IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO.: 6:07-CV-222-ORL-19KRS

BRAY & GILLESPIE MANAGEMENT, LLC, a Florida Limited Liability Company, BRAY & GILLESPIE, DELAWARE I, L.P., a Florida Limited Partnership, BRAY & GILLESPIE X, LLC, a Florida Limited Liability Company, BRAY & GILLESPIE PLAZA, LLC, a Florida Limited Liability Company, BRAY & GILLESPIE V, LLC, a Florida Limited Liability Company, BRAY & GILLESPIE VIII, LLC, a Florida Limited Liability Company, and BRAY& GILLESPIE LAPLAYA, LLC, a Florida Limited Liability Company,

Plaintiffs,

v.

LEXINGTON INSURANCE COMPANY, a Delaware Corporation,

Defendant.
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DEFENDANT LEXINGTON INSURANCE COMPANY'S MOTION FOR RULE 37 DISCOVERY SANCTIONS (TREASURE ISLAND ROOM FOLIOS)

Defendant Lexington Insurance Company ("Lexington"), by and through undersigned counsel and pursuant to Fed. R. Civ. P. 37, moves for an order imposing sanctions on Plaintiffs ("B&G") for continuing discovery abuses, and for other appropriate relief. In support of its motion, Lexington states:

INTRODUCTION

> *[A]t some point, they've got to be accountable for the actions of their lawyers. And this just seems to me to be another example…of the continuing practice of litigation by the plaintiffs in this case of saying, "Well, once you can prove that I did something wrong, well, then I'll fix it."* – The Honorable Karla R. Spaulding, United States Magistrate Judge[1]

B&G was obligated to produce certain documents in this case. It refused to do so. On April 11, 2008, this Court ordered B&G to produce them. It failed to do so. On May 14, 2009, the day before the close of expert discovery, B&G attempted to use these documents to cross-examine a Lexington expert. This was the first time Lexington was made aware that the documents existed. It is beyond dispute that these documents were in B&G's possession before the beginning of this case, and should have been produced long ago.

The documents at issue are room folios for B&G's Treasure Island hotel for the period between Hurricanes Charley and Jeanne in 2004. They are critical to Lexington's defense of B&G's property damage and business interruption claims. B&G's failure to produce those documents is the latest in what has been a series of discovery abuses by B&G in this case. B&G was obligated to produce these room folios almost two years ago. It did not. Instead it chose to use them in an attempt to ambush a Lexington expert during his deposition, in complete contravention of the federal rules governing discovery and this Court's discovery order. Such conduct should not be tolerated or ignored, and B&G should be sanctioned for its abuse of the discovery process. Accordingly, the Court should now consider severe sanctions, including dismissal, or at a minimum, strike B&G's business interruption claim and preclude B&G from using any of the recently produced room folios in this action for any purpose.

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[1] April 2, 2009 Hearing on Motions, Bray & Gillespie Management, LLC, et al. v. Lexington Insurance Company, at 66:13 - 66:17, attached hereto as Exhibit A.

BACKGROUND

This motion relates to room/guest folios for the Treasure Island hotel ("TI Room Folios"), one of the B&G properties at issue in this litigation. Lexington has sought the production of these documents, along with other hotel room folios, since the outset of this litigation. B&G, however, refused or failed to produce a single one until January 2009. B&G did not produce the TI Room Folios that are the subject of this motion until May 18, 2009, three a one-half months after the close of discovery.

On August 17, 2007, Lexington served its First Request for Production of Documents on B&G ("Document Request"). Lexington's Document Request No. 97 ("Request No. 97") specifically requested production of records, room folios and bills for each guest stay, by location, from August 13, 2004 to the present, upon which B&G based its claim for damages related to business interruption. B&G did not respond to Request No. 97 in any fashion until November 9, 2007, when it produced a written response in which it objected to that request on, among other grounds, that the information sought was irrelevant and immaterial information not reasonably likely to lead to the discovery of admissible evidence. After motion practice and a discovery conference with the Court in January 2008, B&G served written supplemental responses to Lexington's first and second document requests on January 22, 2008.

On February 11, 2008, B&G served its Amended Supplemental Responses to Lexington's first and second document requests. The Amended Supplemental Response again objected to Request No. 97 on the grounds that it sought irrelevant and immaterial information that was not reasonably likely to lead to the discovery of admissible evidence. In addition, B&G claimed that assembling the room folios and bills was unduly burdensome and that such documents would provide no additional information necessary for Lexington fully to defend against B&G's claims.

