

Zimmerman v 410-57 Corp.

2023 NY Slip Op 31920(U)

June 2, 2023

Supreme Court, New York County

Docket Number: Index No. 653569/2020

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAKOTA D. RAMSEUR **PART** **34M**

Justice

-----X

BETSY ZIMMERMAN, EDWARD ZIMMERMAN,

Plaintiffs,

- v -

410-57 CORPORATION, THE BOARD OF DIRECTORS OF
THE 410-57 CORPORATION, JOSHUA FORMAN,

Defendants.

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INDEX NO. 653569/2020

MOTION DATE 08/02/2022

MOTION SEQ. NO. 009

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 442, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459

were read on this motion to/for ATTORNEY - FEES.

Plaintiffs, Betsy Zimmerman and Edward Zimmerman (plaintiffs), commenced this action for, *inter alia*, breach of contract and breach of fiduciary duty against defendants, 410-57 Corporation, the Board of Directors of the 410-57 Corporation, and Joshua Forman (Forman) (collectively, defendants), stemming from the purchase of the apartments known as Penthouse AB and Penthouse C in the building located at 410 East 57th Street, New York, New York (premises). Non-party law firm Chemtob Moss Forman & Beyda (CMFB) now moves pursuant to CPLR §§ 3111, 3122(d), and 22 NYCRR 202.70 for an award of attorneys' fees in the amount of \$104,270.33, in addition to costs and disbursements for responding to plaintiffs' July 2, 2021 subpoena directed to CMFB (the subpoena), and pursuant to CPLR 3103(a) for a protective order. Plaintiffs oppose the motion. For the following reasons, the motion is granted in part.

Plaintiffs commenced this action stemming from a dispute concerning the purchase of the premises in July 2017 and became the owners of the shares of 410-57 Corporation. Plaintiffs allege that shortly thereafter, the habitability of the premises was diminished due to hazardous conditions including substantial and chronic leaks in the roofs, ceilings, and walls, substantial and chronic leaks in the pre-1999 windows and doors, and defendants' refusal to maintain, repair, and replace same, dangerous and pervasive mold, and the refusal to test for and/or remediate same, grossly inadequate water pressure which does not comply with applicable code, and a lack of sufficient hot and cold water, and damage to and loss of use of the terrace due to the unauthorized installation and presence of tarps and other materials, and defendants' failure to repair the terrace. The complaint also alleges that defendants prevented plaintiffs from renovating, in that they unreasonably withheld, delayed, conditioned, and ultimately denied consent to proposed alterations to the premises. As a result, plaintiffs allege that the premises was rendered uninhabitable, requiring plaintiffs to abandon the premises.

On July 2, 2021, plaintiffs served the subpoena on CMFB, primarily seeking communications by defendant Joshua Forman, an employee of CMFB, concerning plaintiffs and the premises. The parties agree that Forman is a named partner at CMFB and the former president of the Board of Directors of the 410-57 Corporation. On July 21, 2021, CMFB filed a motion to quash the subpoena (motion sequence 004). On May 11, 2022, the Court filed the decision and order granting CMFB's motion to quash in part, striking and modifying certain demands and modifying certain definitions (NYSCEF doc. no. 432).

