SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BLAKE SILVERMAN and TRACY SILVERMAN,	:	
Plaintiffs,	:	Index No. 603231/08
-against-	:	**NOTICE OF ENTRY OF ORDER OF THE HON. E. BRANSTEN, DATED NOVEMBER 3, 2010**
BENJAMIN SHAOUL, MARK RAVNER , LEMADRE DEVELOPMENT, LLC, LEMADRE MEZZ, LLC, M&B MEZZ, LLC, M&B REALTY DEVELOPMENT, LLC, MAGNUM MANAGEMENT, LLC, CANTOR AND PECORELLA, INC., ISSAC & STERN ARCHITECTS, P.C., ISMAEL LEYVA ARCHITECT, P.C., MG ENGINEERING, P.C., MGJ ASSOCIATES, ROBERT SILMAN ASSOCIATES, P.C., and PAV-LAK CONTRACTING, INC.,	:	
Defendants.	:	
PAV-LAK CONTRACTING, INC.,	:	
Third-Party Plaintiff,	:	Third Party Index No. 590030/10
-against-	:	
FIRST MERCURY EMERALD INSURANCE COMPANY and CUSTOM METAL CRAFTERS AND ERECTORS, LLC,	:	
Third-Party Defendants.	:	
PAV-LAK CONTRACTING, INC.,	:	
Second Third-Party Plaintiff,	:	
-against-	:	
BAY RESTORATION,	:	
Second Third-Party Defendants.	:	

BENJAMIN SHAOUL, MARK RAVNER, LEMADRE DEVELOPMENT, LLC and MAGNUM MANAGEMENT, LLC,

Fourth-Party Plaintiff,

-against-

FIRST MERCURY EMERALD INSURANCE COMPANY,

Fourth-Party Defendants.

FIRST MERCURY INSURANCE COMPANY,

Fifth-Party Plaintiff,

-against-

ZURICH-AMERICAN INSURANCE COMPANY, RUTGERS CASUALTY INSURANCE COMPANY, COLONY INSURANCE COMPANY and RICTONE CONSTRUCTION, INC.,

Fifth-Party Defendants.

CUSTOM METALCRAFTERS AND ERECTORS, LLC,

Sixth-Party Plaintiffs,

-against-

SESTITO INFISSI USA CORP., INTERCOM, S.R.L., GILSANZ MURRAY STEFICEK, LLP, RICTONE CONSTRUCTION, INC., KAL INDUSTRIES, INC., BAY RESTORATION CORP., "XYZ CORPORATIONS 1-10," AND "JOHN DOES 1-10,"

Sixth-Party Defendants.

BENJAMIN SHAOUL, MARK RAVNER, LEMADRE DEVELOPMENT, LLC and MAGNUM MANAGEMENT, LLC,

Seventh-Party Plaintiffs,

-against-

RICTONE CONSTRUCTION, INC.,

Seventh-Party Defendants.

PLEASE TAKE NOTICE, that the within is a true copy of a Decision and Order of the Supreme Court, New York County (Bransten, J.), dated November 3, 2010, regarding Motion Sequence No. 10, and duly entered and filed in the Office of the Clerk of the Supreme Court of the State of New York, County of New York, at the Courthouse located at 60 Centre Street, New York, New York, on the 5th day of November, 2010.

Dated: New York, New York
November 5, 2010

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Branston **PART** 3m
Justice

Blake Silverman etal

- v -

Benjamen School etal

INDEX NO. 603231/08
MOTION DATE 10/27/2010
MOTION SEQ. NO. 010
MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for compel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

[illegible] ACCOMPANYING MEMORANDUM DECISION

Dated: 11-3-10

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

----------X

BLAKE SILVERMAN and TRACY SILVERMAN,

Plaintiffs,

-against-

Index No.: 603231/08
Motion Date: 10/27/2010
Motion Seq. No.: 010

BENJAMIN SHAOUL, MARC RAVNER, LEMADRE DEVELOPMENT, LLC, LEMADRE MEZZ, LLC, M&B MEZZ, LLC, M & B REALTY DEVELOPMENT, LLC, MAGNUM MANAGEMENT, LLC, CANTOR AND PECORELLA, INC., ISAAC & STERN ARCHITECTS, P.C., ISMAEL LEVYA ARCHITECT, P.C., MGJ ASSOCIATES, ROBERT SILMAN ASSOCIATES, P.C., and PAV-LAK CONTRACTING, INC.,

Defendants.

----------X

PRESENT: EILEEN BRANSTEN, J:

Defendants Benjamin Shaoul, Marc Ravner, Lemadre Development, LLC and Magnum Management, LLC (the "Defendants") move to compel plaintiffs Blake and Tracy Silverman (the "Plaintiffs") to pay for costs of electronic discovery. Plaintiffs oppose.

The parties are familiar with the facts of this matter, and therefore the facts are only discussed as necessary.

