

Fiserv Solutions, Inc. v XL Specialty Ins. Co.

2012 NY Slip Op 33330(U)

January 4, 2012

Supreme Court, New York County

Docket Number: 601096/09

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE L. ... Justice

PART 45

Index Number : 601096/2009
FISERV SOLUTIONS, INC.
vs.
XL SPECIALTY
SEQUENCE NUMBER : 018
COMPEL DISCLOSURE

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is by defendants to compel is GRANTED per the attached Decision and Order dated January 4, 2012.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 4, 2012

Signature of Justice L. ...

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

All documents concerning or related to Your compliance with Your policies, procedures, and requirements used or established by You for making or underwriting any loans which are the subject of PVI Claims. (Request No. 18)

See Goodwin Aff., ¶ 21, Att. 9 (Compass Bank's Responses to XL's First Set of Requests for Production).

By way of background, initially, the Banks refused to provide anything in response to these and other requests. XL moved to compel the plaintiffs to produce documents responsive to various requests, including Request Numbers 17 and 18. Justice Lowe, the presiding justice at that time, denied XL's motion. XL appealed. On May 5, 2011, the First Department reversed, ruling that "the disclosure [XL] requested is material and necessary in the defense of this action (CPLR 3101)." See *Fiserv Solutions, Inc. v XL Specialty Ins. Co.*, 84 AD3d 480 (1st Dept 2011).

Following the First Department's ruling, the Banks disclosed some of the information responsive to XL's requests, apparently their loan procedures and requirements, and the loan files for the loans that serve as the basis for their claims under the XL policy. XL contends the Banks have refused or failed, however, to produce discovery "concerning or related" to policies, procedures and requirements used for making loans and in compliance with their policies, procedures and requirements. According to XL, the unproduced material includes e-mail or other correspondence, memoranda, and PowerPoint presentations addressing the Banks' adoption, interpretation, modification, and application of their procedures and requirements. The First Department has already ruled that the requested information is material and necessary. Accordingly, the court directs Compass Bank, Sun Trust and TCF Bank to fully comply with Request Nos. 17 and 18, including producing any documents, electronic or otherwise, concerning or relating to the policies, procedures and requirements requested in Request Numbers 17 and 18.

On a separate but related matter, XL makes a compelling showing that the e-mail to and from Vicki Whatley and Carla Long, employees at Compass Bank during the period between 2003 through April 20, 2008 (the date when coverage under the XL policies in issue ended) with respect to Ms. Whatley, and September 2007 through April 20, 2008 with respect to Ms. Long, are material and necessary. The court, in particular, notes that it was due to Compass Bank's recent and clearly late production of 63,000 documents on January 24, 2011 that accounts for the lateness of XL's insistence that these documents also be produced. However, Compass Bank points out that the emails to and from Ms. Whatley and Ms. Long were deleted from their computers and archived after 90 days in the regular course of business. XL argues that Compass Bank should not have allowed that to happen because Compass Bank was made aware of the dispute even before this action was initiated on April 9, 2009. The court does not agree that it would have been reasonable for Compass Bank to have changed its system to prevent the automatic archiving of the emails to and from Ms. Whatley and Ms. Long. This situation raises an issue of who should bear the costs of retrieving the e-mails in issue from Compass Bank's archives, which are backup tapes. While generally the cost of producing discovery is borne by the responding party (*Clarendon Nat. Ins. Co. v Atlantic Risk Management, Inc.*, 59 AD3d 284 [1st Dept 2009]), that rule does not necessarily apply when the requested information is not readily retrievable due to its having been archived. See e.g. *Samide v Roman Catholic Diocese of Brooklyn*, 5 AD3d 463, 466 (2d Dept 2004); see also *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 27 Misc 3d 1061 (Sup Ct NY County 2010). The court concludes that here XL should bear the reasonable cost of the retrieval of the electronic data in issue with respect to

Ms. Whatley's and Ms. Long's emails (both to and from them). The parties are directed to meet and confer to establish a protocol for how the costs are to be established and shifted to XL.

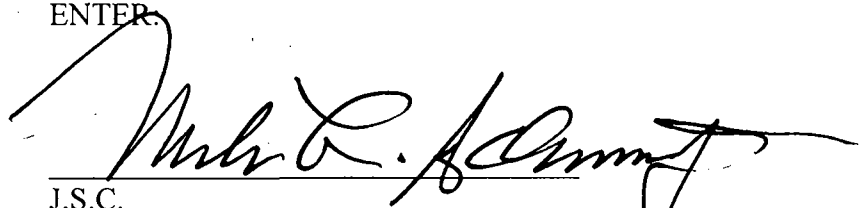
Accordingly, it is

ORDERED that within 30 days of this Decision and Order plaintiffs Compass Bank, Sun Trust and Fiserv for TCF are to produce all documents responsive to the Requests, Numbers 17 and 18; and it is further

ORDERED that within 60 days of this Decision and Order Compass Bank shall produce any material identified by the electronic searches run on material held by Compass Bank consisting of emails to and from Vicki Whatley and Carla Long for the period identified above, with the reasonable costs of such production being borne by XL.

Dated: January 4, 2012

ENTER.



J.S.C.

MELVIN L. SCHWEITZER
J.S.C.