UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRAY & GILLESPIE MANAGEMENT, LLC, et al.,

Plaintiffs,

v. **Case No.: 6:07-cv-0222-Orl-35KRS**

LEXINGTON INSURANCE COMPANY,

Defendant.
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ORDER

THIS CAUSE initially came before the Court upon preliminary review of Plaintiff's Appeal from Order of Sanctions (the "Appeal") (Dkt. 500), Defendant's Motion for Sanctions Related to Treasure Island Room Folios (the "Motion for Sanctions") (Dkt. 526), and a host of record entries related to both filings. (See Dkts. 202, 222, 460, 529, 530, 532, 569, 575, 576, 578, 584, 586, 592, 602-04, 606-13, 615-18, 620, 624).

On October 30, 2009, a telephonic status conference was held to discuss the Appeal, Motion, and all related filings. (Dkt. 621). At the Status Conference, the Court first determined that a portion of the previous Order of Sanctions (the "Order") (Dkt. 460), entered against attorney John Ellison, and, vicariously, the law firm of Reed Smith, LLP, should be quashed concerning a finding of bad faith against Mr. Ellison, attorney John Berringer, and Reed Smith, LLP. The Court found that the Defendant had declined to file a responsive

memorandum challenging the Appeal and had agreed that the production of certain electronic discovery by Plaintiff or the former Plaintiffs[1] and the payment of certain fees, costs, and expenses by Mr. Ellison and Reed Smith, LLP, as directed in the Order, would resolve the parties' dispute concerning delayed production by counsel for the former Plaintiffs of certain electronically stored information alleged to be located in a database, referred to in this case as the "Introspect database." (Dkt. 460 at 5). Accordingly, it is **ORDERED** that the portions of the Order (Dkt. 460) finding bad faith against Mr. Ellison, Mr. Berringer, and Reed Smith, LLP, are hereby **QUASHED**. The portions of the Order directing the payment of fees, costs, and expenses is hereby **AFFIRMED** based upon the stipulation of Mr. Ellison and Reed Smith, LLP, found in the Appeal. (Dkt. 500 at 1-2).

Additionally, in the Status Conference, the Court addressed the pending Objections to two reports and recommendations, each issued by the Magistrate Judge on August 3, 2009 (together, the "Reports and Recommendations"). (Dkts. 576, 578). The Reports and Recommendations made a finding of bad faith against attorneys John Berringer and Michael J. Beaudine and, vicariously, against the law firms of Reed Smith, LLP, and Latham, Shuker, Eden & Beaudine, LLP. The current Plaintiff, Soneet R. Kapila, and the former Plaintiffs and their counsel filed a series of Objections to the Reports and Recommendations. (Dkts. 587, 602, 603, 604). In its two Responses to the Objections (Dkts. 606, 607), the Defendant again declined to offer evidentiary support or significant legal argument in support of the findings of bad faith against counsel, and perhaps, for good reason.

[1]By Order entered on August 24, 2009 (Dkt. 590), Plaintiff Sonnet R. Kapila, on behalf of Ocean Waters Assets Co., was substituted in as sole Plaintiff with separate counsel, and all Bray & Gillespie organizations were terminated as Plaintiffs in this case.

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject, or modify the magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Williams v. Wainwright, 681 F.2d 732, 732 (11th Cir. 1982), cert. denied, 459 U.S. 1112 (1983). A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). This requires that the district judge "give fresh consideration to those issues to which specific objection has been made by a party." Jeffrey S. v. State Bd. of Educ., 896 F.2d 507, 512 (11th Cir.1990) (quoting H.R. 1609, 94th Cong. § 2 (1976)). The court may accept, reject, or modify, in whole or in part, the findings and recommendations. 28 U.S.C. § 636(b)(1)(C). The district judge reviews legal conclusions de novo, even in the absence of an objection. See Cooper-Houston v. Southern Ry. Co., 37 F.3d 603, 604 (11th Cir. 1994).

"In cases invoking the sanction power of Rule 37 the district court must 'clearly state its reasons so that meaningful review may be had on appeal.'" Carlucci v. Piper Aircraft Corp. Inc., 775 F.2d 1440, 1151 (11th Cir. 1985)(citation omitted). Although the Court is afforded broad discretion in imposing sanctions, a sanction which impugns the character of counsel and imposes significant financial penalties and subjects counsel to potential liability to clients should be judiciously imposed on only clear showings of bad faith or violation of express orders of the Court. On review of the record de novo and in the absence of submissions by Defendant in response to specific challenges raised by the subject attorneys, the Court finds that, although the production of relevant discovery by the former Plaintiffs has been inadequate in many respects in the case, the evidence establishing bad faith on the part of

counsel for the former Plaintiffs is insufficient to sustain the finding of bad faith or the imposition of the harsh sanctions against counsel that have been recommended by the Magistrate Judge in this case.

