UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SIMON PROPERTY GROUP, INC.,

Plaintiff,

Case No. 6:11-cv-1598-Orl-31KRS

-against-

LYNNETTE LAURIA, et al.

Defendants.
_____/

Plaintiff's Response to Defendant's Objection to Report and Recommendation and Defendant's Response to Plaintiff's Motion for Spoliation of Evidence

The Report and Recommendation of Magistrate Judge Spaulding, entered December 13, 2012 [Docket Entry 256], which granted Plaintiff's unopposed Motion for Sanctions (the "Motion") [Docket Entry 231], should be approved and adopted in its entirety. Defendants Lynnette Lauria ("Lauria"), Marketing Resource Network ("MRN"), XLM Marketing ("XLM"), Excell Services ("Excell"), XLM Excell, PR Works, RJL Services, LLC ("RJL"), Arnell, Inc. ("Arnell") and Snouthound Enterprises, LLC ("Snouthound") (collectively, the "Lauria Defendants") have failed to demonstrate that Magistrate Judge Spaulding committed an abuse of discretion in the course of her findings. Pursuant to Federal Rule of Civil Procedure 72 and Local Rule for the Middle District of Florida 6.02, Plaintiff hereby opposes the Objections filed by the Lauria Defendants [Docket Entry 259] (the "Objections") to the Magistrate Judge's Report and Recommendation.

As the Magistrate Judge recognized, Lauria has openly admitted to intentionally committing an egregious and appalling action of spoliation by throwing her laptop

containing all of the Lauria Defendants' files into a river before Simon had the opportunity to inspect it. Lauria's latent claim that she was under extreme emotional distress at the time, which is belied by her coldly rational testimony concerning the incident, simply cannot excuse this behavior. Lauria, upon learning that Simon intended to prosecute her for her massive fraud, immediately destroyed key evidence in the hopes of escaping liability or, at worst, admitting only that Simon might be entitled to approximately $300,000 in damages, rather than the over $4 million that Lauria and her family-controlled companies actually defrauded Simon out of over the course of nearly a decade. There is simply no lesser sanction than that recommended by the Magistrate Judge that would sufficiently redress the Lauria Defendants' wrongdoing.

ARGUMENT

I. The Lauria Defendants' Failure to Oppose the Motion Does Not Constitute Excusable Neglect Under Fed. R. Civ. P. 6(b)(1)(B)

The Lauria Defendants' Objections to the Magistrate's Report and Recommendation on the Motion should not be considered by the Court because they failed to oppose the Motion without legitimate excuse or justification. The Lauria Defendants claim that their failure to submit any opposition to the Motion was due to "excusable neglect," but all of their arguments fail to properly invoke this very limited exception by which a Court may extend a deadline after it has passed. All of the proffered excuses for their failure to submit a timely opposition relate to events that only occurred after they had already missed the filing deadline of November 9, 2012.

First, the Lauria Defendants make the counter-intuitive claim that, because Plaintiff's new counsel was getting up to speed on the case, the attorneys for the Lauria Defendants, who remained the same, somehow needed extra time to prepare an

opposition to the Motion. Obviously, a change in counsel for Plaintiff has no effect on the Lauria Defendants' attorneys and, if anything, should have created an advantage for them. Indeed, the Lauria Defendants' attorneys did seek to use this advantage, as is clear in the November 14, 2012 correspondence attached to their Objections, in which they suggested that Plaintiff might simply want to drop the Motion, if not the case altogether, but neglected to advise the undersigned that the Lauria Defendants had already missed the deadline for responding to the motion. Plaintiff, unsurprisingly, did not take the Lauria Defendants up on this offer. To the extent the Lauria Defendants' attorneys actually believed there was any likelihood otherwise and thus failed to file any opposition, they have nobody to blame but themselves (especially since their opposition had already been 5 days overdue by the time they sent this initial email to Plaintiff's substituted counsel). *See, Tenenbaum v. Williams*, 907 F. Supp. 606, 612 (E.D.N.Y. 1995) (Excusable neglect not found even when change in attorneys occurs in the offices of the party who missed the deadline since that party could have easily asked the Court for additional time before the expiration of the filing deadline, but failed to do so.).