In support of its motion, CMFB first argues that plaintiffs should bear the costs associated with CMFB's production of discovery pursuant to the subpoena, as it is a non-party to this action. First, CMFB contends that it is entitled to expenses related to Barrister Digital Solutions, the e-discovery vendor CMFB hired to perform a search of CMFB's email server. Second, plaintiffs seek attorneys' fees associated with the production. Specifically, CMFB argues that production expenses include reviewing the documents to ensure that confidential and privileged matter in connection with clients of the firm were not wrongfully shared. CMFB submits the time log detailing the work counsel for CMFB, Lauren Blau, Esq., performed as part of this action. According to the time log, counsel spent a total of 196.4 hours from the period of July 14, 2021 through July 25, 2022. Counsel indicates that her billable rate was \$460/hour until December 16, 2022 when her hourly rate increased to \$480/hour. The time log indicates entries for court appearances, a meet and confer, correspondence with the Court and plaintiffs' counsel, attempts to seek plaintiffs' compliance, and having to review Forman's email and produce responsive documents and a privilege log. The time log also includes several itemized entries for the following: prepare for court appearance, emails with Court, emails with Barristers, review documents from Barrister, Court appearance, telephone call with attorney, review proposed decision, review responsive documents, emails with counsel, review correspondence to Court, legal research, review invoice, just to name a few. CMFB further contends that the Commercial Division Rules permit attorneys' fees associated with the review for relevance and privilege. CMFB next argues that it is entitled to legal fees associated with filing its motion to quash the subpoena, since it was successful in its motion. CMFB further contends that a protective order is warranted to deter future costs and annoyance.

In opposition, plaintiffs argue that CMFB is not a typical non-party, in that Forman was the president of the board and the managing partner at CMFB, who had control of email access at the firm. Plaintiffs contend that Forman used multiple CMFB email addresses for business on behalf of the defendants that, as plaintiffs claim, are relevant to the claims at issue in this action. Plaintiffs further argue that CMFB's motion is untimely, since it failed to meet and confer on this issue or to raise this issue during court conferences. Plaintiffs next argue that even if CMFB is entitled to expenses, they improperly seek costs for tasks wholly unrelated to producing documents, including prior motion practice, communications with various counsel, and CMFB's review for privilege regarding other unrelated clients and responsiveness. Plaintiffs contend that any fee award would have to be further reduced because CMFB's time records are vague. Plaintiffs further argue that CMFB's ESI vendor performed certain unnecessary work, inflating the total cost. Plaintiffs next argue that CMFB failed to show that it is entitled to fees or costs in connection with the motion to quash or a protective order against future disclosure.

At the outset, the Court finds that CMFB is a non-party for the purposes of CPLR 3111 and 3122(d). CPLR 3111 states, in relevant part, that “[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.” Similarly, CPLR 3122(d) states, in relevant part, that “[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.” Plaintiffs argue that CMFB should not be treated as an unrelated party, since defendant Forman, the managing partner of the firm, used the firm’s email as a means to conduct business in his role as president of defendant 410-57 Corporation. However, plaintiffs do not cite to any caselaw or statute suggesting that the protections afforded to a non-party under CPLR 3211 and 3122(d) do not apply to the CMFB, a non-party to this action.

Instead, plaintiffs cite to *Dow Chem. Co. v Reinhard*, No. M8-85 [HB] [SD NY Apr. 29, 2008]), in support of its proposition that CMFB is not the “quintessential, innocent, disinterested bystander” that the rules are crafted to protect. In the context of Fed. Rule Civ. Proc. Rule 45(d)(2)(b), courts have found “[t]hat a court does have discretion to split the costs between the nonparties and the requesting party when the equities of the particular case demand it” (*id.*). Accordingly, “[a] non-party can be required to bear some or all of its expenses where the equities of a particular case demand it” (*In re First Am. Corp.*, 184 FRD 234 [SD NY 1998]). The factors to be considered in determining whether cost-shifting is warranted include: “1) whether the nonparty actually has an interest in the outcome of the case[;] 2) whether the nonparty can more readily bear the costs than the requesting party[;] and 3) whether the litigation is of public importance” (*Dow Chem. Co.* at 1). The facts herein do not favor cost shifting in favor of plaintiffs: CMFB has no interest in the outcome of the case; it is unclear which party is more readily able to bear the cost of the production of documents; and this case has no public importance because it is a private matter (*see In re Namenda Dir. Purchaser Antitrust Litig.*, No. 15 Civ. 7488, 2017 WL 3822883, at *4 [SD NY Aug. 30, 2017] [finding that cost shifting was appropriate where non-party had no interest in the litigation and where there was no indication that the non-party was in a better position to pay for the costs of document production]). Accordingly, the Court declines to find that CMFB was anything but a non-party to this action, or otherwise apply the cost-shifting mechanism applied in *Dow Chem. Co.*

As CMFB is a non-party, the Court must next determine whether the subject expenses are encompassed by CPLR 3111 and 3122(d).

