**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 16-21882-CV-WILLIAMS/TORRES

TITLE CAPITAL MANAGEMENT, LLC,

Plaintiff,

v.

PROGRESS RESIDENTIAL, LLC. *et al.*,

Defendants.
_____/

**OMNIBUS ORDER**

This matter is before the Court as a result of Defendant PROGRESS RESIDENTIAL, LLC's Motion for Rule 37 Sanctions in the form of dismissal of the Complaint with Prejudice. [D.E. 36].[1] Defendant seeks sanctions based on an alleged destruction of critical evidence, and its Motion has been joined by the other Defendants named in the case. [D.E. 37, 40]. Additionally, Defendants sought a stay of discovery pending resolution of these sanction issues. [D.E. 63].

Plaintiff TITLE CAPITAL MANAGEMENT, LLC filed its Response in Opposition to the Motion on February 7, 2017 [D.E. 38], and the Reply followed on February 14. [D.E. 39]. The Court's rulings follow.

## *I. FACTUAL BACKGROUND*

Defendant Progress Residential, LLC ("Progress"), along with several corporate subsidiaries, conducts real estate operations in the state of Florida,

[1] The Honorable Judge Kathleen M. Williams referred the Motion to the undersigned on June 13, 2017.

purchasing property with the goal of leasing and collecting rental income from new tenants. Beginning in 2012, Progress entered into an agreement with Plaintiff Title Capital Management ("TCM") and its principal, Eric Wesoloski, to perform due diligence in connection with the purchase of foreclosed properties located throughout the state. Wesoloski, an attorney and member of the Florida Bar since 2001, assisted Progress in expanding the company's real estate investment portfolio in the South Florida market. In exchange for this service, TCM and Wesoloski received a four percent commission on the total purchase price of any property acquired on behalf of Progress.

According to TCM, and prior to the start of the business arrangement with Progress, Wesoloski allegedly created a "sophisticated spreadsheet" that helped the company determine a foreclosed property's inherent value. This spreadsheet contained various rows and columns,[2] whereby low-level employees (referred to as "analysts" by TCM) input values and figures into the document. The information placed into the spreadsheet assisted TCM and Wesoloski in determining whether a property met the criteria set forth by Progress. According to Wesoloski, TCM's analysts had no authority or ability to change the information found within the document's columns and rows. Instead, the analysts simply performed data entry,

[2] The spreadsheet included information such as the size of the property, comparable sales in the area, property taxes, homeowner's association fees, and capitalization rates. Once these values were entered into the spreadsheet, the document calculated a "maximum bid price" for the particular property based on various pre-loaded formulas already included in the file.

placing relevant values for the properties in question into the spreadsheet using information found within various real estate databases and listing services.

The relationship between the parties began to sour in the spring of 2013. According to Progress, in April and May of that year the company discovered several errors made by TCM within the spreadsheets used to calculate the value of the foreclosed properties. These errors artificially inflated the maximum bid price on the properties, which in turn resulted in much larger commissions being paid to TCM and Wesoloski following any sale. After more errors were found, Progress concluded that TCM and Wesoloski had fraudulently manipulated the information placed into the spreadsheet in order to obtain greater commissions on the sales. TCM disputes this version of events, stating the mistakes were caused by clerical error.

By May 1, 2013, it was clear that the business arrangement between TCM and Progress was doomed. In an e-mail exchange with Don Mullen,[3] Wesoloski attempted to arrange for a meeting with Progress in order to provide an explanation for the input errors. Mr. Mullen replied to this message on May 20, 2013, stating that Progress "sent our analysis to our lawyers, [and] they will proceed with appropriate action." Later that same day, when Wesoloski asked to come to Mullen's office to meet and discuss the issues, Mullen once again repeated that Progress's

[3] During the evidentiary hearing, counsel referred to Mr. Mullen as the "president," "principal," and "boss" of Progress Residential LP. Mr. Wesoloski testified that he understood Mr. Mullen to be "the principal of a group called Premium Partners." Mr. Mullen, in his correspondence with Wesoloski, sent messages from his FREO account. For purposes of this Order, we deem it sufficient to identify Mr. Mullen as a principal with the Progress Defendants.

lawyers would be in contact with TCM. On May 22, in another response to Wesoloski's request for a meeting, Mullen stated that "you need to speak to our lawyers," and that the issue was "better left in the hands of outside [counsel]." During the course of this e-mail exchange, Wesoloski provided the contact information for TCM's attorneys "if [Progress was] intent on following the legal route."

The Parties then attempted to resolve the matter without court intervention. At the end of May, TCM's attorneys began discussing proposals for settlement with Gail McQuilkin, counsel for Progress. On June 11, 2013, McQuilkin notified TCM's counsel that Progress had no intention of resuming its business relationship with Wesoloski, but that payment in the amount of $400,000.00 would settle the dispute. TCM's legal team made a counter-proposal to that offer on June 20, which kicked off a series of back-and-forth negotiations that continued throughout the summer. In July, it appeared that the parties were close, with Progress demanding a personal guarantee from Wesoloski for a cash payment of $50,000.00 as part of any settlement. Although it seemed as if Wesoloski agreed to make such a guarantee, McQuilkin notified TCM's counsel on September 11, 2013 that "the damages relating to the home owners association fees are escalating," and that additional payments might be necessary to resolve the matter. A final agreement never took place, and Progress eventually filed suit for breach of contract in Miami-Dade Circuit Court on September 23, 2013.

Sometime in September, during the course of settlement negotiations and in the weeks leading up to the filing of the state court action, the computers used by TCM analysts were "wiped clean," destroyed and given away. This caused the loss of all information contained within those computers, including internal correspondence between TCM employees. Progress contends that this destruction took place on the orders of Wesoloski, and was done so in order to destroy evidence relevant to the contract dispute between TCM and Progress. Wesoloski, on the other hand, testified that the computers were destroyed because TCM ceased business operations following the loss of Progress as a client.

During the course of the state court proceedings, Progress sought discovery concerning TCM's internal correspondence during the course of the parties' relationship, including e-mails sent to and from analysts who worked for TCM and entered relevant data into the spreadsheets. Progress continued its pursuit of this information despite the objections raised by TCM over production of that information. After the state court issued motions to compel production to TCM, Wesoloski filed an affidavit informing Progress that the computers had been destroyed and the information lost. This disclosure came on September 11, 2015, nearly two years after the filing of the breach of contract claim. Progress, upon learning of the destruction of the computers, then sought sanctions against TCM and Wesoloski in the state court action. The state court, in an Order dated December 29, 2016, granted Progress's Motion, finding that the jury should be instructed on the failure to preserve the electronically-stored information and

shifting the burden of proof to require TCM to demonstrate that it did not breach the contract with Progress.

The dispute arrived in federal court as a result of a copyright lawsuit filed by TCM on May 24, 2016. TCM alleges that the spreadsheets – referred to by the parties as "bid sheets" – are protected under the Copyright Act of 1976, and that Progress infringed on its exclusive right to use those bid sheets when it provided them to TCM's successor. In response to the Complaint, Progress filed a Motion for Sanctions under Rule 37(e) of the Federal Rules of Civil Procedure, asking this Court to dismiss with prejudice the copyright lawsuit as a result of what they deem the "intentional destruction of critical evidence." Plaintiff, naturally, opposes dismissal.

We held two evidentiary hearings on the matter, taking place on August 24 and September 5, 2017. Wesoloski testified at these hearings, as did several attorneys that took part in settlement negotiations prior to the filing of the state court action. In addition to this testimony, numerous exhibits were entered into the record, including correspondence between the parties and documents used in the state court action to support the motion for sanctions filed there.

After reviewing the party's briefing on the matter, the pertinent portions of the record, and otherwise being fully briefed on the premises, we find that the Motion for sanctions should be denied for now.

## *II. LEGAL STANDARD*

"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) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 669 (2d Cir. 1999)). When considering a claim for spoliation of electronically-stored information ("ESI"), courts should look to Federal Rule of Civil Procedure 37(e), which was recently amended as of December 1, 2015.

Rule 37(e) reads as follows:

> **Failure to Preserve Electronically Stored Information.** If 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, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon a finding that the party acted with the intent to deprive another of the information's use in the litigation may:
>
> > (A) presume that the lost information was unfavorable to the party;
> >
> > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> >
> > (C) dismiss the action or enter a default judgment.

FED. R. CIV. P. 37(e). According to the Advisory Committee Notes, Rule 37(e) "authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify the

measures." FED. R. CIV. P. 37(e) Adv. Comm. Notes, 2015 amendment. "It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used." *Id.*

Pursuant to Rule 37(e), four threshold requirements must be met before a court may impose sanctions: (1) the information sought constitutes ESI; (2) the ESI should have been preserved in anticipation of litigation; (3) the ESI is lost because a party failed to take reasonable steps to preserve it; and (4) the ESI cannot be restored or replaced through additional discovery. *See* FED. R. CIV. P. 37(e); *Eshelman v. Puma Biotechnology, Inc.*, 2017 WL 2483800, at *4 (E.D. N.C. June 7, 2017). If these threshold elements are satisfied, Rule 37(e) next establishes two different avenues parties can take to demonstrate that sanctions are appropriate. "The first avenue, Rule 37(e)(1), requires a court to make a finding of prejudice before sanctions may be warranted. The second avenue, Rule 37(e)(2), requires a court to make a finding that a party acted with the intent to deprive the opposing party" of the ESI at issue. *Id.* (quoting *In re: Ethicon, Inc.*, 2016 WL 5869448, at *3 (S.D. W. Va. Oct. 6, 2016)).

## *III. ANALYSIS*

### *A. Rule 37(e) Threshold Requirements*

As an initial matter, there can be no doubt that the information constituted ESI. *See Alabama Aircraft Industries, Inc. v. Boeing Co.*, 319 F.R.D. 730, (N.D. Ala. 2017) (e-mails containing bidder's proprietary information about costs, pricing and bidding methodology constituted ESI); *Connor v. Sun Trust Bank*, 546 F. Supp. 2d

1360, 1375 (N.D. Ga. 2008) (e-mail discussing employee's termination should be considered ESI); *TLS Mgmt. and Marketing Servs. LLC v. Rodriguez-Toledo*, 2017 WL 1155743 (D.P.R. 2017) (information stored on laptop, iPhone and external hard drives constituted ESI).

There is also no question that the information at issue should have been preserved in anticipation of litigation. The duty to preserve relevant evidence is triggered not only when litigation is pending, but also when it reasonably foreseeable to that party. *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 301 (11th Cir. 2009); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). In determining whether litigation is reasonably foreseeable, "the standard is an objective one." *Alabama Aircraft*, 319 F.R.D. at 742. Here, it is abundantly clear that the parties were anticipating litigation at the time the computers were destroyed, and that suit was most likely forthcoming. By May of 2013, TCM and Progress had referred each other to respective counsel, and both sides had engaged in discussions about the looming threat of a lawsuit. Further, correspondence between TCM and Mr. Mullen show that Wesoloski expressed grave concern that Progress might file suit over the alleged manipulation of the bid sheets and desperately hoped to avoid this outcome. Wesoloski is no neophyte, and at the time the computers were wiped clean he had been a member of the Florida bar for more than a decade. An attorney in his position – whether or not he had been practicing during that 10-year period – would know that Progress had made serious

accusations concerning his credibility and business practices, and that litigation would most likely result. That is sufficient for purposes of Rule 37.

Plaintiff does not dispute that, at the time the computers were destroyed, it was reasonably foreseeable that litigation might arise with regard to the the *breach of contract* claim. [D.E. 94, p. 141, l. 3-7]. TCM and Wesoloski contend, however, that the *copyright* litigation was not reasonably foreseeable at the time the evidence was lost, and that our decision must be guided by what Wesoloski knew about his infringement claim at the time the computers were destroyed. This argument is, at best, naïve, and at worst, disingenuous. Reasonable anticipation of litigation means just that: whether a reasonable person would anticipate, based on the totality of circumstances surrounding the dispute, that litigation might arise as a result of a dispute between the parties. Rule 37 does not require the exacting prescience Plaintiff argues he must have concerning the exact *type* of litigation a party anticipates, especially when the party advancing such an argument is the alleged spoliator. To read such a requirement into the Rule would allow misbehaving parties to escape their obligations to preserve evidence through the careful splitting of hairs.

We also reject Plaintiff's argument that it believed the parties had reached a settlement prior to the destruction of the computers. Although the record reflects that TCM and Progress appeared to be working towards an amicable resolution in May of 2013, negotiations continued throughout that summer. Wesoloski testified that he believed a deal had been reached "in principle," but also admitted that he

never signed nor received a settlement agreement from Progress. As he was represented by counsel at this time – and, as discussed previously, had been a member of the Florida Bar since 2001 – we do not find this testimony credible.[4]

As such, TCM and Wesoloski were under a duty to preserve the ESI pertaining to the Progress account as a result of litigation that was reasonably foreseeable. Plaintiff obviously failed to do so, as the computers were destroyed in early September 2013. The decision on whether sanctions are appropriate, therefore, turns on whether or not the lost information can be restored or replaced through additional discovery. We find that it can, and that the Motion should be denied for this reason. *See Living Color Enterprises, Inc. v. New Era Aquaculture*, 2016 WL 1105297, at *5 (S.D. Fla. May 22, 2016) (if any one of the four threshold requirements of the Rule is not met, "then the Court need proceed no further under Rule 37(e), and a motion for spoliation sanctions or curative measures must be denied.").

At the evidentiary hearing on August 24, 2017, Wesoloski testified that his internal correspondence, in addition to the e-mails sent between analysts working

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[4] As a further consideration, we reject outright Plaintiff's attempts to excuse the destruction of the evidence by making a distinction between the prejudiced parties named in the state court action – Progress Residential, LP, f/k/a Fundamental REO, L.P. – from Progress Residential, LLC, the named Defendant here. This is a classic case of a distinction without a difference; the named parties are nearly identical, the Complaint alleges that Progress Residential operates several related corporate entities that share common controlling interests, and Wesoloski's own testimony establishes that he knew that the entities were related. To argue that the parties are not the same – and that the repercussions of Wesoloski's actions should apply only to the L.P., but not the LLC – is flatly negated by the record before us.

for TCM at the time it performed due diligence for Progress, were still available on his personal computer:

> **WESOLOSKI**: My recollection is it's – I believe it was in 2012 I upgraded to a new computer and I moved all the data that was on my prior computer onto my new personal computer. And I have been using that same one ever since.
>
> COUNSEL: Was that before you started working with the defendants?
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> **WESOLOSKI:** That's correct.
>
> …
>
> THE COURT: Does your email – is your email still on your personal computer from back in 2012?
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> **WESOLOSKI:** It is.
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> THE COURT: And did that – did that involve only TCM, or any emails you were engaging in connection with your business back in 2012? Do you still have those on your computer?
>
> **WESOLOSKI:** Yes, I have the emails.
>
> THE COURT: Okay. And what about the emails between you and other people working for you? … What about internal emails?
>
> **WESOLOSKI:** Yes, I have those emails too.

[D.E. 94, p. 74-75, 96-97]. In light of this testimony, discovery directed at information stored on Wesoloski's computer could conceivably unearth far more relevant information that what TCM destroyed from the analysts' computers. It may turn out that Wesoloski's testimony is not accurate, or that the internal correspondence is truly lost; but the time to make that determination is after an examination of the contents of his computer takes place. *See* FED. R. CIV. P. 37(e)

Adv. Comm. Notes, 2015 amendment ("Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.").

Moreover, we find credible the testimony elicited from former TCM analyst Ana Garces concerning her activities as an employee when she worked for Plaintiff. Ms. Garces testified that the analysts who interacted with the spreadsheet at issue never had the power or authority to change the categorized information included within the spreadsheet, and that only Wesoloski could modify the document. According to Garces, her role at TCM was limited to data entry, which further undermines Progress's argument that the analysts' lost e-mails would assist in preparing its defense in the copyright claim. Again, while we emphasize that Plaintiff's position may, in fact, be correct, at this early stage of the litigation it is simply too premature to make such a finding.

***B. <u>Rule 37(e)(1) and (e)(2)</u>***

As the threshold requirements of Rule 37(e) have not been met, we do not need to reach the "prejudice" and "intent" prongs of the Rule before denying the Motion. *See Living Color Enterprises,* 2016 WL 1105297, at *5; *Keim v. ADF Midatlantic, LLC*, 2016 WL 7048835, at *3 (S.D. Fla. Dec. 5, 2016). We nevertheless feel a brief discussion of each is warranted.

With respect to prejudice under Rule 37(e)(1), the Committee Notes explain:

> The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be

> unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with the discretion to determine how best to assess prejudice in particular cases.

FED. R. CIV. P. 37(e) Adv. Comm. Notes, 2015 amendment. We do not reach the issue of whether or not Defendant established that it suffered prejudice as a result of the destruction of the computers. Instead, the decision turns on Defendants' apparent ability to obtain the information it seeks through other means, and that Wesoloski's computer may contain the relevant ESI at issue. Although Defendants raised several valid arguments as to why it would be prejudiced should the internal communications by TCM analysts remain lost forever, we cannot make such a finding when there are other possible sources by which Progress could obtain that information. At this point in time – before Progress has filed an answer to the Complaint, or served discovery requests, or sought a forensic examination of Wesoloski's computer – we simply do not have enough information to impose the drastic, draconian sanction of dismissal with prejudice. *See Silas v. Sears, Robeuck & Co., Inc.*, 586 F.2d 382, 385 (5th Cir. 1978) ("[I]t is well established that dismissal with prejudice is a drastic remedy to which a court may resort only in extreme situations."); *Malautea v. Suzuki Moto Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993) ("[T]he severe sanction of a dismissal...is appropriate only as a last resort, when less drastic sanctions [are available].").

This Order should not, however, be construed as an exoneration of TCM's actions. Indeed, we are deeply troubled by what the record reveals about the destruction of the analysts' computers, concerns that were in no way assuaged by Mr. Wesoloski's testimony. Under Rule 37(e)(2), there is no need to find prejudice if it is determined that the spoilating party acted with intent. While we need not reach that decision for the reasons discussed above, the intent issue is a close call and one that will be better made after completion of all discovery.

Accordingly, we find that the Motion should be denied at this time. The record needs further development concerning what impact, if any, the communications at issue will assist in defending against the copyright claims, and whether or not those very communications are retrievable after examining the contents of Wesoloski's computer.

## *IV. CONCLUSION*

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED:

A. Defendant's Motion for Rule 37 Sanctions [D.E. 36] is **DENIED** without prejudice to renewal at a later date.[5]

B. The co-Defendants' Motions to Adopt Defendant's Motion for Sanctions [D.E. 37, 40] are **GRANTED**. The relief the co-Defendants seek, however, is **DENIED** for the same reasons discussed above.

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[5] Though the relief sought in the motion is being adjudicated by Order under the Court's authority under Rule 37, the relief sought includes dismissal of the action under Rule 12. So, notwithstanding the entry of this Omnibus Order, if Defendant seeks to file objections to the disposition of its motion for sanctions it may do so through timely objections that seek *de novo* review of this Court's rulings from the District Judge.

C. Defendant's Motion to Stay Discovery [D.E. 63] is **DENIED** as moot. Discovery shall proceed under the Court's Scheduling Order.

**DONE AND ORDERED** in Chambers at Miami, Florida this 29th day of September, 2017.

/s/ *Edwin G. Torres*
EDWIN G. TORRES
United States Magistrate Judge