

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DEBORAH RAIMEY and LARRY RAISFELD,

Plaintiffs,

-against-

WRIGHT NATIONAL FLOOD INSURANCE
CO.

Defendant.

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ORDER

14 CV 461 (JFB)(SIL)(GRB)

GARY R. BROWN, United States Magistrate Judge:

Background

By Memorandum and Order dated January 12, 2015, the Court granted plaintiffs’ application for a second evidentiary hearing “predicated upon purported false representations to the Court by defendant Wright National Flood Insurance Co. (“Wright”) and, potentially, further misconduct by its counsel.” Jan. 12 Order 1, Docket Entry (“DE”) [1]. As reiterated in that Order, “the undersigned imposed monetary sanctions in an amount yet to be fixed against Wright’s counsel for discovery violations and misrepresentations at the first evidentiary hearing, as well as a limitation on the expert evidence that may be used herein, all emanating from the undisclosed and baseless revision of an expert engineering report.” *Id.* As noted, though, those sanctions “were expressly circumscribed based upon the then-undisputed representation that Wright was unaware of the subject engineering practices and the claim that plaintiff failed to disclose the limited evidence she had about the altered engineering report until mediation in this case.” *Id.*

However, pursuant to the November 7 Order issued by the undersigned as well as the December 31 Order of Judge Bianco:

additional documents have been produced since November 7 which appear to establish that Wright was well aware of the improper

conduct, including an email from plaintiff Ramey forwarding the photograph of the earlier, unreleased draft to the Jeff Moore, Wright's Vice President of Claims, who in turn conferred with U.S. Forensic and responded to Ramey's emails and repeated telephone calls. December 31 Order at 12-14. [Moore] was present as the Company's representative both at the mediation and at the evidentiary hearing herein.

Id. at 2 (citing November 7 Order, DE [82]; January 31 Order, DE [129]). Based on this newly-disclosed evidence, plaintiffs requested that the Court "set a hearing and order Defendant to show cause as to why it should not be further sanctioned for its blatant and continued violations of this Court's orders and for material misrepresentations made to the Court." Pls.' Mem. 1, DE [119-1].

After considering the arguments and submissions of both sides, the undersigned granted the application, ordering as follows:

As suggested by counsel for plaintiff, additional sanctions may be warranted under statutory authority, the federal rules or under the Court's inherent authority. This is particularly true because the sanctions imposed were expressly limited based on the apparent misimpression -- created by counsel for defendant -- that Wright was unknowing and blameless in this matter, and it appears that Wright may have attempted to leverage that misimpression to escape the consequences of its actions.

Another issue that may be considered at the hearing is the proper allocation of the monetary sanctions imposed in the November 7 Order. While the undersigned imposed sanctions solely upon counsel (and has not, as yet, allocated those fees among the national and local attorneys representing Wright), the facts may dictate that those sanctions should be borne, in some measure, by defendant.

Jan. 12 Order 6. Based on these findings, the Court set a hearing "to permit Wright, *and its counsel*, to show cause why additional sanctions should not be imposed." *Id.* at 7 (emphasis added).

The hearing set by the January 12 order was held on February 18, 2015. *See* Minute Entry

dated Feb. 18, 2015. Part of the delay was a 30-day adjournment granted to new counsel for Wright to permit an internal investigation. No one appeared on behalf of prior counsel for Wright—neither its former national counsel, Nielsen, Carter & Treas, LLC, nor its former local counsel, McMahon Martine & Gallagher LLP (collectively, the “Law Firms”), both of which were subject to the November 7 sanctions order, and were referenced in the January 12 order.¹ *Id.* (noting that the Court “has not, as yet, allocated those fees among the national and local attorneys representing Wright”). Several witnesses -- all called by plaintiffs -- testified. *Id.* Moore, the only employee of Wright that appeared at the hearing, after stating his name, invoked his Fifth Amendment privilege against self-incrimination in response to all questions asked of him. Feb. 18, 2015 Tr. at 11-16. At the hearing, Wright’s counsel indicated that the Company would not waive attorney-client privilege with respect to these matters. *Id.* at 141.²

Discussion

Because Wright produced no evidence in its defense, it would appear that additional sanctions are warranted. And, indeed, counsel for Wright did not seem to disagree. Feb. 18, 2015 Tr. at 183-84. Wright has agreed—within certain limits—to fully resolve this matter by paying the full policy limits to the plaintiffs (which would amount to the full \$250,000 minus any amounts already paid), and absorb all of plaintiffs’ attorneys’ fees and costs—to a point. *Id.* at 184. Importantly, Wright acknowledged that it would not seek reimbursement of the attorneys’ fees and costs from FEMA. Tr. 184. As such, plaintiffs’ counsel shall serve upon Wright and

¹ An attorney from McMahon Martine & Gallagher LLP, who had not as yet been relieved as counsel in this case, participated in a January 16 court conference at which the hearing date was set. Jan. 16 Tr. at 4 (Patrick Brophy). Although the attorney participating indicated he would be away, and if needed for testimony would be available on another date, he clearly indicated that other members of the firm would be available on the hearing date. *Id.* at 21.

