New Guidance For Businesses When Responding To A Subpoena

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A common misnomer among businesses is that they must respond to a subpoena with no recourse. Thus, it does not matter how burdensome or disruptive replying to the request would be or whether the request is for personnel files, financial records, or customer information. While businesses are not permitted to ignore a subpoena – as it is issued by the clerk of the court or in the name of the clerk – businesses do have options to push back against overly burdensome requests.

The Appellate Division recently analyzed how discovery applies to companies that are not parties to the lawsuit. In a recently-issued published decision, the court emphasized the distinction between discovery sought upon a party as compared to a non-party. In *Trenton Renewable Power v. Denali Water Solutions*, the court noted that discovery directed at a party was broad, but reversed a trial court's holding that the same analysis for producing discovery should be applied to a non-party. Instead, the court found that these two factors should be balanced against each other when a court assesses a discovery dispute involving a non-party. The first factor is the necessity a party may be under in seeking the discovery, or the importance of the information sought in relation to the main case. This factor is balanced against the second factor, which is the relative simplicity in which the information may be supplied by a party, and the availability of less burdensome means to obtain the same information. If the second factor outweighs the first, the subpoena is to be quashed.

Background

Trenton Renewable Power owned and operated an anaerobic biodigester facility in Trenton. It hired Symbiont Science, Engineering and Construction, an engineering, design and construction firm in Milwaukee, Wisconsin, to design and build its Trenton facility.

Upon the facility being completed, Trenton Renewable Power contracted with Denali Water Solutions to supply organic waste for processing at the Trenton facility. An issue arose in March 2020, when Denali Water Solutions claimed it no longer could no perform its contractual obligations, resulting in Trenton Renewable Power filing a breach of contract lawsuit against Denali. In response, Denali raised two defenses: (1) the COVID-19 pandemic made it impossible to perform under the contract; and (2) there were fundamental design flaws in how the facility was constructed. Denali then served a subpoena on Symbiont (who was not a party in the lawsuit), which required Symbiont provide: (1) a corporate designee with certain specified knowledge to be deposed; (2) all communications between Symbiont and Trenton Renewable Power; (3) construction documents for the facility; and (4) documents and communications between Symbiont and Trenton Renewable Power's lenders.

Due to the project's scope, Symbiont identified 54 individuals on the project and 11 of these individuals who it classified as "key personnel." There further were four "computer drives" in Symbiont's electronic filing system related to the project, which contained 40,000 files and approximately 136 gigabytes of data. Not included in that total were the emails of Symbiont's 100 workers, most of whom had some involvement with this project (as those e-mails were stored elsewhere in the system). Symbiont ran a search through the emails of the key personnel and found 30,999 potentially responsive emails. Overall, it was believed there would be around 5.6 million pages of documents and e-mails, resulting in the need to hire an outside vendor to process the data at an estimated cost of $10,000, plus an additional $5,330 per month in storage fees.

In reviewing this information, the trial judge ordered Symbiont to comply with the subpoena based on its holding that the records related to Denali' defense and that the burden on the non-party Symbiont was not undue given the relevance of the materials. In reviewing these facts, the Appellate Division reversed. The court recognized that all discovery imposes some burden on the entity responding. However, when the interests of a non-party are involved (i.e. an individual or company not a party to the lawsuit), whether the burden outweighs the benefits "deserves close scrutiny."

Most critical to the court's rationale was that much of the information could be obtained from a party in the lawsuit (i.e. Trenton Renewable Power), which the trial court judge did not consider. The court held that when a party seeks discovery from a non-party, particularly when the electronically stored information (ESI) is voluminous, time-consuming and costly to prepare for production, and may implicate issues of privilege and confidentiality, the court must consider the relative simplicity in which the information may be supplied by a party, and the availability of less burdensome means to obtain the same information. Thus, Denali should have obtained the contracts and communications already in the possession of Trenton Renewable Power, from Trenton Renewable Power, a party, rather than serving a subpoena to obtain the documents from a non-party.

Employer Actions

The key takeaway is the rules of discovery do not apply equally to parties and non-parties. This case provides the support non-party businesses need to push back against burdensome subpoenas. Thus, when served with a subpoena, businesses should determine how burdensome responding to the subpoena would be, whether the information or documents can be obtained in a less burdensome manner, and/or whether the information or documents can be obtained from a party. Depending on these responses, a motion to quash may be appropriate.

The Porzio employment team routinely assists businesses in responding to subpoenas. This includes helping collect documents, determining what documentation should be provided, working with the party serving the subpoena to narrow the request, and moving to quash the subpoena or obtain a protective order when appropriate.