

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SOUTHEASTERN MECHANICAL
SERVICES, INC.,

Plaintiff,

v.

NORMAN BRODY, JAMES SHEROUSE,
KEVIN SMITH, THERMAL
ENGINEERING CONSTRUCTION
SERVICES, INC. (A/K/A TEI
CONSTRUCTION SERVICES, INC.),
BABCOCK POWER SERVICES, INC.,
AND THEODORE MALISZEWSKI,

Defendants.

CIVIL ACTION FILE
NO. 8:08-cv-1151-T-30EAJ

**DEFENDANTS, NORMAN BRODY, JIMMY SHEROUSE, AND KEVIN
SMITH'S, MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF
SMS' MOTION FOR SANCTIONS DUE TO SPOILIATION OF EVIDENCE**

The Defendants, NORMAN BRODY, (“the Defendant Mr. Brody” or “Mr. Brody”), JIMMY SHEROUSE, (“the Defendant Mr. Sherouse” or “Mr. Sherouse”) and KEVIN SMITH, (“the Defendant Mr. Smith” or “Mr. Smith,” collectively “the Individual Defendants”), by and through their undersigned trial counsel and in accordance with Rule 3.01 of the Local Rules for the Middle District Of Florida, hereby file their Memorandum of Law in Opposition to Plaintiff SMS’s Motion For Sanctions Due To Spoliation Of Evidence And For Order To Show Cause, Or, In The Alternative, To Amend The Complaint (hereinafter “**Motion for Sanctions**”).

I. INTRODUCTION

Plaintiff, Southeastern Mechanical Services, Inc. (“**SMS**”), seeks the imposition of sanctions against Defendants Mr. Brody, Mr. Sherouse, and Mr. Smith, for alleged spoliation of evidence. Plaintiff also seeks an Order to Show Cause why the Defendants should not be held in contempt of this Court’s June 13, 2008, Temporary Restraining Order, for what Plaintiff claims is the willful destruction of evidence.¹ Plaintiff’s Motion for Sanctions should be denied in its entirety as Plaintiff failed to satisfy the criteria to support a claim for spoliation. Moreover, Plaintiff has absolutely no evidence that there was any willful destruction of evidence. Plaintiff’s Motion for Sanctions fails to establish that any evidence is missing, or that any allegedly missing evidence was intentionally destroyed by the defendants in bad faith. Plaintiff’s Motion for Sanctions is based upon its erroneous conclusion that Defendants deleted or “wiped” all emails from the hard drives of the laptop computers issued to Mr. Brody, Mr. Sherouse and Mr. Smith. However, the fundamental flaw in Plaintiff’s Motion for Sanctions is the fact that those laptop computers were never configured to have emails on the hard drives. The reason the emails are not on the hard drives is because such information was never there in the first place. Based upon the facts in this case and the law of spoliation, Plaintiff’s Motion for Sanctions must be denied.

II. FACTUAL BACKGROUND

The Individual Defendants resigned from SMS in May 2008. They started working for co-Defendant Thermal Engineering Construction Services, Inc. (“**TEI**”), on

¹ Plaintiff also seeks, in the alternative, to Amend the Complaint to add a cause of action against Defendant Babcock Power, Inc. for spoliation of evidence. Defendants Brody, Sherouse and Smith will not address that portion of Plaintiff’s Motion since Plaintiff’s proposed amendment is directed to Babcock Power, inc.

or about June 2, 2008. Mr. Brody, Mr. Sherouse and Mr. Smith were planning to open a new office for TEI in Jacksonville, Florida. On or about June 3, 2008, Mr. Brody, Mr. Sherouse and Mr. Smith each received a TEI issued laptop computer. (Affidavit of Norm Brody attached hereto as Exhibit “A”; Affidavit of James Sherouse attached hereto as Exhibit “B”; Affidavit of Kevin Smith attached hereto as Exhibit “C”). Mr. Travis Klepper set up and configured each of the laptop computers issued to the Defendants. (Affidavit of Travis Klepper attached as Exhibit “D”). According to Mr. Klepper, TEI uses a lotus notes email application and the typical setup of lotus notes is to have the user’s email file located on a server. (Affidavit of T. Klepper at ¶3). Mr. Klepper configured each of the laptop computers so that their email would reside on the server instead of on the hard drive of the individual laptop computer. (Affidavit of T. Klepper at ¶4). As a result of the manner in which the laptop computers were configured, no email files would reside on the individual laptops. (Affidavit of T. Klepper at ¶6). Instead, all email files are stored and preserved on a company server. (Affidavit of T. Klepper at ¶6). Mr. Klepper also synchronized the Blackberry devices that had been previously purchased by Mr. Brody, Mr. Sherouse and Mr. Smith, to their TEI email accounts. (Affidavit of T. Klepper at ¶7). As a result of the synchronization, all email sent or received from the Blackberry devices and the individual’s TEI email account would also reside on the company’s server. (Affidavit of T. Klepper at ¶7).

