Conduct, Defendants argue that Attorney Savad did nothing (*i.e.*, they did not notify counsel or the court nor did they instruct Forward to cease his unauthorized accessing of Foschi's e-mail) despite having been put on notice of Foschi's claim based on her counterclaim, discovery requests and preservation letter (Dfts' Mem. of Law at 1-2). Defendants argue that "[i]n the face of overwhelming legal authority requiring disqualification of attorneys who may even potentially have access to privileged documents by virtue of prior representation,

and even more so of those who actually have obtained such communications by unauthorized means, instead of declining representation, which would have been the responsible choice, Savad filed a notice of appearance on behalf of Plaintiff. During the conference on January 8, 2010, Mr. Churgin admitted having seen Ms. Foschi's privileged communications with her counsel, thereby closing the circle ... [t]he continuous irresponsible conduct of Plaintiff and his counsel shall only serve to delay the trial, postpone the adjudication of Defendants' counterclaims and cause the parties and the Court to waste time and resources" (*id.* at 3). Defendants assert that "a sanction short of disqualification would be to treat the conduct at issue with a degree of lenity practically inviting its recurrence" (*id.*, quoting *Matter of Beiny*, 129 AD2d 126, 143-144 [1st Dept 1987]).

Defendants argue that whether to disqualify counsel is a matter for the sound discretion for this Court and there is "[s]ubstantial authority ... [for] disqualification of any attorney or firm whose participation in a case threatens to taint the integrity of the adversary process" — *i.e.*, where there is an appearance of impropriety (Dfts' Mem. of Law at 4-5). According to Defendants, the standard is "probability of disclosure of privileged information" or the "potential for the firm to use the confidences obtained" (*id.* at 5-6). As to the latter reason, the concern is that the "attorney's or firm's continued participation would violate the Code of Professional Responsibility" (*id.* at 7, quoting *Schmidt v Magnetic Head Corp.*, 101 AD2d 268, 280 [2d Dept 1984]).

Relying on authority from the Second Circuit, Defendants argue that disqualification is appropriate here because the Savad Firm has an unfair advantage that may be remediated only by the firm's disqualification (Dfts' Mem. of Law at 8). Further, Defendants note that when the communications were obtained through deceitful means in contravention of the CPLR, "courts have not hesitated to disqualify counsel, and suppress the illicitly-obtained evidence. In certain cases, this has even led to dismissal" (*id.* at 7).

Defendants further argue that Attorney Savad violated the Rule 8.4 of the Rules of Professional Conduct (22 NYCRR § 1200.58) by being dishonest and untrustworthy and prejudicing the administration of justice by failing to disclose the receipt of privileged communications. Defendants assert that Attorney Savad violated Rule 3.4 (22 NYCRR § 1200.26) and Rule 4.4 (22 NYCRR § 1200.35) by failing to notify and turn over the privileged communications upon receipt of same from Forward (*id.* at 9-10).

As a separate basis for disqualification, Defendants argue that Attorney Savad and Forward used improper means to obtain discovery from Foschi and that this clandestine discovery abuse should be sanctioned through this Court's grant of an order of disqualification (*id.* at 12).

Defendants go so far as to contend that Attorney Savad's failure to disclose to this Court the client's trespass of Foschi's e-mail was a violation of Rule 3.3 of the Rules of Professional Conduct (22 NYCRR § 1200.25),^[4] which warrants the outright dismissal of this action in accordance with *Lipin v Bender* (193 AD2d 424 [1st Dept 1993], *aff'd* 84 NY2d 562 [1994]) (*id.* at 13-14). Finally, Defendants argue that Rule 3.7 of the Rules of Professional Conduct requires the Savad Firm's disqualification because Plaintiffs intend to call Attorney Savad and/or Churgin "testify at trial in support of Defendants' counterclaim predicated upon Forward's violations of the SCA" (*id.* at 15). Therefore, because Forward's counsel will likely be called by Plaintiffs to testify as a witness and because such testimony will be prejudicial to Forward since Churgin has

admitted to having seen the e-mails Forward forwarded to Attorney Savad, the Savad Firm should be disqualified.

Based on conference calls with Chambers, it was agreed that Defendants' counsel would provide the Court with the allegedly privileged and confidential e-mails Forward produced during discovery and Plaintiffs' counsel agreed to search for all e-mails on its system that Forward forwarded to Attorney Savad or Churgin. The Court heard oral argument on the motion on February 19, 2010 and at that time, because Plaintiffs' counsel was in the dark as to the documents at issue, the Court ordered Defendants' counsel to provide a privilege log, which they did on February 23, 2010.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISQUALIFY OR SUPPRESS PRIVILEGED E-MAILS

Plaintiffs' counsel, Attorney Savad, submits an Affirmation in Opposition wherein he affirms that his firm was retained again in January 2010 and that they "carefully considered the issues raised in this motion before [they] agreed again to represent Mr. Forward and satisfied [themselves] that they created no problems" (Affirmation of Paul Savad, Esq. dated February 17, 2010 ["Savad Opp. Aff."] at ¶ 4). He contends that Defendants have not met their burden on this motion since they failed to include with their motion: (1) either a privilege log or the documents themselves for an in camera inspection; or (2) an affidavit from Foschi establishing both that the e-mails at issue were privileged and that the privilege had not been waived (Savad Opp. Aff. at ¶¶ 5-7). Attorney Savad contends that the same holds true for the non-privileged, confidential e-mails, which "remain wholly unidentified ... [and] [i]t is not at all clear if [Foschi] is trying to suppress e-mails that she or the employees, vendors and accountants may have forwarded or written directly to Kevin Forward, or that any of these e-mails would be confidential with respect to Kevin Forward, who managed the three physical therapy centers" (*id.* at ¶ 8).

Attorney Savad also points out that they are operating in the dark as they have not seen the file being held by Grey Street and they do not know what documents Forward produced while he was being represented by Bertolino and Grey Street (*id.* at ¶ 9). Nevertheless, Attorney Savad argues that whatever the content of these e-mails, there is no basis for disqualification because "the e-mails [which were sent or received from either sandra@gmail.com or sandra@healthsos.com] are not privileged or confidential as a matter of law. Ms. Foschi did not have any reasonable expectation of privacy. She waived any possible privilege or confidentiality by using e-mail addresses that were known to be accessible to other personnel to whom she gave passwords, and by leaving e-mails open on shared computers" (Savad Opp. Aff. at ¶¶ 13). Plaintiffs alternatively argue that "even if any of the e-mails were privileged or confidential, they do not contain any information that would give Mr. Forward any improper advantage in litigation or would require the disqualification of this law firm" (*id.* at ¶ 14).

Attorney Savad states that his firm was retained by Forward on January 7, 2008 and he began negotiating with Ross to obtain a valuation of Forward's 50% interests in the LLCs. Attorney Savad handed the litigation over to Bertolino and Grey Street in April 2009, and gave them all Paul Savad & Associates' files and a USB stick with Paul Savad & Associates' computer file. He avers that while he does not know what documents were thereafter produced in discovery, he does know that Paul Savad & Associates' files "did not contain the approximately 40,000 pages of documents allegedly provided (albeit probably only one-third of that amount after removing duplicates and triplicates of e-mails culled from various overlapping sources, according to Forward's deposition)" (*id.* at ¶ 21). Attorney Savad submits a log of the allegedly privileged or confidential e-mails stored on the firm's computer (Exhibit B) and affirms that the firm's attorneys may have seen an additional e-mail or two that was not properly stored in the computer and is no longer there for them to access to provide to this Court (*id.* at ¶ 24).

