

In the War of the Roses, It is Best to Change Your Email Password

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Divorce is ugly. It can be uglier when your estranged spouse has the password to your email account.

In *Gurevich v. Gurevich*, 2009 NY Slip Op 29191 (N.Y. Sup. Ct. 2009), the estranged wife had her ex-husband's email password since their separation in 2006. The wife accessed the husband's email account and claimed to find email messages showing a scheme in which her husband, his employer's accountant and former business partners attempted to shield his income from her. *Gurevich*, at *1.

The Court framed the issue as whether the estranged spouse had the right to use the email from the husband's account in trial. The Court found she could.

The parties each had access to the other's email while they were married. *Gurevich*, at *2. After their separation, the wife changed her email password while the husband did not. The wife claimed the husband never revoked his permission for her to access his email after separation. *Id.*

The husband did not change his email password until two years after separation. *Gurevich*, at *3.



The New York statute on eavesdropping prohibits the use of any unlawfully obtained communications in a hearing or trial. *Gurevich*, at *3, citing CPLR section 4506. Eavesdropping is defined under New York law as a person who engages in "...wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication." *Gurevich*, at *3, citing Penal Law section 250.05.

The Court analyzed the legal definitions of 1) "unlawfully;" 2) "intercept or access;" and 3) "electronic communication," in determining whether the wife violated New York law. *Gurevich*, at *3.

What followed was a highly technical reason why the husband lost.

According to New York law, the interception of an electronic communication is the "...intentional acquiring, receiving, collecting, overhearing, or recording of an electronic communication, without the consent of the sender or intended receiver thereof, by means of any instrument, device or equipment..." *Gurevich*, at *3.

Electronic communication is defined under Penal Law section 250.05 as

[A]ny transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system, but does not include: (a) any telephonic or telegraphic communication; or (b) any communication made through a tone only paging device; or (c) any communication made through a tracking device consisting of an electronic or mechanical device which permits the tracking of the movement of a person or object; or (d) any communication that is disseminated by the sender through a method of transmission that is configured so that such communication is readily accessible to the general public. *Gurevich*, at *3.

The wife claimed she did not violate the eavesdropping statute, because she did not intercept the email messages in transit, but accessed them in the husband's email account. *Gurevich*, at *4.

The Court agreed with the wife's arguments and New York case law involving electronically stored information on laptops. The Court found that the intent of Penal Law section 250.00 was to prohibit the interception of communications sent between individuals. *Gurevich*, at *5.

The Court explained that the email was not "in transit", but within an email account. *Gurevich*, at *5. Even though the wife might have unlawfully gained access to the husband's email account, the email was not "intercepted" and thus did not fall under the eavesdropping statute. *Gurevich*, at *5.

Bow Tie Thoughts

This entire case could have been avoided if the email messages had been requested, collected and produced in discovery, instead of a battle over eavesdropping. The content of the email squarely sounds relevant to the case and rightly the subject of a request for production.

The husband lost in this case on a highly narrow technical reading of the New York eavesdropping statute. This might also mean different standards are applied to email messages within Outlook on a laptop verse email messages on a web-hosted platform (while the case is silent on how the email was stored, it sounded like a cloud-based solution in which the court applied case law where ESI was stored on laptops and thus not in "transit"). Regardless, the issue of "interception" or "access" will be fought over again in future cases with the expansion of cloud-based electronically stored information. I think it is a fair question of whether accessing anything stored online would put that electronically stored information in "transit" opposed to being solely stored on a laptop.

More importantly, it highlights the importance of changing email passwords on a schedule or if you have a life changing event such as a divorce.