ANALYSIS

Defendants move to compel Plaintiffs to pay for the costs of "collecting, processing and hosting electronic data" incurred due to Plaintiffs' requests for disclosure (Defendants' Memorandum of Law in Support of Order to Show Cause to Compel Plaintiffs to Pay For Costs of Electronic Discovery ["Defendants' Memo"], p. 1). Defendants argue that New

York law places such costs on the shoulders of the producing party. Defendants further argue that the data requested was not "readily available," and thus they should not be required to pay for its production.

Defendants rely heavily on *T.A. Ahern Contractors Corp. v Dormitory Authority*, 24 Misc 3d 416 (Sup Ct, NY County 2009) for the proposition that New York law is well-settled in that the "party seeking discovery bears the cost incurred in its production" (*id.* at 424 [*citing Waltzer v Tradescape & Co., LLC*, 31 AD3d 302, 304 [1stDept 2006]; Defendants' Memo, p. 2; Reply Affirmation of Stanley Goos in Support of Order to Show Cause to Compel Plaintiffs to Pay for Electronic Discovery ["Reply Aff."], ¶ 4). In *T.A. Ahern*, both parties moved to compel electronic and other discovery. The plaintiff, Ahern, argued that either the producing party should bear the cost of reviewing the data in question, or turn it over in full subject to a confidentiality agreement, so that Ahern would be able to undertake its own review (*T.A. Ahern,* 24 Misc 3d at 418-419). The court declined to compel production of each party's requests for electronic discovery until each party agreed to cover the costs of producing the data that party requested (*id.* at 424). Any agreement between the parties allocating production costs was specifically subject to reallocation at trial (*id.*).

By contrast, in the instant case, without Plaintiffs' agreement Defendants performed work for which they now seek reimbursement. Defendants argue that Plaintiffs' failure to respond to Defendants' July 9, 2010, letter regarding production cost estimates, coupled with

August 2010 email discussions between Plaintiffs and Defendants regarding search terms to be utilized in discovery, constitutes Plaintiffs' agreement to bear the costs of production (Reply Aff., ¶ 8; *see* Reply Aff., Ex. C ["August Emails"]; Affirmation of Stanley Goos in Support of Defendants' Order to Show Cause to Compel Plaintiffs' to Pay for Electronic Discovery ["Goos Aff."], Ex. C [July 9, 2010 letter from Stanley Goos to Arthur Rosenberg]). However, a party's silence will only be "deemed an acquiescence where he or she is under such a duty to speak that his or her 'conduct, accompanied by silence, would be deceptive and beguiling'" (*Russell v Raynes Associates Ltd. Partnership*, 166 AD2d 6, 15 [1st Dept 1991] [*quoting Brennan v National Equitable Investment Co.*, 247 NY 486, 490 [1928]]). Plaintiffs had no duty in law to respond, and Plaintiffs' lack of response may not be deemed acquiescence.

Defendants have neither alleged nor shown anything about Plaintiffs' August Emails such that the Court will interpret Plaintiffs' lack of response to the July 9th Letter as acquiescence to its terms. Plaintiffs' silence and subsequent conduct were neither deceptive nor beguiling.

Furthermore, even if *T.A. Ahern* was more factually similar to the instant case, the proposition for which Defendants cite the case, when contextualized, does not advance their argument. In stating that it is the "well-settled rule in New York State that the party seeking discovery bear[s] the cost incurred in its production," *T.A. Ahern* cites the First Department's

decision in *Waltzer* (*T.A. Ahern*, 24 Misc 3d at 424). *Waltzer*, as Defendants repeatedly cite, declares: "as a general rule, under the CPLR, the party seeking discovery should bear the cost incurred in production of discovery material" (31 AD3d at 304; Defendants' Memo, p. 3; Reply Aff., ¶ 4).

However, Defendants chose to cite *Waltzer* selectively. The cited quote continues "however, here we are not dealing with the retrieval of deleted, electronically stored material" (*Waltzer*, 31 AD3d 304.). Nor does the instant case involve deleted or similarly impeded data. Indeed, the cases cited by Defendants for the proposition that the requesting party should bear the costs of electronic discovery demonstrate a higher burden to obtain and produce upon the producing party than Defendants allege here. Defendants' data was available, but "interspersed amongst data related to [Defendants'] other business entities" (Defendants' Memo, p. 5; Reply Aff., ¶ 12).

Defendants next cite *Lipco Elec. Corp. v ASG Consulting Corp.*, 4 Misc 3d 1019(A) (Sup Ct, Nassau County 2004) for the proposition that the requesting party pays for the costs of production. The court in *Lipco* declined to order the electronic discovery sought and thus the actual burden that would have been visited upon ASG, the party from whom production was sought is unknown. However, ASG alleged that "[i]n order to provide the data sought . . . a separate program would have to be devised to search for and extract each individual table of data . . .a relational database would then have to be created to store the store the

extracted data and a program devised to transfer the data on to a disc or hard drive . . . [then] a compatible version of [the original program] would have to be acquired and installed in order to read and collate the data" (*Lipco Elec. Corp.*, 4 Misc 3d 1019(A) at 6-7). [1] The burden on ASG was thus much greater then in the case at bar.

