

DOCKET NO. KNL CV 12 6018984 S : SUPERIOR COURT
LBI, INC. : J.D. OF NEW LONDON
VS. : AT NEW LONDON
JARED SPARKS, ET AL : SEPTEMBER 15, 2015

ORDER RE:
MOTION RE: ELECTRONIC DISCOVERY, #151 & MOTION TO COMPEL, #154

The defendant, Charles River Analytics (CRA), moves for an order preventing the plaintiff, LBI, Inc., from misusing electronic discovery to harass, and impose undue expenses and burdens on, the defendant, pursuant to Practice Book § 13-5. The defendant brings this motion on the ground that good cause exists to allow the court to grant the relief it requests. The plaintiff opposes the defendant’s motion for a protective order, arguing that the defendant has failed to demonstrate good cause for the order. In conjunction with its opposition to the defendant’s motion regarding electronic discovery, the plaintiff moves to compel the defendant to produce documents in response to certain requests for production propounded by the plaintiff, on the ground that the documents sought contain relevant and material information that the plaintiff requires to prosecute its claims against the defendant.

FACTS

The record reveals the following facts and procedural history. On March 1, 2012, the plaintiff commenced this action in the Judicial District of Waterbury for breach of contract, breach of duty of loyalty, misappropriation of trade secrets, and tortious interference with business and contractual relations by service of process on Jared Dylan Sparks and Jay Williams.¹ On March 23, 2012, the defendants filed a notice of removal and the case was

SUPERIOR COURT - NEW LONDON
JUDICIAL DISTRICT AT NEW LONDON

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FILED

¹ The defendant CRA will hereinafter be referred to as the defendant, while Sparks and

198
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removed to the United States District Court for the District of Connecticut; however, the United States Court of Appeals for the Second Circuit remanded the matter in a September 20, 2012 ruling.² On December 6, 2012, the plaintiff moved to cite the defendant as a defendant and to amend its original complaint. The Superior Court granted that motion on April 9, 2013, and on April 30, 2013, the plaintiff filed its second amended complaint, which sounds in tortious interference with business and contractual relations and future business and contractual relations; abuse of process; civil conspiracy; and violation of the Connecticut Unfair Trade Practices Act against the defendant.

The following is a brief summary of the facts alleged by the plaintiff. On or about January 4, 2010, the plaintiff hired Sparks as an electrical engineer and on or about May 10, 2010, the plaintiff hired Williams as an electronics and mechanical technician. As part of their employment agreements, Sparks and Williams executed nondisclosure and noncompete agreements. While employed by the plaintiff, Sparks and Williams worked extensively on a contract issued by the Office of Naval Research (ONR). From about 2009 through 2011, the plaintiff collaborated with the defendant on a particular ONR program, which included the contract Sparks and Williams worked on. Sometime during 2011, the defendant, Sparks, and Williams allegedly conspired to achieve several objectives, including appropriating the plaintiff's trade secrets and ending Sparks' and Williams' employment with the plaintiff so they could work for the defendant instead. One of the major results of this alleged conspiracy was that the ONR

Williams will be referred to individually. Sparks and Williams are not parties to the present motion. Sparks and Williams were former employees of the plaintiff.

² Following remand, the case was transferred from the Judicial District of Waterbury to the Judicial District of New London.

awarded the defendant—instead of the plaintiff—a subsequent contract to continue the work that the plaintiff had begun via the contract that Sparks and Williams worked on during their employment with the plaintiff.

On June 30, 2014, the defendant submitted a motion regarding electronic discovery pursuant to Practice Book § 13-5, requesting the court to enter an order preventing the plaintiff from misusing electronic discovery to harass, and impose undue expenses and burdens on, the defendant. In response, on July 23, 2014, the plaintiff submitted a memorandum in opposition to the defendant's motion regarding electronic discovery. Additionally, the plaintiff filed a motion to compel and a memorandum of law³ in support of that motion, seeking to compel the defendant to produce documents responsive to certain requests for production previously requested by the plaintiff. On August 20, 2014, the defendant filed a combined memorandum of law in opposition to the plaintiff's motion to compel and reply memorandum in support of its motion regarding electronic discovery. On September 3, 2014, the plaintiff filed a reply memorandum in support of its motion to compel. On April 27, 2015, the parties and the court held a telephone conference to discuss and narrow the issues of the present motions. Following the conference, the parties each submitted supplemental briefs to address questions that arose during the conference. On May 6, 2015, the defendant submitted an affidavit of Alexandra S. Davidson, an attorney for the defendant's counsel, in support of its motion regarding electronic discovery, and on May 18, 2015, the plaintiff filed a supplemental memorandum in opposition. Additional facts will be provided where necessary.