Next, the Lauria Defendants claim that they also failed to timely oppose the Motion because they were "induced" into reliance on an alleged 15-day extension to respond to the Motion provided by Simon's attorneys. However, even if the 15-day extension had been granted (which it was not, due to the failure of the Lauria Defendants' attorneys to ever confirm that they would accept an extension that was not totally indefinite in length), the Lauria Defendants then promptly missed the "extended" deadline anyway. As noted above, when the Lauria Defendants first requested any extension on November 14, 2012, the deadline to oppose the Motion had *already*

passed on November 9, 2012, a fact that they failed to mention to Simon's new counsel when they initially requested an "open-ended" extension to respond. As a corollary to this argument, the Lauria Defendants seem to imply that it was their failure to file the motion for extension of time to file a response to the Motion that resulted in their failure to timely file any opposition. However, even the purported 15-day extension would have meant that the opposition would have had to be filed, at the latest, by November 24, 2012, and the Magistrate Judge did not issue any opinion until December 13, 2012, just shy of three weeks later. The Lauria Defendants had plenty of time to either (a) file an opposition within the time frame allowed under the Case Management Order or the time frame as extended by the purported 15-day extension or (b) seek an extension directly from the Court before the expiration of their time to respond if they felt that an extra 15 days was insufficient and believed they could justify the necessity of more than an extra 15 days to the Court.

Finally, the Lauria Defendants argue that they had other responsibilities in this case, such as four days of depositions, which should therefore excuse their failure to timely oppose the Motion. First, the four days of depositions were over a two-week period. Further, the undersigned was the attorney substituting in for prior counsel and therefore had a heavier burden with respect to these depositions. Second, the undersigned advised the Lauria Defendants' counsel at one of these depositions on November 27 that Plaintiff was not agreeing to any extension of the deadline to file any opposition to this motion because, as the Lauria Defendants' counsel had failed to clarify when requesting additional time, the deadline was then eighteen (18) days past. The undersigned advised the Lauria Defendants' counsel that any motion he made to

the Court would have to be over Plaintiff's objection. Nevertheless, the Lauria Defendants' counsel never made any motion. Furthermore, ongoing responsibilities in a case do not excuse missing deadlines without leave of Court. *See, McLaughlin v. La Grange*, 662 F.2d 1385, 1387 (11th Cir. Ga. 1981) ("The fact that counsel has a busy practice does not establish 'excusable neglect.'"). If this were otherwise, no litigant would ever need meet a deadline. Moreover, according to their account of the alleged 15-day extension, the Lauria Defendants would have had over 30 days to respond to this simple, straightforward Motion, yet they still failed to do so. This failure is made more glaring when considering that they apparently had no trouble filing the instant Objections within 14 days, but only after they saw the outcome of the Motion and then decided that they did, indeed, want yet another bite at the apple.

Accordingly, without the necessary showing of excusable neglect, the Motion should be properly considered unopposed and the Objections should be disregarded.

II. Magistrate Judge Spaulding Did Not Abuse Her Discretion in Recommending that the Court Grant the Motion for Sanctions

A. Standard of Review

"To prevail in an objection to a magistrate judge's determination of a discovery motion such as the Rule 37 Motion, the objecting party must establish that the conclusions to which it objects are clearly erroneous or contrary to law." *Palma v. Fla. Neurological Ctr., LLC*, 2011 U.S. Dist. LEXIS 142587 (M.D. Fla. Dec. 9, 2011). "Clear error is a highly deferential standard of review." *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (citations and

quotations omitted). A magistrate judge's order "is contrary to law 'when it fails to apply or misapplies relevant statutes, case law, or rules of procedure.'" *Palma v. Fla. Neurological Ctr., LLC*, 2011 U.S. Dist. LEXIS 142587 (M.D. Fla. Dec. 9, 2011).

