UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-cv-21882-KMW

TITLE CAPITAL MANAGEMENT, LLC,

Plaintiff,

HEARING REQUESTED

v.

PROGRESS RESIDENTIAL, LLC, et al.,

Defendants.
_____/

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS UNDER RULE 37(e) BASED ON PLAINTIFF'S INTENTIONAL DESTRUCTION OF EVIDENCE

TCM claims that it should not be sanctioned for its intentional destruction of evidence because it didn't intend to deprive *these* parties in *this* litigation. TCM does not dispute that it did intentionally destroy evidence in anticipation of litigation with Progress Residential LP ("Progress LP"), which is a related entity to Defendants Progress Residential, LLC and FREO Florida LLC. ("Progress Defendants"). Nonetheless, TCM asks the Court to completely ignore its intentional destruction of its staff computers and emails on the grounds that it only meant to deprive Progress LP of use of the evidence, but not Progress LP's subsidiaries and related entities, and because this spin-off litigation arising from the same failed business relationship is somehow separate from the litigation TCM anticipated when it destroyed the evidence. TCM's arguments are not supported by the law or the facts, and the Progress Defendants' Motion to Dismiss must be granted.

I. The Requirements of Rule 37(e) are Satisfied

The threshold requirements of Rule 37(e) are met when "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced

through additional discovery." Fed. R. Civ. P. 37(e). Heavy sanctions, including dismissal, are appropriate under Rule 37(e)(2) when "the party acted with intent to deprive another party of the information's use in litigation." Fed. R. Civ. P. 37(e)(2).

Here, TCM does not dispute that it intentionally destroyed electronically stored information in anticipation of litigation with Progress LP. Rather, TCM's argument hinges on the legally unsupported claims that (1) it somehow did not foresee this litigation that arises from the same failed business relationship as the pending state court litigation, and (2) it only meant to deprive Progress LP of use of the evidence, but not Progress LP's subsidiaries and related entities. TCM also makes the claim that the destroyed information can somehow be replaced or restored through additional discovery. This argument was explicitly rejected by the state court. Finally, TCM makes an unsubstantiated claim that the Progress Defendants are not prejudiced because none of TCM's staffers were involved in the creation of the bidsheets. This claim is blatantly contradicted by evidence in the Progress Defendants' possession. In short, none of TCM's arguments withstand scrutiny, and TCM's intentional destruction of evidence must be sanctioned.

A. This Litigation was Foreseeable At the Time TCM Destroyed the Evidence

TCM's Response reads as though the only claims it asserts in this lawsuit are copyright claims. However, TCM has asserted contract claims against the Progress Defendants which arise from commissions that are allegedly due to TCM for work performed in April 2013, pursuant to TCM's contract with Progress LP. TCM has sued the Progress Defendants under the very contract that is the subject of the state court action. Its verbal contract claim also arises from the same failed business relationship that gives rise to the state court action. Indeed, TCM asserted a

nearly identical contract claim against Progress LP for unpaid commissions in October 2013 – only one month after the evidence was destroyed.

TCM's Response glazes over its pending contract claims because they were reasonably foreseeable no later than May 2013, when TCM allegedly did not receive payment due for services performed in April 2013. Thus, these contract claims were reasonably foreseeable at least four months before TCM destroyed its computers in September 2013.

Moreover, with respect to the copyright claims, TCM was on notice by June 11, 2013 that Progress and its related corporate entities had selected another vendor for their foreclosure auction bidding business. *See* email correspondence attached as Exhibit A. And, on May 28, 2013, TCM was even provided Albertelli Law's contact info when Progress informed TCM that it was changing its escrow/closing agent on existing contracts to Albertelli Law. *See* email correspondence attached as Exhibit B. Thus, TCM's claim that the copyright litigation against the Progress Defendants and their new vendor was unforeseeable at the time it destroyed its computers is untenable.

In any event, TCM does not deny that pre-suit settlement negotiations between its counsel and the undersigned law firm were ongoing from May 2013 until Progress LP brought suit in September 2013. Where TCM foresaw litigation arising from the parties' failed business relationship, it was under a duty to preserve evidence relevant to that litigation. It violated that duty by ordering the destruction of all evidence contained on all staff computers. Accordingly, the Court should reject TCM's argument that the claims at issue in this case were not foreseeable at the time it destroyed its staff computers.

