Kennedy Assoc. v JP Morgan Chase Bank N.A.
2014 NY Slip Op 30025(U)
January 7, 2014
Supreme Court, New York County
Docket Number: 650019/2012
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

KENNEDY ASSOCIATES,

Plaintiff,

-against-

JP MORGAN CHASE BANK N.A.,

Defendant.

----------X

INDEX NO. 650019/2012
MOTION DATE Sept. 11, 2013
MOTION SEQ. NO. 002

DECISION & ORDER

For Plaintiff:
By Peter Cane, Esq.
230 Park Avenue, Suite 1000
New York, New York 10169
212-922-9800

For Defendant:
Alonso, Andalkar, Small, Toro, & Facher
By Joan Toro, Esq.
920 Broadway, 16th Floor
New York, New York 10010
212-598-5900

Papers considered in review of this motion to shift discovery production costs:

Papers	**Numbered**
Notice of Motion-Affidavits-Exhibits	1
Opposition	2
Reply	3

ELLEN M. COIN, J.:

Defendant JP Morgan Chase Bank moves to compel plaintiff Kennedy Associates to shift costs of production of electronically stored information ("ESI"), to toll its time to produce, and for a protective order against production.

Plaintiff is an executive search agency and defendant is a multinational banking institution. The two parties entered into an agreement for executive search services that outlined the

procedures to be used when defendant desired plaintiff to execute a candidate search. Specifically, the agreement provided that plaintiff receive assignments from defendant "via a written document." (Compl. Ex. A; Ex. A to Toro Aff.). In the underlying case, plaintiff claims that it provided an employment candidate, Jerry Koo, to defendant, whom defendant subsequently hired and therefore owes plaintiff its contractual fee. Although plaintiff's action was originally comprised of seven causes of action, only plaintiff's breach of contract claim survived defendant's prior motion to dismiss. Plaintiff now seeks production of emails of fifteen of defendant's employees from the Asia region that include the terms "Kennedy Associates" and "Kennedy Ventures."

In support of defendant's motion for cost-shifting, defendant's in-house IT expert, Michael Varzally, submits an affidavit outlining the procedure and costs of production. (Varzally Aff.). Varzally is an Executive Director for IT Risk and Security Management for defendant. (*Id.* at ¶ 2). Varzally attests that Defendant employees' email mailboxes are located on the company's email servers. (*Id.* at ¶ 7). The servers are backed up on magnetic tapes which are sent to an offsite third party document storage company. (*Id.* at ¶¶ 7, 8). The

restoration process for these backup tapes includes essentially making a copy of the custodian's mailbox, from which email is extracted to a software platform. (*Id.* at ¶¶ 12, 13).

Varzally states that costs involved in the email restoration process are dependent on the number of custodians whose emails are sought and the length of time under examination. (*Id.* at ¶ 14). All other costs revolve around the corporation's reviews for "responsiveness, relevance, and/or any applicable privilege." (*Id.* at ¶ 15). Varzally contends that defendant's costs for restoration is "significantly less than what (defendant's) pre-approved third-party vendors charge for the same service." (*Id.* at ¶ 16). Defendant's total calculated cost of production is $1,631,201. (Toro Aff. ¶ 22).

Plaintiff argues that defendant should bear the entire cost of production. (Cane Aff. at ¶ 28). Plaintiff provides no expert affidavit of its own and thus does not provide any alternative calculations of the cost of production of the ESI discovery.

Discussion

The presumption in New York is that the producing party must bear the costs of discovery for all reasonable requests. (*U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58, 65 [1st Dept 2012]). In the *Zubulake* line of cases, the United

States District Court for the Southern District of New York created a test for determining when cost-shifting is appropriate for ESI production. (*Zubulake v UBS Warburg LLC (Zubulake I)*, 217 FRD 309 [SD NY 2003]; *Zubulake v UBS Warburg LLC (Zubulake III)*, 216 FRD 280 [SD NY 2003]). The Appellate Division, First Department, adopted the standards articulated in *Zubulake I* in *U.S. Bank N.A.* (*U.S. Bank N.A.*, 94 AD3d at 63). Therefore, the *Zubulake* analysis is applicable to the present matter.