Attorney Savad further states that

The healthsos.com e-mails were provided to [Attorney Savad] on March 7, 2008, and were all dated March 6, 2008. Both Mr. Forward and Ms. Foschi could access each other's healthsos.com e-mail accounts, as both had all of the necessary passwords. Ms. Foschi also gave her password to employees, so that they could read her e-mails to her ... Forward accessed the e-mails after Ms. Foschi had admittedly stolen his Blackberry containing all of his private e-mails. The blackberry was never returned ... Ms. Foschi's gmail e-mails were provided to us on April 1, 2008. Mr. Forward told us that he had found Ms. Foschi's gmail account open in a shared office computer on March 31, 2008, in the Ardsley office. He stumbled upon them at a time when the new health care attorneys were being consulted. He provided us with a few e-mails from March 28, 2008, to March 31, 2008 ... These allegedly privileged e-mails, which the defendants failed to offer to the Court for inspection when the Order to Show Cause was presented for signature, contain virtually no information useful in the litigation. However, some of the e-mails reveal that Ms. Foschi knew that Mr. Forward had access to sandra@healthsos, and that she was using that e-mail address to plant e-mails to mislead him about the negotiations ... Significantly, Ms. Ross admits that when she and her client believed that Mr. Forward had access to Ms. Foschi's confidential e-mails, they chose to wait and see what evidence they could collect to support their counterclaims for violation of the electronic storage act. They took the risk of further dissemination of the allegedly confidential information, rather than demanding an immediate return of the e-mails. The e-mails reveal that they began using the allegedly confidential e-mail accounts to plant misleading e-mails, rather than stopping the leak immediately (*id.* at ¶ 28). Attorney Savad argues that there was no breach with regard to the allegedly confidential e-mails as "they were written to and from a business account e-mail that was routinely accessible by others, including Kevin Forward. The few e-mails [the Savad Firm] ha[s] in [its] computer records to or from this e-mail address contain no confidential information" (*id.* at ¶ 29). Further, given that Forward managed the three physical therapy centers and regularly dealt with vendors "it is difficult to imagine that any communications to or from Sandra, or to or from these third-parties can possibly be confidential as to Kevin Forward" (*id.* at ¶ 31).

Attorney Savad contends that this motion has been made as a litigation tactic for two reasons (1) to disqualify the Savad Firm because of its experience in these cases and (2) to financially break Forward⁵¹ (*id.* at ¶ 34; *see also* Pltfs' Opp. Mem. at 11).

Finally, Attorney Savad states that while there may have been a confidentiality agreement in place with the stenographer during Foschi's deposition that "may have preserved any privilege for testimony and exhibits that might otherwise lose their privilege. No such agreement was in place for Kevin Forward's deposition, where Ms. Ross introduced the very exhibits that she claims are privileged and refuses to produce, yet relies on them in this motion. Any privilege was waived by introduction of those exhibits before the stenographer and Mr. Forward's attorney, without following the requirements of a confidentiality agreement" (*id.* at ¶ 37).

Plaintiffs also submit affidavits from Kevin Forward and Lyn Culpepper, a former employee of Health SOS PTPC.

Forward describes the nature of his business relationship with Foschi, the business model they used with regard to the LLCs, and his claim that he left a lucrative job (\$180,000 a year) to devote himself full time to setting up and managing the physical therapy centers he and Foschi formed (Affidavit of Kevin Forward, sworn to February 17, 2010 ["Forward Aff."] at ¶ 7). He claims that the services he performed in managing the centers included hiring staff, managing banking relationships, performing financial management (*e.g.*, payroll, billing and reimbursement), purchasing supplies, setting up the bookkeeping system, and engaging in marketing activities (*id.* at ¶ 8). He avers that he and Foschi agreed that the fees payable to the LLCs by the PCs for management services would be deferred until the practices were generating sufficient revenue and also agreed that the "repayment of [their] loans to the three management companies and to the three PCs would similarly be deferred" (*id.* at ¶ 9).

Forward's affidavit factually buttresses the statements made by Attorney Savad in his affirmation. He explains that his access to the GoDaddy e-mail accounts for healthsos.com was the result of his role as administrator of the e-mail accounts, of which Foschi was well aware, as confirmed in an e-mail from her to Forward on August 27, 2007 (*id.* at ¶ 13). Forward claims (and attaches an e-mail as Exhibit 1 as supporting evidence) that he responded to Foschi's e-mail by providing her with all of the passwords necessary to access all of the healthsos e-mail accounts, including Forward's (*id.* at ¶ 14). He avers that he and Foschi had "access to all of the HealthSOS e-mail accounts at all times, until Spring 2008, when [Forward] became angry and changed the passwords for a period of time, after [Foschi] stole [his] blackberry with all of [his] personal and business e-mails, and did not return it" (*id.* at ¶ 15). He asserts that Foschi "could not possibly have reasonably expected that [he] could not see her e-mails at sandra@healthsos.com, just as she could see [his]" (*id.* at ¶ 17).

Forward avers that he believes he only accessed her business e-mail account once on March 6, 2008, which was a week or two after Foschi stole his Blackberry which contained both his private e-mails (kevin.forward@gmail.com) and his business e-mails (kevin@healthsos.com). He states he opened her e-mail because he did not believe she was negotiating with him in good faith and wanted to see what she was doing with the business behind his back. He claims he found and copied only three e-mails between Foschi and Ross all dated March 6, 2008, which concerned Foschi's negotiations with Eric Loughman, a physical therapist who held an ownership interest in and ran the Babylon PC, but he stopped reviewing the e-mails at that point because he got disgusted (*id.* at ¶ 18). He claims to the best of his knowledge, he has no other e-mails from or to Foschi's healthsos e-mail that were not sent to him. He further asserts that the

allegedly confidential e-mails with employees, vendors or the accountant were not confidential to him since he was the business partner involved in the management of the centers and hired all the staff of these facilities. Finally, while Foschi may not have given him express permission to access her healthsos e-mail account, "permission was understood in the setup that [they] both used and understood permitted [*sic*] access to every healthsos.com e-mail account" (*id.* at ¶ 22).

With regard to the gmail account, Forward avers that he never broke into it, and instead, on March 31, 2008, he found her gmail account left open on an Ardsley office computer that was shared by everyone, and that he forwarded the e-mails dated March 28, 20 and 31, 2008 to his attorney Paul Savad, Esq. (*id.* at ¶¶ 24, 28). Forward contends that these e-mails simply show that Foschi was retaining other attorneys and attempting to trick Forward and his counsel with planted e-mails that contain nothing of significance in connection with the merits of these cases. Finally, Forward avers (as does another Health SOS employee in a separate affidavit) that Foschi often left her gmail account open on computers and also gave her password to her e-mail accounts to employees so that they could read her e-mails to her (*id.* at ¶ 26).

Lyn Culpepper, a former Health SOS employee from October 2005 to May 2007 avers that she was employed as a biller/bookkeeper and that "Foschi often called in and asked [her] to check her e-mails" on both her gmail and healthsos accounts, which Culpepper would do as she had access to her passwords (Affidavit of Lyn Culpepper, sworn to January 12, 2010 at ¶¶ 4-6). She avers that Foschi did the same with several other employees. She further attests to the fact that at the location in Westchester in which she was employed, Health SOS had six computers that were shared by all the employees and no computers were exclusive to anyone, including Foschi (*id.* at ¶ 7). She claims that Foschi would normally work later in the day than Culpepper and that often, Culpepper would go to a computer in the morning and see Foschi's e-mail account open with the last e-mail she sent because she failed to close her account and that "[o]ther employees advised [Culpepper] that they also saw her e-mails open on a computer when they came in the morning" (*id.* at ¶ 8).

