

FILED

12:06 pm, Oct 22, 2019

PREPARED AND FILED BY THE COURT

NICOLE A. CASCIOLA,

Plaintiffs,

v.

DAMIANO LAW OFFICES, TONI BELFORD
DAMIANO, XYZ CORPORATIONS 1-2 and
JOHN and/or JANE DOES 1-3,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. ESX-L-8934-17

Civil Action

ORDER

THIS MATTER, having been opened to the Court by The Epstein Law Firm, P.A., attorneys for Defendants, upon Notice of Motion pursuant to R. 1:6-2 for an Order Dismissing Plaintiff's Complaint; and for good cause shown;

IT IS on this 22 day of October 2019:

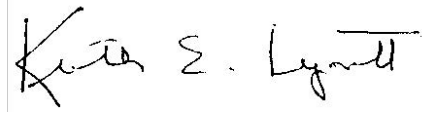
ORDERED that Defendants' motion to dismiss or for other spoliation sanctions is DENIED without prejudice for the reasons stated in the accompanying Statement of Reasons; and

IT IS FURTHER ORDERED that Plaintiff and Defendants shall comply with the procedure as set forth in the accompanying Statement of Reasons; and

IT IS FURTHER ORDERED that Defendants are permitted to file an Amended Counterclaim asserting a claim of fraudulent concealment against Plaintiff; and

IT IS FURTHER ORDERED that Plaintiff shall pay Defendants' attorneys' fees as set forth in the accompanying Statement of Reasons and upon submission of a Certification of Services; and

IT IS FURTHER ORDERED that Defendants shall serve this Order on Plaintiff within 7 days of posting hereof.

A handwritten signature in black ink, reading "Keith E. Lynott". The signature is enclosed within a thin black rectangular border.

Hon. Keith E. Lynott, J.S.C.

Statement of Reasons

In this employment action, the Defendants move for dismissal of the Complaint or other sanctions in the form of an adverse inference or bar on testimony, as well as counsel fees for multiple motions to compel production of a taped audio recording of a conversation. The Defendants also move to amend their Answer to allege a Counterclaim for fraudulent concealment.

The recording related to an April 26, 2017 conversation involving the Plaintiff and a representative of the Defendant Damiano Law Office. The Plaintiff's counsel here, during the pendency of this motion, acknowledged that a copy of the recording that was once in his possession has been lost. He has, many months after the Defendants first demanded production of the recording, supplied a copy recently made from the Plaintiff's cell phone, where the original recording is purposefully stored.

The procedural history is complex and the Court only briefly summarizes the pertinent matters here. In initial Answers to Interrogatories served in or about April 2018, the Plaintiff disclosed the existence of a recording of an April 26, 2017 conversation with a representative of the Defendant Damiano Law Office. The Defendants sought production of the recording. When the recording was not produced, the Defendants successfully moved to compel production.

The Plaintiff did not produce the same in response to the Court's Order. The Defendants repeatedly inquired as to the status without response as to the April 26, 2017 recording. At one point, the Defendants' counsel was permitted to examine other recordings at the office of the Plaintiff's counsel, but the April 26, 2017 recording was not included and no explanation for the lacuna was supplied.

The Defendants filed a second motion to compel. The Court granted the unopposed motion. The Defendants sought some response from the Plaintiff and counsel, including possibly an acknowledgment and correction that the initial disclosure of an April 24, 2017 recording was in error and the recording never existed. All of the motions and inquiries were met with disturbing silence.

Finally, the Defendants brought the pending motion, which is itself unopposed in any formal way. The motion seeks dismissal of the Complaint with prejudice on the basis of spoliation of evidence. In an alternative, the Defendants ask for an adverse inference and a bar to any testimony from the Plaintiff as to the April 26, 2017 meeting. The Defendants also seek counsel fees for this and the previous motions. At oral argument, they also requested disqualification of the Plaintiff's counsel.

The Plaintiff did not file opposition to the motion. However, while the motion was pending, the Plaintiff's counsel wrote to the Defendants' counsel and stated the copy of the recording he previously had in his possession was lost and efforts in his office to locate it had turned up empty. He submitted a thumb drive with a recording of the conversation taken from the Plaintiff's cell phone.

The Plaintiff's counsel explained at oral argument that the Plaintiff originally recorded the conversation (apparently by activating her video recording capability) on her cell phone and the recorded conversation remains stored on that device. The Court understands from the colloquy at oral argument that the Plaintiff's position is that the recording, as originally created by the Plaintiff, remains intact and unaltered and that counsel only misplaced a copy. The Court notes that none of the information is set forth in a Certification of the Plaintiff or her counsel.

Given these circumstances, the Court concludes it would not be appropriate to impose the draconian remedy of dismissal of the action. Even assuming it is not possible to recover or accurately reproduce the recorded conversation at issue – and this is not established at this time – dismissal of the Complaint would still not be an appropriate remedy. There are other remedies, such as an adverse inference, that will protect the legitimate interests of the Defendants in the circumstances without giving rise to the extreme prejudice to the Plaintiff of dismissal of the claim.

Moreover, as the Court understands the present record, it is at least possible that the original recording remains intact and unaltered. Accordingly, the Court will also not at this time impose the remedy of an adverse inference and/or testimonial bar on the grounds of spoliation. However, it so concludes without prejudice to the Defendants' right to renew their motion at a later time following completion of the steps it does require herein.

The Plaintiff's and her counsel's failure to communicate with the Defendants and to inform them and, during pending motion process, the Court, of the fate of the tape previously possessed by counsel raises the distinct possibility of spoliation. Given the passage of so much time and in light of the long silence, it is not possible without more to credit the assertion that the original recording is intact and unaltered and that the copy now supplied to the Defendants is authentic.

For these reasons, the Court will require the Plaintiff to submit her cell phone to a full forensic analysis by a provider of such services selected by the Defendants (provided the selected consultant shall not have previously performed any services for the Defendants or their clients). The Plaintiff will bear the full reasonable cost of the analysis and the provider should present a

written report submitted simultaneously to the parties and the Court. While the analysis is on-going, no party shall have contact with the provider without the participation of the other party.

The Court will also require the Plaintiff to bear all reasonable attorneys' fees and costs associated with the prior motions to compel and this motion. This Court is highly reluctant to impose counsel fees. However, it is readily apparent in the circumstances here that the motion practice could have been obviated altogether or limited if the Plaintiff and counsel had simply communicated about the circumstances with the adversary. Here, the prior motions were met with no response and the Plaintiff did not comply with the resulting orders. Indeed, as noted, there is no formal opposition even to the pending motion. It should not have been necessary to pursue these motions to obtain essentially a substitute copy of the recording and an explanation of what happened. Accordingly, the Defendants may submit a Certification of Services.

Following the required actions described herein, the Defendants may renew a motion for spoliation sanctions if warranted by the circumstances. As the motion to amend the Counterclaim is unopposed and motions to amend must be granted freely, the Court will also grant that aspect of the Defendants' motion. However, the trial of any such action will be severed and will take place after the trial on the issues currently in suit.