PREPARED BY THE COURT

CHELSEA SQUARE CONDOMINIUM ASSOCIATION, INC.,

Plaintiff,

vs.

CHELSEA COMMONS, LLC.; GRACE D'ADAMO DEROSA; IGOR BORKIN; IRINA BOKIN; PADMA RANGCHAR; HEMMIGE V. RANGCHAR; IRA D. ROSENTHAL; BARBARA ROSENTHAL; JOSEPH KERRIGAN; CAROLYN KERRIGAN; BARBARA LURIE; FRED EVANS; HILLARY EVANS; AUGUSTIN APIAR; DIANE APIAR; DEBBY H. ANASTASIA; PHILIP ANASTASIA; JOHN F. MELHORN; ANNA S. MELHORN; HO SHING MAK; OLIVIA MAK; ZINAIDA AYZIN; ROBERT E. RICKER; JOSEPHINE RICKER; MARIO VERRI; ELIZABETH VERRI; VERA JOAN COSTANZO; ELIZABETH COSTANZO GOLEY; JOHN OLIVER PAVING, INC.; DREAMERS PAVING LLC; JLV LANDSCAPE AND PAVING LLC; GET FENCED; AAA GATEWAY FENCE CO.; DELTA MECHANICAL SERVICES LLC; MACARO IRON WORKS; F&C PROFESSIONAL ALUMINUM RAIL CORP.; CLEM ORNAMENTAL IRON WORKS; SHEL-RON PLUMBING AND HEATING; CLAYTON PLUMBING & HEATING; METROCORP PLUMBING, INC.; MAGRANN ASSOC.; J&M HOME IMPROV D/B/A MELODY PRYOR; ROBINSONS FIBERGLASS SERVICES; MARONE CONTRACTORS INC.; LOPES MASONRY, INC. D/B/A SKY MASON

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

MONMOUTH COUNTY

DOCKET NO.: L-2406-18 (CBLP)

Civil Action

ORDER

AND CONTRACTING LLC; F&B ROOFING & SIDING INC.; PIZZO CONTRACTING INC. T/A CARL'S FENCING, DECKING & EXTERIORS; ALL COUNTY ENTERPRISES; COMFORT HVAC, LLC; BARRERA'S CONSTRUCTION; CAMPOS BEST CONSTRUCTION, LLC; D&A IMPROVEMENT, INC.; ERE CONSTRUCTION; JO CONSTRUCTION; LUNAS CONSTRUCTION; NATIONAL'S CONTRACTOR COMPANY, INC.; STRONG CONTRACTORS INC.; "JOHN DOES" 1-10 (fictitious individuals); ABC CONTRACTORS 1-20 (fictitious contractors/subcontractors); and, XYZ ARCHITECTS/ENGINEERS 1-10, *Defendants*.
CHELSEA COMMONS, LLC, *Third Party Plaintiff*, vs. ARTHUR FUSCO and JENIFER FRISCIA, *Third Party Defendants*.
DELTA MECHANICAL SERVICES LLC, *Third Party Plaintiff*,

vs.

COMFORT HVAC, INC. and JOHN DOES 1-10 (fictitious names representing unknown individuals), ABC COMPANIES 1-10; and, XYZ CORPORATIONS 1-10 (fictitious names representing unknown corporations, partnerships and/or Limited Liability Companies or other types of legal entities),

Third Party Defendants.

ALL COUNTY ENTERPRISES,

Third Party Plaintiff,

vs.

BARRERA'S CONSTRUCTION; CAMPOS BEST CONSTRUCTION, LLC; D&A IMPROVEMENT, INC.; ERE CONSTRUCTION; JO CONSTRUCTION; LUNAS CONSTRUCTION; NATIONAL'S CONTRACTOR COMPANY, INC.; STRONG CONTRACTORS INC.; JOHN DOES 1-10 (fictitious names representing unknown individuals); and ABC COMPANIES 1-10 (fictitious names representing unknown corporations, partnerships and/or Limited Liability Companies or other types of legal entities),

Third Party Defendants.

THIS MATTER having been opened to the court, sua sponte because of a pending discovery dispute, to decide which party or parties should bear the costs of Chelsea Commons' responses to plaintiff's discovery demands and whether there should be cost-sharing, and for good cause appearing;

IT IS on this 13th day of May 2021; hereby

ORDERED that defendant Chelsea Commons, LLC's request to shift costs is **DENIED WITHOUT PREJUDICE**; and

IT IS FURTHER ORDERED pursuant to R. 1:5-1(a) that a copy of this Order will be served on all parties not served electronically, nor served personally in court this date, within seven (7) days of the date of this Order.

