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Outside Counsel

Clarity in E-Discovery: First Department Rules on Who Bears Production Costs

By
Mark A. Berman

The Appellate Division, First Department, in *U.S. Bank N.A. v. GreenPoint Mtge. Funding Inc.*,[1] in its second significant decision in the last month addressing issues relating to electronically stored information (ESI),[2] answered the following question, and has now provided clarity to the courts and attorneys of this state, as to:

> which party is to incur the cost of searching for, retrieving and producing both electronically stored information and physical documents that have been requested as part of the discovery process.

The court held that "it is the producing party that is to bear the cost of the searching for, retrieving, and producing documents, including electronically stored information," subject to reallocation upon a proper showing. This author discussed the lack of clarity on this issue in its New York Law Journal article titled: "The Case Law Is Unclear as to Who Pays for What?"[3]

With the decision in *U.S. Bank*, the First Department now has provided practitioners with practical guidance on how to counsel clients regarding which party is required to pay for the costs associated with an ESI production. When a client now asks if it will be required to pay for the requesting party's "overbroad" discovery requests seeking "irrelevant" ESI, which would create an "undue burden or expense" to review and produce, the answer is "yes, but."

To reduce such expense, the First Department has advised that the first step is to seek a protective order. If the result of such motion fails to satisfactorily reduce e-discovery costs by sufficiently narrowing the ESI required to be produced, the next step would be for the motion court to consider the equitable factors set out in *Zubulake v UBS Warburg, LLC*[4] to determine whether to "shift," in whole or in part, the cost of searching for, retrieving and/or producing ESI to the requesting party. The First Department, in its ruling, took into account that plaintiff, often the requesting party seeking broad discovery, would not be able to afford ESI discovery if it had to bear the burden of paying for such expenses.

Production and Cost-Shifting

In *U.S. Bank*, the cost issue came to the court on defendant's motion for a protective order conditioning production on compliance with a proposed protocol that provided that plaintiff would pay the costs associated with its requests and defendant would pay the costs associated with its requests. Defendant also sought an order that plaintiff would pay for defendant's pre-production attorney review time for the purposes of privilege and confidentiality assertions.

The motion court held that "the well-settled rule in New York State" was that "the party seeking discovery bears the costs incurred in its production." The motion court "noted that its ruling did not preclude either party from making any further application regarding the allocation of discovery costs at such later date if it becomes clear that such application is meritorious."[5]

The First Department in *U.S. Bank* noted that:

> the question of which party is responsible for the cost of searching for, retrieving and producing discovery has become unsettled because of the high cost of locating and producing electronically stored information (ESI). The CPLR is silent on the topic. Moreover, while our courts have attempted to provide working guidelines directing how parties and counsel should prepare for discovery, including ESI, these guidelines generally abstain from recommendations concerning the issue of cost allocation.

The court observed that there has been a movement among courts, where the cost of ESI production is significant, to adopt the standards articulated in *Zubulake*, and to place the cost of discovery, including searching for, retrieving and producing ESI, at least initially, on the producing party. The First Department held that it is "persuaded that the courts adopting the *Zubulake* standard are moving discovery, in all contexts, in the proper direction" and that it "presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI." The First Department did not address, and left open for the lower courts to determine, what ESI costs may or should be shifted to the requesting party to pay.[6]

MARK A. BERMAN *is a partner at Ganfer & Shore and is secretary of the e-discovery committee of the Commercial and Federal Litigation Section of the New York State Bar Association.* ANNE TABACK, *an associate at the firm, assisted in the preparation of this article.*

The First Department did not specifically rely in its ruling on any specific CPLR provision or, in particular, on CPLR §3103(a), which provides in relevant part that "[t]he court may…make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" in order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Instead, noting that the CPLR was "silent on the topic," the court generally relied on the CPLR stating:

> [w]hen evaluating whether costs should be shifted, the IAS courts, in the exercise of their broad discretion under article 31 of the CPLR…may follow the seven factors set forth in *Zubulake*:
> (1) [t]he extent to which the request is specifically tailored to discover relevant information; (2) [t]he availability of such information from other sources; (3) [t]he total cost of production, compared to the amount in controversy; (4) [t]he total cost of production, compared to the resources available to each party; (5) [t]he relative ability of each party to control costs and its incentive to do so; (6) [t]he importance of the issues at stake in the litigation; and, (7) [t]he relative benefits to the parties of obtaining the information (*Zubulake*, 217 FRD at 322). The motion courts should not follow these factors as a checklist, but rather, should use them as a guide to the exercise of their discretion in determining whether or not the request constitutes an undue burden or expense on the responding party (id. at 322-23).

While the First Department in *U.S. Bank* addressed when the cost-shifting motion should be made, it did not indicate when the "shifting" was to actually occur. The court left it to the motion court's discretion to determine when payment by the requesting party should be required (e.g., should it be when the cost-shifting motion is decided or, at a later date, upon summary judgment or after trial?)

Long-Standing Rule

The First Department justified its holding requiring the producing party to bear its own costs as that is consistent with "the strong public policy favoring resolving disputes on their merits," and to have the requesting party pay "'may ultimately deter the filing of potentially meritorious claims' particularly in circumstances where the requesting party is an individual." By supporting its holding in this way, the court rejected the position of the producing party—in many cases the larger of the parties and often the one in possession of more ESI than the other—that requiring the requesting party to pay encourages it "to self-regulate the scope of [its] discovery demands and discourages parties from placing unnecessary and oppressive (even prohibitive) costs upon an opponent." The court noted that the:

> adoption of the *Zubulake* standard is consistent with the long-standing rule in New York that the expenses incurred in connection with disclosure are to be paid by the respective producing parties and said expenses may be taxed as disbursements by the prevailing litigant.