² This seems to run somewhat contrary to an earlier representation by Wright’s new counsel, who suggested that, at least in conjunction with the internal investigation it planned on conducting, Wright would waive privilege. Jan. 16 Tr. at 15 (“we have resolved in one respect I believe, which is that the client has committed that if we do an internal investigation, Your Honor will see the results. So I suppose that does answer partially an attorney/client privilege issue.”).

the Law Firms an itemized statement of all fees and costs incurred in this matter from the lawsuit's inception to the present date, on or before February 27, 2015. Wright and the Law Firms will review this information and advise the Court in writing by March 6, 2015 as to whether they will pay the requested costs and fees, and if so, whether they have agreed upon an allocation of those fees and/or are challenging the reasonableness of the amounts sought. *Id.* at 200-01.

At the hearing, several matters were raised which could warrant further exploration. *See, e.g.*, Pl's Ex. 1; Tr. 163 (counsel requesting inquiry concerning late-produced documents). However, this Court is making every effort to avoid further delay and expense to the parties. As has been previously noted in this action, the "major effect of the reprehensible practices uncovered here – as well as counsel's failure to disclose these practices at an earlier juncture – was to unnecessarily complicate and delay this action." November 7 Order at 23. The Committee of Magistrate Judges assigned to manage these cases "has endeavored to speed resolution of these matters while also reducing costs for the parties and the burdens on the Court, . . . and ultimately 'to facilitate the efficient resolution of the cases.'" *Id.* at 25 (quoting CMO 1 at 2; CMO 3 at 2).³ Further discovery and hearings are not appropriate at this point, particularly given that the matter appears close to resolution.⁴

As to the Law Firms, at the February 18 hearing, the plaintiffs suggested that the Court should consider additional disciplinary sanctions, including, as appropriate, revocation of *pro hac vice* status and referral to disciplinary committees. *Id.* at 159. The orders in place made it clear that to the extent the Law Firms wanted to be heard, their opportunity to do so was at the February 18 hearing. *Id.* However, out of an abundance of caution, and particularly because the Nielsen

³ Notably, the discovery and mediation plan implemented appears to have met with some success. As of earlier this month, of the 1,323 Hurricane Sandy cases filed in this district, more than 400, or about 31% have been settled or otherwise resolved and another 400 are scheduled for mediation between now and the end of April.

⁴ "[T]he best balm for battered homeowners would be for FEMA to conclude settlement talks as quickly as possible and get the money to those who are owed it." *Newsday* Editorial Staff, "Double whammy: Sandy and then an insurance scandal," *Newsday* 2/24/15.

firm may not have received notice of the hearing, the Law Firms are hereby directed that, should they wish to present evidence⁵ or oral argument, a hearing may be requested in writing on or before February 27, 2015. In addition, the Law Firms may submit any additional written materials—both in terms of evidence and briefs as to the appropriate monetary and non-monetary sanctions that should be imposed—on or before March 6, 2015. *See* Minute Entry dated Feb. 18, 2015.

Conclusion

Based on the foregoing, it is hereby ORDERED that:

1. Counsel for plaintiff will serve a copy of this Order upon Law Firms forthwith;
2. As discussed at the hearing, counsel for plaintiff will file detailed information concerning all attorneys' fees and costs incurred in this matter from inception to the present, and serve a copy on the Law Firms on or before February 27, 2015.
3. Counsel for Wright and for the Law Firms will file any response to plaintiffs' cost and fee information, as well as any additional argument and/or evidence on or before March 6, 2015. Should the Law Firms seek oral argument and/or an evidentiary hearing, a written request to schedule a hearing date should be made on or before February 27.

SO ORDERED.

Dated: Central Islip, New York
February 24, 2015

/s/ GARY R. BROWN
Gary R. Brown
United States Magistrate Judge

⁵ Given that Wright, which owns the attorney-client privilege in this circumstance, has refused to waive it, the Law Firms may be limited as to what matters they may submit. However, as discussed in the November 7 Order, not all of the matters leading to the imposition of sanctions as against the Law Firms relate to privileged matters.