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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**

Argued: September 4, 2020

Decided: November 23, 2020

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 matter has been designated a complex commercial case within the Commercial Business Litigation Program (CBLP) because it involves numerous parties and complicated issues arising out of the construction of a condominium complex. 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 Chelsea Commons’ responses to plaintiff’s discovery demands and whether there should be cost-sharing. The cost for the production is $19,106.00 for 80,000 pages including oversized pages. There appear to be no published cases in New Jersey, which address this issue.

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 overbroad and unduly burdensome but invited plaintiff to come to the Sponsor’s office to perform its document inspection. According to defendant, for the next year or so, plaintiff failed to schedule a document inspection.

To advance the case, counsel for the Sponsor agreed to have a document reproduction company come to his client’s office and obtain an estimate for collecting and providing the relevant ESI. Consistent with those efforts, paragraph 2 of the Scheduling Order dated March 13, 2020 stated 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 (25%) (approximately $4,926); Sponsor (25%) (approximately $4,926); and other remaining Defendants, Third-Party Defendants and Fourth-Party Defendants (50%) (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 ("PREDFDA"). 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 as follows:

> The most elegant and equitable resolution is that the Plaintiff recoups its costs by charging the other Defendants $.03 per page charge for their documentation. Since the Sponsor's folders to be preproduced are organized by vendor's name, I am told that this is very easy to do. The Defendants are willing to agree to this reasonable compromise. But, the Plaintiff refused.

II. New Jersey Court Rules

The 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 rule 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, R. 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 has not received any legal analysis from the parties to render its decision regarding allocation of costs. 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 is providing notice to the parties and an opportunity to state their positions based upon the framework set forth herein, specifically relying on R. 4:10-2(g) even though there is no formal motion presently before the court. Accordingly, the parties shall e-file a legal memorandum addressing the considerations

[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.

set forth in R. 4:10-2(g) within fourteen days of this Order. That submission shall not exceed ten pages double-spaced.

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