B. TCM Intended to Deprive the Progress Defendants of Use of Information on TCM's Staff Computers In Litigation Arising from the Parties' Failed Business Relationship

When TCM destroyed its staff computers, it did not intend to deprive solely Progress LP of the use of information stored on those computers. TCM destroyed its emails with the intent to deprive Progress LP, the Progress Defendants, and any other related corporate entity with which it might face litigation as the result of the failed foreclosure auction bidding business relationship.

The critical question under spoliation law is whether TCM destroyed evidence with the intent of depriving opponents of its use when TCM anticipated litigation involving that evidence. *Vanliner Ins. Co. v. ABF Freight Sys., Inc.*, 2012 WL 750743, at *3 (M.D. Fla. Mar. 8, 2012) quoting *Optowave Co. v. Nitikin*, U.S. Dist. LEXIS 81345, at *22 (M.D. Fla. Nov. 7, 2006) (Spoliation "[s]anctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation or potential litigation.") The Advisory Committee Notes to Rule 37 state: "Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant." Fed. R. Civ. P. 37, Advisory Committee Notes, 2015 Amendment. The inquiry does not turn on whether TCM intended to deprive a specific corporate entity of use of the information. Rather, spoliation law looks to whether TCM destroyed relevant evidence when litigation involving that evidence was foreseeable, with the intent of depriving opposing parties in such litigation of its use.

Here, TCM anticipated litigation arising from its failed business relationship with Progress LP and the related Progress Defendants at the time it destroyed its staff computers. At least some of the material contained in TCM's staff computers and emails would be relevant to the litigation. Where TCM foresaw litigation from the failed business relationship with Progress and the Progress Defendants and destroyed evidence relevant to that litigation, it violated its preservation duty. TCM violated that duty with the intent to deprive not only Progress LP of use

of the information in litigation arising from the failed business relationship, but also related corporate entities which may oppose TCM in litigation arising from the same failed business relationship.

TCM suggests that Progress is engaged in "subterfuge" by "blur[ring] the distinction" between related entities. However, no "subterfuge" or "blurring" is required. TCM cannot shy away from the fact that the entities in this suit and the State Court Action are indeed related corporate entities. TCM explicitly pled that the entities are related in its complaint: "Progress Residential and FREO are related corporate entities that share a common parent or controlling interest." Am. Compl. at ¶ 11. Moreover, TCM cannot escape the fact that FREO Florida LLC is also a party in the state court action.

The Progress Defendants and Progress LP are similarly situated, related entities. TCM's undisputed efforts to deprive Progress LP from use of information stored on its employee computers in litigation over their failed business relationship is indistinguishable from its effort to deprive the related Progress Defendants from use of the same information in litigation over the same failed business relationship. The Court should reject TCM's effort to create a distinction where none exists.

C. The Destroyed Evidence Cannot be Replaced Through Additional Discovery

TCM points out that the Progress Defendants have filed this motion prior to discovery in this case, apparently advancing the notion that the destroyed evidence can be re-created through other avenues. The state court explicitly rejected this argument. Specifically, Judge Bronwyn Miller stated that the delay of several years has "undoubtedly resulted in erosion of witness memory, preventing [Progress] from obtaining the equivalent information." [D.E. 36-1 at p. 9.]

Even if the Progress Defendants attempted to set the staffers' depositions, the Progress Defendants would be unable to use contemporaneous emails and other documents to impeach their testimony. Moreover, the information cannot be obtained from other sources as it was saved locally on computers that have been discarded or given away. *Living Color Enters. v. New Era Aquaculture Ltd.*, 2016 U.S. Dist. LEXIS 39113, *10, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016) (deleted text messages could not be restored or replaced through additional discovery). Thus, this Court should reject TCM's argument, as did the state court.

D. The Progress Defendants Are Not Required to Demonstrate Prejudice Under Rule 37(e)(2)

The law is clear that, when a party destroys evidence with the intent to deprive another party of its use in litigation, the evidence is presumed to be relevant and no showing of prejudice is required because prejudice is presumed. *See In re Abell*, 2016 Bankr. LEXIS 1690, *65-67; *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D. Md. 2008) (*citing Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir.1995)).

