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New York Appellate Division Adopts Zubulake Standard to Determine Which Party Should Bear the Cost of Producing ESI

March 20, 2012

U.S. Bank Natl. Assoc. v. GreenPoint Mortgage Funding, Inc., 2012 N.Y. Slip Op 01515 (N.Y. App. Div. Feb. 28, 2012)

Large scale document production, in particular production involving an extensive amount of electronically stored information ("ESI") has come to the forefront of discovery news lately in New York. We discussed the Appellate Division for the First Department's decision in *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, ____ AD3d _____, NY Slip Op 00658 (January 31, 2012), which adopted the standards articulated by *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) in the context of preservation and spoliation. The First Department has taken it further and adopts the *Zubulake* standard for determining which party should bear the cost of producing the documents in *U.S. Bank Nat. Assoc. v. GreenPoint Mortgage Funding, Inc.*, 2012 N.Y. Slip Op 01515 (N.Y. App. Div. Feb. 28, 2012).

In February 2009, Plaintiff U.S. Bank Nat. Assoc. commenced an action against Defendant GreenPoint Mortgage Funding Inc. and concurrently served its first request for production of documents. Instead of producing the requested documents, on April 28, 2009, Defendant asked the court to condition production on Plaintiff's confirmation that it would pay the cost of producing the discovery. On December 11, 2009, the Defendant moved to stay discovery and to receive a protective order conditioning production of discovery on compliance with a proposed discovery protocol. The protocol provided that each party would pay for its own discovery costs. The Plaintiffs opposed the motion arguing that the cost of production could run into the millions of dollars. The trial court denied the Defendant's motion, but endorsed their contention that inNew Yorkthe well-settled rule is that the party seeking discovery bears the cost incurred in its production.

In reviewing the trial court's order, the Appellate Division noted that the rule allocating cost of searching for, retrieving, and producing discovery has become unsettled because courts struggle with the high cost of locating and producing ESI. Further, the courts have not developed or chosen to follow any one particular standard for cost allocation. For this reason, the Appellate Division determined that *Zubulake* presents the most practical framework for allocating all costs in discovery. *Zubulake* requires, consistent with the Federal Rules of Civil Procedure, "the producing party to bear the initial cost of searching for, retrieving and producing discovery, but permits the shifting of costs between the parties." According to the Court, when evaluating whether costs should

be shifted, courts should follow the seven *Zubulake* factors, which are:

> *(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.*

The Appellate Division found the *Zubulake* standard controlling for multiple reasons, including the fact that (1) "requiring the producing party to bear its own cost of discovery, including the searching, retrieving, and producing of ESI, supports 'the strong public policy favoring resolving disputes on their merits;'" (2) commentators and courts have recently called into question the validity of the "requestor pays" rule; and (3) the adoption of the *Zubulake* standard would be consistent with the long-standing rule in New York that "expenses incurred in connection with disclosure are to be paid by the respective producing parties and said expenses may be taxed as disbursements by the prevailing litigant."

Applying the *Zubulake* standard to the Defendant's motion, the Court found that the motion was premature. The Court stressed that the more prudent course of action would have been for the Defendant to first make a motion to limit or strike the discovery requests if it believed them to be overbroad, irrelevant, or unduly burdensome. Then, if the Defendant "still believed that the costs associated with searching for, retrieving, and producing ESI to be prohibitive," the Defendant could then file a motion for the costs to be shifted to the Plaintiff. Thus, because the record contained no evidence supporting the Defendant's proposed fee structure, the Appellate Division reversed the lower court's order and held that the Defendant should bear its own discovery costs, subject to reallocation on a proper showing of reasons supporting cost shifting. This determination is to be made by the trial court.