

Cedeno v Pacelli

2021 NY Slip Op 30545(U)

February 23, 2021

Supreme Court, New York County

Docket Number: 452016/2018

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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PETER CEDENO, PETER L. CEDENO & ASSOCIATES, P.C.,

Plaintiff,

- v -

ATESA PACELLI, and ANTHONY PACELLI,

Defendant.

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INDEX NO. 452016/2018
MOTION DATE 09/09/2020
MOTION SEQ. NO. 010

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 282, 284, 285, 286, 287, 288 were read on this motion to/for DISCOVERY.

Plaintiffs Peter Cedeno and Peter L. Cedeno & Associates, P.C. move, by order to show cause, for an order (i) making defendants responsible for all costs associated with producing documents responsive to defendants' discovery demands, including the cost of retaining and using a third-party electronic discovery vendor, and (ii) granting a protective order limiting the scope of the devices to be searched as part of electronic discovery. Defendants oppose plaintiffs' motion.

Background

Cedeno and his firm represented defendant Atesta Pacelli in a divorce proceeding against defendant Anthony Pacelli in 2016. In the course of Cedeno's representation of Ms. Pacelli, the professional relationship became personal. In September 2016, the Pacellis commenced an action against Mr. Cedeno and his firm asserting claims for, inter alia, of breach of fiduciary duty, violation of Judiciary Law §487 and sexual battery and assault. Cedeno and his firm asserted a counterclaim for defamation.

In July 2018, Cedeno and his firm commenced this action asserting claims for libel, trade libel and defamation based on allegations that "the Pacellis authored, created, and published or caused John Does to author, create, or publish over 120 false and defamatory reviews and websites concerning plaintiffs" (NYSCEF # 132, ¶ 26). Defendants countered that the alleged defamatory reviews were actually authored by plaintiffs (NYSCEF # 210, amended answer).

By order dated June 9, 2020, the court directed the parties to meet and confer on the electronic discovery issue (NYSCEF # 245). Plaintiffs opted not to seek electronic discovery, asserting that through pre-action discovery and service of subpoenas, they obtained information that the reviews and websites at issue were published or caused to be published by defendants. Subsequent orders as to defendants' request for electronic discovery directed defendants to provide lists of proposed vendors to plaintiffs and for plaintiffs to obtain cost estimates from proposed vendors and file a motion for a determination as to which party should bear the cost of defendants' request for electronic discovery (NYSCEF # 265, July 24, 2020 order; NYSCEF # 268, August 7, 2020 order).

Plaintiffs argue that defendants should bear the cost of the production of electric discovery as their request, which requires the search of nine devices and three email addresses for approximately 250 search terms is not specifically tailored to discover relevant information; that the information is readily available from other sources as evidenced by the information obtained by plaintiffs through subpoenas; and in view of the immense cost of producing the information sought by defendants. With regard to the costs, plaintiffs submit proposals from two eDiscovery vendors, the first estimates the cost of providing the requested electronic discovery at between \$110,607 and \$216,964 (NYSCEF # 252), while the second vendor estimates the cost at \$1,081,500 (NYSCEF # 253).

In opposition, defendants submit a proposal from another eDiscovery vendor estimating the cost at \$20,750.00, (plus a monthly cost projection of \$2,855), based on the search of three devices, and two email accounts (NYSCEF # 267). As noted by plaintiff in reply, this estimate is at odds with the nature and extent of discovery sought by defendants in their June 15, 2020 letter (NYSCEF # 261) which calls for, *inter alia*, a search of "at minimum, all documents, emails, chats, texts, voicemails and records on devices" including includes "all computers, laptops, cloud storage, phone, iPads or other mobile devices in the possession or control of Cedeno both personal and work."

The court issued an interim order dated January 4, 2021, stating that "[a]s the scope of discovery of electronic information sought by defendants and the estimated cost of producing such discovery remains unclear, the court cannot determine on this record whether, and the extent to which, the cost of the subject discovery should be shifted to defendants..." Accordingly, the court directed that the motion be held in abeyance and directed that defendants submit an affirmation specifying the scope of electronic discovery sought, including the number and nature of devices and email or other accounts that they seek to have searched and the time period of such search, and that each party efile an estimate from at least one vendor as to the costs associated with searching, retrieving and producing such information.

In compliance with the interim order, defendants filed an affirmation clarifying that they seek to have plaintiffs conduct searches for electronically stored information on three devices, consisting of Cedeno's work desktop computer, personal laptop computer, and personal smart phone, and of two separate email accounts, Cedeno's work email and personal email (NYSCEF # 277). As for the estimated cost of searching these devices and email accounts, defendants submit proposals from three eDiscovery vendors, consisting of a previously submitted proposal estimating the cost at \$20,750.00, and a monthly cost projection of \$2,855 (NYSCEF # 279); and two new proposals estimating the cost of \$2,950, and a monthly cost projection of \$1,945.50 (NYSCEF # 280) and a cost of between \$12,260 and \$15,735, and a monthly cost projection of \$940 (NYSCEF # 288). Defendants also argue that as the electronically stored information they seek is accessible, there is no basis for shifting the costs of producing it to them.