As their legal argument, Plaintiffs assert that the burden is on Defendants to prove that the documents are privileged and that the privilege was not waived, which burden Plaintiffs say Defendants did not sustain. But even if the Court were to find that the privilege was not waived, then, at most, Plaintiffs argue, the e-mails should be suppressed. Plaintiffs argue that there is no basis for disqualification because the attorneys have engaged in no misconduct and have not obtained any advantage from viewing these e-mails, which contain nothing to give them an unfair advantage in this litigation (Pltfs' Mem. of Law at 4). Plaintiffs argue that Foschi did not protect the confidentiality of her communications and had no expectation of privacy because she used shared computers, left her e-mails open, gave her passwords to employees and because Forward, as the administrator of the Health SOS e-mail, had full access to the accounts (*id.* at 5). Plaintiffs go so far as to suggest that Ross was too lax in protecting the privilege by failing to advise Foschi to discontinue her communications with Ross at her computers at work over Foschi's business e-mail address (*id.* at 6). Plaintiffs further contend that Foschi waived the privilege by not demanding the return of the allegedly privileged documents after she believed Forward had accessed them and, instead, decided to continue to use the e-mail to plant misleading e-mails (*id.* at 6).

Alternatively, Plaintiffs argue that should this Court decide that the e-mails are privileged and that the privilege was not waived, the Court should nevertheless reject Defendants' attempt to disqualify the Savad Firm because: (1) the e-mails do not contain any information to give the Savad Firm an unfair advantage; (2) the e-mails were not wrongfully obtained and therefore the penal law provisions and the federal stored communications act do not apply; and (3) the Rules of Professional Conduct have not been violated. With regard to the lack of a violation of such rules, Plaintiffs argue:

(1) Rule 3.3(b) requires an attorney to take remedial measures when it knows that someone has engaged in criminal conduct and here, Attorney Savad knew that the access was obtained by Foschi's failure to log off of her e-mail account (*id.* at 9);

(2) Rule 3.7(a) and (b)(1) require that a lawyer should withdraw if he is likely to be called as a witness on a significant issue and here, testimony from attorneys at the Savad Firm would be unlikely, unnecessary, immaterial and duplicative (*id.* at 10);

(3) Rule 4.4(b) is inapplicable because it involves the notification to the adversary when it was clear that a privileged document was inadvertently sent, which did not occur here (*id.*); and

(4) Rule 8.4 is inapplicable as it involves "misconduct in (a) violating the Rules of Professional Conduct, (b) engaging in illegal conduct, (c) engaging in dishonesty or fraud, (d) engaging in conduct prejudicial to the administration of justice, (e)(2) achieving results by violating the rules, (h) engaging in conduct that adversely reflects on the lawyer's fitness as a lawyer" (*id.*)

Finally, in arguing against disqualification, Plaintiffs attempt to distinguish^[6] the two main cases upon which Defendants rely and further argue that all of the questions to be asked in deciding disqualification are answered in the negative here — *i.e.*, there was no privilege because it was waived, the information is not useful to the Savad Firm in this litigation, and disqualification would be highly prejudicial to Plaintiffs who have been through two attorneys and should not be forced to find a third (*id.* at 11).

LEGAL DISCUSSION

Defendants seek to disqualify Attorney Savad's present firm based on Attorney Savad's complicity in receiving and reviewing privileged and confidential e-mails Forward forwarded to them from Foschi's business and personal e-mail accounts in violation of the Rules of Professional Conduct because Attorney Savad failed to either notify Defendants' counsel of these e-mails or involve the Court by having it conduct an *in camera* review to determine if the privilege had been waived. Alternatively, Defendants seek to suppress the fruits of Forward's unlawful access to Foschi's personal and business accounts. The essence of Plaintiffs' opposition is that any privilege was waived because Foschi knew that Forward had access to her healthsos.com e-mail account, and therefore, since the privilege had been waived, Plaintiffs' counsel was under no obligation to alert Defendants' counsel or to seek this Court's intervention to determine whether the privilege had been waived. Alternatively, Plaintiffs argue that by providing the documents to the stenographer during Forward's deposition without a confidentiality agreement with the court reporter, the privilege was waived.

The common law attorney client privilege, which exempts communications between an attorney and his/her client from disclosure, is codified in CPLR 4503(a) and provides:

Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of a client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication ... nor shall the client be compelled to disclose such communication (CPLR 4503[a]).

CPLR 3101(b) shields privileged attorney-client communications with absolute immunity from disclosure. Because the attorney-client privilege constitutes an obstacle to the truth-finding process, "its invocation ... should be cautiously observed to ensure that its application is consistent with its purpose" (*Hoopes v Carota*, 142 AD2d 906, 908-909 [3d Dept 1988], *affd* 74 NY2d 716 [1989], *quoting Matter of Jacqueline F.*, 47 NY2d 215, 219 [1979]). The attorney client privilege "enables one seeking legal advice to communicate with counsel ... secure in the knowledge that the contents of the exchange will not be revealed against the client's wishes (*People v Osorio*, 75 NY2d 80, 84 [1989]). It must be demonstrated that the information that is claimed to be protected from discovery was in fact a confidential communication made to counsel for the purpose of obtaining legal services or advice in the course of a professional relationship (*Rossi v Blue Cross & Blue Shield of Greater NY*, 73 NY2d 588, 593 [1989]; *All Waste Sys., Inc. v Gulf Ins. Co.*, 295 AD2d 379 [2d Dept 2002]). When deciding whether an attorney-client privilege attaches to a document, "the 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. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]).

Thus, on this motion, it is Defendants' burden to show that the privilege exists and that it has not been waived (*John Blair Communications, Inc. v Reliance Cap. Group, L.P.*, 182 AD2d 578 [1st Dept 1992]); *Manufacturers and Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392 [4th Dept 1987]).^[7]

The privilege extends to all persons who act as the attorney's agents (*US v Kovel*, 296 F2d 918, 921 [2d Cir 1961]). "[P]rivilege covers communications to non-lawyer employees with a menial or ministerial responsibility that involves relating communications to an attorney" (*Kovel*, 296 F2d at 921). Accordingly, the production of the e-mails before the stenographer transcribing Forward's e-mail did not constitute a waiver of the privilege associated with these e-mails, regardless of whether or not a confidentiality agreement with the stenographer was executed (*see Abbott Labs. v Airco, Inc.*, 1985 WL 3596 at * 8 [ND Ill 1985]).

It is well settled that disclosure of an attorney-client communication to a third party or communications with an attorney in the presence of a third party, not an agent or an employee of counsel, vitiates the confidentiality required for asserting the privilege (*Doe v Poe*, 92 NY2d 864 [1998]; *Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's London*, 176 Misc 2d 605, 610 [Sup Ct NY County 1998], *affd* 263 AD2d 367 [1st Dept 1999], *lv dismissed* 94 NY2d 875 [2000]). Here, while no third party was actually present, Plaintiffs' theory is that because Forward (as well as other employees of the LLCs) had access to Foschi's business e-mail account since they knew her password, they were, in essence, looking over her shoulder while she was

communicating with her counsel. An obvious flaw in this argument is that Forward did not view the e-mails until after they were sent and thus cannot be said to have been present, even virtually, at the time of the communications.