CPLR 3111 and 3122(d) do not define “reasonable production expenses,” but courts have held that production costs can include the costs for locating documents and producing documents (*see Tener v Cremer*, 89 AD3d 75, 82 [1st Dept 2011] [“CPLR 3111 and 3122(d) require the requesting party to defray the reasonable production expenses of a nonparty. Accordingly . . . the court should allocate the costs of this production” to the requesting party]). While attorneys’ fees are not explicitly mentioned in neither CPLR 3111 or 3122, the practice commentary for CPLR 3122(d) states that “[t]he court would be empowered to direct such a payment, particularly where any substantial right of the nonparty witness is involved and representation by an attorney is needed” (Patrick M. Connors, Practice Commentaries, CPLR C3122:4, citing 22 N.Y.C.R.R. § 202.70[g], Com. Div. Rules, Appendix A, Guidelines for Discovery of Electronically Stored Information [“ESI”] from Nonparties, V., A & B). Trial courts have generally agreed that production expenses include attorneys’ fees (*see Finkelman v Klaus*, 17

Misc. 3d 1138[A] [Sup Ct, Nassau County 2007] [holding that the production expenses under CPLR 3122 include the reasonable cost of labor expended to gather and review documents for production, including attorneys' fees]; *The Walt Disney Co. v Peerenboom*, 2019 NY Slip Op. 30181[U] [Sup Ct, New York County 2019] [finding there is no prohibition to the allocation of attorneys fees pursuant to CPLR 3111 and 3122(d)]; *Mayer v Marron*, 2018 N.Y. Slip Op. 30229[U], at *9 [Sup Ct, New York County, Feb. 14, 2018] ["While the CPLR only states that a nonparty is entitled to 'reasonable production expenses,' there is authority indicating that such expenses may also cover production-related costs, 'including attorneys' fees, to a non-party for costs incurred in complying with a subpoena' "], quoting *Parklex Assocs. v Parklex Assocs., Inc.*, 33 Misc 3d 1216[A], *4 n.8 [Sup Ct, Kings County 2011]; *but see L.F. v M.F.*, 78 Misc. 3d 810 [Sup Ct, Nassau County 2023] [holding that CPLR § 3122(d) was not intended to include reimbursement of attorneys' fees within the context of a matrimonial action]).

The question of whether the review of documents for relevancy and privilege should be included in the calculus is less clear. In *Finkelman v Klaus* (856 NYS2d 23 [Sup Ct, New York County 2007]), the parties asserted claims stemming from an alleged verbal "handshake" deal and "Global Agreement" between the parties (*id.* at 1). Plaintiff thereafter served a subpoena upon non-party Tannenbaum, Halpern, Syracuse & Hirschtritt, LLP, the law firm that represented the defendants at the time the parties entered into the agreement, seeking certain documents and testimony related to the agreements. The law firm withheld certain documents based on attorney client privilege. Thereafter, the plaintiff moved for an order pursuant to CPLR 2308(a) and 3124 compelling the non-party law firm and a partner of the firm to comply with the subpoena and subpoenas duces tecum served on them seeking the firm's production of documents and communications concerning the agreement. The court found that "[w]hile some costs are recoverable by a non-party responding to Subpoenas Duces Tecum, the responding party does bear the costs associated with withholding documents from production due to relevancy or privilege" (*id.* at 6). After finding that certain communications were not protected, the court "[d]irected [plaintiff] to pay the defendants the costs incurred in producing the e-mail records in order to procure their production" (*id.*).