On March 14, 2008, four days before the parties' March 18, 2008 discovery conference, B&G produced a DVD containing emails from a number of current or former B&G employees and agents. As with prior productions, the DVD contained no TI Room Folios. Two days after the March 18, 2008 discovery conference, Lexington moved for an order compelling B&G to produce documents responsive to Request No. 97, among others. (Doc. # 178). On April 11, 2008, the Court issued an order granting Lexington's motion, ruling that B&G had abandoned all objections to Request No. 97 other than privilege ("April 11 Order")(Doc. # 181). B&G made seven document productions to Lexington from April 8, 2008 to October 31, 2008. Not one of those documents productions included TI Room Folios. By mid-November 2008, despite the Court's April 11 Order, B&G had failed to produce even one TI Room Folio in hard copy or requested electronic format. (Exhibit B, Declaration of Donna Knapton, Dec. 4, 2008).

On December 15, 2008, Lexington's counsel sent correspondence to B&G's counsel setting forth the agenda for the parties' discovery teleconference on December 16, 2008. (Exhibit C, Email from John A. Camp to John B. Berringer, Dec. 15, 2008 4:02PM). Among the items for discussion was the production of TI Room Folios. *Id.* By this time, fact witness depositions had been underway for six months, and the fact discovery deadline was January 30, 2009. On January 9, 2009 B&G produced documents that, for the first time, included certain TI Room Folios. In its correspondence accompanying this production, B&G did not disclose that it was producing less than all of the TI Room Folios in its possession, nor did it represent that it was continuing to search for additional folios. Between January 9, 2009 and the fact discovery cutoff on January 30, 2009, B&G made four more document productions to Lexington. Not one of those document productions included additional Treasure Island room folios.

B&G is claiming business interruption damages in excess of $4 million for Treasure Island. (Exhibit D, March 16, 2009 Rule 26(a)(2)(c) Expert Report of Stan D. Johnson, at p. 10). To arrive at that figure, Mr. Johnson "evaluated data provided by B&G to determine the count of rooms out of service before and after each storm to determine the extent of impact to room availability caused by each event…." *Id.* at 8. In rebutting Mr. Johnson's opinions, Lexington expert Peter Fogarty opined, among other things, that Mr. Johnson merely considered rooms out of service, which was an inappropriate measure, particularly in light of the fact that the room folios produced by B&G on January 9, 2009 reveal that the only people to whom Treasure Island rented rooms after Hurricane Frances (and before Hurricane Jeanne) were employees of Florida Power & Light and Employees of Belfor, the company performing demolition and remediation work at the hotel. (Exhibit E, March 30, 2009 Expert Report of Peter Fogarty, at 9-10). Additionally, the room folios may reveal certain information relevant to B&G's property damage claim and Construction Consulting Associates' opinions concerning the nature and extent of damage at Treasure Island after each hurricane.[2]

Lexington did not learn that B&G had withheld certain TI Room Folios from its productions until the deposition of Mr. Fogarty on May 14, 2009, one day before the deadline for completion of expert discovery. During the deposition of Mr. Fogarty, B&G's counsel, for the first time, revealed a set of non-privileged TI Room Folios that had never previously been produced or shown to Lexington, and about which Lexington was never informed. (Exhibit F, Deposition of Peter Fogarty, May 14, 2009, pp. 120:14 - 120:16)("Fogarty Depo")). Lexington's counsel immediately requested copies of all withheld TI Room Folios. (Exhibit F, Fogarty Depo, at pp. 118:2 - 118:12). Even then, B&G's counsel refused to produce the documents. In fact, it

[2] Construction Consulting Associates, or "CCA," was retained by B&G to determine the extent of storm damage separately attributable to hurricanes Charley, Frances, and Jeanne in fall 2004.

was not until May 18, 2009 that B&G finally produced the withheld TI Room Folios to Lexington, after the close of all discovery in this case, including expert discovery.

ARGUMENT

I. SANCTIONS ARE APPROPRIATE FOR B&G'S FAILURE TO PRODUCE THE TI ROOM FOLIOS UNTIL AFTER CLOSE OF DISCOVERY, ABUSE OF THE DISCOVERY PROCESS AND IMPROPER TACTICS

Rule 34 of the Federal Rules of Civil Procedures requires a party upon whom a request for production has been served to respond to each item in the request within 30 days, unless another time period has been stipulated to by the parties. Fed. R. Civ. P. 34(b)(2)(A) and (B). Further, this Court's April 11, 2008 Order required B&G promptly to produce all room folios that could not be withheld under a valid claim of privilege. Despite the Court's April 11, 2008 Order and its obligations under Rule 34, B&G did not produce any TI Room Folios to Lexington until January 9, 2009. Unbeknownst to Lexington at that time, B&G failed to produce all of the TI Room Folios in its possession. It was not until May 14, 2009, during Mr. Fogarty's deposition, that B&G's counsel revealed that there were more TI Room Folios that were never produced to Lexington.