"The fundamental questions in assessing whether waiver of the privilege occurred are, whether the client intended to retain the confidentiality of the privileged materials and whether he took reasonable precautions to prevent disclosure" (*Manufacturers and Traders Trust Co.*, *supra* ., [132 AD2d at 399](#); *New York Times Newspaper, Div. of New York Times, Inc. v Lehrer McGovern Bovis, Inc.*, [300 AD2d 169, 172](#) [1st Dept 2002]). Furthermore, as "the waiver inquiry depends heavily on the factual context in which the privilege was allegedly waived," courts should review the particular circumstances of each case to determine whether, and to what extent, waiver occurred (*In re Grand Jury Proceedings*, [219 F3d 175, 188](#) [2d Cir 2000]). Thus, a privilege is waived where the communication takes place under circumstances such that persons outside the privilege can overhear what is said or where a waiver of privilege may be implied from the client's conduct.

Based on this Court's *in camera* review of the e-mails in question,[\[8\]](#) they involve both (a) privileged e-mail communications between Forward and Foschi from Foschi's personal gmail account and from her business healthsos.com account; and (b) confidential, but non-privileged, communications between Foschi and Eric Loughman concerning their negotiations over the Babylon LLC. As to the latter, it is evident from the e-mails that, for the most part, Forward is not copied (either as a "cc" or as a "bc") on them nor were they forwarded to him. Thus, Forward's assertion that because he was the manager of the LLCs, he was aware of all dealings between Foschi and vendors, employees, accountants, has not been established. Further, whether or not he had the knowledge of the subject matters discussed in these e-mails is not the issue. The issue is whether Forward's decision to access Foschi's e-mails without her express authorization based on her implied consent through her knowledge that he had her password did not invade her attorney-client or other privilege as any privilege had been waived.

Even if the Court were to accept Forward's contention that he was in effect the system administrator and, as such, was provided with Foschi's e-mail passwords, that would not, in and of itself, vitiate any privilege attached to Foschi's e-mails. CPLR 4548 explicitly provides that "[n]o communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication" (CPLR 4548). In enacting CPLR 4548, the Legislature made a " finding that when the parties to a privileged relationship communicate by e-mail, they have a reasonable expectation of privacy" (*Scott v Beth Israel Med. Ctr., Inc.*, [17 Misc 3d 934, 938](#) [Sup Ct NY County 2007], *quoting* Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B CPLR C4548). However, as Justice Ramos observed in the *Scott* case:

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. For example, a spouse who sends her spouse a confidential e-mail from her workplace with a business associate looking over her shoulder as she types, the privilege does not attach (*Scott, supra*, [17 Misc 3d at 938](#)).

In arguing in favor of disqualification, Defendants rely on the Court of Appeals' decision, [*Lipin v Bender* \(84 NY2d 562 \[1994\]\)](#). *Lipin* involved an action for sexual harassment. Plaintiff and her counsel (for whom plaintiff worked as a paralegal) and defendant's counsel attended a discovery conference before a Special Referee. At that discovery conference, plaintiff saw a stack of documents in front of her on the conference table that appeared to be from defendant's counsel. She admitted that she slipped the stack onto her lap and read the documents while counsel were absorbed in heated exchanges. Plaintiff advised her counsel that she had read what appeared to be interview notes defendant's counsel had written concerning interviews with witnesses who made inflammatory remarks about plaintiff. At the lunch break, plaintiff took the documents back to the office and made copies of them. Later, plaintiff's counsel read the documents and decided they were entitled to use them against defendant because any claim of confidentiality had been waived by defendant's counsel's failure to secure the documents from view, which invited plaintiff to read them. When defendant's counsel learned what had occurred, they moved pursuant to CPLR 3103 for an order suppressing the privileged documents, disqualifying plaintiff's counsel and imposing sanctions. After a hearing on the motion, the trial court found that the documents were privileged, that plaintiff, as an employee of counsel, had an obligation to return the documents and that because the taking of these documents was so heinous, the only remedy was dismissal of the complaint. The dismissal was affirmed by the Appellate Division, First Department, and by the Court of Appeals.

The Court of Appeals held that, while CPLR 3103 did not provide for dismissal as a specific discovery sanction, CPLR 3103 authorized courts to exercise their discretion in making an appropriate order. On the facts presented, dismissal was appropriate because plaintiff's conduct, which her attorney compounded, was "heinous and egregious," a threat to the attorney-client privilege, to the concept of civilized, orderly conduct among attorneys, and even to the rule of law" based on plaintiff's review of what she recognized as a paralegal to be attorneys' confidential documents and her subsequent conduct whereby she chose the course that exacerbated the harm rather than purging herself and minimizing the prejudice to defendants.

Defendants also rely on *Matter of Beiny, supra*, in support of their motion for disqualification. *Beiny* involved a trust accounting proceeding wherein the petitioners — the owners of 45% of the trust — claimed that the Trustee (Beiny) (who held a 55% beneficial interest) had diverted certain assets and placed them in two trusts in Lichtenstein that were also owned by the Trustee. To obtain evidence of the diversion of these assets, petitioners' counsel, Sullivan & Cromwell, served a combined notice and subpoena *duces tecum* on a third party, without providing notice to the trustee/respondent. After counsel received the records, counsel failed to make them available to the trustee. Many of the documents produced contained confidential attorney-client communications between the trustee and her counsel. The lower court declined to disqualify Sullivan & Cromwell even though the material was not obtained through the proper discovery practice, but ordered suppression of all but 7 of the 114 documents produced. The Appellate Division, First Department modified the trial court's decision by ordering Sullivan & Cromwell disqualified.

The Court wishes to make a few observations prior to reaching its determination. Forward's actions are not made any less aberrant, and are no more excusable, by the prior personal, intimate relationship that existed between the parties. Accessing someone's personal e-mail accounts

without express authorization is an invasion of privacy. Further, even if it is assumed that Foschi took Forward's Blackberry and accessed his personal and business e-mails in the Spring 2008,^[9] Forward should have proceeded to redress any such action in court, rather than decide, on his own, that a remedy for any invasion of his privacy by Foschi was to invade her privacy.

It is also obvious that there is a high level of antagonism between the Savad Firm and the attorneys for Defendants and, similarly, there was a high level of antagonism between Plaintiffs' former attorneys (Bertolino and Grey Street) and the attorneys for Defendants. While it is likely that the intensity of hostility existing between counsel is an outgrowth of the level of hostility of the clients, counsel should know better and are required to act better. Litigation is not a street fight; rather, counsel must conduct themselves in accordance with the provisions of law, including the Civil Practice Law and Rules and the rules and practices of the courts. It ill serves their clients, the courts, and the legal profession, for counsel not to act as both counselors, guiding their clients as to the proper courses of action, and as professional and civil advocates for their clients. Attorney Savad, when he realized in March 2008, that his client had turned over to him communications between Foschi and her attorneys, should have disclosed his receipt of such communications and attempted to mitigate the circumstances, especially, if, as he asserts, the communications were of little value. Further, Attorney Savad makes no response to Foschi's assertion that he failed to timely respond to document demands.