/s/ MARA ZAZZALI-HOGAN, J.S.C.

Opposed (X)

Unopposed ( )

See Attached Opinion.

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

CHELSEA SQUARE CONDOMINIUM ASSOCIATION, INC., Plaintiff, v. CHELSEA COMMONS, LLC, ET AL, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION; MONMOUTH COUNTY DOCKET NO. MON-L-2406-18 (CBLP) Civil Action **OPINION**

Craig D. Goltilla, Esq. & David J. Byrne, Esq., Ansell, Grimm & Aaron, P.C.; Barry Brownstein, Esq., Ward Law, LLC; John Potenza, Esq., Burke & Potenza, P.A.; attorneys for plaintiff, Chelsea Square Condominium Association, Inc.

Terry Zuckerman, Esq., Pollack & Zuckerman, attorney for defendant, Chelsea Commons, LLC.

HONORABLE MARA ZAZZALI-HOGAN, J.S.C.

This case presents a matter of first impression as it involves the question of whether cost-shifting is appropriate when the production of electronically stored information ("ESI") is involved. In its Complaint, plaintiff Chelsea Square Condominiums ("the Association" or "Chelsea Square") seeks damages for various causes of action including negligence, breach of contract and breach of warranty from defendant Chelsea Commons, LLC ("the Sponsor" or "Chelsea Commons). Ultimately, approximately one dozen subcontractors were impleaded. At issue is which party or parties should bear the costs of the Sponsor's

responses to plaintiff's discovery demands and whether there should be cost sharing. The cost for the production of the ESI is $19,106 for 80,000 pages including oversized pages.

I. Background

Approximately two years ago, plaintiff served the Sponsor with a document demand for items such as bills, contracts, invoices, receipts for purchase of materials, written and electronic communications, field notes and plans, for every contractor at the development from 2005 through 2018. The Sponsor objected to the demands as being overbroad and unduly burdensome but invited plaintiff to the Sponsor's office to perform its document inspection. According to defendant, for the next year or so, plaintiff failed to schedule an inspection.

To advance the case, counsel for the Sponsor agreed to have a document reproduction company consult with his client and obtain an estimate for collecting and providing the relevant ESI. Consistent with those efforts, the court entered an order dated March 13, 2020, stating that:

> Sponsor shall provide an estimate of the cost to scan and produce a copy of its file in OCR searchable format by March 31, 2020. The cost of the production shall be shared equally by all parties who request a copy of the file. Parties who do not share in the cost will be permitted to schedule and conduct a document inspection at the Sponsor's office in Morganville, New Jersey.

Due to the COVID-19 public health emergency, the Sponsor's office was closed for several months. It was not until July that the Sponsor was able to obtain an estimate from New Jersey Legal ("NJL") of the cost to scan, label and format approximately 80,000 pages and 300 sheets of oversized building plans. According to NJL, the total estimated

cost of producing the Sponsor's file is $19,706. Upon learning of the cost, several defendants wavered on sharing in the cost. Thereafter, the parties conducted two telephone conferences but were unable to reach an agreement as to dividing the cost and are seeking the Court's assistance in resolving this dispute.

Plaintiff notes that the parties agreed to share in the cost if they wanted a copy of the Sponsor's entire file but concedes that the scheduling order does not compel the parties to pay for the reproduction costs. Ultimately, plaintiff believes that defendants should collectively pay 75% of the costs of reproduction based upon the following allocation: the Association and Sponsor (25% each, for approximately $4,926 each) and other remaining Defendants, Third-Party Defendants and Fourth-Party Defendants (50%, or approximately $9,853 to be divided among them). Likewise, the Association proposes that any party who does not share in the cost shall be permitted to schedule and conduct an inspection at the Sponsor's office in Morganville, New Jersey.

The Association adds that the Sponsor is statutorily obligated to provide the Association with a broad range of documents and materials under both the Condominium Act, N.J.S.A. 46:8B-1 to -38 ("the Condo Act") and the Planned Real Estate Full Disclosure Act, N.J.A.C. 5:26-1.1 to -11.11 ("PREFDA"). The Association enumerates the categories of documents subject to those statutes although they seem much narrower than what is being requested in the Notice to Produce.

