

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
07 CVS 16486

MARTHA B. CAPPS, by and through her )  
Guardian ad Litem, BRUCE L. CAPPS, )  
Plaintiff )

v. )

HAROLD EARL BLONDEAU, R.J. )  
BLONDEAU, NEAL WILLIAM KNIGHT, )  
ANNE LOUISE KNIGHT, HELEN )  
SOUTHWICK KNIGHT, MORGAN )  
KEEGAN & COMPANY, INC., MARVIN L. )  
BAKER FAMILY FOUNDATION, INC., and )  
REGIONS BANK, d/b/a REGIONS )  
MORGAN KEEGAN TRUST FSB, )  
Defendants )

**ORDER**

THIS MATTER comes before the court upon Plaintiff's Motion for Non-Spoliation Order as against Morgan Keegan (the "Motion"), in which Plaintiff seeks an order requiring preservation by Defendant Morgan Keegan & Company, Inc. ("Morgan Keegan") of discoverable information and evidence during the pendency of appeals in this matter by Defendants Morgan Keegan and Harold Earl Blondeau ("Blondeau") (the "Appeals") from this court's order ("Arbitration Order") denying those Defendants' motions to stay judicial proceedings and compel arbitration.

SPECIFICALLY, Plaintiff asks the court to order that Morgan Keegan suspend any destruction of both certain tangible records and electronically stored information ("ESI") (the various things sought by the Motion to be preserved collectively are referred to herein as the "Information") pending the outcome of the Appeals and any subsequent trial at law of this civil action.

THE COURT, having considered the Motion in the procedural context of this proceeding and further having considered the potential materiality of the Information at issue, FINDS and CONCLUDES that:

1. In its original Case Management Order in this matter, dated January 28, 2008, this court ordered that “[t]he parties shall retain all potentially relevant documents, including documents stored electronically, until this litigation is fully and finally resolved. Any automatic deletion of electronically-stored information shall be suspended.”<sup>1</sup>

2. Notwithstanding the foregoing provision, Plaintiff seeks further preservation of Information in the custody and control of Morgan Keegan.

3. The common law duty to preserve and retain evidentiary matters relevant or potentially relevant to litigation issues is clear and long-standing. Further, it has been established that such duty extends to ESI.

4. The duty of preservation typically involves consideration of two questions: (a) when does the duty of preservation attach and (b) what is the extent of evidence that must be preserved. The answer to these two questions aids the court in determining, among other things, when a party should be required to suspend a routine and existing document retention/destruction program in order to preserve potentially relevant and discoverable evidentiary material.

5. The duty of preservation attaches when the custodial party knows or should know that particular evidence is relevant to issues involved in potential or actual litigation. Here, where suit has been filed and the issues joined, the potential parameters of the claims – and the evidentiary importance of relevant information – are

---

<sup>1</sup> January 28, 2008 Order, IV.B.

apparent.

6. With regard to the extent of evidence that must be preserved, it generally has been held that the custodial party is required to (a) make reasonable efforts, in good faith, to identify information that is reasonably likely to be relevant to the issues in the litigation and (b) manage that information in order that it be preserved for potential future production. These duties typically are more easily accomplished when dealing with paper and other tangible “hard copy” information. They become more problematic when dealing with ESI.

7. In the instant case, the parties disagree with regard to the extent the court should order retention and preservation of Information. The court’s duty is to weigh and balance the respective rights and interests of the parties. For purposes of this case, those include (a) the right and interest of Plaintiff in having the Information available for appropriate discovery should the court’s Arbitration Order be affirmed on appeal and (b) Morgan Keegan’s right and interest in continuing to manage its routine document and information retention and destruction protocols in the interests of its business enterprise.

8. The court has considered and examined closely the Information Plaintiff wishes to have preserved. The Motion seeks preservation of a broad and comprehensive range of Information roughly falling into three categories of relevancy: (a) Information that clearly would be relevant to the issues here, (b) Information that arguably could be relevant to the issues and (c) Information that is unlikely to be relevant to the issues as currently joined.

9. Many of the categories of Information defined in the Motion are stated in the form of either a request for production of documents and materials or in the form of

interrogatories, and are not focused on the stated concept of Information preservation. In substance, the requests are so broadly and loosely defined that the court is forced to conclude that it would be difficult, if not impossible, to enter a preservation order without micro-managing the preservation initiative to such an extent that the result likely would impose an unjust result on either Plaintiff or Morgan Keegan.<sup>2</sup> An order from this court requiring preservation of such Information would be difficult, if not impossible, for Morgan Keegan in good faith to obey or for this court to police. Accordingly, the Motion should be DENIED.

10. The court is concerned about information retention in a case of this nature. The duty of Morgan Keegan and other party litigants to preserve Information relevant to the issues is apparent. The potential ramifications and available sanctions of a violation of that duty also are apparent. The court expects that Morgan Keegan and all other parties will discharge those duties appropriately and in good faith.

THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it is ORDERED that:

1. Plaintiff's Motion for Non-Spoliation Order as against Morgan Keegan, in which Plaintiff seeks an order requiring preservation by Defendant Morgan Keegan & Company, Inc. of discoverable Information and evidence, is DENIED.

2. This Order shall not be construed in any way to be in derogation of the clear evidence retention requirements of the common law or of Section IV.B. of the court's January 28, 2008 Order.

3. This Order is without prejudice to Plaintiff's right to submit a further

---

<sup>2</sup> For example, the Motion makes multiple use of broad qualifying words such as "any" and "all" "records" or "communications" about a particular subject. It also uses qualifiers seeking to preserve Information about occurrences, events or "communications" that took place "at all relevant times."

preservation/retention request that reflects more narrowly-defined, focused and manageable categories of information Plaintiff seeks to have preserved.

This, the 13th day of August, 2010.

/s/ John R. Jolly, Jr.  
John R. Jolly, Jr.  
Special Superior Court Judge for  
Complex Business Cases