Aldrich v Northern Leasing Sys., Inc.

2012 NY Slip Op 32193(U)

August 17, 2012

Supreme Court, New York County

Docket Number: 602803/07

Judge: Martin Shulman

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SCANNED ON 8/20/2012
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN
Justice

PART 1

Index Number : 602803/2007
ALDRICH, BRADLEY C.
vs.
NORTHERN LEASING SYSTEMS, INC.
SEQUENCE NUMBER : 008
ORDER OF PROTECTION

INDEX NO. 602803/07
MOTION DATE ______
MOTION SEQ. NO. 008

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits A-F	No(s). 1, 2
Answering Affidavits — Exhibits 1-4	No(s). 3
Replying Affidavits - Exhibits G-K	No(s). 4

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
AUG 20 2012
NEW YORK
COUNTY CLERKS OFFICE

Dated: August 17, 2012

______, J.S.C.
HON. MARTIN SHULMAN

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

---X

BRADLEY C. ALDRICH, MICHAEL ARNOLD,
ESTELA SALAS and STEPHANIE WEIER,
on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

NORTHERN LEASING SYSTEMS, INC., JAY COHEN
STEVE BERNARDONE, RICH HAHN, SARA KRIEGER
AND JOHN DOES 1-50,

Defendants.

---X

Index No: 602803/07

Decision and Order

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Hon. Martin Shulman, JSC:

Defendants move for a protective order pursuant to CPLR §3103(a) with respect to plaintiffs' demand for the production of certain emails. Specifically, defendants seek to limit the scope of emails to be produced to those relating to the four named plaintiffs, or to require plaintiffs to pay all costs related to producing the emails. Alternatively, defendants request that they "only be required to produce a sample set of the requested emails after a decision is rendered on Plaintiffs' impending motion for class certification . . ." Plaintiffs oppose the motion.

According to defendants, the parties agreed upon search terms and further agreed that: 1) they would follow the same protocol for email production as was directed in a related federal action;[1] and 2) the scope of the email search would entail "emails to/from the named individual defendants or involving the ISOs who dealt with

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[1] See U.S. District Judge James S. Gwin's June 3, 2010 decision in *Serin, et al. v Northern Leasing Systems, Inc., et al.*, Case No. 7:06-CV-1525 (JG), at Exh. 1 to Chittur Aff. in Opp.) ("Serin").

the Plaintiffs" (Lillienstein Aff. in Supp. at Exhs. A & B). The only unresolved issue is which party should bear the production costs. Defendants submit two written estimates for the search costs, one totaling $61,943 and the other $104,641, exclusive of attorney review time (*id.* at Exh. C).

Defendants note that the foregoing agreement was reached prior to plaintiffs' counsel advising that the emails would not be required to move for class certification and request that this court hold determination of this motion, including the scope of emails to be produced, in abeyance pending decision on the class certification motion. Absent class certification, defendants contend that the discovery plaintiffs seek is irrelevant to the four plaintiffs' claims and the cost of the production will far exceed the total amount of damages these plaintiffs may recover.

In opposition, plaintiffs *inter alia* cite *U.S. Bank Natl. Assn. v Greenpoint Mtge. Funding, Inc.*, 94 AD3d 58 (1st Dept 2012), for the proposition that the producing party must bear the costs of production, even with respect to electronically stored information such as emails. However, *U.S. Bank* adopts the holding in *Zubulake v UBS Warburg LLC*, 220 FRD 212 (SDNY 2003), and notes that costs may be shifted in the court's discretion upon evaluating the following seven factors:

> "1. [t]he 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" (*Zubulake*, 217 FRD at 322).

Plaintiffs also argue that "the emails sought are material to Defendants' liability for wilful violations of the FCRA and NYFCRA . . ." (Chittur Aff. in Opp. at ¶2). However, by decision and order dated August 16, 2012, this court *inter alia* denied plaintiffs' motion for class certification and granted defendants' cross-motion for summary judgment dismissing Counts I and V of plaintiffs' complaint alleging defendants willfully obtained plaintiffs' consumer credit reports without a permissible purpose in violation of the Fair Credit Reporting Act ("FCRA") and its New York counterpart ("NYFCRA"), and further dismissing Counts II and VI of the complaint alleging defendants negligently obtained plaintiffs' consumer credit reports without a permissible purpose in violation of the FCRA and NYFCRA.[2]

In light of this court's dismissal of plaintiffs' causes of action alleging wilful and/or intentional violations of the FCRA and the NYFCRA, many of the emails plaintiffs seek now appear to be irrelevant. Moreover, as class certification has been denied, only three[3] plaintiffs' claims are now before the court and a comparison of the cost of production with the amount in controversy does not warrant imposing this expense upon defendants at this time. Clearly, the scope of emails to be produced must be limited as a result of this court's recent rulings and defendants are entitled to a protective order with respect to their production of emails. The foregoing is without

[2] Counts I and V were dismissed as against all defendants and Counts II and VI were dismissed solely as against the individual defendants.

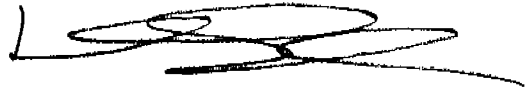
[3] In connection with the class certification motion, this court learned that plaintiff Stephanie Weier has declared bankruptcy and as a result, determination of her claims in this action is automatically stayed.

prejudice to plaintiffs' right to serve a subsequent demand for the production of emails, tailored to reflect the case's present status. Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent that defendants are granted a protective order with respect to their production of emails as set forth herein.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
August 17, 2012



HON. MARTIN SHULMAN, J.S.C.

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