EarthLink, LLC v Charter Communications Operating, LLC

2025 NY Slip Op 32585(U)

July 8, 2025

Supreme Court, New York County

Docket Number: Index No. 654332/2020

Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

----------X

EARTHLINK, LLC,

Plaintiff,

- v -

CHARTER COMMUNICATIONS OPERATING, LLC,

Defendant.

INDEX NO. 654332/2020

MOTION DATE

MOTION SEQ. NO. 020

DECISION + ORDER ON MOTION

----------X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 020) 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 648, 649, 650, 651, 652, 661, 662, 665, 666, 667, 668, 669, 670, 671, 672, 747, 748, 750

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Plaintiff EarthLink, LLC (Earthlink), an internet service provider, alleges that defendant Charter Communications Operating LLC (Charter) "engaged in a campaign to dupe EarthLink high-speed Internet customers into switching providers to Charter" by "falsely inform[ing] EarthLink customers, … that (a) EarthLink is "out of business"; (b) Charter has "taken over" EarthLink; and (c) EarthLink Internet service "wasn't available" in markets where it was." (NYSCEF Doc. No. [NYSCEF] 15, Amended Complaint ¶¶ 1-2, 19.)

In motion sequence number 020, Charter moves for a "clarification" of this Court's January 18, 2024 Order (Order) (NYSCEF 564), wherein the court granted Earthlink's motion for spoliation sanctions including an adverse inference and prohibited Charter's use of such terms as "handful" and "stray". Alternatively, Charter moves pursuant to CPLR 2221 for renewal of its opposition to spoliation sanctions based on

new evidence. Because the court precluded Charter from using certain misleading terms such as "stray" and "handful" to characterize the numerosity of Earthlink's customer calls to Charter's customer service during which customers were allegedly informed of Earthlink's demise, Charter seeks clarification to guide the parties on permissible evidence at summary judgment and trial.[1] Effectively, Charter asserts that the adverse inference and the prohibition on terms regarding numerosity are inconsistent.[2]

Charter cites no legal authority for this motion in its notice of motion, which is not fatal to the motion, but also not helpful. (*See* NYSCEF 584, Notice of Motion; *Rosenheck v Schachter*, 194 AD3d 1144, 1145-46[3d Dept 2021].) As stated on the record, the court rejects Charter's use of the term renewal in the notice of motion since there are no new facts relevant to whether Charter destroyed evidence -- the recorded calls were destroyed. (NYSCEF 748, tr at 3:24-4:11 [oral argument transcript].) Accordingly, the motion to renew is denied.

Charter's proffered "new" evidence challenges whether there would be enough recordings to support Earthlink's claim of Charter's "campaign to dupe EarthLink high-speed customers into switching to Charter" (NYSCEF 60, EarthLink MOL at 7) "rather than occasional misstatements by Charter's call-center representatives" as Charter

---

[1] Parties are reminded to use meaningful labels for documents filed in NYSCEF. Bates numbers alone are useless. Rather, label an email as such, for example, with relevant information such as the date range of the email and topic.

[2] Accordingly, this is not a motion to "clarify." Traditionally, a motion to clarify is "designed 'not for substantive changes [in, or to amplify a prior decision of, the court], but to correct errors or omissions in form, for clarification or to make the [judgment] conform more accurately to the decision.'" (*Matter of Torpey v Town of Colonie, NY*, 107 AD3d 1124, 1125 [3d Dept2013] [internal citations omitted].)

seeks to prove. (NYSCEF 622, Charter MOL at 4.) Because the truth will never be known, the court prohibited Charter's use of terms such as "stray." Accordingly, this motion for clarification is correctly labeled as one for reargument under CPLR 2221(d). (*Bowen v Sherwood Sec. Corp.*, 189 AD2d 592 [1st Dept 1993].)

A motion for leave to reargue pursuant to CPLR 2221 (d) "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion." (CPLR 2221 [d] [2].) However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided … or to present arguments different from those originally asserted." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [citations omitted].) The movant bears the initial burden on a motion to reargue a prior decision pursuant to CPLR 2221. (*See id*.) Charter effectively argues that it was error for the court to prohibit Charter's use of any terms such as "handful" or "stray."

The court granted Earthlink an adverse inference because Charter failed to preserve the recordings of its customer service calls between service subscribers and Charter customer service agents that occurred from May 12, 2020 to October 31, 2020. (NYSCEF 562, January 18, 2024 Order [Order] at 5-14.)

