

## CASE PROFILE

### Einstein v. 357 LLC

*Failure to implement a hold is grossly negligent and labeled "culpable conduct"*

#### KEY INFORMATION

<b>Reference No.:</b>	N.Y. Sup. Ct. County of N.Y., No. 604199
<b>Date:</b>	November 4, 2009
<b>Court:</b>	New York Supreme Court, County of New York
<b>Judge:</b>	New York Supreme Court Justice Charles E. Ramos
<b>Sector:</b>	Real Estate
<b>Type:</b>	Construction Defects

#### CASE SUMMARY

Plaintiff claimed that a Brooklyn condo unit was defective and that defendant, including a real estate brokerage, fraudulently concealed water leakage defects. Plaintiff filed a motion to compel discovery after defendant failed to provide hard drives. In response, defendant argued that it had in good faith produced all the responsive documents. However the apparent non-production of known emails prompted the court to order a forensic search of two unproduced hard drives.

That search failed to recover the expected emails or any additional relevant documents. The broker's IT Director said that defendant had an email deletion policy due to limited server space. Any emails deleted before the end of the month backup were unrecoverable. The director also admitted he had not told anyone about the possibility that relevant emails were being deleted.

The court held that the IT Director was responsible for the failure to communicate the deletion policy, and held that "counsel for the broker is also to blame for failing to investigate." The court also characterized the deletion of emails as selective since some relevant emails were missing.

#### OUTCOME

The court found that the broker willfully and unnecessarily caused extensive motion practice and delay, and thwarted the implementation of a preservation solution by failing to disclose the nature of the email system at an earlier stage. Moreover, "the utter failure to implement a litigation hold constitutes a separate discovery violation warranting sanctions."

Following is an excerpt of the court's opinion: "[T]he failure to implement any litigation hold, not only after the commencement of litigation, but also after this court's repeated warnings that counsel should 'read [their] client the riot act', was grossly negligent and rises to the level of 'culpable conduct' required for a finding of spoliation."

The court gave an adverse inference instruction and awarded plaintiff about \$100,000 in costs and fees incurred by the discovery motions and the fruitless review of the hard drives.

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