Just by way of example, in one instance, both Mr. Berringer and Mr. Beaudine are subjected to a recommendation that each be held jointly and severally liable for the failure of the former Plaintiffs timely to produce all room folios, as demonstrated by a late disclosure of room folios to Defendant's counsel by Mr. Beaudine in May 2009. Upon review of the room folios by his associate, Mr. Beaudine became aware (after his associate reviewed a client production received on May 4, 2009) on or about May 8, 2009, that certain additional folios that had not yet been produced were responsive to Defendant's prior written discovery demands and the Court's related Order, entered on January 7, 2009. (Dkt. 442). That Order directed that any responsive documents learned of after January 30, 2009, be produced within five business days of counsel's awareness of the documents' responsiveness to prior written discovery demands. The deposition of Defendant's expert, Peter Fogarty, CPA, CFE, was scheduled for May 14, 2009 (the "Fogarty Deposition"). Certainly, production of those materials and disclosure of their existence would have been highly beneficial to Defendant's fair preparation for the deposition. Yet, Mr. Beaudine decided not to disclose the existence of the materials until after he arrived at the Fogarty Deposition and after he commenced questioning Mr. Fogarty on areas germane to the additional folios. During the deposition, Mr. Beaudine disclosed the existence of the additional folio documents and worked out an agreement to produce the documents to Defendant, with reservation of the Defendant's right to challenge the late production.

Certainly, it would have been more prudent and professional for Mr. Beaudine to have produced the documents to Defendant immediately, which likely would have required the deposition to be rescheduled to permit Mr. Fogarty to amend his expert opinions or to permit counsel to address the former Plaintiffs' late production with the Court. Of course, the late disclosure and its attendant prejudice to the defense of this action remain at issue in relation to sanction against Plaintiff and the affect on claims asserted that relate to the folios. However, the Court cannot find that the disclosure by counsel constituted a bad faith, willful violation of a court order or other clear court directive. As noted, the relevant Order entered on January 7, 2009, directed that supplemental discovery be made within five business days of knowledge of the need to supplement. Under Federal Rule of Civil Procedure 6(a), whenever an Order of this Court directs that action be taken in fewer than eleven days, the obligated party may, in calculating the deadline, exclude the day of the act and omit subsequent holidays and weekends. Thus, under the clear directive of the Court's Order, in conjunction with Federal Rule 6(a), the supplement occasioned by the former Plaintiffs' late submission to counsel was due on or before the fifth business day from the date Mr. Beaudine was made aware that the documents were responsive and not duplicative to previous production. As discussed, Mr. Beaudine became so aware on or about Friday, May 8, 2009, disclosed the existence of the documents to Defendant on Thursday, May 14, 2009, the fourth business day, and produced the documents to Defendant via Federal Express on the following Monday, May 18, 2009, the sixth business day. (Beaudine Objection, Dkt. 603 at 6; Beaudine Letter, Dkt. 532-7 at 1). As such, Mr. Beaudine's disclosure of the supplemental folios, though unprofessional and later than necessary, cannot be said to have been an act committed in bad faith or deserving of severe, personal or professional sanctions

More patently clear is that Mr. Berringer and Reed Smith, LLP, cannot be held jointly and severally liable for the late production just described. No findings of bad faith on the part of Mr. Berringer or Reed Smith, LLP, were made in conjunction with that conduct. Likewise, certain of the other findings paint counsel with a broad brush for the conduct of each other or for the apparent failings of their clients. For example, the Reports and Recommendations document that Defendant's expert started working on his report in early March 2009 (Dkt. 576 at 21 n.22) and that the expert report was served on the former Plaintiffs and their counsel on March 30, 2009, Id. Yet, the sanctions against attorney Berringer in the Reports and Recommendations were premised on representations Mr. Berringer made to the Court prior to that time period. Although a general request for production of all room folios was made at the outset of litigation in this case, the Defendant did not specifically inquire about the inadequacies of the production of the Treasure Island room folios until December 15, 2008. (Camp email, Dkt. 526-3). Further, in January 2009, when Mr. Berringer made what was later determined to be only a partial production of Treasure Island room folios, he did so upon being informed by his client that the production included the "complete set" of folios. (Berringer Aff., Dkt. 575-1, ¶ 4). This is not the sort of conduct for which sanctions against counsel may issue.