> "The least harsh adverse inference instruction "permits (but does not require) a jury to presume that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party." (*Apple Inc. v Samsung Elecs. Co., Ltd*. (*Apple I*), 881 F Supp 2d 1132, 1150 [ND Cal 2012].)[3] This is the appropriate procedure here because there is an issue of fact as to

[3] While the District Court modified the Magistrate Judge's adverse inference, the law on adverse inferences stated therein and relied upon by this court remains the same. (*Apple Inc. v Samsung Electronics Co., Ltd*. (*Apple II*), 888 F Supp 2d 976 [ND Cal 2012].)

> whether Charter had storage options and whether EarthLink could have searched the transcripts or if transcribed whether the transcripts would yield the same poor quality of the 104,000 transcripts. Where there is an issue of fact this is the appropriate charge. (*Krin v Lenox Hill Hosp*., 88 AD3d 597 [1st Dept 2011].) Under these circumstances, Charter will be precluded from using terms such as "handful" and "stray" to describe the number of calls. (*See Warner Recs. Inc*., 2022 WL 1567142, *3 (holding that Charter's failure to implement a litigation hold, resulting in deletion of relevant custodial data and documents, precluded Charter from disputing the numerosity of copyright notices in infringement action].) However, EarthLink's request for the Court to overrule any potential objections by Charter to the admission of EarthLink's own evidence of its calls and customer notes is premature." (*Id*. at 16.)[4]

In drafting the January Order, the Court considered Charter's argument that the number of such calls was small and not meaningful and that the found 103,000 transcripts solved the problem. However, the court found that the poor quality of the transcriptions were no substitute for the recordings. Accordingly, the court prohibited Charter's use of such terms as "stray" and "handful". However, the court did not forbid Charter from presenting a defense. (NYSCEF 748, tr at 18:14-19:20.) Rather, the jury draws its own conclusion from the evidence. Likewise, the court explicitly invited Charter to rebut the adverse inference. (NYSCEF 562, Order at 5-14.) While the adverse inference that addresses the destruction of recorded phone calls will impinge on Charter's ability to disprove that Charter had a campaign to steal EarthLink's customers in violation of the contract are two separate things, it is not fatal. Clearly, Charter has some relevant

[4] An additional reason for the adverse inference is that Charter failed to timely respond to EarthLink's requests for the call recordings. (NYSCEF 146, Charter's Response and Objections to Document Request; NYSCEF 145, Charter's Response and Objections to Interrogatories; NYSCEF 147, EarthLink June 23, 2022 Letter regarding Earthlink's first and second Document Requests to Charter; NYSCEF 148, Charter's June 24, 2022 response to Earthlink's Letter; NYSCEF 149, Earthlink June 29, 2022 Letter regarding Charter Responses; NYSCEF 150, Charter's July 27, 2022 Letter regarding Document Requests and Interrogatories.) Charter did not disclose that it had destroyed the calls for two years. (NYSCEF 562, Order at 10-11.)

evidence to support its defense e.g. guidance to call center representatives (NYSCEF 1057, Guidance Document)[5]; Michael Locke's[6] September 6, 2017 email (NYSCEF 592, Locke September 6, 2017 Email)[7], but it may not use the recordings or their absence to make their case. (*See* NYSCEF 593, Charter Guidance; *see also* NYSCEF 594, Earthlink Account Care Handling Procedures; NYSCEF 595, Charter Guidance regarding Earthlink legacy service; NYSCEF 596, tr at 220:7-221:14 [Locke Depo]; NYSCEF 587, March 2017 Employee note; NYSCEF 598, June 29, 2020 email regarding transition of customers; NYSCEF 600, Earthlink transition plan; NYSCEF 601, July 15, 2020 email regarding legacy agreement.) However, no one can speak to the content or the quality of the recordings and the jury cannot assess quality for itself, because the recordings were destroyed. Should the transcripts of the few transcribed calls go into evidence, then the jury may evaluate for itself the quality of those transcripts.

To resolve this motion for reargument, the court invited the parties to propose a script for the adverse inference. (NYSCEF 748, tr at 16:24-17:6.)

Earthlink's proposed adverse inference follows:

> Before this trial began, the Court decided that Charter has failed to prevent the destruction of relevant evidence for EarthLink's use in this litigation. Specifically, Charter failed to preserve call recordings between EarthLink Service Subscribers and Charter's customer service agents (the "relevant evidence"). This is known as the "spoliation of evidence." I instruct you, as a matter of law, that Charter failed to preserve relevant evidence after its duty to preserve arose. This failure resulted from its failure to perform its discovery obligations. You also may

---

[5] As to Charter document dated July 2020, this document was available to Charter on the prior motion; it is not new evidence.