Plaintiff obtained a Temporary Restraining Order (“**TRO**”) in this case on Friday, June 13, 2008. Mr. Sherouse was served with the TRO on Saturday, June 16, 2008, and on Monday, June 17, 2008, Mr. Sherouse returned the laptop computer and Blackberry device to Mr. Robert Barrett, TEI’s Chief Information Officer. (Affidavit of J. Sherouse

at ¶2). Mr. Brody and Mr. Smith were served with the TRO on Monday, June 17, 2008, and on Tuesday, June 18, 2008, they both returned the laptop computers and Blackberry devices to Mr. Barrett. (Affidavit of N. Brody at ¶2; Affidavit of K. Smith at ¶2). None of the Individual Defendants deleted any emails or other information from either the laptop computers or the Blackberry devices. (Affidavit of N. Brody at ¶4; Affidavit of J. Sherouse at ¶4; Affidavit of K. Smith at ¶4). When this lawsuit was filed, Mr. Klepper recovered all email files associated with Mr. Brody, Mr. Sherouse and Mr. . Smith, from the company's server, and he then provided those email files to the company's counsel. (Affidavit of T. Klepper at ¶8). Those email files were produced through discovery to Plaintiff. Thus, all emails sent or received by Mr. Brody, Mr. Sherouse and Mr. Smith, were produced through discovery to Plaintiff.

In response to Plaintiff's discovery requests, TEI also produced the individual defendants' TEI issued laptop computers and Blackberry devices. While analyzing the laptop computer hard drives, Plaintiff's expert found that there were no email files on the hard drives. While there were no emails on the hard drives, there were numerous Microsoft Word and Excel documents on the hard drive, which documents were also produced to Plaintiff. Plaintiff immediately concluded that the hard drives on the laptops were "wiped" and all emails deleted, and Plaintiff filed its Motion for Sanctions. However, contrary to Plaintiff's erroneous conclusion, the reason there were no emails on those hard drives is simply that the laptops were not configured to have email on the hard drives. All emails sent or received by the Defendants, either through their laptops or their Blackberry devices, were stored on a server, and those emails were all produced to

Plaintiff. The emails and other documents produced by Defendants to Plaintiff include many of the documents upon which Plaintiff relies for its claims against the Defendants.

III. THE LAW OF SPOILIATION

Spoliation is the “intentional destruction, mutilation, alteration or concealment of evidence.” BLACK’S LAW DICTIONARY 1437 (8th ed. 2004). Federal law governs the imposition of spoliation sanctions in this case, but Florida state law may be consulted to guide the Court in its analysis. Kimbrough v. City of Cocoa, 2006 WL 3500873 (M.D. Fla. Dec. 4, 2006). Under Federal law, to establish spoliation, the party seeking sanctions must prove (1) that the missing evidence existed at one time, (2) that the alleged spoliator had a duty to preserve the evidence, and (3) that the evidence was crucial to the movant being able to prove its *prima facie* case. Lockheed Martin Corp. v. L-3 Commc’n Corp., 2007 WL 3171299 (M.D. Fla. Oct. 25, 2007). Further, in the Eleventh Circuit, sanctions for spoliation of evidence are appropriate only when the “absence of that evidence is predicated on bad faith. . . ‘Mere negligence in losing or destroying the records is not sufficient for an adverse inference, as it does not sustain an inference of consciousness of a weak case.’” Kimbrough, 2006 WL 3500873 (M.D. Fla. Dec. 4, 2006) (citing Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (“In this circuit, an adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.”))

IV. PLAINTIFF FAILED TO SATISFY THE ESSENTIAL REQUIREMENTS FOR A CLAIM OF SPOILIATION.

A. No Spoliation Sanction Is Appropriate Because There Was No Destruction of Evidence.

Under Florida law, the first element Plaintiff must establish in a claim for spoliation is that the missing evidence existed at one time. Wilson v. Wal-Mart Stores, Inc., 2008 WL 4642596 (M.D. Fla. 2008). Plaintiff's claim for spoliation is based entirely upon the fact that the laptop computer hard drives used by Mr. Brody, Mr. Sherouse and Mr. Smith during a brief 2-week period from June 3 or 4, 2008 through June 17, 2008, did not have any emails and that the Blackberry devices they used during that same time period likewise did not have any emails. Plaintiff does not contend that Defendants have not produced the emails. Rather, Plaintiff claims that the laptops and Blackberry devices have been "wiped" because there are no emails. Thus, the "evidence" that Plaintiff contends is missing is the emails on the hard drives of the laptop computers used by Mr. Brody, Mr. Sherouse and Mr. Smith. The **only** support for the spoliation claim is Plaintiff's expert's affidavit wherein he asserts that after conducting his examination of the laptop hard drives, he was not able to find any emails. Plaintiff makes the giant leap that since there were no emails on the hard drives, then Defendants must have "wiped" the laptops. Plaintiff's entire claim is predicated on the **false** assumption that the hard drives for the laptop computers stored emails.