Churgin admitted on the return date of this motion that his office was aware of certain e-mails between Foschi and Ross as Forward had forwarded e-mails to Attorney Savad at the inception of the representation. Indeed, an e-mail dated March 6, 2008 from Forward to Attorney Savad transmits e-mails from that same date from Ross to Foschi at her healthsos.com account having to do with their negotiations with Eric Loughman over the Babylon LLC. While it appears from Forward's document production that he may not have forwarded to Attorney Savad all of the e-mails he intercepted, Attorney Savad did receive a sizeable number and failed to immediately notify opposing counsel of his receipt of the e-mails. Nor did he seek an *in camera* review of the e-mails based on a good faith belief the privilege had been waived. Attorney Savad thus violated the spirit and intent of relevant ethics principles. Formal Opinion 2003-04 of the Committee on Professional and Judicial Ethics of the Bar Association of the City of New York advises that " if there is a legal dispute before a tribunal and the receiving attorney believes in good faith that the communication appropriately may be retained and used, the receiving attorney may submit the communication for in camera consideration *by the tribunal as to its disposition*" (*MNT Sales LLC v Acme Television Holdings LLC*, NYLJ, April 20, 2010 at 42, col. 5, *quoting* Formal Opinion 2003-04). Given this ethics opinion as well as the relevant rules of professional conduct, the Court does not agree that because the production was not inadvertent and instead, was intentional, that the Rule 4.4(b) of the Rules of Professional Conduct is inapplicable (*compare Stengard v Loving Care Agency, Inc.*, 201 NJ 300, 325-326, 990 A2d 650, 665-666 [2010] *with Burt Hill, Inc. v Hassan*, 2010 WL 419433 at * 4 [WD Pa 2010]). Had Attorney Savad acted appropriately two years ago, the present challenge to the propriety of his conduct might well have been entirely avoided.

Based on an e-mail dated February 3, 2008, Foschi knew at that point (if not sooner) that Forward was accessing her e-mail. Despite this knowledge, she did nothing to prevent him from continuing to access her communications, though she could have readily done so by such

obvious measures as opening a new e-mail account with either a new provider or her existing providers, by changing her e-mail passwords on her existing accounts, or by hiring an IT person to remedy the situation. Instead, Foschi and her attorney, Ross, decided to turn the situation to their advantage by creating bogus e-mails on Foschi's healthsos.com account as plants to lead Forward down a garden path (*see* e-mail dated March 30, 2008 from Foschi to Ross stating that she "will now forward [Ross] a series of emails from the Healthsos.com account as a plant" and e-mail dated March 30, 2008 from Foschi to Chris Panczner, Esq. wherein she states that she "continue[s] to use the email account that [Forward] has access to in order to distract him and make him think that [she] is worried"). The fact that Foschi, assisted by Ross, having thus decided to accept the situation and make affirmative use of it strongly militates against her protestations of invasion of privacy and in favor of a finding of consent, *i.e.*, she decided to allow Forward continued access to her e-mails so that she could feed him false information. Moreover, the fact that Foschi put Ross on notice that their attorney-client communications were being intercepted and that Ross, at a minimum, acquiesced in Foschi's continued use of bogus e-mails to delude Forward, militates strongly against Ross' present arguments about the sanctity of attorney-client communications. Moreover, Ross should have alerted Attorney Savad to the situation and they should have candidly addressed it. That Ross allowed the situation to fester for further months and then profess great outrage in seeking relief from this Court was also entirely unprofessional. Ross allowed this Court to form the impression that the interception of her attorney-client communications was not known until Forward produced documents. She thus failed in her duty of candor to the Court (*see* former Code of Professional Responsibility DR 7-102[a][5] [eff. until April 1, 2009]; Rule 3.3 of the Rules of Professional Conduct). Moreover, the conduct of Ross and Foschi militates strongly in favor of a conclusion that they were and are using the issue of the e-mails as a means of denying Forward access to counsel of his choosing, bearing in mind that Foschi had made a motion to disqualify Bertolino and Grey Street (which precipitated their withdrawal) and has now made a similar motion directed to the Savad Firm.

The Court further notes, from its *in camera* review, that the e-mails in question are not particularly informative or enlightening and do not give Forward and his counsel an unfair advantage in this litigation as a result of their access to them — *i.e.*, these communications (and counsel's knowledge of them) have minimal utility for the purposes of this litigation.

While Forward suggests that the only time he accessed Foschi's healthsos.com e-mail account was on March 7, this claim is incredible in light of the numerous e-mails from Foschi's healthsos.com account that Forward produced during the document discovery in this case that are dated in January 2008 (Forward Ex. 83, Forward Ex. 63, Forward Ex. 89) and February 2008 (Forward Ex. 84). It is also incredible in view of the fact that Forward stresses that, as of February 3, 2008, Foschi was aware of his access to her e-mails, something that would not have been possible unless Forward was accessing them earlier than he now states. Accordingly, the Court puts no credence in Forward's assertion that he only accessed Foschi's healthsos.com e-mail account on that one occasion on March 7, 2008 and that he only forwarded several of her privileged communications with Ross from March 6, 2008, to his counsel.

Turning to the issue of whether Foschi waived the privilege because she did not safeguard her passwords and left her e-mail account open on her computer, the Court finds that at least up until

February 2008, there was no waiver and that she had a reasonable expectation of privacy in her e-mails, despite Forward's access to her e-mail account as system administrator.

This issue most often arises in the context of an employee's expectation of privacy in computer and Internet files.

In [*Scott, supra*](#), Plaintiff, Dr. Scott, sued Beth Israel Medical Center, Inc. ("BI") for its alleged breach of a severance agreement. In that case, BI had provided e-mail correspondence between Dr. Scott from his BI e-mail address to his counsel. BI's counsel, without reading the e-mail, contacted Scott's counsel and advised that they had the correspondence and that they believed the privilege had been waived by Scott's use of BI's internet system. In that case, BI's policy warned employees that the computer system and e-mail system were the property of BI, that they could only be used for business purposes, that all information sent and received on BI's systems was the property of BI, and that the employees had no personal privacy right in the material created, received or sent. Relying on *Matter of Asia Global Crossing, Ltd.* (322 BR 247, 257 [Bankr SD NY 2005]), the court reviewed the factors to consider, which were " (a) ... the corporation maintain[s] a policy banning personal or other objectionable use, (b) ... the company monitor[s] the use of the employee's computer or email, (c) ... third parties have a right of access to the computer or emails,^[10] and (d) ... the corporation notif[ies] the employee, or was the employee aware, of the use and monitoring policies" (*id.* at 941, quoting [*Matter of Asia Global Crossing, Ltd.*, 322 BR at 257](#)). The court found that factors (a), (b) and (d) weighed in favor of a finding that the privilege had been waived, and therefore, denied Scott's motion for a protective order. Therefore, in *Scott*, since the BI policy had the same effect as someone looking over Scott's shoulder every time he sent an e-mail, communication could not have been made in confidence.

In *Curto v Med. World Communications, Inc.* (2006 WL 1318387 [ED NY 2006]), the employee sought to protect confidential communications she created on and saved to her company-owned computer but never transmitted through the company's e-mail. The company argued that its E-Mail Computer Privacy Policy precluded any assertion of privilege because the employees expressly waived any right of privacy in anything they created, stored, sent or received on the company-owned computer. The court held that the heart of the overriding question was whether the employee was so careless as to suggest she was not concerned with the protection of the privilege and found that the confidentiality of the attorney-client communication could reasonably be preserved, and therefore, could reasonably be expected.

