

4. An opinion from the Eastern District of New York denying a motion to compel the plaintiffs to use additional search methodologies to find responsive materials where the defendants failed to substantiate their claims that the plaintiffs' search methodologies were inadequate or that plaintiffs productions were made in bad faith.

In *Sidman v. Concord Arena Parking, LLC*, 2021 WL 1940255 (E.D.N.Y. May 11, 2021), U.S. Magistrate Judge Sanket Bulsara denied the Defendants' motion to compel production of additional documents from the Plaintiffs, finding that Defendants failed to establish that Plaintiffs' search methodology was inadequate or that Plaintiffs' productions were deficient or made in bad faith.

Earlier in discovery in this case, Defendants had brought a motion claiming that Plaintiffs had acted in bad faith by producing a limited quantity of documents, producing documents without explaining their origin, and refusing to describe the methods used to collect and produce documents. *Id.* at \*1. The magistrate judge overseeing discovery at that time had declined to compel additional production but permitted the parties to exchange interrogatories inquiring as to the methods undertaken with respect to their respective searches for discoverable information. After additional discovery, Defendants renewed their motion to compel, claiming that Plaintiffs' additional production of four documents was deficient and that discovery from third parties suggested that Plaintiffs had failed to produce responsive documents. However, Magistrate Judge Bulsara found that nothing had changed from the prior motion practice that would suggest that Plaintiffs were not acting in good faith, and therefore denied Defendants' motion to compel. *Id.* at \*2.

Magistrate Judge Bulsara began his analysis by noting that “[t]he burden is on the party seeking to compel discovery to cast doubt on the responding party’s assertion that it does not have the requested information.” *Id.* (quoting *Gary Friedrich Enters., LLC v. Marvel Enters., Inc.*, No. 2011 WL 2623458, at \*1 (S.D.N.Y. June 21, 2011)). He stated that Defendants had not met that burden by arguing that it was “inconceivable” that there were not more documents in Plaintiffs’ production. He noted that “parties will often find an adversary’s search methodology lacking. As a result, a party’s assertion that its adversaries’ search methodology was unreasonable is virtually always insufficient absent some concrete evidence pointing to the existence of missing documents.” *Id.* (quoting *Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop.*, 2020 WL 3498161, at \*4 (E.D. Pa. June 29, 2020)). He found that Defendants did not point to any concrete evidence of missing documents or any discovery from Plaintiffs that suggested documents were missing. Nor did Defendants cite to any provision of an electronic discovery protocol that Plaintiffs were alleged to have breached in conducting their search for electronic documents.

Magistrate Judge Bulsara also took issue with the procedure Defendants followed to challenge Plaintiffs’ document production. He stated that if a party asserts that it has produced all responsive documents — as Plaintiffs did here — and the adversary believes the production is incomplete, the remedy is not to ask the court to order additional production because a court cannot order a party to produce documents that do not exist. *Id.* at \*3. Instead, the remedy is to ask for a declaration (or deposition) that outlines the practices and procedures used to collect and produce documents in order to outline to the court the steps not taken and identify with specificity the categories and types of documents that should have been, but were not, produced.

Magistrate Judge Bulsara found that Defendants had not taken the necessary predicate steps to challenge Plaintiffs' document production. In particular, Magistrate Judge Bulsara highlighted that Defendants failed to take any affirmative steps after seeking discovery regarding Plaintiffs' document collection and production to identify with specificity the categories of documents that were allegedly missing.

Moreover, Magistrate Judge Bulsara found that the evidence Defendants pointed to did not establish either that documents were missing from Plaintiffs' productions or that Plaintiffs acted in bad faith, including a letter produced by a third party that Defendants claimed should have been produced by Plaintiffs. Defendants provided no explanation for why a copy of the letter should have been in Plaintiffs' files. Magistrate Judge Bulsara noted that just because Plaintiffs have not produced certain documents does not mean that they possess them but are refusing to produce them. Nor did one witness's inability to recall various aspects of the document collection or production lead to a conclusion of bad faith. Magistrate Judge Bulsara noted that "[u]nder ordinary circumstances, a party's good faith averment that the items sought simply do not exist, or are not in his possession, custody or control, should resolve the issue of failure of production." *Id.* (quoting *Bank of New York v. Meridien BIAO Bank Tanz. Ltd.*, 171 F.R.D. 135, 152 (S.D.N.Y. 1997)).

Magistrate Judge Bulsara stated that Defendants "fail to offer anything more than hypothetical inferences in support of their claim that [Plaintiffs] have engaged in the sort of misconduct that would merit discovery on discovery" and denied Defendants' motion to compel.