Tellingly, in this respect, Defendant has not sought to support the findings of subjective bad faith on the part of counsel or the imposition of sanctions against counsel as explained in its Responsive Memoranda or "Notice" filed after the status hearing. At the Status Conference, Defendant made clear that it did not intend to offer evidence in support of a bad faith finding against Mr. Ellison, Mr. Berringer or Reed Smith, LLP. Further, on November 5, 2009, Defendant filed a notice advising the Court that Defendant does not intend to pursue

a finding of subjective bad faith or to otherwise seek imposition of sanctions against Mr. Beaudine. Nonetheless the Defendant does seek to "preserve" certain factual findings made concerning Reed Smith, LLP, Mr. Ellison, Mr. Berringer, Mr. Beaudine, and Latham, Shuker, Eden & Beaudine, LLP, and to ascribe that conduct to the Plaintiff. In one instance, Defendant refers to conduct based on findings originally made in the Court's Order entered on March 4, 2009. (Dkt. 460 at 46-47). As previously discussed herein, counsel for the former Plaintiffs appealed from that Order and Defendant did not respond. Those findings have been quashed per the Court's Order entered on the stipulation of the parties at the status conference and will not serve as a basis for liability or sanctions in this case.

Consequently, the Findings and related Reports and Recommendations that sanctions be issued against counsel for the former Plaintiffs are **REJECTED** upon de novo review.

Thus, what remains at issue are the alleged significant failures of the Plaintiff: (a) to make timely and complete disclosures to the Defendant in response to several discovery demands concerning te Treasure Island room folios; and (b) to respond timely to the Court's clear requirements that a full and complete review be conducted and that subsequent, timely, comprehensive disclosures be made. The correlative issues are whether such failures were in bad faith, constitute spoliation of evidence and willful violations of Court Orders and Discovery obligations and, if so, what sanctions may be imposed and against whom. The Evidentiary Hearing ordered by the Court at the status conference and further established herein will address these issues.

Accordingly, it is hereby **ORDERED** as follows:

1. An evidentiary hearing on the aforementioned remaining issues shall be held on Thursday, December 3, 2009, and Friday, December 4, 2009, in Tampa, Florida.

2. The exact start time and location of the Evidentiary Hearing shall be established by separate order from this Court.

3. A senior client representative for each party or, in the case of individuals, the individual parties, along with their respective counsel, shall appear before the Court for the Evidentiary Hearing regarding the remaining issues raised in the Motion for Sanctions. The parties are advised that photographic identification is required for entry into the Courthouse. The parties are further advised that cellular phones and other electronic equipment are not allowed in the Courthouse without prior order of the Court.

4. The focus of the Evidentiary Hearing shall be:

(a) how the alleged failure of the former Plaintiffs, Bray & Gillespie Management LLC; Bray & Gillespie Delaware I, L.P.; Bray & Gillespie X, LLC; Bray & Gillespie Plaza, LLC; Bray & Gillespie V, LLC; Bray & Gillespie VIII, LLC; and Bray & Gillespie Laplaya, LLC (together, "B&G"), to preserve and to produce timely and in native format to Defendant any and all room folios generated for the Treasure Island Resort between "August 13, 2004, to the present" (Dkt. 526 at 3) has unduly prejudiced Defendant's ability to defend Plaintiffs' claims for business interruption losses, property damage, or other related losses incurred in relation to any damage caused to the Resort by Hurricane Jeanne;

(b) how any prejudice discussed in "(a)" above has not been otherwise mitigated by the production of Treasure Island room folios that has occurred in this case; and

(c) what sanctions would be most appropriate should the Court find that undue prejudice has occurred. The parties shall be prepared to argue the extent to which it may any such sanctions may be imposed on B&G's creditors in bankruptcy.

5. The Defendant has advised that it intends to call one live witness, Mr. Daryl Teshima; and Plaintiff has advised that it intends to call two senior corporate representatives for B&G, and possibly an expert witness for the Plaintiffs. Plaintiffs shall have up to and including Monday, November 23, 2009, to file a written notice informing the Court and Defendant of their selection of the later three witnesses.

6. On or before Tuesday November 24, 2009, the parties shall file a **joint** stipulation of undisputed facts in relation to the events underlying the Treasure Island room folio discovery.

DONE and **ORDERED** in Orlando, Florida, on this 16th day of November 2009.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record