

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

LECHASE CONSTRUCTION SERVICES, LLC,

Plaintiff

-vs-

Index No. 2011/7765

INFO. ADVANTAGE, INC. and
MITCHELL WELLER,

Defendants

Special Term
October 4, 2012

APPEARANCES

WOODS OVIATT GILMAN LLP
Warren B. Rosenbaum, Esq.
Attorneys for Plaintiff

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP
Glenn E. Pezzulo, Esq.
Attorneys for Defendants

DECISION

Rosenbaum, J.

Defendants, Info. Advantage, Inc. and Mitchell Weller, move to compel Plaintiff's response to Defendants' disclosure demands and notice to conduct deposition, or in the alternative, for an order precluding evidence, striking the Complaint, and/or precluding Plaintiff from testifying or presenting proof; costs and disbursements of this motion. Plaintiff, LeChase Construction Services, LLC, cross moves for: (1) an order pursuant to CPLR 3124 compelling

Defendants to comply with Plaintiff's discovery requests; and (2) an order pursuant to CPLR 3103 directing that, in searching for and reviewing electronically stored information responsive to Defendants' First Notice to Produce Documents, Plaintiff may locate documents in its database utilizing key word search terms reasonably designed to cull out non-responsive documents, thus preventing Defendants from compelling Plaintiff to review all electronically stored information, so as to prevent abuse and needless expense.

This action was commenced on June 28, 2011, alleging that Defendants interfered with the possession, operation, and use of a middleware computer program application and related software programs, and further that Defendants had failed to obtain licenses for software they provided to Plaintiff. A Second Amended Complaint was filed thereafter. Defendants have asserted several counterclaims.

Defendants served two sets of discovery demands, a First Set of Interrogatories and a First Request for Production of Documents. In response, Plaintiff served its Responses and Objections. Plaintiff objected to every Interrogatory and did not provide any responses. Likewise, Plaintiff objected to every document request and provided no documents. With respect to some questions, Plaintiff indicated that it would provide responsive information and/or documents if and when it became available. No supplementation has yet been made.

Plaintiff contends that the raw data set of documents potentially responsive is enormous and has proposed limiting the search by using search terms to reduce the size of the data set. According to Plaintiff, all documents and information possibly responsive to Defendants' requests resulted in 19 gigabytes of compressed ESI and related attachments. Plaintiff contends that uncompressed the size is 36 gigabytes and is comprised of 280,000 email messages. Plaintiff argues that to review all of the information would take

approximately 1400 hours, if the emails are only one page long each. Assuming the emails are an average of two pages long, Plaintiff contends that review time would be approximately 2800 hours. Given Plaintiff's counsel billing rates, review of the data would result in an expense to Plaintiff of approximately \$500,000. Defendants rejected this proposal, stating that Plaintiff would not be unduly burdened. Defendants contend that keyword searches will exclude many documents from the scope of the search, including documents attached to emails in .pdf format.

Plaintiff served Defendants with a First Notice to Produce, Omnibus Demands, and Notice to Take Deposition on August 15, 2011. A Second Notice to Produce was served on May 31, 2012. Defendants have not responded to any of the discovery demands.

A conference with the Court was held on August 7, 2012. The parties could not reach an agreement on the discovery issues and were instructed to make any necessary motions.

Defendants' Discovery Requests

ESI is clearly discoverable under the CPLR's broad discovery guidelines. See, e.g., Mosley v. Conte, 2010 WL 3536810 (Sup.Ct. N.Y. Co. 2010). "As no specific State statute addresses ESI, courts have interpreted the CPLR 'so as to be virtually parallel to the Federal provision' set forth in Rule 34 of the Federal Rules of Civil Procedure." Mosley, 2010 WL 3536810, at *6, quoting Delta Fin. Corp. v. Morrison, 13 Misc.3d 608 (Sup.Ct. Nassau Co. 2006).

