

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

HIGH ROCK WESTMINSTER :
STREET, LLC :
 :
v. : C.A. No. 13-500S
 :
BANK OF AMERICA, N.A. :

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A)) is Plaintiff’s Motion to Compel Production by CBRE, Inc. (Document No. 41). Non-party CBRE, Inc. objects. (Document No. 47). A hearing was held on June 6, 2014.

This is an atypical landlord-tenant dispute arising out of a ten-year lease for the twenty-six story office building located at 111 Westminster Street, Providence, Rhode Island. Plaintiff, the owner/landlord, alleges that Defendant, the successor tenant to Fleet Bank, breached certain maintenance and repair provisions of the lease. Plaintiff alleges approximately \$20,000,00.00 in damages to repair, maintain and/or replace aspects of the building damaged by neglect, including the building facade, windows, electrical system and HVAC system. Plaintiff alleges that Defendant ignored the upgrade and/or maintenance recommendations of its various third-party consultants and engineers and took a “do the minimum” approach as the end of the lease term neared.

This discovery dispute centers on a document subpoena served by Plaintiff on non-party CBRE. CBRE was Defendant’s property manager for the 111 Westminster Street building. Plaintiff describes CBRE as a “critical percipient fact witness” who acted “as the exclusive interface between [Defendant] and all of the various vendors and professionals who were engaged to study and

maintain 111 Westminster's mechanical, electrical, HVAC and other systems." (Document No. 41 at pp. 4-5).

Plaintiff contends that CBRE's proposed search for responsive documents is too narrow and that it should be ordered to run an additional search using Plaintiff's proposed search string. (See Document No. 41 at p. 8). Plaintiff also argues that CBRE should bear the costs of its compliance with the subpoena. CBRE counters that it is agreeable to searching "the electronic documents of each of the 39 CBRE custodians identified by [Plaintiff] using virtually all of the search terms proposed by [Plaintiff] (CBRE agreed to use 66 search terms plus any relevant project codes and project numbers)." (Document No. 47 at p. 1). CBRE argues that the "additional" search string proposed by Plaintiff would do nothing other than to produce a large volume of irrelevant documents and increase CBRE's compliance costs. Finally, CBRE argues that "[i]f [it] is ordered to produce documents in response to the subpoena, [Plaintiff] should be required to pay CBRE's costs of compliance pursuant to Rule 45(d)(2)(B)(ii), Fed. R. Civ. P." (Document No. 47 at p. 9).

"Usually, absent an order compelling document production, a non-party bears its own production cost." Behrend v. Comcast Corp., 248 F.R.D. 84, 86 (D. Mass. 2008). Pursuant to Rule 45(d)(2)(B)(ii), if the Court orders production by an objecting non-party, "the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." However, "[a] non-party can be required to bear some or all of its expense where the equities of a particular case demand it." In re Honeywell Intern. Inc. Sec. Litigation, 230 F.R.D. 293, 302-303 (S.D.N.Y. 2003). In determining whether to shift costs from the non-party, courts have considered three factors: "(1) whether the non-party has an interest in the outcome of the litigation; (2) whether the non-party can more readily bear the costs of production than the

requesting party; and (3) whether the litigation is of public importance.” In re Subpoenas to Folliard and McKnight, No. 10-mc-789 (ESH) (AK), 2012 WL 907763 at *2 (D.D.C. March 16, 2012).

“Where the non-party was...substantially involved in the underlying transaction, courts have found the non-party to be interested in the outcome of the litigation.” Id. at *3. See also Wells Fargo Bank, N.A. v. Konover, 259 F.R.D. 206, 207 (D. Conn. 2009) (“In determining whether the requesting party should be required to bear the costs of production, a number of courts have looked to whether the non-party was substantially involved in the underlying transaction and could have anticipated that such transaction could potentially spawn litigation or discovery.”) Here, CBRE managed the building in issue for Defendant for over a decade and supervised the various vendors and professionals who were hired to inspect and maintain the building and its systems. It is also undisputed that CBRE manages other properties for Defendant and, according to Plaintiff’s counsel, Defendant’s document production to date reflects “CBRE’s direct involvement in [Defendant’s] capital budgeting, cost savings initiatives, and related management activities for [Defendant’s] real estate across New England.” (Document No. 52-1, ¶ 13 and Exh. 6). Thus, CBRE’s relationship with Defendant and direct involvement in the management and maintenance of the building in issue is sufficient to provide it with an interest in the outcome of this litigation. Further, CBRE is a major global real estate services company that has the internal expertise and resources to bear the costs of compliance.

Finally, although this dispute involves a long-term lease for a private office building, the building is historic and the most recognizable on Providence’s skyline. It is one of the larger office buildings in downtown Providence and is presently vacant and apparently in need of substantial

upgrades and repairs to be reoccupied as an office building or otherwise repurposed. Thus, this litigation is of public importance.

Applying these factors, the Court concludes that the balance weighs against shifting the costs of production from CBRE to Plaintiff. However, CBRE is not presently ordered to perform the additional search based on the disputed search string proposed by Plaintiff. If, after receiving and reviewing CBRE's document production, Plaintiff still contends that the additional search is necessary to reasonably capture responsive documents, it may move for an order compelling CBRE to conduct the additional search subject to the Court revisiting the issue of cost-shifting under Rule 45(d)(2)(B)(ii).¹ See Tucker v. Am. Int'l Grp., 281 F.R.D. 85, 100 (D. Conn. 2012) (observing that when non-parties are forced to pay the costs of discovery, the requesting party has no incentive to deter it from engaging in fishing expeditions for marginally relevant material).

For the foregoing reasons, Plaintiff's Motion to Compel Production by CBRE, Inc. (Document No. 41) is GRANTED in part and DENIED in part as provided herein.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
June 17, 2014

¹ Of course, before filing such Motion, Plaintiff's counsel shall meet and confer in good faith with CBRE's counsel in an effort to reach agreement regarding the need for and contents of the additional search and the allocation of costs.