Indeed, the Advisory Committee Notes to Rule 37 state that a finding of prejudice is not required under Rule 37(e)(2):

> Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Fed. R. Civ. P. 37

Even if a finding of prejudice were a consideration here, TCM's unsubstantiated claim that that the staffers "played no role whatsoever in creating the copyrighted spreadsheets themselves" falls far short of demonstrating that the Progress Defendants would not be prejudiced by the destruction of its staff computers. [D.E. 38 at p. 4.]

TCM instead attempts to shift the burden to the Progress Defendants to demonstrate prejudice, claiming that the Progress Defendants have failed to provide "a scintilla of evidence" that they were prejudiced by destruction of the staff computers and emails. [D.E. 38 at p. 4.] First, TCM's effort to pin the burden on the Progress Defendants is contrary to spoliation law. *Pinkney v. Winn-Dixie Stores, Inc.*, No. 14-CV-075, 2015 U.S. Dist. LEXIS 24122, 2015 WL 858093, at *5 (S.D. Ga. Feb. 27, 2015) ("Allowing Defendant to avoid spoliation sanctions through the testimony of its witness that the destroyed evidence would not have benefited Plaintiff would turn spoliation law on its head.").

Nonetheless, even assuming the burden was on the Progress Defendants to demonstrate prejudice, they are able to demonstrate through the emails in their own employees' possession that TCM staffers were, in fact, involved in the creation of the bidsheets. For example, Wesoloski specifically told Progress LP and the Progress Defendants that one of the TCM staffers, Mauro Luna, would input Progress LP and the Progress Defendants' requested structural changes into the spreadsheet. *See* email attached as Exhibit C. Luna also instructed Progress LP and the Progress Defendants how to address formulaic issues within the spreadsheets. *See* email attached as Exhibit D. Indeed, Luna was identified as TCM's "tech guy" by TCM's corporate representative. *See* except from transcript of continued deposition of TCM's corporate representation at 50: 5-7 attached as Exhibit E.

Even from the emails in Progress' possession, it is beyond dispute that TCM's staffers, including Luna, edited and manipulated the allegedly copyrighted work. When TCM destroyed the computers of Luna and the other staffers, it also destroyed all record of their activities and communications. Staff emails and computer files would contain locked-in-time work product and communications, which would show exactly what changes were made to the bid sheets, at what time, at whose direction, and whether any changes were original or were being made based on other sources that already existed.

Thus, without the computers or emails of any TCM staffers, the Progress Defendants are left with TCM's version of events. Even in its Response, TCM's version of events has been contradicted by the meager email evidence in the Progress Defendants' possession, which demonstrates exactly why the spoliated emails and information are critical to the Progress Defendants' defense. Without the spoliated evidence, the Progress Defendants are irreparably prejudiced in their ability to defend themselves.

II. Conclusion

The requirements of Rule 37(e)(2) are satisfied here. TCM intentionally destroyed its staff emails and computers with the intent to deprive the Progress Defendants of their use in reasonably foreseeable litigation arising from the parties' failed business relations. This intentional destruction is made more egregious where TCM is a sophisticated corporate party, controlled by a member of the Florida Bar, and aware of its preservation obligations and the broad scope of discovery. *DVComm, LLC v. Hotwire Communs., LLC*, 2016 U.S. Dist. LEXIS 13661, *14 (E.D. Pa. Feb. 3, 2016); *See also* Fed. R. Civ. P. 37, Advisory Committee Notes, 2015 Amendment. Dismissal of TCM's complaint is the appropriate sanction for its intentional misconduct, pursuant to Rule 37(e)(2)(c) of the Federal Rules of Civil Procedure.

REQUEST FOR HEARING

The Progress Defendants respectfully request that an evidentiary hearing be conducted on this matter. In order to grant the relief sought by the Progress Defendants in this motion, it may be necessary for the Court to make findings of fact that will require the presentation of evidence. Further, given the complex factual and procedural history of this case, which encompasses a State Court Action that has been pending for more than three years, the Progress Defendants believe that a hearing would be beneficial to the Court. We estimate that approximately 2 hours will be required for the hearing.

Dated: February 14, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2017, 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 either via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/Monica M. McNulty
Monica M. McNulty