According to the Sponsor, plaintiff's request must be denied for several reasons. First, plaintiff does not set forth any reason why the Sponsor should pay thousands of dollars to obtain documents already in its possession. Second, defendants should not be compelled to pay for thousands of irrelevant documents. For example, defendant states

that plaintiff has demanded thousands of documents for vendors concerning things such as appliances and cabinets, which have nothing to do with this construction defect case. Third, a defendant should not have to pay for documents not relevant to their particular claim. For example, the electrician defendants should not have to pay for plumbing documents. In an effort to resolve the disagreement, the Sponsor suggested that plaintiff pay for the production and then recover costs "by charging the other Defendants $.03 per page . . .for their documentation."

II. New Jersey Court Rules

The Complex Business Litigation Program ("CBLP") is designed to streamline and expedite service to litigants in complex business, commercial and construction cases. The New Jersey Supreme Court established the program on January 1, 2015, and on September 1, 2018, the rules governing CBLP practice and procedure became effective. On January 1, 2019, the Judiciary announced additional case management guidelines, model forms and orders. See Directive #01-19 and https://njcourts.gov/courts/civil/cblp.html. These rules are generally modeled off of the Federal Rules of Civil Procedure.

Pursuant to Directive #01-19, the parties should set forth in their Joint Discovery Plan any "issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced" and "describe any agreements reached by the parties regarding same, including costs of discovery, production . . . ." In these parties' joint discovery plan, they did not anticipate any ESI issues and likewise, had not reached any agreements regarding the costs of discovery, which is not uncommon. See Joint Discovery Plan, Question 10. Because the CBLP program is in its

nascent stages, however, there has been a dearth of jurisprudence regarding cost allocation during discovery insofar as it relates to the production of ESI in these cases.

In 2015, however, the Federal Rules of Civil Procedure were amended to reflect the authority of federal courts to allow cost-sharing and consider proportionality under Fed. R. Civ. P. 37(e) and Fed. R. Civ. P. 26(c)(1) (allows court to issue order for good cause "to protect a party from undue burden and expenses, including specifying the terms of discovery such as the 'allocation of expenses for the disclosure of discovery."). The advisory committee notes made clear, however, that cost-shifting should not necessarily be the norm and that rather, the parties should proceed based on the "assumption that the responding party ordinarily bears the costs of responding." Fed. R. Civ. P. 26 advisory committee's notes.

Our court rules mirror many aspects of the federal rules in addressing ESI. See, e.g., R. 4:10-2 (generally governing scope of discovery similar to Fed. R. Civ. P. 26) and R. 4:10-2(f)(2) (imposing limitations on ESI that is "not readily accessible" as does Fed. R. Civ. P. 26(b)(2)(B)). For purposes of the issue currently before the court, Rule 4:10-2(g), which is modeled after Fed. R. Civ. P. 26(b)(1), the court may limit discovery if it determines that:

> (1)The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues. The court may act pursuant to a motion or on its own initiative after reasonable notice to the parties.

R. 4:10-2(g). These considerations are consistent with the guideposts set forth by the Sedona Conference in The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production (October 2017), which can be found at https://thesedondaconference.org/publication/The_Sedona_Principles.[1] While those guidelines are not binding on this court, they are instructive for both jurists and practitioners alike.

During a CMC on September 4, 2020, the court addressed the parties' concerns regarding this issue. After further review of the post-conference submissions, the court had not received any legal analysis from the parties to render its decision regarding allocation of costs. The court thereafter stated as follows: "While the court could make a decision based upon general fairness and equity, it would not be adhering to the spirit of the CBLP and the need to develop guidance in this area." Accordingly, the court provided notice to the parties and an opportunity to state their positions based upon the framework contained in R. 4:10-2(g) and related federal court rules and case law. In response, the following parties submitted legal memoranda in support of their respective positions: Plaintiff Association; Defendant Sponsor; Defendant Marone Contractors and Defendant Robinson Fiberglass Services. The latter two asserted that it would be unfair to evenly divide the costs among all of the parties including the fourteen subcontractors given their small and isolated roles in this construction project. Marone added that it is entitled to any discovery of any document plaintiff intends to use in support of its claims, including

[1] The Sedona Conference Working Group on Electronic Document Retention & Production is essentially a think tank that addresses a wide spectrum of electronic discovery issues by reviewing and analyzing case law, statutes and court rules. The Sedona Principles intend to provide best practices, recommendations, and principles for addressing ESI issues (some of which may arise prior to commencement of a lawsuit) in both state and federal courts.

whatever materials plaintiff obtains from the Sponsor's project file. That defendant stood firm in its position that it had no affirmative duty to contribute to discovery produced by the Sponsor in response to plaintiff's discovery demand.