Here, the information sought is discoverable, and Plaintiff does not dispute that. Rather, the conflict arises over the allegedly enormous amount of data that Plaintiff and counsel would have to sift through to find information relevant to the discovery requests. CPLR 3103 states:

- (a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a

protective order denying, lifting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Insofar as Plaintiff seeks an order directing that, in searching for and reviewing ESI responsive to Defendants' discovery requests, Plaintiff may locate documents using keyword search terms designed to cull out non-responsive documents, the motion for a protective order is granted as directed infra.

To the extent Plaintiff and its counsel seeks to engage in self-collection, Plaintiff and/or counsel must evaluate whether its email system is capable of searching both email and attachments. If either is capable of doing so within their own environment, then self-collection, using appropriate keyword search parameters, may proceed. If neither Plaintiff nor Plaintiff's counsel has such capability within its environment, then a vendor must be used to perform the searches. To the extent a vendor is ultimately used and the vendor identifies any items that are not searchable, those items or documents will have to be reviewed individually by counsel to determine relevance. Plaintiff's counsel states in his Affirmation, and it is the Court's understanding of ESI, that readable attachments (including Microsoft Word documents, excel spreadsheets, and readable .pdfs) can be searched by an e-discovery vendor's document review system. Defendant's motion to preclude as to this discovery is granted only to the extent that production must be made as described.

The Court notes, where keyword searches are ordered, they must not be "designed . . . in the dark, by the seat of the pants, without adequate . . . discussion of those who wrote the emails." William A. Gross Construction Assocs., Inc. v. Amer. Manuf. Mut. Ins. Co., 256 F.R.D. 134, 135 (S.D.N.Y. 2009). It has been observed:

"While keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval,

there are well-known limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge. . . .”

Id., quoting Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 260 (D.Md. 2008). The Court strongly encourages counsel for both parties to work cooperatively in the area of electronic discovery and endorses The Sedona Conference Cooperation Proclamation. www.TheSedonaConference.com. See William A. Gross Constr. Assocs., Inc., 256 F.R.D. at 134. It has been well stated:

Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of ‘false positives.’ It is time that the Bar– even those lawyers who did not come of age in the computer era– understand this.

Id. at 136. See also, Moore v. Publicis Groupe & MSL Group, ___ F.R.D. ___, 2012 WL 607412 (S.D.N.Y. 2012). This production should be completed within sixty days of the order signed on these motions. If there is difficulty complying with that time frame, it should be brought to the Court’s attention promptly.

To the extent there is additional outstanding discovery owed by Plaintiff, other than that discussed supra, the circumstances presented warrant the issuance of a conditional order of preclusion. Defendants’ motion in that regard is granted insofar as the court grants a 30 day order of preclusion any other outstanding (non-ESI) discovery. If responses are not received within that time frame, Plaintiff shall face preclusion without the need to make further application to the Court.

Spoliation occurs “when a party negligently loses or intentionally destroys key evidence, thereby depriving the nonresponsible party of the ability to prove its claim or defense. . . .” Coleman v. Putnam Hosp. Center, 74 A.D.3d 1009, 1011 (2d Dept. 2010). “The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and ‘fatally compromised its ability to defend [the] action.’” Utica Mut. Ins. Co. v. Berkoski Oil Co., 58 A.D.3d 717, 718 (2d Dept. 2009), quoting Lawson v. Aspen Ford, Inc., 15 A.D.3d 628, 629 (2d Dept. 2005). To the extent Defendants allege spoliation, requisite proof is not submitted at this juncture in the proceedings.

Plaintiff’s Discovery Requests

CPLR §3124 states: “If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.” As a penalty for refusal to comply with discovery demands, CPLR §3126 permits a court to issue various forms of relief. Here, the circumstances presented warrant the issuance of a conditional order of preclusion. Plaintiff’s motion to compel is granted insofar as the court grants a 30 day order of preclusion as to the outstanding discovery. If responses are not received within that time frame, Defendants shall face preclusion without the need to make further application to the Court.

Signed at Rochester, New York this 4th day of October, 2012.

Matthew A. Rosenbaum
Supreme Court Justice