³ The plaintiff submitted a combined memorandum in opposition to the defendant's motion regarding electronic discovery and memorandum in support of its motion to compel.

DISCUSSION

“The granting or denial of a discovery request rests in the sound discretion of the court.” *Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 57, 459 A.2d 503 (1983). “The extent of discovery and use of protective orders is clearly within the discretion of the trial judge.” *Carrier Corp. v. Home Ins. Co.*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-88-352383-S (February 10, 1992, *Schaller, J.*). This discretion “must be exercised in light of the broad and liberal discovery principles governing civil actions.” *State v. McGraw-Hill Cos.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X04-CV-10-6008838-S (September 3, 2014, *Sheridan, J.*).

In its motion regarding electronic discovery, the defendant argues that the plaintiff has already imposed enormous discovery costs and burdens on the defendant and is seeking to expand the production beyond the agreed upon end date. Based on this argument, the defendant requests that the court enter a protective order preventing the plaintiff from misusing electronic discovery to harass, and to impose undue expenses and burdens on, the defendant. Specifically, the defendant’s motion requests the court to either confirm that it need not provide further electronic discovery to the plaintiff or to limit discovery and allocate costs between the plaintiff and the defendant. In response, the plaintiff argues that the defendant has failed to demonstrate that good cause exists to enable the court to grant the relief requested and that, on the other hand, the plaintiff has demonstrated that the electronic discovery sought via its motion to compel is relevant and material to the claims and relief requested in its second amended complaint. Further, it argues that the defendant unilaterally limited their production to the March 1, 2012 end date, which the plaintiff did not realize until after extensive review of the documents.

During the April 27, 2015 conference with the parties, the court requested evidence from the defendant regarding the potential cost of the expanded production and whether the documents at issue were reasonably accessible. In response, the defendant submitted an affidavit of Alexandra S. Davidson, an attorney for the defendant's counsel who worked on the previous discovery production in this action. In her affidavit, Davidson attests to two total estimated costs for the production of the documents at issue. First, she attests to an estimated cost of \$28,168 for review and production of additional electronic discovery of material dated through November 23, 2012, the date that Williams' noncompete agreement with the plaintiff ended.⁴ Second, she attests to an estimated cost of \$107,246 for review and production of additional electronic discovery of material dated through April 1, 2014, the date through which the plaintiff has requested production. In addition to detailing the method by which she reached these estimates, Davidson also attests that the documents at issue are not reasonably accessible. While conceding that the raw data associated with the documents at issue are accessible, Davidson attests that the extensive processing and reviewing of the data that is necessary to identify and produce the responsive documents makes them not reasonably accessible.

In a supplemental reply following the filing of Davidson's affidavit, the plaintiff argues that the defendant's motion regarding electronic discovery should be denied in its entirety because the defendant conceded that the documents are accessible and so cost shifting should be denied; the defendant has proffered no legal basis for including attorney's fees in its estimation of production costs; and the attorney's fees estimates are speculative and unreliable.

⁴ Sparks left employment with the defendant earlier than Williams, so Davidson used Williams' noncompete agreement end date for its estimations because it was the later of the two

noncompete agreement end dates.

“What is discoverable under [the Practice Book rules] is broader than what is admissible at trial, so long as that which is sought during discovery is reasonably calculated to lead to the discovery of admissible evidence.” *Edwards v. Awd*, Superior Court, judicial district of New Haven, Docket No. CV-13-6043343-S (December 31, 2014, *Nazzaro, J.*); see also Practice Book § 13-2. “A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action. . . . A plaintiff should describe with such details as may be reasonably available the material he seeks . . . and should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess would turn up evidence helpful to [its] case.” (Citation omitted; internal quotation marks omitted.) *Berger v. Cuomo*, 230 Conn. 1, 7, 644 A.2d 333 (1994). Electronic documents are no less subject to discovery than paper records. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003).

