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| <b>FPG CH 94 Amity, LLC v Pizzarotti LLC</b>   |
| 2021 NY Slip Op 31415(U)   |
| April 27, 2021   |
| Supreme Court, Kings County  |
| Docket Number: 512149/2019   |
| Judge: Leon Ruchelsman   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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FPG CH 94 AMITY, LLC,

Plaintiff,

Decision and order

- against -

Index No. 512149/2019

PIZZAROTTI LLC, & FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND

Defendants,

April 27, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3124 seeking to compel the plaintiff to comply with discovery demands served. The plaintiff has cross-moved pursuant to CPLR §3124 seeking to compel the defendant to comply with discovery demands served. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in prior orders, on February 15, 2016 the plaintiff and defendant entered into a construction agreement wherein the defendant agreed to construct residential townhouses located at 88-98 Amity Street in Kings County. The agreement provided the defendant would be substantially complete with the project by September 30, 2017 and that time was of the essence. On January 25, 2019 after significant delays prevented the completion of the construction project the parties entered into a Letter Agreement. That agreement noted the completion of the work exceeded the guaranteed maximum price by over six million dollars and the defendant had already paid a portion of that

amount and would pay the remainder of that amount provided the plaintiff would relieve the defendant of any overrun excess. The parties have disputed numerous provisions of that agreement. On July 16, 2020 the plaintiff filed a second amended complaint and alleges a breach of the letter agreement, a claim based upon the defendant's failure to secure a maintenance bond and for specific performance of the letter agreement and breach of contract.

The parties each accuse the other of failing to diligently and faithfully engage in discovery. Numerous attempts to foster agreement between the parties concerning the proper scope of discovery proved fruitless necessitating this motion. The specific discovery issue in dispute concerns the scope and expense of production of electronically stored information ["ESI"]. The parties cannot agree upon search term protocols, the cost of production of ESI and the burden of such production.

#### Conclusions of Law

In one of the earliest New York cases dealing with ESI the court noted that "electronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR" (see, Lipco Electrical Corp., v. ASG Consulting Corp., 4 Misc3d 1019(A), 798 NYS2d 345 [Supreme Court Nassau County 2004]). Nevertheless, courts in New York, other states and the Federal courts have crafted guidelines and rules to govern discovery for

ESI. Thus, Federal Rule of Civil Procedure §26(b)(2)(B) amended in 2006 states that "a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost" (id). In Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294 [S.D.N.Y. 2012] the court held, based upon the advisory committee notes to the amendments, that the undue burden or costs relate to the accessibility of the ESI not the cost of production. The court explained that "for example, the sheer volume of data may make its production expensive, but that alone does not bring it within the scope of Rule 26(b)(2)(B). Rather, the cost or burden must be associated with some technological feature that inhibits accessibility" (id). This comports with the presumption enunciated by the Supreme Court that "the responding party must bear the expense of complying with discovery requests" (Oppenheimer Fund Inc., v. Sanders, 437 US 340, 98 S.Ct. 2380, 57 L.Ed2d 253 [1978]). Thus, early cases rejected cost shifting on the basis of undue burden. As one court observed in a design defect case against General Motors "the mere fact that producing documents would be burdensome and expensive and would interfere with a party's normal operations is not inherently a reason to refuse an otherwise legitimate discovery request" (Baine v. General Motors Corp., 141 F.R.D. 328 [Middle District of Alabama 1991]).

However, recently courts have adopted a more favorable approach to cost shifting. As one court recently explained "where the cost of producing documents is very significant, the Court has the power to allocate the cost of discovery, and doing so is fair. If Plaintiffs' counsel has confidence in the merits of its case, they should not object to making an investment in the cost of securing documents from Defendant and sharing costs with Defendant" (Boeynames v. LA Fitness International LLC, 285 F.R.D. 331 [Eastern District of Pennsylvania 2012]).

Turning to New York, courts generally require the party to produce all relevant ESI regardless of the costs involved. However, "the court is not insensitive to the cost entailed in electronic discovery, and would, at the appropriate juncture, entertain an application by defendants to obligate plaintiff, the requesting party, to absorb all or a part of the cost of the e-discovery it seeks, or will seek" (Weiller v. New York Life Insurance Company, 6 Misc3d 1038(A), 800 NYS2d 359 [Supreme Court New York County 2005]). Indeed, NYCRR 22 §202.70(g)(8)(b)(x) states that "the anticipated cost and burden of data recovery and proposed initial allocation of such costs" may be addressed to the court.

In efforts to reduce costs and streamline ESI production, courts have endorsed the use of search terms which narrow the scope of the documents sought. There is an inherent problem

utilizing search terms whereby such terms by their very nature may limit relevant discovery. The prevalence or richness of the yield is necessarily constrained by the search terms used. The yield rate which is defined as "the fraction of documents in a population that are relevant to an information need" (Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology Assisted Review*, 7 Fed. Ct. L. Rev. 1, 26 [2013]) cannot fall below a minimum, yet undefined, standard. To alleviate these and other problems "where ESI is concerned, this typically means the parties are expected to meet and confer about custodians of relevant ESI, date ranges for searches of ESI, and other search parameters" (see, Brown v. Barnes & Noble, Inc., 474 F.Supp3d 637 [S.D.N.Y. 2019]). In Brown (supra) the court highlighted the burden and cost of preparing and reviewing ESI prior to furnishing it to the other side. Specifically, the court noted that "the negotiation of ESI protocols takes an inordinate amount of time and tends to delay, rather than expedite, discovery. Disputes frequently arise about which and how many custodians' records will be searched, search terms, the scope of so-called seed sets used in some active learning TAR processes, and appropriate sampling and quality control processes" (id). Furthermore, "the review process itself is time-consuming. The average rate of review is about 40-60 documents per hour, though the rate of review can vary considerably based on the complexity of the documents and the

experience of the reviewers. Assuming a case involves review of 100,000 documents, it would take 2000 hours for an attorney to review these documents for production if reviewing them at a rate of 50 documents per hour" (id). Lastly, the court noted that collection and review can be very expensive. In the present case all those expenses are increased by the failure to agree on search terms and for protracted conferences and motions submitted. Consequently, where parties dispute the relevant search terms that should be employed the court must make an appropriate determination (Beaton v. Verizon New York Inc., 2020 WL 6449235 [E.D.N.Y. 2020]).

Considering all of the above the court resolves the dispute as follows: the defendant shall produce all the ESI and utilize the three search terms proposed by the plaintiff, namely "Amity," "Amity Street" and "88-98 Amity. However, such ESI will be limited to the eleven custodians defendant proposed, namely, Tony Catanzaro, Gabriele Corazza, Michael Decker, Jamie Ferber, Sally Hu, Matthew Izzo, Kenneth Kruppa, Anthony Kowalski, Marco Martegiani, Rance McFarland, Joseph Roussine, Stefani Soncini, and Michael Wewiora. This protocol should yield the most relevant emails from the most relevant custodians at a modest expense. This incremental approach should resolve some of the more pressing issues raised by the parties (see, Haka v. Lincoln County, 246 F.R.D. 577 [Western District of Wisconsin, 2007]).

If the plaintiff has a basis to seek further ESI following

this production they can surely raise such request at that time. Likewise, if the defendant believes this request remains overly burdensome and costly they can move to seek cost sharing pursuant to the above rules noted.

So ordered.

ENTER:



DATED: April 27, 2021  
Brooklyn N.Y.

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Hon. Leon Ruchelsman  
JSC