[6] Michael Locke is the Vice President of Sales at Charter. (NYSCEF 1182, Locke's August 11, 2016 Email.)

[7] As to Charter document dated September 2017, this document was available to Charter on the prior motion; it is not new evidence.

presume that EarthLink has met its burden of proving the following two elements by a preponderance of the evidence: first, that relevant evidence was destroyed after the duty to preserve arose. The Court has already found that the call recordings are relevant to EarthLink's claims and would be the most reliable evidence since they were contemporaneous; and second, the lost evidence was favorable to EarthLink.

Whether this finding is important to you in reaching a verdict in this case is for you to decide. You may choose to find it determinative, somewhat determinative, or not at all determinative in reaching your verdict. (NYSCEF 749, Earthlink May 14, 2024 Letter.)

Charter proposed the following adverse inference:

Charter has failed to prevent the destruction of evidence for EarthLink's use in this litigation. Specifically, Charter failed to preserve recordings of calls between Service Subscribers and Charter customer service agents that occurred from May 12, 2020 to October 31, 2020, after which the contractual relationship between EarthLink and Charter terminated. I will refer to these call recordings as the May to October Recordings. I instruct you, as a matter of law, that Charter failed to preserve the May to October Recordings after its duty to preserve those recordings arose. This is known as the "spoliation of evidence." This spoliation resulted from Charter's failure to turn off an automatic deletion system as part of its discovery obligations. I further instruct you that the Court has found that Charter preserved and made available to EarthLink transcripts for a majority of the May to October Recordings. You may, but are not required to, presume that EarthLink has met its burden of proving the following by a preponderance of the evidence: first, that the May to October Recordings were relevant to this case; and second, that some portion of the May to October Recordings was favorable to EarthLink. Whether this finding is important to you in reaching a verdict in this case is for you to decide. The presumption, should you adopt it, can be rebutted by Charter and Charter has offered evidence, which you must consider, seeking to rebut the presumption. If adopted, you may choose to find the presumption determinative, somewhat determinative, or not at all determinative in reaching your verdict. Finally, Charter had no duty to preserve audio recordings of calls between Service Subscribers and Charter customer service agents that occurred prior to May 12, 2020 or after October 31, 2020. This instruction does not concern any evidence in this case other than the May to October Recordings. (NYSCEF 750, Charter May 14, 2024 Letter.)

After argument, the court was informed that Charter found a call log of EarthLink customer calls, which it has not produced to EarthLink. (NYSCEF 749, EarthLink May 14, 2024 Letter at 2 ["On May 9, Charter disclosed, for the first time, that it allegedly

has access to a "call log" detailing the exact number of inbound calls from active EarthLink customers and that in the process of its expert's review, Charter determined there is a category of EarthLink service subscribers for whom all transcripts were destroyed during the litigation (as well as all recorded calls). As a result of this, Charter now believes that it has produced transcripts for approximately 52.3% of the May to October Recordings, not two-thirds as it originally claimed and argued to the Court."]) Now, EarthLink seeks to strike any mention of the transcripts or other evidence from Charter's jury instruction.[8] (*Id*.)

Based on the proposals and a review of the law concerning adverse inferences, the court finds that the following adverse inference is appropriate under the circumstances:

> Charter has failed to preserve evidence for Earthlink's use in this litigation. Specifically, Charter had a duty to preserve recordings of phone calls between Service Subscribers and Charter customer service agents that occurred from May 12, 2020 to October 31, 2020. You may, but are not required to, presume that EarthLink has met its burden of proving the following by a preponderance of the evidence: first, that the May to October Recordings were relevant to this case; and second, that some portion of the May to October Recordings was favorable to EarthLink. Charter may rebut this presumption. You will decide whether the presumption is important to you in reaching a verdict.

The court rejects the parties' efforts to draft the jury instruction to favor one side or the other with facts favorable to them. By keeping it simple, and in the appropriate order of decision making, the court avoids Charter's inappropriate direction to the jury, based on *Apple*, that it "must" consider Charter's rebuttal evidence. (*Apple I*, 881 F Supp 2d at 1150, *mod* 888 F Supp 2d 976 [ND Cal 2012].) The jury is directed to consider all the evidence and decides how much weight to give it; the court will not single out Charter's

[8] This is issue is not before the court, was not briefed, and thus is not addressed.