Zubulake entails a two-step analysis. (*Zubulake I* at 317-18). First, cost-shifting is considered only if the requested documents are inaccessible. (*Zubulake I*, 217 FRD at 318; *see also Novick v AXA Network, LLC*, 2013 WL 5338427, *4 [SD NY 2013]; *Xpedior Creditor Trust v Credit Suisse First Boston (USA), Inc.*, 309 F Supp 2d 459, 465 [SD NY 2003]). Both paper and electronic documents can be accessible or inaccessible. (*Zubulake I*, 217 FRD at 318). Specifically for electronic documents, "any data that is retained in a machine readable format is typically accessible. Whether electronic data is accessible or inaccessible turns largely on the media on which it is stored." (*Id.*). This relates to how easily the data may be restored or manipulated. (*Id.*, 217 FRD at 320). Active, online data is considered accessible, while backup tapes and erased or

damaged data are considered inaccessible. (*Id.*, 217 FRD at 318-20).

If cost-shifting is found to be appropriate, the second step consists of a balancing test of seven factors to determine if such cost-shifting is warranted and to what extent. (*Zubulake I*, 217 FRD at 320-22). The rationale is that where the marginal usefulness of the discovery request is outweighed by the burden and expense of the discovery request, cost-shifting to the requesting party may be considered. (*Id.*, 217 FRD at 322-23)

The following is the seven-factor test established in *Zubulake*:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation;
7. The relative benefits to the parties of obtaining the information. (*Id.*, 217 FRD at 322).

The test is not meant to be applied mechanically. (*Id.*, 217 FRD at 323). The first two factors should weigh most heavily in the analysis, while factors three through five are of the next highest significance. (*Id.*). The last two factors will only rarely play a role in the analysis. (*Id.*).

Because the sought emails are stored on back-up tapes considered inaccessible, the Court must consider cost-shifting and apply the seven-factor analysis. (*Id.*; *see also Quinby v WestLB AG*, 245 FRD 94, 102 [SD NY 2006]).

The extent to which the request is specifically tailored to discover relevant information

Plaintiff has requested the email records of a specified set of fifteen employees as outlined in the Compliance Conference Order of May 6, 2013. The actual number appears to be only thirteen, as defendant states that two of the requested employees were not found in its records. Additionally, plaintiff has narrowed the search terms to "Kennedy Ventures" and "Kennedy Associates." The Court does not find that these search terms are overly broad or would generate a great deal of false positives. The emails sought are a "likely source of information" regarding the hiring of employees like Koo, and including Koo, as they relate to plaintiff and its efforts. (*See Xpedior Creditor Trust*, 309 F Supp 2d at 465).

Additionally, the search is limited to emails generated and stored by defendant's offices in Asia for the specified three-year period of January 1, 2006 through December 31, 2008, and limited to a finite group of defendant's employees. (*Cf. Wiley v Paulson*, 2007 WL 7059722, *2 [ED NY 2007] [finding two years of

documents from a "large and unidentified group of individuals" too broad]). Although the prospect of finding emails referencing plaintiff is not certain, it is at least probable that such emails exist and will contain information relevant to plaintiff's case. The facts here differ from, for example, *Quinby v WestLB AG*, where production had already occurred, so that the court was actually able to analyze how many emails were in fact relevant and to estimate what percentage of requested emails could prove useful. (*Quinby*, 245 FRD at 107-09). At the current stage of discovery, plaintiff is understandably unable to provide such definitive information to demonstrate that its request is narrowly tailored.

The email search, however, is relevant to plaintiff's case. In denying defendant's prior motion, this Court found that although telephone communications would not fall under the services contract's reference to a written communication, email communications might suffice. Plaintiff claims that in its course of dealing with defendant, defendant made requests for employee searches through email or by telephone. Plaintiff argues that such a method of assignment was the norm for the parties and had never been an issue. To the extent that emails maintained by defendant may show prior requests and discussions

with plaintiff about employment candidates, this would support plaintiff's argument that such methods were typical and regarded as proper by defendant and thus are contractually binding. Further, if the business team hired Koo as a result of having heard about him through plaintiff's efforts, such information may be present in company emails.

A final, countervailing consideration is that plaintiff (1) has not put forward any evidence thus far that demonstrates email communications between its own team members and defendant employees about Koo or other candidates, and (2) has not provided any affidavit from its former employee who, it claims, sought to place Koo with defendant. In fact, defendant has already provided some evidence that Koo was hired without the use of any executive search firm. (Yoon Aff.). Thus, while the requested ESI has potential to be relevant to plaintiff's case, this factor is offset, in part, by plaintiff's failure to supply any such communications to support its contentions that the parties did not strictly adhere to the form of written assignment required by their contract.