However, as is specifically set forth in the Affidavit of Travis Klepper, who configured the laptop computers at issue in this case, no emails were stored on the hard drives of the laptops. According to Mr. Klepper each of the laptops was configured so that the users' email would reside on the server as opposed to residing on the hard drive

of the individual laptop. (Affidavit of T. Klepper at ¶4). Mr. Klepper did not configure the computers to allow for a replica file. (Affidavit of T. Klepper at ¶5). The individuals could access their emails only when the laptops were connected to the server. Thus, there were never any emails on the hard drives of the laptop computers used by Mr. Brody, Mr. Sherouse and Mr. Smith. Of course, Plaintiff's expert would not have seen any emails, as the laptops were not connected to the server when he conducted his examination of the hard drives. Contrary to Plaintiff's conclusion that the laptops were "wiped," the information was never stored on the hard drives. Accordingly, Plaintiff's claim for spoliation based upon the emails "missing" from the laptops must fail.

Plaintiff also claims that the Blackberry devices used by the Individual Defendants were also "wiped" because they were devoid of any information. However, contrary to Plaintiff's expert's findings, TEI's forensic expert, Mr. Lacey Walker, examined the Blackberry devices, and found that one device contained 66 contacts and another device contained 208 contacts, and one of the devices contained 5 text messages. (Affidavit of Lacey Walker attached as Exhibit E, at ¶10).

While Plaintiff is correct that the Blackberry devices currently contain no emails, this fact does not establish that evidence is missing. Even assuming *arguendo* that the emails from the Blackberry devices were somehow deleted, Plaintiff cannot maintain a claim for spoliation based solely upon that fact. In Lockheed Martin Corp., 2007 WL 3171299, *2, this Court held that a defendant could not be sanctioned for spoliation if the evidence was produced in another format. In Lockheed, the defendant sought the imposition of sanctions after finding that one of Plaintiff's employees had deleted emails. This Court did not impose sanctions, concluding that the evidence was insufficient to

establish that there were any missing emails that would constitute evidence in the case, since the defendant did not assert that the emails were not produced through discovery, albeit in a different format since they did not appear on the hard drive. In this case, all of the email communications of Mr. Brody, Mr. Sherouse and Mr. Smith, including email communications through the Blackberry devices, were stored on a server. Once this litigation commenced, the emails were pulled from the server, sent to TEI's counsel, and then produced to Plaintiff during the course of discovery in this case. All emails have been produced to Plaintiff, such that there is no "missing evidence." Accordingly, Plaintiff cannot satisfy the first element of a claim for spoliation.

B. No Spoliation Sanction Is Appropriate Because There is No Bad Faith.

In the Eleventh Circuit, to justify even the mild sanction of an adverse inference, the Court must find bad faith. Victor v. Makita U.S.A., 2007 WL 3334260 (M.D. Fla. Nov. 9, 2007). In Bashir, the Eleventh Circuit expressly held that an adverse inference can be drawn from a party's failure to preserve evidence, only when the absence of that evidence is predicated on bad faith. Bashir, 119 F.3d at 931.

In this case, there is absolutely no evidence of bad faith. None of the Defendants deleted any emails from their laptop computers or from their Blackberry devices. (Affidavit of N. Brody at ¶4; Affidavit of J. Sherouse at ¶4; Affidavit of K. Smith at ¶4). The laptop computers are devoid of emails because that is how they were configured. No one deleted or "wiped" the laptops as Plaintiff erroneously contends. While Plaintiff admits in its Motion for Sanctions that the emails on the Blackberry devices could have been deleted by someone repeatedly entering an incorrect password to access the device, Plaintiff overlooked two other plausible explanations. As set forth in the Affidavit of

Lacey Walker, one explanation is that the wipe could have been initiated from the Blackberry server. (Affidavit of L. Walker at ¶11). During his deposition, Plaintiff's forensic expert, Mr. Joe Kessler admitted that the administrator of the Blackberry server could have sent a remote wipe to the devices that resulted in the deletion of all emails on the devices. Mr. Kessler further testified that it is not uncommon for the administrator of the Blackberry server to perform a remote wipe when a Blackberry is lost or when an employee is terminated. As more specifically addressed in Defendants TEI's and BPS' Memorandum in Opposition to Plaintiff's Motion for Sanctions, the third party administrator of the Blackberry server at issue here, Internoded, has been contacted to determine whether Internoded remotely deleted the contents of the Blackberry devices, but no confirmation has yet been received. Further, it is also possible that the emails from the Blackberry devices were inadvertently deleted by Plaintiff's expert while he was capturing the information on the devices. (Affidavit of L. Walker at ¶11). Given the fact that none of the Defendants intentionally deleted any information from the Blackberry devices and the fact that there are other plausible explanations for why the Blackberry devices do not contain email information, there is absolutely no evidence to show the emails on the Blackberry devices were intentionally deleted in bad faith. Moreover, since all emails from the Blackberry devices were stored on BPI's server and were produced to Plaintiff through discovery, Plaintiff's claim for spoliation must fail.

V. CONCLUSION

For the foregoing reasons, Mr. Brody, Mr. Sherouse and Mr. Smith respectfully request that this Court deny Plaintiff's Motion for Sanctions.

DATED this 24th day of April, 2009.

/s/ Thomas T. Steele

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 24th day of April, 2009, I filed the foregoing Memorandum of Law in Opposition to Plaintiff SMS' Motion for Sanctions Due to Spoliation of Evidence with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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