[*Pure Power Boot Camp v Warrior Fitness Boot Camp* \(587 F Supp 2d 548 \[SD NY 2008\]\)](#) involved an action by plaintiff against two former employees for (1) stealing plaintiff's business model, customers and internal documents, (2) breaching fiduciary duties, and (3) infringing on plaintiff's trademarks, traddress and copyrights. After defendant Alexander Fell was fired from plaintiff's employ, plaintiff accessed three of Fell's personal e-mail accounts and printed e-mails from them. Plaintiff admitted that it was able to access the hotmail account because Fell left his username and password information stored on plaintiff's computer such that when the hotmail account was accessed, the username and password fields were automatically populated. Also, that Fell had given another employee his user name and password at one point so that she could check on an Ebay sale he was conducting. The other two accounts were accessed because the

gmail account username and password were sent to the hotmail account and the other account based on a lucky guess that the username and password were the same as the hotmail account.

In *Pure Power Boot Camp*, while there was a company policy against using the company's equipment for accessing personal e-mail which provided that no privacy could be expected in such access, there was no evidence that all of the e-mails plaintiff downloaded were e-mails that were created or reviewed through the use of plaintiff's system because plaintiff did not use its computer's memory to determine what Fell had accessed at work. Thus, because plaintiff "accessed three separate electronic communication services, and ...obtained Fell's e-mails while they were in storage on those service providers' systems ... [e]ither of those actions, if done without authorization, would be a violation of the [Stored Communications Act]" (*id.* at 556).

The court found that Fell had a reasonable expectation of privacy in the e-mail accounts since the policy at issue only addressed the lack of privacy in e-mails the employee created or accessed through the company's computer system. Further, that plaintiff could only be authorized to access those e-mail accounts if Fell had given his consent and that Fell, by merely leaving his login information stored on the company's computers where it could be discovered, did not give his implied consent. Instead, the court found "at most, one could argue that Fell ... consented to [plaintiff] viewing his password. But he did not consent to [plaintiff] ... using it" (*id.* at 562).

In *Pure Power Boot Camp*, the Court decided to suppress all e-mails, regardless of whether or not they were otherwise discoverable (*i.e.*, not privileged), but would allow their use for impeachment purposes should Defendants open the door, because the integrity of the judicial process was "threatened by admitting evidence wrongfully, if not unlawfully, secured" (*id.* at 571).

Similarly, in [Surgical Design Corp. v Correa \(21 AD3d 409 \[2d Dept 2005\]\)](#), defendants, who were plaintiff's former employees, received copies of letters from plaintiff's counsel during the course of their employment and gave the letters to their attorney when this action was commenced. The Appellate Division, Second Department modified the trial court's decision, which denied both plaintiff's motion for defendants' counsel's disqualification and the motion to suppress the privileged documents, by granting the suppression branch of plaintiff's motion, but affirming the denial of the motion to disqualify as disqualification would have been too harsh a sanction since the practical effect would deny defendants the counsel of their choice and further delay the action. In granting that branch of the motion which was to suppress, the Court noted that the "documents were presumptively privileged ... and, rather than notify the plaintiff that he had come into possession of its privileged material, the defendant's attorney attempted to use the material to his client's advantage in this litigation" (*id.* at 410). There, even though the bell could not be unringed, the Second Department found disqualification too harsh a remedy (see also *Fayemi v Hambrecht & Quist, Inc.*, 174 FRD 319 [SD NY 1997] [after plaintiff's employment terminated, he gained access to office after hours and copied confidential materials; court sanctions plaintiff by prohibiting plaintiff's use of the wrongfully-obtained information]; *Herrera v Clipper Group, L.P.*, 1998 WL 229499 at * 2 [SD NY 1998] [same]; *Ashman v Solectron Corp.*, 2008 WL 5071101 [ND Cal 2008] [disqualification of counsel too severe a sanction for plaintiff's discovery self-help of accessing employer's electronically stored documents]) .

Based on the foregoing authority, the Court believes that the privilege was not clearly waived by Foschi until February 2008. Thus, Defendants have established that the e-mails obtained by Forward prior to February 2008, were improperly obtained.

Nevertheless, the Court will not disqualify the Savad Firm based on Forward's transgressions. The e-mails are by no means a "blue print" to Plaintiffs' case or Defendants' defense. Militating against disqualification is the fact that Ross and Foschi were well aware of Forward's interception of their e-mails as of February 2008 and took no action to prevent further interception and made no complaint to Attorney Savad or to anyone else. Rather, they decided to permit further interception and use the situation to their own advantage by planting bogus information designed to mislead Forward. Disqualification would cause substantial prejudice. Discovery is complete and the case is ready to proceed to trial.^[11] Successor counsel would have a mountain of work to do to become familiar with the case and trial would be significantly delayed. The cost of bringing a new attorney up to speed would be significant. Indeed, the Court is aware, from the discussions at conferences, that Forward had retained Paul Savad & Associates, and later, Bertolino and Grey Street, on a contingency basis. At present, there are at least two charging liens against any recovery that may be had in this case based on Paul Savad & Associates' first representation of Forward and then the representation by Bertolino and Grey Street. While the Court is not privy to the current details of Forward's current retainer with the Savad Firm, it is likely that the Savad Firm has again agreed to represent Forward on a contingency fee basis. Thus, Forward would be severely prejudiced by the disqualification of the Savad Firm as not only would this two-year old case be further delayed, but the prospect of his being able to retain counsel he can afford is highly unlikely. The actions of Foschi and Ross, in tolerating the interception of their communications by Forward and not complaining about them to Attorney Savad in a timely way, and the antagonism between the parties, and the antagonism between counsel, lead the Court to believe that there is much credence to Attorney Savad's argument that the disqualification motion was made in order to oppress Forward economically and prevent him from proceeding with his claims against Foschi.

On the other hand, there is a less drastic remedy that may be provided. Forward's transgressions are best viewed as a discovery violation and sanctioned as such. As noted by one court, "[t]he discovery process is not meant to be supplemented by the unlawful conversion of an adversary's proprietary information ... [and Forward's] behavior was not the product of a momentary lapse of judgment, but of a calculated strategy, carried out over ... [some] period of time ... As such, it demonstrates contempt of the discovery process [and] [s]anctions are therefore appropriate" (*Herrera v Clipper Group, L.P.*, 1998 WL 229499 at * 2 [SD NY 1998]).

Because Forward would be severely prejudiced if this Court were to disqualify the Savad Firm, and suppression of the documents improperly obtained by Forward prior to February 3, 2008, ameliorates any prejudice that inures to Defendants as a result of Forward's discovery transgressions (*see Nesselrotte v Allegheny Energy, Inc.*, 2008 WL 2890832 [WD Pa 2008]), the Court will deny the motion to disqualify and will, instead, suppress any e-mails between Foschi and Ross (or any other attorney for Foschi) sent prior to February 3, 2008. Similarly, with regard to business communications between Foschi and the accountant, vendors and employees that were not cc'd or bc'd to Forward, while these communications would otherwise be discoverable, because Forward accessed these e-mail outside of the discovery process by engaging in self-help,

the Court shall suppress these e-mails as well to the extent they were sent prior to February 3, 2008.