Meanwhile, Robinson relied primarily upon Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 284 (S.D.N.Y 2003), which is modeled after Fed. R. Civ. P. 26, and examined: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total costs of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. Similarly, plaintiff relied on Federal Rule of Civil Procedure 26 to support its position that the Sponsor, as the responding party, bore the costs associated with any document production. It too noted that Rule 4:10-3 generally follows the federal counterpart and related caselaw.

The Sponsor relied primarily on Rule 4:10(f)(2) and (g), emphasizing that because it had demonstrated how the requests were overly burdensome, that plaintiff must now demonstrate why costs should not be shared. The court notes that at no point did the Sponsor ever formally file a motion for a protective order.

III. The Analysis

No party in this case disputes the fundamental proposition that the responding party generally bears the cost of producing documents. Nor do the parties disagree that the court may, in its discretion, propose an alternative to ensure that the responding party

is not subject to undue burden or expense. See Smithey v. Johnson Motor Lines, 140 N.J. Super. 202 (App. Div. 1976) (holding that the responding party is, upon appropriate proofs, entitled to reimbursement for the time, effort and production costs involved). Once a court determines that the discovery sought is relevant, the producing party must demonstrate good cause for cost-shifting. See also Gulf Oil v. Bernard, 452 U.S. 89, 102 n. 16 (1981)(stating that good cause requires that the moving party to make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements" and R. 4:10-3 (providing court with broad discretion to avoid burdening party by specifying terms or conditions of production or limiting actual scope)).

To date, there is not yet a body of case law in New Jersey regarding when, if at all, cost-shifting should occur when ESI is involved, presumably because the case law cited in the commentary to the New Jersey Court Rules preceded the advent of electronic discovery and ESI by decades. Nonetheless, there have been some amendments to the Court Rules in 2006 and 2016 to reflect the age of electronic information and very general tenets. For example, the 2006 amendment to Rule 4:10(f) demonstrates that ESI is discoverable. The Rule also states that if ESI is not readily accessible because of undue burden or costs, the court should consider whether the information is available from other sources. Likewise, Rule 4:10-2(g), which is entitled "limitation on frequency of discovery," provides that the court may limit discovery if:

> it determines that (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery had had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issue at stake in the litigation, and the importance

> of the proposed discovery in resolving the issue. The court may act pursuant to a motion or on its own initiative after reasonable notice to the parties.

R. 4:10-(g); see also comment 8 to R. 4:10-(g) (stating that this "paragraph gives the court the express authority to limit discovery in the circumstances enumerated by rule in an effort to curb the proliferating discovery abuses attending modern litigation practice").

In document demand number 4, plaintiff seeks "all documents referencing and/or relating to any contractors and/or subcontractors retained by You concerning the Building, the Common Elements, the Units, the Development and/or the Association" for the time period 2005 to 2019. In response, the Sponsor stated that the demand was improper because plaintiff's allegations regarding construction defects were non-specific and vague and dated all the way back to 2004. Consequently, the Sponsor objected to producing the documents thought it offered an on-site inspection.

According to the Sponsor, plaintiff's engineering report does not opine on each and every subcontractor's work. Rather the report criticizes only ten (10) areas of alleged subcontractors: concrete/asphalt/paver defects; improper support of A/C condenser; loose railings; undersized gas line; balconies; masonry walls; vinyl siding; brick masonry veneer; roof covering; and landscaping. These demands include discovery related to "asphalt roads, retaining walls, street lighting, drywall, carpets, gutters, doors, painting kitchen cabinets, appliances, sheet rock, tiling, windows, plumbing, heating, electric, air conditioning, kitchen counters, insulation, stairs, elevators, duct work, chimneys, the pool, pool equipment, the Clubhouse, everything that is installed in the clubhouse fencing, fire hydrants, manholes, street sewers and other installations, etc." The Sponsor adds that plaintiff seeks irrelevant documents "regarding the installation of all the toilets, the painting, retaining walls, carpets, carpentry, electrical, appliances and other items that

have nothing to do with Plaintiff's case." In light of the foregoing, the Sponsor contends that the burden of proof now shifts to plaintiff to demonstrate good cause, considering the limitations of R. 4:10-2(g). Although the court agrees that R. 4:10-2(g) provides the proper analysis, the court does not agree with the Sponsor's conclusion as set forth in detail below.