rebuttal evidence which effectively tells the jury to give it weight. (*See* PJI 1:21.) This adverse inference is about the destruction of phone recordings and nothing else. It is consistent with New York law because it "place[s] the innocent party in the same position [it] would have been in had the evidence not been destroyed by the offending party." (*Crocker C. v Anne R*., 58 Misc 3d 1221[A], 18 [Sup Ct, Kings County 2018]; *see MOSAID Tech. Inc. v Samsung Elecs. Co*., 348 F Supp 2d 332, 335 [DNJ 2004] [Adverse inference "level[s] the playing field after a party has destroyed or withheld relevant evidence."].) As written by the court, the adverse inference is hardly a "windfall" nor relieves EarthLink of its obligation to prove its case. (*Stinson v City of NY*, 2016 WL 54684, *7-8 (SDNY Jan. 5, 2016.) It is not "tantamount to a grant … of summary judgment as to liability." (*Temiz v TJX Cos., Inc*., 178 AD3d 620, 621 [1st Dept 2019].)

This decision is not based on the discovery of a call log which was not produced to EarthLink and not addressed by the parties in their briefs.[9] Likewise, the court does not address Charter's expert evidence which is not before the court; Charter's request is properly raised in a motion in limine. Charter's expert, Steven E. Turner states that "I expect to be in a position to offer analytically sound and reliable expert testimony in this case regarding (a) the prevalence in the Transcripts of comments by Charter call-center representatives of the type referenced in the Amended Complaint; (b) the extrapolated likely prevalence of such comments in the broader pool of calls between Charter call-

[9] The court is concerned about the import of Charter's "discovery" of a call log of EarthLink calls because Charter earlier stated to the court that it could not differentiate between Charter customers and EarthLink customers. (NYSCEF 183, Hosein, Charter's VP of information technology operations aff ¶¶ 1, 9.) This fact was critical to the Order. (NYSCEF 562, Order at 7.)

center representatives and Service Subscribers during the period relevant to EarthLink's allegations; and (c) the relationship between any such comments and Service Subscriber churn during the relevant period." (NYSCEF 614, Turner aff ¶ 7.) However, whether to allow a particular witness to testify or not is considered on a motion in limine. This request could not be more premaster; there is not even a report yet.

Regarding Charter's admission that it produced 52.3% of the May to October transcripts, not 66%, it shall produce any documents, call logs, or evidence on which its admission is based. (NYSCEF 750, Charter May 14, 2024 Letter at 8.)

Regarding the court's prohibition against Charter's use of such terms as "handful" and "stray," Charter may use such terms in its closing argument.[10] Such statements are not evidence. (PJI 1.5.) It is for the trier of fact to decide whether Earthlink's evidence is sufficient to establish a campaign or whether Charter's evidence is otherwise. However, the court is concerned that Charter states that "it has no need to use these precise terms." To be clear, Charter may not use these precise terms nor any other terms like these two examples. Should Charter use any terms about the numerosity of the relevant Earthlink call recordings, Charter should expect to be sanctioned. Earthlink has no such recordings because Charter destroyed them. Charter cannot now benefit from such destruction. "'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, ... are common in business,' and are lawful 'under ordinary circumstances.'" (*Apple II,* 888 F Supp 2d 976 at 989, citing *Arthur Andersen LLP v. United States,* 544 US 696, 704, [2005], *and Micron*

[10] Charter may not use such terms in its opening. The court finds it more prudent to wait and see which evidence is presented to the jury.

Tech., Inc. v Rambus Inc., 645 F3d 1311, 1322 [Fed Cir 2011] ["recognizing that 'most document retention policies are adopted with benign business purposes, reflecting the fact that 'litigation is an ever-present possibility in American life. (quoting *Nat'l Union Fire Ins. v. Murray Sheet Metal Co.,* 967 F2d 980, 984 [4th Cir 1992]."]

Accordingly, it is

ORDERED that Charter is directed to produce the "call log" within 5 business days of this decision, if it has not already done so; and it is further

ORDERED that the court modifies its prohibition against the use of such terms as "handful" and "stray" to the extent Charter may use such terms in its closing argument; and it is further

ORDERED that the adverse inference for use on summary judgment and trial is as follows:

Charter has failed to preserve evidence for Earthlink's use in this litigation. Specifically, Charter had a duty to preserve recordings of phone calls between Service Subscribers and Charter customer service agents that occurred from May 12, 2020 to October 31, 2020. You may, but are not required to, presume that EarthLink has met its burden of proving the following by a preponderance of the evidence: first, that the May to October Recordings were relevant to this case; and second, that some portion of the May to October Recordings was favorable to EarthLink. Charter may rebut this presumption. You will decide whether the presumption is important to you in reaching a verdict.

20250708214340AMASLEY15AA6B6B080A49A6BD1B19FA23F0F3CC

7/8/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[x]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**