Forward's brazen actions in accessing Foschi's e-mail accounts without her authorization, his affidavit which verges on being perjured, and his counsel's complicity in failing to alert Defendants of the e-mails and seeking this Court's determination over whether the privilege had been waived, would favor the award to Defendants of their costs and reasonable attorneys' fees incurred on this motion. On the other hand, the fact that Foschi has not proffered an affidavit of her own (which might have shed light on whether she took Forward's Blackberry before Forward intercepted her e-mails), Foschi's decision in February 2008 to allow Forward continued access to her e-mails in order to deliberately provide him with misleading information, and Ross' involvement in leading the Court to form the misimpression that Forward's improprieties were not known until he produced documents, and her use of the disqualification motion as a tactic, are of equal gravity. Given the transgressions of both parties and their counsel, the Court will not reward either side through an award of costs and attorneys' fees.

Accordingly, the Court will deny both parties their costs and attorneys' fees incurred in connection with this motion.

THERE IS NO BASIS TO DISQUALIFY THE SAVAD FIRM BASED ON THE WITNESS ADVOCATE RULE

A party's right to counsel of its choosing is a valued right that should not be abridged absent a clear showing that disqualification is warranted (*S & S Hotel Ventures L.P. v 777 S.H. Corp.*, 69 NY2d 437, 443, 445 [1987]; *Goldstein v Held*, 52 AD3d 471, 472 [2d Dept 2008]). It is not a sufficient basis for disqualification that opposing counsel intends to call the attorney as a witness (*Miness v Miness*, 202 AD2d 362 [2d Dept 1994]; *Kaplan v Maytex Mills, Inc.*, 187 AD2d 565 [2d Dept 1992]). The party seeking to disqualify an attorney bears the burden of establishing that "the testimony of the attorney who purportedly ought to be called as a witness would be noncumulative of other witnesses' testimony, and thus necessary, or that such testimony, if the attorney were called to testify by defendants, would be prejudicial to plaintiff" (*Metropolitan Tr. Auth. v 2 Broadway LLC*, 279 AD2d 315, 316 [1st Dept 2001]; see also *Petrossian v Grossman*, 219 AD2d 587 [2d Dept 1995]; *Morgasen v Federated Consultant Serv., Inc.*, 174 AD2d 656 [2d Dept 1991]).

The witness-advocate rule is now found at Rule 3.7 of the New York Rules of Professional Conduct that became effective April 1, 2009 (22 NYCRR § 1200.29). Rule 3.7 replaced DR 5-102 and changed the language from "ought to be called a witness" to "the lawyer is likely to be a witness." Rule 3.7 prohibits a lawyer from acting as a witness in a matter where the "lawyer is likely to be a witness on a significant issue of fact." However, a lawyer is allowed to testify on a significant issue and may remain as a party's advocate if:

(1) the testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal (22 NYCRR §1200.29 [a]). The Court of Appeals has made clear that the witness advocate rule is not to be applied as if it were "controlling statutory or decisional law," and that, instead, the rule provides guidance for courts in determining whether a party's law firm, at his adversary's instance, should be disqualified during a litigation. Courts must, in addition, consider such factors as the party's valued right to choose his own counsel,^[12] and the fairness and effect in the particular setting of granting disqualification for continuing representation (*S & S Hotel Ventures L.P.*, [69 NY2d at 443, 445](#)). Disqualifying opposing counsel has been a tactic used by many to gain an advantage during trial (*id.*). Nevertheless, the right to choose representation is not absolute and may be overridden when necessary (*id.*).

Relevant knowledge or involvement in the transaction at issue is not a sufficient basis for disqualification of an attorney based on the advocate-witness rule (*id.*; [Talvy v American Red Cross in Greater NY](#), [205 AD2d 143, 152](#) [1st Dept 1994], *affd* 87 NY2d 826 [1995] [even if attorney "has relevant knowledge, or was involved in the transaction at issue [it] does not make the attorney's testimony necessary" and therefore does not warrant disqualification]).

The standard on a motion to disqualify is whether the movant has met its burden to show that the testimony to be given by the witness is necessary and that if called by the opposing side, the testimony would be prejudicial to the witness-advocate's client (*S & S Hotel Ventures L.P.*, [69 NY2d at 446](#), *see also Talvy*, [205 AD2d at 152](#)). "Any doubt concerning the necessity for the attorney's testimony should be resolved in favor of disqualification" ([Zagari v Zagari](#), [295 AD2d 891, 891](#) [4th Dept 2002], *citing Matter of Stober v Gaba & Stober, P.C.*, [259 AD2d 554, 555](#) [2d Dept 1999]; [108th Street Owners Corp. v Overseas Commodities, Ltd.](#), [238 AD2d 324](#) [2d Dept 1997]). For testimony to be "necessary" the Court must consider the "significance of the matters, weight of the testimony, and availability of other evidence" (*S & S Hotel Ventures L.P.*, [69 NY2d at 446](#)). A motion to disqualify should be denied where the testimony sought is cumulative as there is other evidence available either from a third party or from the parties themselves ([Plotkin v Interco Dev. Corp.](#), [137 AD2d 671](#) [2d Dept 1988]). "A witness whose testimony is, at best, cumulative is not a necessary witness" ([Talvy](#), [205 AD2d at 143, 152](#); *see also Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, [299 AD2d 64](#) [1st Dept 2002] [disqualification required where advocate was the only one who could provide testimony on a critical issue in case]; *Matter of Cowen & Co. v Tecnoconsult Holdings, Ltd.*, [234 AD2d 86](#) [1st Dept 1996] [holding that attorney's testimony is unnecessary when four other witnesses are available to testify on the same issue]).

Even if the testimony is relevant and highly useful, it may not be strictly necessary ([Plotkin, supra](#)). If an attorney will not testify on behalf of the client, the Court must still consider the effects of the attorney being called to testify by opposing counsel. Then, disqualification will be required only if it is apparent that the attorney's testimony will be prejudicial to the testifying attorney's client. (*id.*). By requiring that the moving party provide proof as "to the content or subject matter of the testimony that might be elicited from the ... attorney" and "how such

testimony would be so adverse to the factual assertions or account of events offered on behalf of the [party] as to warrant disqualification," the law is protecting, to the extent possible, the party's right to be represented by an attorney of the client's choosing ([Goldstein, supra, 52 AD3d at 472](#)).

The timing of the motion should also be considered, especially in light of using the motion as a litigation tactic to cause the respondent hardship or delay ([Talvy, 205 AD2d at 149](#)). Further, even when the witness-advocate rule applies, the Court may consider disqualifying only the witness-advocate, and not the entire law firm ([Talvy, 205 AD2d at 152](#)).

With regard to Defendants' application to disqualify the Savad Firm on the grounds that they intend to call Attorney Savad and/or Churgin as a witness, the Court finds that Defendants did not meet their burden of establishing that Attorney Savad's and/or Churgin's testimony is necessary to Defendants' counterclaims since Defendants may use Forward's deposition testimony to prove that he accessed Foschi's e-mail from her personal and business e-mail accounts without the need to call Churgin or Attorney Savad to further establish the access ([S & S Hotel Ventures L.P. v 777 S.H. Corp., supra; Hudson Valley Marine, Inc. v Town of Cortlandt, 54 AD3d 999](#) [2d Dept 2008]). Further, there is no dispute that Forward forwarded some number of these e-mail to his counsel. Indeed, it is highly likely that the parties could stipulate to this effect — *i.e.*, that Forward would stipulate that he took the e-mails prior to February 2008 without Foschi's express authorization and that Attorney Savad would stipulate that Forward forwarded some or all of these e-mails to it at the inception of Paul Savad & Associates' representation and that Attorney Savad did nothing to alert Defendants' counsel of its receipt of these e-mails.^[13] Even if such stipulation is not forthcoming, it is clear that Foschi may establish her case through Forward's trial and prior deposition testimony alone.