The availability of such information from other sources

The emails sought by plaintiff are at least in part unavailable to them through any other source. Plaintiff should

possess correspondence between the parties. However, defendant is the only party capable of producing its own intra-company emails. Such emails may very well contain information relevant to plaintiff's claim that Jerry Koo was hired because of plaintiff's work or in accordance with the parties' agreement. As defendant claims, the back-up tapes are the only location in which to find the documents. (Varzally Aff.; *Quinby*, 245 FRD at 109). A lack of clarity over whether the information could be found elsewhere is not a sufficient reason to shift costs. (*Juster Acquisition Co., LLC v N. Hudson Sewerage Auth.*, 2013 WL 541972, *5 [D NJ 2013]). Therefore, this factor weighs against cost-shifting.

The total cost of production, compared to the amount in controversy

In determining this factor, the Court must first address the issue of which costs of production should be included. *Zubulake* holds that only the costs of restoration of and searching for the inaccessible data should be considered. (*Zubulake III*, 216 FRD at 289-90). The producing party is responsible for the costs of reviewing and producing the information once it is in an accessible format. (*Id.; see also Fleisher v Phoenix Life Ins. Co.*, 2012 WL 6732905, *4 [SD NY 2012]). Therefore, even if defendant's submitted costs are taken

at face value, only those that relate to restoring the back-up tapes to a readable format and the keyword search are appropriate subjects for cost-shifting.

Based on its expert's analysis, defendant submits a total cost of production of $1,631,201. (Toro Aff. at ¶¶ 22, 23; Varzally Aff. at ¶ 24-28). This total cost includes $610,319 for what is described as a post-keyword search first pass review of the documents which may be conducted by an outside vendor. (*Id.*). It also includes $838,350 for a second pass review to be conducted by defendant's attorneys. (*Id.*). Both costs would be incurred only after restoration of the emails is complete. Because *Zubulake* permits only restoration costs and keyword search to be the subject of cost-shifting, upon subtraction of the individual costs that would occur post-restoration from defendant's calculations, the estimated cost of restoration and basic keyword search is $182,532.

The parties submit different calculations of the amount in controversy, ranging from defendant's $80,000 to plaintiff's $300,000. Using these amounts as a general benchmark for the amount of possible recovery, the cost submitted for ESI production is in that same range.

The difference between estimated ESI costs and potential recovery is of far smaller magnitude than that found in other cost-shifting cases. For example, in *Zubulake*, where the potential recovery was in the multi-million dollar range, the court found that ESI costs in the hundred-thousand dollar range were not significantly disproportionate. (*Zubulake III*, 216 FRD at 288; *see also Quinby*, 245 FRD at 109-10 [multi-million dollar possible recovery proportionate to $226,266.60 ESI costs]; *Wood v Capital One Services, LLC*, 2011 WL 2154279, *7 [ND NY 2011] [$1,000 recovery "exponentially exceeded" by ESI costs]; *Juster Acquisition Co., LLC*, 2013 WL 541972, *5). Here, the projected ESI costs represent a high percentage of the expected recovery. Thus, the ESI discovery costs are disproportionate to the amount in controversy, even if that amount is as large as plaintiff alleges. This factor therefore weighs in favor of cost-shifting.

The total cost of production, compared to the resources available to each party

JP Morgan Chase is a multinational banking corporation, with substantial financial and human resources. (*Wood*, 2011 WL 2154279 at *7). This factor weighs against cost-shifting. (*Xpedior Creditor Trust*, 309 F Supp 2d at 465). This does not mean that defendant is required to shoulder the entire cost of the ESI production. Plaintiff Kennedy Associates is not an

individual, but a corporation (Compl. ¶ 1) that may have financial and reputational incentives to ensure that this case moves forward. (*See Zubulake III* at 288; *see also Orraca v Lee*, 2007 WL 81921, *1 [ND NY 2007] [denying request for document copies, noting that even indigency is not a reason not to pay where appropriate]).

However, the relative resources of the parties are relevant in assessing the type of data storage and recovery programs defendant has available. This factor weighs against total cost-shifting, but does suggest some cost apportionment. (*Zubulake III*, 216 FRD at 288 ["while this factor weighs against cost-shifting, it does not rule it out"]; *see also Quinby*, 245 FRD at 110 [citing *Zubulake III*]). In both *Zubulake* and *Quinby*, the requesting parties were individuals who nevertheless were held responsible for a portion of the ESI production costs incurred by large corporate defendants.