Defendants also rely on *Delta Financial Corp. v Morrison,* 13 Misc 3d 604 (Sup Ct, Nassau County 2006) for the proposition that "allocating costs to the requesting party is appropriate where the producing party implemented search and de-duplication protocols in order to harvest responsive information" (Defendants' Memo, p. 4). Extensive discovery had already been conducted in that case, including restoration of back-up tapes containing requested data. Therein, the defendants sought additional discovery from the plaintiffs including additional searches on data already restored from which discovery materials had been produced and searches that would require restoration of additional back-up tapes (*id.* at 606-614). Importantly, the defendants volunteered to pay the costs associated with further discovery and raised the possibility that further searches might not be worthwhile (*id.* at 607). The court, skeptical that any relevant documents would be found, accepted defendants' offer to pay and ordered test searches to determine whether further discovery was appropriate (*id.* at 612, 614). *Delta Financial Corp.* is distinguishable from the case at bar. Plaintiffs have not offered to pay for the costs incurred, relevance is not at issue, and, importantly, the

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[1]Furthermore, *Lipco's* holding regarding cost-sharing in e-discovery derives from two cases predating the explosion of e-discovery.

burden borne by the *Delta Financial Corp.* defendants included restoration of archived material, whereas in the instant case, Defendants' burden does not.

Defendants next cite *Etzion v Etzion*, 7 Misc 3d 940 (Sup Ct, Nassau County 2005) for the proposition that "ordering the requesting party to pay for costs may be appropriate where the producing party must copy or clone entire hard drives of information" (Defendants' Memo, p. 4). The Court in *Etzion* ordered the requesting plaintiff to pay the costs of her own computer expert, but not simply because files had to be copied or cloned. The Court stated that "[i]n cases in which it is suggested that some files might have been deleted or altered, the services of a computer expert is required to insure complete and accurate discovery of relevant data. Notwithstanding an effort to delete certain information, computer experts assert that they can nonetheless 'clone' a hard drive and restore or rescue deleted documents" (*Etzion*, 7 Misc 3d at 943). Indeed, the plaintiff in that case did suggest that files had been altered, and the services of computer experts for both sides were required (*id.* at 941-942). The Court in *Etzion* thus envisioned a heavier burden than Defendants suggest.

Furthermore, contrary to Defendants' assertions, the First Department recently stated that it saw "no reason to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests" *(Clarendon Nat. Ins. Co. v Atlantic Risk Management, Inc.*, 59 AD3d 284, 286 [1st Dept 2009]).

Reading *Clarendon* with *Waltzer*, precedent shows that the requesting party bears the cost of electronic discovery when the data sought is not "readily available." Data is not readily available upon a showing of undue burden by the producing party to obtain the data (*cf. Waltzer*, 31 AD3d at 304; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 27 Misc 3d 1061, 1075-1076 [Sup Ct, NY County 2010]; *Delta Financial Corp*, 13 Misc 3d at 605-617; *Lipco Elec. Corp.*, 4 Misc 3d 1019(A) at 6-7).

The data at issue in the instant case was neither archived nor deleted; it was simply stored in a number of places and "interspersed with defendants' various documents for their several business entities" (Defendants' Memo, p. 5; Reply Aff., ¶ 12). The fact that Defendants were required to "process" the data discloses no undue burden, but merely the normal burden of litigation. Indeed, Defendants suggest they keep their records in accordance with the general expectations of the business world (Reply Aff., ¶¶ 10, 17). We do not suggest that retrieving archived data is the only circumstance that renders electronic data not "readily available." However, Defendants' documents requested by Plaintiffs have not been shown to be unduly difficult or burdensome to obtain and produce. Defendants repeatedly suggest that their allegedly incurred high cost of producing the requested documents is a product of producing *responsive* documents (Defendants' Memo, pp. 2-3, 5;Goos Aff., ¶¶ 12, 14; Goos Aff., Ex. F, Affidavit of Deborah Duffy, ¶¶ 11-14; Reply Aff., ¶ 10). This is a cost that *Waltzer* places squarely on the shoulders of the producing party:

"The cost of an examination by Defendants' agents to see if [material] should not be produced due to privilege or on relevancy grounds should be borne by [the producing party]" (31 AD3d at 304).

We have considered Defendants' arguments and find them unavailing.

Accordingly, it is

ORDERED that Defendants' Order to Show Cause to Compel Plaintiffs to Pay for Costs of Electronic Discovery is denied.

Dated: New York, New York
November 3 , 2010

ENTER

Hon. Eileen Bransten, J.S.C.