Accordingly, the Court shall deny Defendants' alternative basis for seeking the Savad Firm's disqualification based on the witness advocate rule.

CONCLUSION

The Court has considered the following papers in connection with these motions:

- 1) Order to Show Cause dated January 21, 2010; Affirmation of Donna Ross Esq., dated January 23, 2010, together with the exhibits annexed thereto;
- 2) Memorandum of Law In Support of Defendants' Motion to Disqualify dated January 23, 2010;
- 3) Affirmation of Paul Savad, Esq. dated February 17, 2010 together with the exhibits annexed thereto;
- 4) Memorandum of Law in Opposition to Motion to Disqualify and Suppress dated February 17, 2010;

5) Letter dated February 23, 2010 from Donna Ross, Esq. to Hon. Alan D. Scheinkman (and the enclosures therein) (which documents are hereby sealed by order of this Court and shall not be available for inspection or examination and, in the event of any appeal, shall be transmitted by the County Clerk to the Appellate Division, Second Department, under seal); and

6) Letter dated February 24, 2010 from Susan Cooper Esq. to Hon. Alan D. Scheinkman.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Defendants Sandra Foschi, Health SOS PT P.C., Health SOS Realty LLC, Health SOS Realty Babylon LLC and Health SOS Re Management Ardsley LLC to disqualify counsel for Plaintiffs, Savad Churgin, from representing Plaintiffs, or to suppress from evidence all privileged and confidential communications Plaintiff Kevin Forward accessed from Defendant Sandra Foschi's personal and business e-mail accounts, and for an award of costs and counsel fees associated with bringing the motion, is granted in part and denied in part, as set forth herein; and it is further

ORDERED that counsel for Plaintiffs shall, by not later than May 31, 2010, turn over to Defendants' counsel any and all copies of all e-mails in their, or Plaintiff Kevin Forward's, possession, custody or control, that were sent to or from Sandra Foschi by or from any attorney prior to February 3, 2008 and Plaintiffs' counsel shall further ensure that any copies (including electronic copies) not so turned over shall be destroyed by June 2, 2010; and it is further

ORDERED that counsel for Plaintiffs shall, by not later than May 31, 2010, turn over to Defendants' counsel any and all copies of all e-mails in their, or Plaintiff Kevin Forward's, possession, custody or control, that were sent to or from Sandra Foschi to or from vendors, accountants or employees prior to February 3, 2008, unless said e-mails were cc'd or bc'd to Plaintiff Kevin Forward, and Plaintiffs' counsel shall further ensure that any copies (including electronic copies) not so turned over shall be destroyed by June 2, 2010; and it is further

ORDERED that to the extent Plaintiffs or their counsel provided copies of any of the aforementioned e-mails, Plaintiffs' counsel shall serve on Defendants' counsel, by June 2, 2010, a letter identifying all persons who have received copies of the e-mails and an explanation of why the documents were provided; and it is further

ORDERED that Plaintiff Kevin Forward shall, by June 2, 2010, provide an affidavit that he and his counsel (both present and former) have returned and/or have destroyed all copies of any of the aforementioned e-mails, and that neither he nor his attorneys have retained copies of said e-mails;

ORDERED any of the aforementioned e-mails may not be used by Plaintiffs or their counsel, directly or indirectly, in any way during the course of this litigation and if Defendants' counsel should determine or have a good faith reason to believe that any evidence adduced by Plaintiffs in this case was secured through the use of the said e-mails, Defendants may move to strike the evidence; and it is further

ORDERED that Defendants' motion, insofar as it seeks to disqualify Plaintiffs' attorneys and seeks an award of costs and attorneys fees, is denied, and it is further

ORDERED that counsel shall appear for a Trial Readiness Conference on June 4, 2010, at 9:30 a.m., which conference shall not be adjourned without the prior written permission of this Court.

The foregoing constitutes the Decision and Order of this Court.

[1] While there is another Plaintiff in action #

2, Eric Loughman, Loughman has not taken an active role in this litigation; when Forward personally appeared before this Court *pro se*, Loughman was not present. It would appear that Loughman has discontinued his action as against Defendants or has effectively abandoned it.

[2] The LLCs are alleged to have been formed to develop and manage physical therapy centers where the physical therapy services were performed by Ms. Foschi through her professional corporations (Affirmation of Paul Savad, Esq. dated February 17, 2010 ["Savad Aff."] at ¶ 16).

[3] Relying on *Matter of Beiny* (129 AD2d 126 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]), Defendants argue the "bell cannot be unring" since Savad's knowledge of privileged information cannot be purged. Therefore, the only way to sanitize the proceeding is to disqualify Savad" (Dfts' Mem. of Law at 17).

[4] This rule provides that a lawyer representing "a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct relating to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal" (22 NYCRR § 1200.25).

[5] The reference to financially breaking Forward has to do with the fact that Forward has obtained contingency fee arrangements with both Paul Savad & Associates and Grey Street/Bertolino. Given the charging liens both attorneys have on these files, it would be extremely difficult at this juncture (not to mention the set back that would cause to the scheduling in this case) if the Savad Firm were to be disqualified. Indeed, the Court would not be surprised that if the Savad Firm were disqualified, Forward would be unable to retain substitute counsel at this juncture.

[6] Plaintiffs argue that *Matter of Beiny*, 129 AD2d 126 [1st Dept 1987]; and *Lipin v Beiner*, [84 NY2d 562 \[1994\]](#) are *inapposite* to the facts of this case.

[7] *But see U.S. v Hatfield* (2009 WL 3806300 at * 3 [ED NY 2009]), in which the court adopts the intermediate view that the party asserting the waiver has the burden of proving it occurred unless the privileged documents have already been disclosed, in which case the court may require the holder of the privilege to show that it has not been waived.

[8] While Defendants' counsel submitted another group of e-mails which were not produced by Forward during discovery but were created at around the time of the e-mails that were produced or touched on the subject matters of those e-mails, the Court is unwilling to assume for the purposes of this decision that those e-mails were also intercepted by Forward and forwarded to his counsel since there is absolutely no evidence of this having occurred. Accordingly, that group of e-mails has not been considered for the purposes of this decision.

[9] Foschi did not submit an affidavit in support of her motion and did not have an opportunity to submit a reply. It is certainly possible that she did not submit an affidavit in support of her motion because she did not wish to address

the relevant background, including any actions on her part to invade Forward's privacy. But the Court, for purposes of this motion, will assume that Foschi disputes that she engaged in the conduct that Forward alleges.

[10] The court stated that given CPLR 4548, this factor is irrelevant and has been trumped by the New York Legislature that has decided that access, or potential access, by third parties does not destroy the privilege ([Scott, 17 Misc 3d at 942](#)).

[11] While counsel could make summary judgment motions, given the nature of dissolution proceedings and the numerous disputed facts, such motions would be highly inadvisable.

[12] Plaintiffs' right to choose their own counsel implicates the First Amendment guarantee of freedom of association and the Sixth Amendment right to counsel ([Matter of Abrams, 62 NY2d 183, 196 \[1984\]](#), citing [N.A.A.C.P. v Button, 371 US 415 \[1963\]](#), [Faretta v California, 422 US 806 \[1975\]](#)).

[13] This, of course, would not be an admission of liability as there are other issues, such as whether there was waiver.