The First Department held that it is "persuaded that the courts adopting the 'Zubulake' standard are moving discovery, in all contexts, in the proper direction."

Specifically, CPLR §8301(a) provides that "[a] party to whom costs are awarded in an action or on appeal is entitled to tax his necessary disbursements for…4. the legal fees paid for a certified copy of a paper necessarily obtained for use on the trial; …6. [t]he reasonable expenses of printing the papers for a hearing, when required." See *Gray & Associates, LLC v. Speltz & Weis LLC*[7] ("prevailing party may be able to recover some or all of these duplication costs and computer forensic fees as taxable disbursements at the conclusion of this case").[8]

Ultimately, the court declined to determine whether there should be cost-shifting because there was "no evidence in the record" supporting the expenses proposed and because the producing party failed to provide a sufficient reason for either limiting the requesting party's discovery requests and shifting some or all of the cost to it. Should producing parties wish to make an application for cost-shifting, they need to come forward with the appropriate support, as unsupported positions will be insufficient to cause a court to order the requesting party to pay for the ESI it has requested.

1. 2012 WL 612361 (1st Dept. Feb. 28, 2012). See "First Department Adopts 'Zubulake' on Bearing Costs in Discovery." NYLJ, Feb. 29, 2012.
2. In *Voom HD Holdings LLC v. Echostar Satellite LLC*, 2012 WL 265833 (1st Dept. Jan. 31, 2012), the First Department ruled that "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents," including ESI. The *Voom* decision is discussed in the author's article titled "First Department Weighs In on ESI Preservation." NYLJ, Feb. 28, 2012.
3. NYLJ, Jan. 4, 2011.
4. 217 F.R.D. 309 (S.D.N.Y. 2003).
5. The motion court also held that the requesting party did not bear the cost of compensating the attorneys engaged by the producing party to determine whether documents are responsive and not privileged. This issue was not raised on appeal and not addressed by the First Department.
6. See, e.g., *Silverman v. Shaoul*, 30 Misc. 3d 491, 496, 913 N.Y.S.2d 870, 874 (Sup. Ct. N.Y. Co. Nov. 3, 2010) (court denied defendants' motion to compel plaintiffs to pay for the costs of "collecting, processing and hosting electronic data" incurred due to plaintiffs' requests for disclosure, where ESI was "neither archived nor deleted; it was stored in a number of places and 'interspersed with defendants' various documents for their several business entities.' The fact that Defendants were required to 'process' the data discloses no undue burden, but merely the normal burden of litigation"; and "[t]he cost of an examination by Defendants' agents to see if [material] should not be produced due to privilege or on relevancy grounds should be borne by [the producing party].''); *T.A. Ahern Contractors Corp. v. Dormitory Authority*, 24 Misc.3d 416, 422, 875 N.Y.S.2d 862, 867 (Sup. Ct. N.Y. Co. 2009) ("The court agrees with DASNY's contention that the hiring of an electronic vendor to cull e-mails and other documents responsive to Ahern's demands should be considered a component of the production process…. In finding the hiring of a vendor to be a necessary component of the production process, it is significant, in this court's view, that Ahern does not allege that DASNY has maintained its electronic data in a negligent or otherwise improper fashion which has added in any way to the expense of retrieving the responsive data.").
7. 22 Misc.3d 1124(A), 880 N.Y.S.2d 223, 2009 WL 416138, at *18 (Sup. Ct. N.Y. Co. Feb. 2, 2009).
8. See e.g., *B&B Hardware Inc. v. Fastenal Co.*, 2011 WL 6829625, *7 (E.D. Ark. Dec. 16, 2011) (e-discovery costs recoverable; court found "[plaintiff] made repeated requests for [defendant's] ESI from an 11–year period and from 10 different custodians, that [plaintiff's] requests required [defendant] to extract over 150 gigabytes of raw data for the 10 custodians named by [plaintiff], that once the raw data was retrieved from the server and physical computers the extracted data was run through a keyword filter, and that this filtering process reduced the raw data from 150 gigabytes to 11.88 gigabytes of filtered data, which counsel for [defendant] was required to review for responsiveness and to code for privilege."); *In re Scientific-Atlanta Inc. Sec. Litig.*, 2011 WL 2671296, at *1 (N.D. Ga. June 6, 2011) (court found that the training-related costs, keyword searching costs, and home support costs are not taxable, and adopted plaintiff's argument that, with respect to keyword searching, "[s]uch searches are simply the ESI equivalent of having a room full of reviewers physically review paper documents for responsive documents."); *Comrie v. IPSCO Inc.*, 2010 WL 5014380, at *5 (N.D. Ill. Dec. 1, 2010) ("ESI costs are limited to costs of conversion, processing and extraction. These costs are recoverable in this case since they were not for searching or storage, but, rather, were necessary to [defendant's] ESI production").

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Ganfer & Shore, LLP
360 Lexington Avenue
New York, New York 10017
212.922.9250
mberman@ganfershore.com