The court in *Finkelman* addressed the factual circumstance where the non-party withheld certain documents from the plaintiff based on an assertion of attorney client privilege, thus necessitating a motion to compel, whereas here, the attorneys' fees stem from the production itself and fees stemming from motion practice. Thus, while "reasonable production expenses" do not include attorneys' fees for the conferences and motions in this matter, it may include attorneys' fees stemming from the fees associated with the review of responsive documents for relevance and privilege, so long as those fees are reasonable (*G. Willi-Food Intern. Ltd. v Herzfeld & Rubin, P.C.*, 2019 N.Y. Slip Op. 31410[U], at *3 [Sup Ct, New York County, May 20, 2019] [finding that "reviewing for privilege" may be calculated as part of reasonable production expenses], citing *Tener*, 89 AD3d at 82). This finding makes sense, since the court in *Finkelman* relies on *AYW Networks, Inc. v Teleport Communications Group, Inc.*, 2005 WL 8162267, at *1 [Sup Ct, Nassau County, June 13, 2005]), which held that the non-party was not entitled to attorneys' fees "[a]s a result of the parties' various discovery demands and details the legal work, i.e., motion to quash subpoena, memorandum of law, telephone conferences/in person hearings related to discovery, . . .". Importantly, the court in *AYW* did not explicitly exclude attorneys' fees related to review for privilege from "reasonable production expenses."

Accordingly, the Court finds that *Finkelman* does not preclude the inclusion of attorneys’ fees stemming from the review for relevancy and privilege in the context of CPLR 3111 and 3122(d).

Thus, the question turns into, taking into consideration the defined search terms limiting the scope of the documents retrieved, whether the attorneys’ fees by CMFB for the review of the documents are reasonable. As discussed above, the time log includes certain descriptions, such as “review responsive documents” and “telephone call with attorney,” but without more, the time log is insufficient to decide whether the fees are reasonable. Accordingly, the question of whether the attorneys’ fees were reasonable, including the hourly rate charged by attorney Blau and the fees charged by CMFB’s vendor, is referred to a special referee to determine.

The Court further finds that CMFB is not entitled to recover its attorneys’ fees relating to its communications with defendants’ counsel (*see JHAC LLC v Advance Entertainment, LLC*, 2022 N.Y. Slip Op. 30251[U] at *3 [Sup Ct, New York County 2022] [“The court agrees that it would be unreasonable to hold the requesting party responsible for fees generated by communications between the nonparty and opposing counsel”]; *Peters v Peters*, 2016 N.Y. Slip Op. 31254[U] [Sup Ct, New York County 2016] [declining to “award attorney’s fees to [the nonparty] with respect to time spent conferring with defendants’ counsel”]).

To the extent that the CMFB also seeks a protective order pursuant to CPLR 3103, that branch of the motion is denied. A protective order is to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103[a]). As CMFB does not identify any other discovery request seeking the same discovery as previously ordered, or otherwise identify an unreasonable demand for discovery, a protective order at this time would be premature.

Accordingly, it is hereby

ORDERED that the motion of Chemtob Moss Forman & Beyda (CMFB) seeking an order to compel plaintiffs to defray its reasonable expenses incurred to comply with plaintiffs’ subpoena is granted to the extent that this matter shall be referred to a Special Referee, to hear and report with recommendations, on the issue regarding the reasonableness of the attorneys’ fees and the e-discovery vendor expenses incurred by CMFB; and it is further

ORDERED that CMFB shall serve a copy of this order with notice of entry, within ten (10) days of entry, together with a completed Information Sheet, upon the Special Referee Clerk (spref@nycourts.gov), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date.

This constitutes the decision and order of the Court 20230606165933DRAMSEUR0F7AE313DA024FC8AC0C35FC6B08FE3D

<u>6/2/2023</u> DATE					<u>DAKOTA D. RAMSEUR, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>
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					OTHER
					REFERENCE