At Mr. Fogarty's deposition, B&G's counsel suggested that Lexington was somehow to blame for B&G's failure to produce the undisclosed TI Room Folios because Lexington had not informed B&G that its production was incomplete:

> MR. BEAUDINE: I'm just saying that, you know, you and your colleagues have not been bashful to complain about our production of documents in various formats, and have never been reluctant to point out deficiencies. And it seems odd to us that in this instance not one word was mentioned, and instead Mr. Fogarty was allowed to proceed laboring under the misunderstanding and misconception that this represented all the room folios...You could have determined whether it was complete or not yourselves. (Exhibit F, Fogarty Depo, at pp. 122:10 - 123:16).

This is absurd. This is exactly the type of wait and see, catch-me-if-you-can approach to production by B&G that this Court condemned at the April 2, 2009 hearing in this case. (Exhibit A, pp. 66:6 - 66:17, Transcript of April 2, 2009 Hearing on Motions before the Honorable Karla R. Spaulding). B&G is the only one with knowledge and control of its documents, and B&G is responsible for its own compliance with this Court's orders and its Rule 34 discovery obligations. Moreover, Lexington had no way of knowing whether there were additional folios, and it reasonably assumed that B&G produced any and all documents that it had, in compliance with the Court's April 11 Order.

B&G's failure to provide Lexington with the withheld TI Room Folios is not a harmless discovery violation. In fact, it has profoundly prejudiced Lexington's defense of B&G's claims -- from Lexington's decisions and strategy throughout its defense of this case, to its ability to conduct fact and expert discovery that is now closed. The TI Room Folios contain information that was critical to Lexington's analysis of B&G's business interruption and property damage claims, and necessary to rebut B&G experts' reports and opinions on B&G's business interruption and property damage claims. The most obvious effect of B&G's latest discovery stunt is on Mr. Fogarty's report and opinions, which it turns out, were based on incomplete information that B&G has had all along. But the effects are further reaching, as the information contained in the TI Room Folios bears directly on Lexington's analysis of B&G's Treasure Island claim generally.

Rule 37 provides for sanctions for violation of a discovery order, including but not limited to: 1) directing that designated facts be taken as established for purposes of the action as the prevailing party claims; 2) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; 3) striking

pleadings in whole or in part; 4) dismissing the action in whole or in part; and/or 5) treating as contempt of court the failure to obey an order. Fed R. Civ. P. 37(b)(2)(A).

Additionally, "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). The Court does not need to find that the party or its counsel acted willfully or in bad faith before imposing Rule 37 sanctions, unless the sanction is dismissal of the complaint or entry of a default judgment. BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045 (11th Cir. 1994).

Sanctions under Rule 37 are warranted against B&G for its ongoing violation of this Court's April 11 Order and Rule 34, by withholding non-privileged TI Room Folios throughout this case and until after close of discovery. See Giancola v. Johnsondiversey, 157 Fed. Appx. 320 (1st Cir. 2005)(dismissal an appropriate sanction for repeated discovery violations); Roberts v. Nordan Division, United Aircraft Corp., 76 F.R.D. 75, 80 (D.C.N.Y. 1977)(intentional or conscious failure to obey a discovery order is sanctionable as willful, as distinguished from involuntary non-compliance). According to the deposition testimony of B&G's corporate designee Matt Carlock, all of the TI Room Folios are stored in the property management system on one of three computer servers. (Exhibit G, Deposition of Matt Carlock, July 29, 2008, at 36:4 – 36:14). As such, it apparently required effort not to produce the withheld Room Folios, as this obviously would have required segregation of those room folios from the Treasure Island room folios produced on January 9, 2009. In addition, B&G's counsel obviously had the withheld TI Room Folios in advance of the Fogarty deposition, but plainly ignored B&G's discovery

obligation to promptly supplement its production upon discovery of additional responsive documents.

B&G's counsel apparently had no difficulty obtaining the additional TI Room Folios when it wanted to cross-examine Lexington's expert with them, which begs the question of why B&G failed to produce the TI Room Folios at any time after it was ordered by this Court to do so on April 11, 2008. During Mr. Fogarty's deposition, B&G's counsel claimed that he was not aware that B&G had produced less than the full set of Treasure Island room folios until receiving Mr. Fogarty's March 30, 2009 expert report. See Fogarty Depo at 118:20 - 120:8. B&G, however, did not supplement its production until Lexington's counsel insisted it do so after B&G's counsel sprung the withheld TI Room Folios on Mr. Fogarty during Mr. Fogarty's deposition.