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 301 (11th Cir. 2009). The party seeking spoliation sanctions, *i.e.*, Simon, must prove that (1) the missing evidence existed at one time; (2) the spoliator had a duty to preserve the evidence; and (3) the evidence was crucial to Simon being able to prove its prima facie case. *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 U.S. Dist. LEXIS 74307, 2010 WL 2927962, at *2 (S.D. Fla. July 23, 2010). If all three elements are met, "a party's failure to preserve evidence rises to the level of sanctionable spoliation 'only when the absence of that evidence is predicated on bad faith,' such as where a party **purposely loses or destroys relevant evidence**." *Id.*, 2010 U.S. Dist. LEXIS 74307, [WL] at *2 (*quoting Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)) (emphasis added).

Also, in determining the propriety of spoliation sanctions, the Eleventh Circuit has instructed that courts should consider the following factors: (1) prejudice to the non-spoiling party as a result of the destruction of evidence, (2) whether the prejudice can be cured, (3) practical importance of the evidence, (4) whether the spoiling party acted in good or bad faith, and (5) the potential for abuse of expert testimony about evidence not excluded. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005).

The Lauria Defendants, even if the Court considers their objection despite their failure to timely oppose the Motion, have failed to establish that any of Magistrate Judge

Spaulding's determinations were clearly erroneous or contrary to law and, indeed, would fail in their belated attempt to oppose the Motion even under a less deferential standard. Magistrate Judge Spaulding goes through, in detail, the facts that have been established in discovery and admitted by Lauria both in her deposition and by her failure to oppose the Motion, and then cites those facts while addressing each point in the legal analysis required by Eleventh Circuit precedent. *See,* Report and Recommendation, at pp. 10-18. Given this analysis by Magistrate Judge Spaulding, the Lauria Defendants simply cannot establish that her determination failed to apply relevant case law, statutes or rules of procedure.

The Lauria Defendants do not now attempt to contest that they had a duty to preserve the evidence, which is established by Lauria's recognition that she received the litigation hold letter from Simon before she threw the laptop in the river. Lauria's tepid and undeveloped argument that the laptop did not contain anything of evidentiary value is just absurd and, as such, easily refuted. *See* Objections, p. 4. Lauria, at her deposition, did testify and admit that the laptop contained evidence, including "documentation and e-mails," that were "directly related to the lawsuit." *See* Report and Recommendation, at p. 9. Thus, Lauria's claim that Simon's attorneys, at her deposition, "never specifically ask, nor does Lauria state, that there was in fact any evidence on that computer that would assist them in proving or establishing its allegations" is without any basis whatsoever. *See* Objections, p. 4. Additionally, in response to the Lauria Defendants' counsel's own questions at the deposition of Dave Donaway, Director of Corporate Security at Simon Property Group, Mr. Donaway also

pointed out the logic behind presuming valuable and incriminating evidence was on Lauria's laptop:

> Q: Do you have any reason to believe that there is any information on her laptop – or on her personal laptop?
>
> A: Only that she was asked to preserve it and then later stated she threw it in the river.
>
> Q: But absent that, do you have any reason to believe there is anything on it?
>
> A: Why would you throw it away?
>
> Q: That was not my question.
>
> A: Okay. I mean, well, my answer would be, I don't know why you would throw it away if there wasn't anything on it.

Deposition of Dave Donaway, November 27, 2012, pp. 150-151, lns. 24-25, 1-10.

In reality, the primary arguments raised by the Lauria Defendants are that sanctions are not justified in this case because (a) the destruction was not in bad faith; (b) that the evidence was not crucial to Simon's case; (c) that Simon was not prejudiced thereby; and (d) that the spoliation was of no practical importance and has essentially been cured because Simon obtained documents from other sources. Each of these arguments was addressed by the Magistrate Judge and Simon, however, and the Report and Recommendation's discussion clearly subverts any claim that the Magistrate Judge abused her discretion in coming to her conclusions on these issues.

B. The Magistrate Judge Did Not Abuse Her Discretion in Finding that Lynnette Lauria's Destruction of Evidence was Intentional and in Bad Faith

In this case, Lynnette Lauria, while professing not to seek excuse for her actions, does in fact attempt to excuse it by claiming she was under distress and, essentially, wanted to assist her husband and daughters in escaping liability. Of course, the Lauria

Defendants have no law to support any notion that, even if the described rationale was true, it could excuse the bad faith implicit in Lauria's intentional destruction of the laptop. Any distress that Lauria may have felt was merely the distress any defendant would feel as his or her fraud has been revealed and that retribution is imminent. As such, any allowance for her justification would be the exception that would swallow the rule. Obviously, the desire to assist others in escaping liability also does not serve as a justification for destroying evidence any more than if the act were taken to help oneself. Furthermore, this recently manufactured reasoning for the destruction conflicts mightily with the forethought plainly apparent in her deposition testimony regarding the incident:

> Q: Okay. Why did you throw the laptop away?
>
> A: Because I knew that something was coming down and I just didn't want all the stuff around.
>
> Q: So you were trying to get rid of documentation and e-mails and things?
>
> A: Uh-huh, yes.
>
> Q: That directly related to the lawsuit?
>
> A: Yes. Now, they do, yes.

See Report and Recommendation, p. 9.

This testimony reflects that Ms. Lauria did not just drive over to a river and throw the laptop in without thinking, but rather thought through what the laptop contained and decided that she and her co-conspirators would benefit by its destruction. There is no other possible inference from her testimony and certainly that testimony provides enough bases that the Magistrate Judge could not be held to have abused her discretion in making a finding of bad faith against the Lauria Defendants.

C. The Magistrate Judge Did Not Abuse Her Discretion in Finding Lynnette Lauria Destroyed Crucial Evidence, Thereby Irreparably Prejudicing Plaintiff's Prima Facie Case

The Lauria Defendants' argument that the laptop did not contain essential evidence begs the question of why she would go to such lengths to destroy it ***immediately*** after receiving notice of Simon's investigation via the litigation hold letter that she received. It is incomprehensible that the laptop would, in the mind of Ms. Lauria, merit destruction if it did not contain crucial evidence. Beyond this simple inference, however, both Simon and the Magistrate Judge did discuss many reasons why the evidence was crucial, reasons which easily subvert any notion that the Magistrate Judge's Report was at all contrary to law or clearly erroneous. *See* Report and Recommendation, pp. 11-16; Motion, pp. 14-19.

For instance, although the Lauria Defendants claim that the metadata contained on the laptop is not crucial evidence, they simultaneously tout that Lauria produced an alleged list of hotels to which marketing materials were purportedly distributed on behalf of Simon, thereby justifying many of the invoices Simon paid to all of the defendants in this case. This "list of hotels" is, actually, a perfect example of why metadata would be crucial to Simon's case. While this list is now serving as the Lauria Defendants' chief defense evidence, Simon has no ability to see when this list was created and whether it ever existed on the destroyed laptop. In essence, the question remains: was this list created after the fact and is it no more than a recent self-serving fabrication? We cannot know without the metadata.

Simon's – and the Magistrate Judge's – belief that the laptop's metadata is crucial to Simon's case finds further support in the fact that Lauria is a well-documented

and admitted forger of documents. As recognized by the Magistrate Judge, Lauria admitted to creating contract after contract with fictitious persons and entities, all for the purpose of furthering the continued operation of her fraudulent scheme should there ever be any audit by Simon. *See* Report and Recommendation, p. 15. As the Magistrate Judge also noted, when Lauria learned the identity of the whistleblower that brought down her $4 million fraud, she even created fake email addresses to make it appear that persons at Simon were contacting the whistleblower, in an attempt to stop him from talking to Simon's Director of Corporate Security and auditors. *See* Report and Recommendation, p. 7. Lauria's actions have severely prejudiced Simon by "putting it in the position of having to rely on the testimony of an individual who has admitted to fabricating documents and even personas to 'cover her tracks' in order to make out its claims." *See* Report and Recommendation, p. 15.

Although the Lauria Defendants may counter that the list of hotels would allow Simon to go to each hotel to check whether the purported distributions of marketing materials actually occurred, thereby obviating the need to resort to metadata analysis, the Lauria Defendants, not coincidentally, chose not to attach this list as an exhibit to their Objections for the Court to review. The reason for this telling omission is because the list does not identify a single individual at any of these hotels that Simon can interview. No matter who Simon speaks with at any of these hotels, the Lauria Defendants will undoubtedly claim that Simon still has not spoken with the elusive employee that could attest to the purported distribution of marketing materials.

This serious impediment to Simon's case is even further pronounced by the Lauria Defendants' claims that they do not remember the names of a single person they

supposedly worked with at any of these hotels and Lauria's failure to produce even a single email or other piece of correspondence with any hotel employee, or with any of her co-conspirators, two of whom, Ryan Deming and Dale Takio, have filed a motion for summary judgment largely based upon a dearth of communications between them and Lauria. Regardless of the merits of that motion for summary judgment, it does emphasize that the evidentiary gap left in the wake of Ms. Lauria's destruction of her laptop is now being exploited as the primary defense strategy of her co-conspirators. More importantly, the laptop very well could have the necessary communications between the Lauria Defendants and the accused co-conspirators; now, we'll never know.

Although the Court and Simon would likely draw adverse conclusions against the Lauria Defendants in light of these facts, the truth of the matter remains that Simon is irreparably prejudiced by the inability to inspect the metadata of the hotel distribution list. Doing so would thereby prove, conclusively, that the hotel distribution list was just one more after-the-fact creation by Lauria and the Lauria Defendants. It would also belie their professed inability to produce any correspondence with hotel employees or their co-defendants, which likely would have been retrievable from the laptop. It is ludicrous that the Lauria Defendants should suggest that this Court and Simon should just trust Ms. Lauria that all relevant evidence that would have been on the laptop has been made available to Simon anyway, after her countless acts of fraud, deception, forgery, destruction of evidence, and lies upon lies, many of which are either admitted or beyond doubt. Lauria's word is meaningless and this latest claim that she is now being completely open and honestly admitting to the full scope of her wrongdoing cannot be

trusted after she has spent the past eight or more years lying to and robbing her employer without qualm or remorse.

III. The Magistrate Judge Did Not Abuse Her Discretion in Finding that the Recommended Sanctions Were Necessary

The Lauria Defendants falsely claim that the Magistrate Judge's Report and Recommendation was "silent" on the issue of why the recommended sanctions, and nothing less, were necessary in these circumstances. Objections, p. 10. Clearly, the Lauria Defendants must not have read, or chose to ignore, pages 16 through 18 in which the Magistrate Judge does, in fact, discuss why the recommended sanctions were appropriate in light of the Lauria Defendants' egregious and wanton destruction of evidence.

It is unnecessary to repeat verbatim the entirety of the discussion, but suffice it to say that any suggestion that the Magistrate Judge abused her discretion by ignoring controlling law is conclusively refuted by her lengthy analysis and comparison of the instant facts to those involved in the Eleventh Circuit's imposition of similar sanctions in the case of *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). The Magistrate Judge, after considering the Motion for Sanctions, the facts presented, and the relevant legal precedent came to the correct conclusion that no lesser sanction would suffice to redress the Lauria Defendants' wrongdoing.

CONCLUSION

WHEREFORE, for the foregoing, Plaintiff Simon Property Group, Inc. respectfully requests this Honorable Court adopt Magistrate Judge Spaulding's Report and Recommendation in all respects; grant the Plaintiff's Motion for Sanctions in its entirety; overrule each of the Lauria Defendants' Objections to the Report and Recommendation;

award attorneys' fees and costs associated with the Motion for Spoliation in favor of Plaintiff and against the Lauria Defendants; as well as any other relief this Court may deem just and proper.

Dated: January 10, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically using this Court's ECF system, which will serve an electronic copy to Thomas Sadaka, Esq., Nejame, Lafay, Jancha, Ahmed, Barker, Joshi & Moreno, P.A., 189 S. Orange Avenue, Suite 1800, Orlando, FL 32801, Craig A. Brand, The Brand Law Firm, P.A., Grove Forest Plaza, 2937 S.W. 27th Avenue, Suite 101, Miami, FL 33133, and Timothy Herman, an unrepresented party, P.O. Box 141452, Orlando, Florida 32814, on this 10th day of January, 2013. Furthermore, a copy of the foregoing has been sent by regular mail and email to pro se Defendant Timothy Herman at the foregoing address and the email address provided by Mr. Herman for the purpose of service in this action, tim@exileorlando.com.

/s/Carlos E. Mustelier
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