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State E-Discovery

Practical ESI Lesson Concerning Non-Parties

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January 2017 brought a series of decisions by motion courts in New York County Supreme Court concerning electronically stored information (ESI) discovery disputes with non-parties. *Bank of N.Y. Mellon v. WMC Mtge.*, 1 2017 N.Y. Misc. LEXIS 222 (Sup. Ct. N.Y. Co. Jan. 18, 2017) (J. Kornreich) made clear a requesting party's obligation to defray the ESI expenses on a non-party and, while requiring tailored ESI protocols to minimize cost, the expenses that would be paid by the requesting party included reasonable collection, review and production costs, including certain legal fees. In *RSSM CPA v. Bell*, 2 2017 N.Y. Misc. LEXIS 40 (Sup. Ct. N.Y. Co. Jan. 6, 2017) (J. Kornreich), a plaintiff entity in financial extremus was not permitted to assert that it could not afford to fund its ESI discovery obligations and, taking into account proportionality concerns and limiting what may need to be produced, the motion court indicated that the entity's partners may well need to assume and fund certain of such expenses. Finally, warning that a party may be sanctioned for spoliation even when ESI is in the possession of a non-party, the motion court in *Threadstone Advisors v. Success Apparel*, 3 2017 N.Y. Misc. LEXIS 347 (Sup. Ct. N.Y. Co. Jan. 31, 2017) (J. Rakower), where the uncooperative principal of the defendant claimed to lack the know-how to access the requested ESI, cut through such claim by granting plaintiff's expert supervised access to defendant's accounting system.

Cost-Shifting and Proportionality

In *WMC Mtge.*, the court noted that, when a party is seeking documents from a non-party, cost-shifting will be applied to "defray [the non-party's] reasonable document collection, review, and production costs, including certain legal fees," citing 22 NYCRR 202.70, Rule 11-c, Appendix A ("Fees charged by outside counsel and e-discovery consultants … include "[t]he costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production.").[1]

The motion court noted an ESI protocol would need to establish reasonable "de-duplicated" hit count totals in order for the requesting party to know, ahead of time, approximately how much the ESI production would cost. The court

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further noted that "[i]n light of foreseeable privilege disputes (which are not ripe for a ruling prior to the document review and service of a privilege log), it was agreed that, although certain internal [law firm] communications regarding their directions to Digital Risk will be reviewed, a categorical privilege log, in the first instance, will be employed for the sake of cost efficiency." As such, once the requesting party learns of the hit count totals associated with the privilege designations, it can decide whether it wants to pursue such purportedly privileged documents in light of the legal fees necessary to do so.

Funding an Entity's Obligations

In *RSSM*, plaintiff, RSSM, an accounting firm that had gone out of business, claimed that it could not afford to fund its ESI discovery obligations and sought to shift such costs. The motion court noted that the accounting firm's partners had a financial obligation for the firm's e-discovery obligations, as well as their own. The court rejected the contention that accounting firm's bank controlled its funds and that it would not permit the firm to pay its ESI vendor, which refused to release the processed ESI without payment. The motion court noted that:

> The RSSM Partnership Agreement does not govern discovery. RSSM brought this action. Its partners controlled the decision to bring it. Having done that, they must fund reasonable ESI searches and production. There is no showing that the partners have no funds or that their funds were seized by the Bank. Further, the ESI Stip was agreed to by the TPDs, not just RSSM. It was an agreement between the parties, not imposed by the court.

The court, however, stated that "[g]iven the limitation on the issues left to try and the importance of proportionality when crafting ESI discovery, the court will revisit the scope of ESI searches and limit them to what is reasonably necessary to prepare for trial" and the accounting firm will "have one chance to run more limited searches and produce ESI, at their own expense." Finally, the motion court noted "ESI discovery is not a punishment administered to an adversary to gain an advantage."

Remedy for Lack of Cooperation

In *Threadstone Advisors*, plaintiff served a restraining notice on the entity defendant as well as subpoenas duces tecum and ad testificandum. The document subpoena sought the production of defendant's financial and accounting statements and tax returns, as well as defendant's financial dealings with its owner. Defendant did not satisfy any part of the judgment and did not comply with the subpoena. Plaintiff claiming spoliation of evidence sought an adverse inference against the defendant that: (1) the corporate veil of defendant should be pierced to permit plaintiff to hold defendant's principal personally liable for the judgment, and (2) that the $2.7 million payment by such principal to defendant's attorneys constituted a fraudulent conveyance. In response, defendant argued that its principal "lack[ed] the technical capabilities or know-how to access the server to obtain documents in response to [Plaintiff's] Subpoena." The motion court rejected such argument as "unpersuasive" and noted that parties may be sanctioned for spoliation even when evidence is in the possession of a non-party. While denying the spoliation sanction and refusing, as "improvident," to order the defendant to provide plaintiff with "remote unfettered access through a password" to defendant's accounting system, the motion court granted plaintiff's expert supervised access to defendant's accounting system through normal Quickbooks protocols.

> 'Threadstone Advisors v. Success Apparel' warns that a party may be sanctioned for spoliation even when ESI is in the possession of a non-party.

1. Appendix A, Part V, provides: The requesting party shall defray the nonparty's reasonable production expenses in accordance with Rules 3111 and 3122(d) of the CPLR. Such reasonable production expenses may include the following:

A. Fees charged by outside counsel and e-discovery consultants;

B. The costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production;

C. The cost of disruption to the nonparty's normal business operations to the extent such cost is quantifiable and warranted by the facts and circumstances; and

D. Other costs as may be identified by the nonparty.

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