In response, plaintiffs argue that the cost estimates of defendants' three proposed vendors are inaccurate based on the disparity of these estimates, and the vendors' failure to take into account the 250 search terms, or the need to review the information retrieved after the search terms are applied. Plaintiffs also submit an estimate from an eDiscovery vendor which estimates the cost of the search at \$207,057 (NYSCEF # 286). Plaintiffs also argue that since a significant amount of the information retrieved will be privileged, the information will be time-consuming. As for defendants' argument that shifting the costs is unwarranted as the electronic data at issue is accessible, plaintiffs contend that while it appears that the data would be accessible, it is not readily usable as it will require substantial effort to cull and produce.

Discussion

While the producing party generally bears the initial cost of searching for, retrieving, and producing discovery, courts have the discretion to shift the cost to the requesting party upon an analysis of the following guiding factors set forth in *U.S. Bank Nat. Ass'n v GreenPoint Mortg. Funding, Inc.*, 94 AD3d 58, 63 [1st Dept 2012]),

1. The 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."

(*U.S. Bank*, 94 AD3d at 63-64, citing *Zubulake v UBS Warburg, LLC*, 217 FRD 309, 317-318 [SD NY 2003]).

As for defendants' argument that cost-shifting is unwarranted here since the electronic information sought is accessible, such argument is based on the holding in *Zubulake* that "the court should consider cost-shifting only when electronic data is relatively inaccessible, such as on backup tapes" (217 FRD at 324). Notably, however, the First Department in *U.S. Bank*, while adopting *Zubulake* framework, did not hold that the inaccessibility of data is a threshold requirement to cost-shifting. Nor did it require a strict adherence to the seven factors set forth in *Zubulake*. Instead, the court wrote that "in 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*" (*U.S. Bank*, 94 AD3d at 64). Thus, while the issue of whether the electronically stored data is accessible is relevant to the cost-shifting analysis, it is not dispositive.

Using the seven factors as a guide, with regard to whether the information is necessary and the request narrowly tailored, it is noted that the parties agreed on, or the court previously determined that the 250 search terms would retrieve information that is material and relevant. Moreover, while plaintiffs seek a protective order as to the number of devices from which the information is sought, that aspect of the motion is moot as defendants have narrowed their request to the search of three devices and two email accounts.

As for the costs associated with the search, retrieval and production of the information, the amount of such costs remains unclear as the defendants' cost estimates range from approximately \$5,000 to approximately \$20,000 while plaintiffs have submitted an estimate of approximately \$207,000. That said, however, contrary to plaintiffs' position, the costs associated with reviewing the information for privileged material should not be considered in the cost analysis since such work need not be performed by an eDiscovery vendor, and is a normal cost associated with production of discovery (*see Rowe Entertainment, Inc. v William Morris Agency Inc.*, 205 FRD 421, 432 (SDNY 2002) [expense of privilege review should be borne by producing party]).

Next, without an accurate estimate of the costs of the discover, such cost cannot be compared to the amount in controversy in this action, which amount is not evident at this stage of discovery in any event. The other factors are not dispositive since both sides would appear to have important issues at stake, and no party clearly has superior resources to the other. At the same time, however, it would appear that plaintiffs are in a better position to control costs and are incentivized to do so.

Under these circumstances, plaintiffs shall be required to produce the electronically stored information at their own expense using the eDiscovery vendor of their choice, without prejudice to renewing their request to shift the costs of some or all of the production to defendants in the event the cost of the discovery exceeds \$5,000, excluding costs associated with reviewing the information retrieved for privilege. Any request by plaintiffs to renew their request to shift costs shall be made upon a further motion supported by an affidavit and/or other proof, such as invoices, detailing the services provided in connection with retrieval of the information and the costs of such services.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiffs' motion to shift the cost of searching for, retrieving, and producing discovery of electronically stored information is denied without prejudice to renewal in the event the cost of the discovery exceeds \$5,000, excluding costs associated with reviewing the information retrieved for privilege, upon a further motion supported by an affidavit and/or other proof detailing the services provided in connection with retrieval of the information and the costs of such services; and it is further


ORDERED that plaintiff shall furnish the electronically stored information sought by defendants, together with a privilege log, within 60 days of efileing this order; and it is further

ORDERED that plaintiffs' motion for a protective order is denied; and it is further

ORDERED that a status conference shall be held by telephone on April 29, 2021 at 10 am, with the court to provide call in information to the parties.

This constitutes the decision and order of the court.

2/23/21
DATE


 MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT