UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-CV-21199-CMA/O'Sullivan

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants,
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' APPEAL OF MAGISTRATE JUDGE O'SULLIVAN'S DENIAL OF DEFENDANTS' MOTION FOR SANCTIONS BASED ON PLAINTIFFS' AND THIRD PARTY DEFENDANT J.M. PRODUCTS INC.'S SPOLIATION OF EVIDENCE

Plaintiffs, Andrea Rossi and Leonardo Corporation, by and through their undersigned counsel, hereby file their response in opposition to Defendants', Thomas Darden, John T. Vaughn, Industrial Heat, LLC ("IH"), IPH International B.V. ("IPH"), and Cherokee Investment Partners, LLC, Appeal of Magistrate Judge O'Sullivan's Denial of Defendants' Motion for Sanctions Based on Plaintiffs' and Third Party Defendant, J.M. Products, Inc.'s, Spoliation of Evidence [ECF No. 285], and state:

Brief Introduction

Defendants' motion for spoliation pertains to the purported destruction of (1) an output pipe, (2) a heat exchanger, and (3) communications with Fabio Penon. Judge O'Sullivan properly denied Defendants' motion following a hearing on April 20, 2017. Defendants' Appeal [ECF No. 285] merely re-hashes the same factual arguments that have already been presented, and fails to

indicate any abuse of discretion and/or clearly erroneous findings. Judge O'Sullivan's ruling should accordingly be affirmed.[1]

Background

On December 14, 2015, Plaintiffs' counsel sent a demand letter to Defendants' counsel outlining a dispute between the parties. Of relevance, Plaintiffs' counsel identified and acknowledged IPH's contention that the testing of the E-Cat Unit "cannot be the Guaranteed Performance process" predicated upon the beginning date of the test. At such time, Plaintiffs were on notice only that Defendants disputed the timing of the Guaranteed Performance Test. Plaintiffs were not put on notice of any dispute with respect to the measurements taken during the Guaranteed Performance Test, whether Defendants knew (or even cared) about the existence of a heat exchanger within the 1MW E-Cat Plant, or that Defendants believed there may have been fraudulent or deceptive acts taking place within the 1MW E-Cat Plant.

Subsequently, in February 2016, the Defendants and their counsel visited the 1MW E-Cat Plant with Plaintiffs and Plaintiffs' counsel. During such visit, Defendants still did not indicate that there was any question as to the validity of measurements taken, that the heat exchanger was at all material, or that Defendants believed Plaintiffs perpetrated any type of fraud or scheme. Rather, Defendants and Plaintiffs jointly padlocked a container, which Plaintiffs believed to contain all equipment that may be the subject of litigation. Accordingly, without knowledge of Defendants' yet-to-be identified issues of manipulation and/or heat dissipation, Plaintiffs repurposed the output pipe and heat exchanger to begin new ventures and continue their business.

Approximately one (1) month later, in March 2016, the Defendants and their counsel returned to the 1MW E-Cat Plant. During the second visit, Defendants took measurements and,

[1] As a preliminary note, Defendants' Appeal [ECF No. 285] attaches sixteen (16) Exhibits. Plaintiffs object to any such Exhibit that was not part of the record before Judge O'Sullivan, including Defendants' Exhibits 1-14.

significantly, observed that the piping was no longer present at the facility. Defendants made no indication at that time that the removal of the piping was an issue. Had Defendants raised the issue in March 2016, Plaintiffs may have had the opportunity to locate and/or preserve the piping.

On April 5, 2016, Plaintiffs filed their Complaint against Defendants [ECF No. 1], and Defendants filed their Motion to Dismiss on June 2, 2016 [ECF No. 17]. The Motion to Dismiss did not make any mention of any purportedly spoliated evidence. On July 28, 2016, Defendants filed their Unopposed Motion for Extension of Time [ECF No. 27] to file and serve an answer and "any counterclaims" to the Complaint. According to the Motion, Defendants were still considering what, if any, defenses, counterclaims, and/or third party claims were available to them, requiring additional time to consult with the clients. ECF No. 27 at 2.

Finally, on August 6, 2016, approximately six (6) months after the output pipe and heat exchanger were repurposed, Defendants filed their first Answer, Additional Defenses, Counterclaims and Third Party Claims [ECF No. 29]. For the very first time, Defendants raised concerns regarding potential manipulation of data. Defendants still had not yet raised any issues with respect to the absence of the heat exchanger and/or concerns over dissipation of heat, nor had Defendants brought any spoliation claims before the Court or even advised Plaintiffs of their concerns of missing/destroyed/re-purposed evidence.

On January 31, 2017, through the Expert Disclosure of Joseph A. Murray and Expert Report of Rick A. Smith, Defendants finally indicated that the heat exchanger may be relevant. By that time, the heat exchanger had already been repurposed for approximately one (1) year. Defendants had still not brought any spoliation claims before the Court and, on February 27, 2017, all discovery, including expert discovery, was completed. *See* ECF No. 23 at 1.

On March 22, 2017, approximately one (1) month after the discovery deadline (and the date of the original dispositive motion deadline), and more than one (1) year after Defendants learned that certain pipes/equipment from the 1MW E-Cat Plant were repurposed, Defendants, for the first time, filed a motion for spoliation. Defendants' motion was heard by Magistrate Judge O'Sullivan who, after considering the evidence, denied the motion. [ECF No. 266].

Specifically, Judge O'Sullivan made the following findings of fact: (1) the request was untimely because Defendants failed to bring the matter to the Court for approximately a year after learning of the alleged spoliation; (2) the pipe and heat exchanger were removed in or around March 2016, but no duty to preserve arose until at least August of 2016; (3) the allegedly spoliated evidence is not crucial; rather, it is cumulative; and (4) Defendants have not shown any bad faith. **Ex. 1** at 45-46.

On May 4, 2017, Defendants filed their appeal of the foregoing Order [ECF No. 285]. As a basis for their appeal, Defendants claim that no legal authority exists to support Judge O'Sullivan's timeliness finding. To the contrary, as more fully set forth below, ample authority exists. Defendants fail to identify any concise statement as to how or where Judge O'Sullivan erred. Judge O'Sullivan's Order [ECF No. 266] and factual findings must be affirmed.

Memorandum of Law

A. Standard

The decision regarding a spoliation motion is reviewed for an abuse of discretion. *Oil Equip. Co. v. Modern Welding Co.*, 661 Fed. Appx. 646, 652 (11th Cir. 2016). Typically, there are a range of conclusions that the judge may reach and, as such, the decision must be affirmed unless the judge "made a clear error in judgment or has misapplied the law." *Id.*; *see also Eli Lilly & Co. v. Air Express Int'l USA, Inc.*, 615 F.3d 1305 (11th Cir. 2010). The abuse of discretion standard is

similar to that set forth in Federal Rule of Civil Procedure 72(a), which states that objections to a magistrate's order may be modified or set aside only if such order is "clearly erroneous" or "contrary to law."

The party moving for spoliation carries the burden of proof. *In re Boston Boat III, L.L.C.*, 310 F.R.D. 510 (S.D. Fla. 2015). Specifically, the moving party must show that: (1) the missing evidence existed at one time; (2) the alleged spoliator had a duty to preserve the evidence; and (3) the evidence was crucial to the movant being able to prove its prima facie case or defense. *Id.* "Additionally, in this 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 enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case.'" *Peeler v. KVH Indus.*, No. 8:12-cv-1584-T-33TGW, 2013 U.S. Dist. LEXIS 104240, 2013 WL 3871420 (M.D. Fla. July 25, 2013) (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)). Even grossly negligent conduct does not justify spoliation sanctions. *Id.* (citing *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 U.S. Dist. LEXIS 42239, 2011 WL 1456029, at *10 (S.D. Fla. Apr. 5, 2011)). "In fact, district courts in our Circuit regularly deny adverse inference requests even when there is an indisputable destruction of evidence." *Id.*

B. Judge O'Sullivan properly found that the Defendants' Motion was untimely as to the output pipe and heat exchanger.

Judge O'Sullivan correctly ruled that Defendants' Motion regarding the output pipe and heat exchanger "is out of time" because Defendants became aware of their removal in approximately March 2016 and did not bring this matter to the Court's attention until approximately a year later." **Ex. 1** at 46. In response, the Defendants misrepresent to this Court

that "[t]here is no authority for the Magistrate Judge's timeliness argument in the context of spoliation, and his decision should be reversed." ECF No. 285 at 10.

There is ample authority to deny a spoliation motion for untimeliness. "Courts view spoliation motions filed near a dispositive motion deadline or in response to a motion for summary judgment with extreme skepticism." *Sherwood Invs. Overseas Ltd., Inc. v. Royal Bank of Scotland N.V.*, No. 6:10-bk-00584-KSJ, 2015 Bankr. LEXIS 2513 (Bankr. M.D. Fla. July 22, 2015) (denying motion for spoliation as untimely where movant "waited over a year from when it discovered the facts upon which spoliation motion is based before filing it"); *see also Olson v. Shawnee Cnty. Bd. Of Comm'rs*, 7 F. Supp. 3d 1162, 1199 (D. Kan. 2014) (holding spoliation motion filed eight months after the close of discovery untimely); *Am. Nat. Prop. & Cas. Co. v. Campbell Ins., Inc.*, No. 3:08-CV-00604, 2011 U.S. Dist. LEXIS 80534, 2011 WL 3021399, at *3 (M.D. Tenn. July 22, 2011) (holding motion made four months after close of discovery untimely); *Johnson v. Next Day Blinds Corp.*, No. WMN-09-2069, 2012 U.S. Dist. LEXIS 95800, 2012 WL 2871418, at *2 (D. Md. July 11, 2012) (holding spoliation motion filed after the close of discovery, just eight weeks prior to the dispositive motion deadline, untimely).

Defendants cannot claim to be unaware of the foregoing authorities, as Plaintiffs cited thereto in their Response in Opposition to Defendants' Consolidated Motion in Limine. ECF No. 276 at 3. Notwithstanding, Defendants make no attempt to address or distinguish the same.

In addition to the case law cited above, the Southern District of Florida's Local Rule 26.1(g) also clearly states, in relevant part, that "[a]ll disputes related to discovery ***shall*** be presented to the Court… within (30) days from the… date on which a party first learned of or should have learned of a purported deficiency concerning the production of discovery materials." Defendants failed to raise the issue of purported spoliation as to the output pipe and heat exchanger

for approximately a year after learning that Plaintiffs repurposed the same and, instead, first raised the issue of spoliation at the time of the dispositive motion deadline. Accordingly, Judge O'Sullivan properly denied Defendants' Motion as untimely with respect to such evidence.

C. Judge O'Sullivan properly found that the Plaintiffs did not have a duty to preserve the output pipe and/or heat exchanger at the time they were repurposed, and that Plaintiffs attempted to preserve the communications with Penon.

(i) Plaintiffs had no duty to preserve the output pipe until at least August 2016.

With respect to the output pipe, Judge O'Sullivan properly found that the Plaintiffs were not aware of the allegations of manipulation of the tests until August 2016, and that is "the earliest that they would have been on notice of a duty to preserve, so the duty to preserve has not been shown prior to August of 2016." **Ex. 1** at 46. This ruling is substantiated by the fact that, in December 2015, Defendants merely argued that the Guaranteed Performance Test could not have been completed due to an issue of timing. Defendants did not once raise an issue of potential manipulation of data when: (1) Plaintiffs' counsel sent the demand letter in December 2015; (2) Defendants visited the 1MW E-Cat Plant in February 2016; (3) Defendants visited the 1MW E-Cat Plant in March 2016; (4) Plaintiffs filed their Complaint in April 2016; (5) Defendants filed their Motion to Dismiss in June 2016; or (7) Defendants filed their Motion for Enlargement of Time in July 2016. Rather, Defendants did not raise a concern regarding the measurements until the filing of their Answer, Additional Defenses, Counterclaims and Third Party Claims in August 2016. In fact, Defendants were even unaware of their defenses and counterclaims in July 2016 when they filed their Motion for Enlargement of Time.

Defendants do not dispute the foregoing. Instead, Defendants argue that Plaintiffs "destroyed evidence critical to proving the allegations in their Complaint…." ECF No. 285 at 2. Accepting Defendants' assertion as true (it is not), no sanction is necessary, as Plaintiffs (according

to Defendants' logic) have already harmed themselves by repurposing the pipe. Notwithstanding, the fact remains clear that, at the time the pipe was repurposed, Plaintiffs anticipated only a dispute regarding the timing of the Guaranteed Performance Test. This is especially so in light of the fact that the License Agreement contemplated only that the agreed-upon ERV, Fabio Penon, provide written certification that guaranteed performance was achieved. The License Agreement did not contemplate any evaluation of measurement devices, data, or equipment by any person other the agreed-upon ERV. A dispute only as to timing would not have required preserving the output pipe. Judge O'Sullivan's factual finding must accordingly be affirmed.

(ii) Plaintiffs had no duty to preserve the heat exchanger until January 31, 2017.

Regarding the heat exchanger, Judge O'Sullivan correctly ruled that "there was no duty to preserve that until after the counterclaim was filed at the earliest, in August of 2016. Indisputably, the issue regarding the heat exchanger did not come to light as one of the Defendants' arguments until January 30, 2017, when Defendants' expert report was provided." **Ex. 1** at 47. Defendants cannot dispute the fact that the heat exchanger and/or the issue of heat dissipation is not mentioned in any pleading, motion, discovery request, and/or other document prior to Defendants' expert disclosures. Judge O'Sullivan's factual finding must accordingly be affirmed.

(iii) Plaintiffs took steps to preserve the communications with Penon.

Judge O'Sullivan found that "steps were taken to preserve [the communications with Penon] shortly after the filing of the lawsuit." **Ex. 1** at 48. Defendants make no effort to dispute this. Instead, Defendants reargue that they are unable to examine the e-mail communications. ECF No. 285 at 15. Such argument is addressed by Judge O'Sullivan's factual finding that the e-mail communications are cumulative, as set forth in more detail below. Defendants do not identify any

clearly erroneous findings by Judge O'Sullivan, and the Order below must accordingly be affirmed.

D. Judge O'Sullivan properly found that the communications with Penon were not crucial to the Defendants' claims or defenses.

Judge O'Sullivan found that the existence of the communications with Penon "is not crucial to proving or disproving – proving either the Plaintiffs' case or the Defendants' case or disproving either of those cases or disproving the Plaintiffs' case in that they would be cumulative to the records that we know now exist." **Ex. 1** at 48. Judge O'Sullivan found that Defendants had the opportunity to take the deposition of Fabio Penon; question Penon regarding communications with Plaintiffs; review Plaintiffs' logs which underlaid the communications; and review Penon's final reports which summarized and/or compiled the information that would have been contained in the communications. Again, Defendants make no effort to identify how or where the Court erred in making such factual findings. The Order must therefore be affirmed.

E. Judge O'Sullivan properly found that Plaintiffs did not act in bad faith.

Finally, Judge' O'Sullivan found that Plaintiffs did not act in bad faith. Specifically, with respect to the output pipe, Judge O'Sullivan ruled that "bad faith hasn't been shown because the pipe was repurposed" and Defendants have not shown that the repurposing was intentional for any other reason. **Ex. 1** at 47. The Magistrate Judge made the same findings with respect to the heat exchanger. *Id.* As for the communications with Penon, Judge O'Sullivan found that Defendants "did not take sufficient steps to attempt to obtain other copies of these e-mails; for instance, by questioning Dr. Penon or trying to obtain them from the Italian mail server or taking up the Plaintiff on their offer to have the Defendants' expert examine the e-mail servers to see if they would be able to determine when they were destroyed or why they were no longer available." *Id.* at 48. As seen throughout the entirety of Defendants' appeal, Defendants fail to address how or where Judge

O'Sullivan made any error in the foregoing factual findings. Absent any clear error, the Order must be affirmed.

WHEREFORE, Plaintiffs, Andrea Rossi and Leonardo Corporation, respectfully request the Court enter an Order affirming Judge O'Sullivan's Order [ECF No. 266], and granting any further relief the Court deems just and proper.

Dated: May 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 18, 2017, the foregoing document was served on all counsel of records identified on the attached Service List via the manner specified.

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