Factor 1: Whether request is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

As is common with condominium construction cases, there are more than a dozen subcontractors or vendors who worked on the complex at issue, which is comprised of at least 215 units and 14 buildings. Plaintiff does not dispute that its expert does not opine on the liability of all of the subcontractors. In fact, plaintiff has provided a wholly reasonable solution, stating that if the Sponsor objects to producing vendor folders that are irrelevant because the work performed by those vendors or contractors is not implicated in this action, the Sponsor can index the list of vendors or subcontractors that performed work on the project, along with a brief explanation as to why the Sponsor believes the documents are irrelevant. If there are "thousands of irrelevant documents" as the Sponsor contends, that is one simple way to reduce the volume.

The Sponsor's response is essentially that it is plaintiff's fault for asking for all vendors' files. That misses the point. To the extent plaintiff recognizes that some vendors may not be implicated here because of what discovery has revealed thus far, it has provided an alternative, which the Sponsor declines to substantively address. What is equally troubling is the representation that to date, the Sponsor has only produced thirty-eight (38) pages of documents. In other words, the Sponsor made no effort to cull the

documents related to the subcontractors mentioned in the expert report. Indeed, the Sponsor is in the best position to do so because it controlled the development and construction of the association complex.

Regarding whether plaintiff can obtain documents from other sources, the Sponsor contends that plaintiff should seek these documents from the subcontractors, which is more convenient, less burdensome and less expensive for the Sponsor. To request such documents from the subcontractors and the Sponsor is duplicative and cumulative according to the Sponsor. That argument, however, ignores that the Sponsor may have additional or updated documents with markings not contained on the subcontractors' documents and vice versa. Moreover, the Sponsor does not articulate which documents are duplicative. Therefore, that factor does not weigh in favor of shifting the costs to plaintiff and/or the other subcontractors because plaintiff can narrow the request to those vendors or subcontractors contained in the liability report.

Factor 2: Whether the party seeking discovery had had ample opportunity by discovery in the action to obtain the information sought.

That factor is partially addressed above. Although plaintiff may receive some similar documents from the subcontractors, it is important for plaintiff to obtain the contractor's entire file for the project as it may differ from the other parties' files.

(a) the needs of the case;

In this case, plaintiff is seeking fundamental discovery governing the relationships and obligations of the parties among each other and is not seeking anything extraordinary that would warrant cost-shifting.

(b) total cost of the production in relation to the entire controversy;

According to defendant Marone, plaintiff can be "anticipated to assert claims for millions of dollars in damages, while only a few thousand are even remotely related to foundation issues, and no repairs have been made where Marone performed its foundation-waterproofing work." Meanwhile, plaintiff contends that the amount in controversy is "at least $1,000,000." Using plaintiff's more conservative number regarding the value of the case, $20,000 (not including attorney time) would constitute 2% of the value of the case. In other words, when looking at the big picture, the costs are not significant.

(c) the parties' resources;

Unfortunately, none of the parties refers to any specific reasons why the cost of the production is unfair given resources of the respective parties. The Sponsor, however, is in the best position to control costs because it retained the ESI vendor. It is unclear precisely what it is being charged for or if less expensive alternatives were available. For example, it is not evident whether the total bill involves charges for collecting, preserving, processing and indexing ESI, key word searching of ESI, file conversion and/or scanning paper documents to create electronic images. Likewise, it is not clear what the cost would

be if the suggestion posed by plaintiff was used instead. To the extent attorney review is needed for any of those tasks, the Sponsor fails to demonstrate how that cost is unique or particularly burdensome, particularly when it is incumbent upon attorneys to review documents before actually producing them regardless of the format.

(d) the importance of the issue at stake in the litigation.

As noted in the Zubulake case, this factor "will only rarely come into play." There, the subject matter concerned workplace discrimination, which was characterized as a "weighty issue" but "hardly unique." Because the litigation did not present any "particularly novel issue," the court deemed this factor neutral. 216 F.R.D. at 288. For this case, the court finds this factor to be neutral for similar reasons. This is a construction case. Although it is complex because of the number of parties involved, there is nothing to indicate there are any "particularly novel issues."

Conclusion:

For the foregoing reasons, it is clear that the application of general discovery principles as applied to ESI follow the same norms of traditional discovery. Having reviewed various considerations in determining whether the cost of reproduction of ESI should be shifted to plaintiff and/or other parties, the court finds that the Sponsor has not met its burden. Accordingly, the Sponsor's request to shift costs is **denied**.

/s/ MARA ZAZZALI-HOGAN, J.S.C.