The relative ability of each party to control costs and its incentive to do so

There are standard costs associated with technological matters that are beyond defendant's control. The *Quinby* court chose not to impose sanctions where defendant converted its data into an inaccessible format. (*Quinby*, 245 FRD at 103-04). The court stated that litigants are permitted to retain their data

in a format of their own choosing, particularly where litigation is not anticipated. (*Quinby*, 245 FRD at 105). The *Quinby* court deferred to the rationale of defendant to use its chosen third-party vendor, despite plaintiff's assertions that defendant could have chosen a less expensive alternative. (*Quinby*, 245 FRD at 110; *see also Semsroth v City of Wichita*, 239 FRD 630, 634 [D Kan 2006] [noting lack of bright line rule regarding producer's choice of difficult format for storage of data]).

Plaintiff argues that defendant created the problem of expensive restoration through its choice of storage methods. (Plaintiff Memo. of Law at 6). However, plaintiff fails to provide its own calculations or expert affidavits to demonstrate that less expensive storage options were available to defendant. Thus, this factor weighs slightly in favor of cost-shifting. (*See Zubulake III*, 216 FRD at 288).

The importance of the issues at stake in the litigation

This factor is rarely relevant. (*Zubulake III*, 216 FRD at 289; *see Xpedior Creditor Trust*, 309 F Supp 2d at 466). The instant case is a private contractual dispute, with no major public policy concerns. (*See Zubulake III*, 216 FRD at 289 [employment discrimination issues not novel, render this factor neutral]).

The relative benefits to the parties of obtaining the information

This factor is also rarely relevant. (*Zubulake I*, 217 FRD at 323). However, to the extent that it bears consideration, it is evident that plaintiff stands to gain far more than does defendant from restoration of the backup tapes. (*See Zubulake III*, 216 FRD at 289). Thus, this factor weighs in favor of cost-shifting.

Conclusion

The analysis is not meant to be a mechanistic number-crunching exercise. Instead it is, as noted, a balancing test with the earlier factors having greater weight than the latter.

As a starting point, the underlying presumption is that all or the bulk of the costs are to be borne by defendant as the producing party. (*Quinby*, 245 FRD at 111). This fulfills the policy rationale of ensuring that plaintiffs are able to pursue meritorious cases. (*Id.* [citing *Zubulake*]).

The seven *Zubulake* factors weigh more heavily against cost-shifting. The first factor weighs against total cost-shifting because of the relevance of the potentially found information. As noted, this factor is slightly mitigated by plaintiff's failure to provide evidence that makes such a finding more likely. The second factor weighs against cost-shifting, as

defendant is the only possessor of the requested emails. The third factor weighs in favor of some cost-shifting, as the cost of production is high relative to estimated recovery costs for plaintiff. However, the fourth factor weighs firmly against cost-shifting, as defendant is a multi-national corporation that can commit significant resources to litigation, including discovery costs. Defendant corporation has the sole ability to control costs of the ESI production, the fifth factor, which militates against cost-shifting.

Thus, the balance of the factors requires some cost-shifting here. Three of the five most important factors weigh more heavily against cost-shifting, while only one of the five most important factors (cost versus amount in controversy) weighs strongly in favor of cost-shifting. Combining this analysis with the presumption that the producing party pay, the apportionment must weigh more heavily towards defendant. Therefore, the costs will be apportioned, with 20% ($36,506.40) preliminarily to be borne by plaintiff and 80% by defendant ($146,025.60).

Plaintiff shall pay its share of estimated costs to defendant within thirty days of the date of this decision. Defendant shall restore, search, and produce responsive

discovery within ninety days of the date plaintiff pays its share of the costs. Defendant shall submit an accounting of the actual costs of data restoration and keyword search to plaintiff and to the Court within twenty days of production. To the extent that the actual cost of production differs from the estimated cost, the Court shall order reconciliation of cost apportionment in accordance with the percentages determined herein.

Finally, defendant is solely responsible for the costs of any legal review of the documents produced, such as for relevance, privilege, or other redaction. Thus, the Court will not grant the protective order requested by defendant. The Court shall also stay defendant's motion for summary judgment, motion sequence four, until such time as the parties have fully complied with this order.

In accordance with the foregoing, it is hereby

ORDERED that so much of defendant's motion as seeks cost allocation is granted to the extent detailed above, and the motion is otherwise denied.

This constitutes the decision and order of the Court.

Dated: January 7, 2014

ENTER:

Ellen M. Coin, A.J.S.C.

NON-FINAL DISPOSITION