Perhaps most egregious is that B&G's counsel first revealed the existence of the TI Room Folios during the Fogarty deposition, in an apparent attempt to ambush Mr. Fogarty with documents that counsel thought may discredit Mr. Fogarty's report and opinions. "Modern discovery was designed to eliminate litigation by ambush and surprise. Cooperation and candor by all parties are crucial to the proper function of the discovery process; obstreperous conduct and deceptive tactics designed to delay and impede have no place in the discovery process." In re Atlantic Intern. Mortg. Co., 352 B.R. 503 (Bkrtcy. M.D. Fla. 2006). This latest discovery abuse, and disregard of the Court's previous discovery orders, exposes the blatant gamesmanship, delay, and dilatory tactics that B&G has practiced throughout this case.

In addition to B&G's recent conduct, the court also may consider whether B&G's non-compliance is preceded by a pattern of delay and dilatory discovery conduct when determining appropriate sanctions. See Malautea v. Suzuki Motor Company, Ltd., 987 F.2d 1536 (11th Cir.

1993); Baltimore v. Jim Burke Motors, Automotive, 300 Fed. Appx. 703 (11th Cir. 2008). B&G's ongoing failure to produce the withheld TI Room Folios is just one more in a series of well documented ongoing discovery abuses by B&G since the inception of this case. In fact, this Court already has sanctioned B&G's counsel for violation of the April 11 Order with respect to B&G's ESI production. (See Doc. #460).

At a minimum, this Court should strike B&G's claim for business interruption and preclude its use of the withheld TI Room Folios for any purpose in this case. These are measured and proportionate sanctions for B&G's latest discovery violation. Indeed, given B&G's conduct throughout this case and the evidently contumacious nature of B&G's withholding of these room folios, the Court should now consider severe sanctions, including dismissal or striking of pleadings. See Rabello v. Bell Helicopter Textron, Inc., 200 F.R.D. 484 (S.D. Fla. 2001)(sanctions including striking witnesses and prohibiting use of investigator's report appropriate where defendants did not produce investigator's report to plaintiffs until after investigator's deposition and close of discovery); Giancola, 157 Fed. Appx. 320 (dismissal of plaintiff's case upheld as an appropriate sanction where plaintiff's discovery violation was not a single isolated mishap, and the court had previously warned plaintiff that dismissal was a possible sanction); Torres-Vargas v. Pereira et al., 431 F.3d 389 (1st Cir. 2005)(finding district court did not have to exhaust lesser sanctions prior to imposing sanction of dismissal of action with prejudice, where plaintiff repeatedly failed to comply with discovery deadlines, disregarded court's discovery orders regarding production, and court warned that failure to full satisfy discovery requests would result in dismissal). This is particularly true given B&G's history of delay and dilatory discovery tactics throughout this case. See, e.g., Giancola, 157 Fed. Appx. 320.

Simply compelling the withheld TI Room Folios, and extending discovery for Lexington so that it can take additional discovery based on those documents, will not remedy the harm to Lexington. That course would subject Lexington to further prejudice by potentially forcing it to take new depositions, reopen concluded depositions, and cause Lexington's expert to completely revise portions of the expert report -- all costly and time consuming propositions. This avenue actually could be particularly prejudicial, due to a conflict with upcoming pre-trial deadlines. Lexington's resources would be diverted to additional discovery that should be devoted to mediation and trial preparation.

All of the foregoing considerations demonstrate that striking B&G's business interruption claim, and precluding B&G's use of the withheld TI Room Folios for any purpose, is the minimum sanction the Court should impose on B&G. Moreover, Lexington submits that even that is insufficient to deter B&/G from discovery misconduct and to alleviate the prejudice B&G's conduct has caused to Lexington at this late date.

CONCLUSION

For the reasons set forth herein, Lexington requests that this Court: i) strike B&G's pleadings, dismiss B&G's claims, or at a minimum, strike B&G's business interruption claim and preclude use of the withheld TI Room Folios by B&G for any purpose in the ongoing litigation and trial of this case; ii) award Lexington attorneys' fees and costs incurred in bringing this motion pursuant to Fed. R. Civ. P. 37(a)(5); iii) and award such further relief as this Court deems just and proper.

CERTIFICATE OF CONFERRAL

The undersigned certifies that counsel for Lexington attempted to confer with counsel for B&G in a good faith effort to resolve the issues raised by this motion, but the parties did not agree to a resolution of this motion.

Respectfully submitted,

/s/ John A. Camp
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 22, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ John A. Camp