The Connecticut rules governing electronic discovery were only enacted in 2012; therefore, it is instructive to review the corresponding Federal Rule of Civil Procedure. Rule 26 (b) (2) (B) of the Federal Rules of Civil Procedure places specific limits on electronically stored information. “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.”⁵ Fed. R. Civ. P. 26 (b) (2) (B). “[W]hether production of documents is unduly burdensome or

⁵ Rule 26 (b) (2) (B) of the Federal Rules of Civil Procedure states, in pertinent part, as follows: “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. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the

expensive turns primarily on whether it is kept in an accessible or inaccessible format (a distinction that corresponds closely to the expense of production).” (Emphasis omitted.) *Zubulake v. UBS Warburg LLC*, supra, 217 F.R.D. 318. Further, “whether electronic data is accessible or inaccessible turns largely on the media on which it is stored.” Id. “Information deemed accessible is stored in a readily usable format. Although the time it takes to actually access the data ranges . . . the data does not need to be restored or otherwise manipulated to be usable. Inaccessible data, on the other hand, is not readily usable.” Id., 320.

Pursuant to Practice Book § 13-5 (9), “[u]pon motion by a party from whom discovery is sought, and for good cause shown, the judicial authority may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (9) specified terms and conditions relating to the discovery of electronically stored information including the allocation of expense of the discovery of electronically stored information, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.” A party responding to a request to produce electronic discovery should permit discovery of electronically stored information that is “likely to lead to admissible evidence, is not privileged and is reasonably accessible.” Practice Book § 13-5, commentary (2012). “The decision whether to require the responding party to search for and produce information that is from sources that are not reasonably accessible depends not only on the burden and expense of doing so, but also on whether the burden and expense can be justified in the circumstances of one case.” Id. “Appropriate considerations may include: (1) the requesting party shows good cause”

specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available from more easily accessed sources; (4) the likelihood of finding relevant responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; and (6) a party's willingness to voluntarily bear the cost of discovery.” *Id.* If the court orders discovery after considering evidence of these factors, it has the discretion to allocate the expense of the discovery in whole or in part. *Id.*

In the present case, while the defendant conceded that some of the documents at issue are reasonably calculated to lead to the discovery of admissible evidence, it argues that none of the documents are reasonably accessible. In her affidavit, Davidson attests that because the responsive and discoverable materials are embedded within a large amount of electronic documents, it will take vendor assistance—most likely by Evidox Corporation (Evidox), the electronic discovery vendor that the defendant's counsel has used for similar discovery processes—and many attorney hours to process, review, and make production of them. Further, while she concedes that the raw data is relatively accessible, she states that it would be necessary to engage in extensive processing and reviewing of the raw data to identify responsive and discoverable material.

Davidson's affidavit provides the court with evidence of the burden and expense the defendant would bear in terms of the review and production of the documents in question; however, an affidavit from an attorney who has not attested to having a technical understanding of, or background in, electronically stored data is alone not enough evidence to demonstrate that

the material sought is not reasonably accessible. While Davidson's affidavit outlines the estimation of the vendor costs in terms of tasks that Evidox would have to perform to make the documents at issue discoverable, it does not discuss whether the documents at issue are stored in a readily usable format, which would constitute evidence of their accessibility. *Zubulake v. UBS Warburg LLC*, supra, 217 F.R.D. 320.

Before the court can determine whether the defendant must produce the documents requested and consider cost-shifting, it must determine whether the documents at issue are reasonably accessible. In order to make that determination, the court needs additional evidence demonstrating that the documents at issue are not reasonably accessible, specifically whether they are stored in a readily usable format. For this reason, the court orders the defendant to submit additional evidence demonstrating that the documents at issue are not reasonably accessible.

CONCLUSION

For the foregoing reasons, the court orders that the defendant submit further evidence as to whether the documents at issue are reasonably accessible.

Zemetis, J.