

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

SHERWOOD BRANDS, INC. :
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 v. : C.A. No. 08-051ML
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 PENNSYLVANIA MANUFACTURERS' :
 ASSOCIATION INSURANCE CO. :

MEMORANDUM AND ORDER

Before the Court for determination (28 U.S.C. § 636(b)(1)(A); LR Cv 72) is Defendant's Motion for Sanctions, i.e., dismissal of Plaintiff's Complaint, due to a claimed discovery violation. (Document No. 63). Plaintiff strenuously opposes the Motion, (Document No. 64), and countered with its own Motion for Sanctions, i.e., an award of fees and costs incurred in responding to Defendant's "groundless" Motion. (Document No. 69).¹ Hearings were held on January 6, 2010 and February 19, 2010.

Background

Plaintiff, Sherwood Brands, Inc., ("Sherwood") formerly occupied an old, four-story mill building in New Bedford (the "Premises") and utilized the Premises as a warehouse. Defendant, Pennsylvania Manufacturers' Association Insurance Company ("PMAI"), insured the Premises but not its contents under Policy Number 820500-76-39-06-5 for the period October 3, 2005 to October 3, 2006. (Document No. 1-1 at ¶¶ 3, 4).

Sherwood commenced this action in Superior Court in early 2008. It was removed to this Court by PMAI on diversity grounds on February 15, 2008. Sherwood alleges that its insured

¹ Together, the parties have filed over 600 pages of submissions related to these Motions. See Document Nos. 63 66, 69 75.

building was damaged by wind and rain during a storm occurring on or about November 11, 2005 and, in particular, that high winds caused a catastrophic roof lift which allowed water to get under the roof membrane and then into the Premises. Id. ¶ 5. PMAI denied coverage on the grounds that the claimed damage resulted from the failure of the roof through normal wear and tear which is excluded from coverage. Id. ¶ 7.

On November 3, 2008, PMAI moved to compel discovery responses from Sherwood. (See Document Nos. 7 and 8). In response, Sherwood's first attorney² moved to extend the pretrial deadlines by six months because, in part, Sherwood had "come to believe that its case can best be presented through testimony of an additional expert"³ and that it "needs additional time to fully prepare its case and present the anticipated evidence to [PMAI] in the course of discovery." (Document No. 9). As to the Motions to Compel, Sherwood's counsel requested seventy-five days to respond because "if compelled to respond...now, the response would be incomplete and would have to be amended." (See Document Nos. 10 and 11). He also noted, regarding document production, that Sherwood has "produced the initial disclosure that is presently available to [Sherwood] and will fully respond as soon as all documents, some of which have not yet been created, are available." (Document No. 11). A hearing was held on the Motions to Compel on December 2, 2008. Although I questioned why Sherwood did not simply provide initial responses

² Sherwood was initially represented by Attorney Robert Fine. He withdrew on December 9, 2008 following the appearance of Attorney Matthew Oliverio. (Document Nos. 13, 14). On August 21, 2009, Attorney Oliverio moved to withdraw, citing "irreconcilable differences" between counsel and client regarding "the manner in which the litigation should be pursued," and failure to meet financial obligations. (Document No. 35). That Motion was granted on September 2, 2009 and attorneys from the law firm of Sally & Fitch, LLP entered shortly thereafter. (Document Nos. 37, 39 42). These attorneys are still in the case, but recently moved for the pro hac vice admission of an additional, out of state counsel. (Document No. 78).

³ Plaintiff's expert disclosure deadline had already passed on October 2, 2008. (Document No. 6).

and then supplement if necessary (see Fed. R. Civ. P. 26(e)), I granted some relief to Sherwood and extended the pretrial deadlines by three months and extended the response dates to PMAI's discovery requests until December 31, 2008. It should be noted that Sherwood's counsel advised me at the December 2, 2008 hearing that he had just learned he was being replaced as counsel on the case and thus my ruling was made in the context of an upcoming change in counsel and the transitional delays that generally follow.

With respect to this dispute, the operative discovery requests are Document Request Nos. 9 and 11 and Interrogatory Nos. 20 and 21 which made the following requests:

9. Copies of all documents created prior to the alleged date of loss detailing any concerns with the roof, repairs to the roof, estimates to repair to the roof, damage caused by leaking, reference to any problems with the roof or any item of any nature whatsoever that involves any concerns with the roof prior to the date of loss.

11. Copies of any and all internal documents, e-mails or any item of any nature whatsoever concerning any employee concerns with the roof, repairs to the roof, complaints regarding the roof, damage caused to the roof or any issue or situation that has ever arisen concerning the integrity and water tightness of the roof at any point in time prior to the alleged date of loss.

20. Please provide a detailed listing of any letter, e-mail, phone message or any documentation or item of any nature whatsoever that in any way references the condition of the roof or the potential for leaks or water damage in your building at any point in time prior to the date of the alleged loss, including any internal memorandum or correspondence concerning products being stored and/or any risk of leaking or water damage and/or any request to repair or prevent same.

21. Please provide a detailed listing of any letter, e-mail, phone message or any documentation or item of any nature whatsoever that in any way shows any notice or concern regarding the condition of the roof or any prior leaks or water infiltration at any point in time prior to the date of loss.

(Document Nos. 8-1, 7-1).

In early 2009, Sherwood responded to all four discovery requests by stating “there are no documents in its possession, custody and/or control.” (Document No. 63-1 at pp. 3-4).

After the close of discovery, PMAI received a document which it claims Sherwood “deliberately and willfully” withheld and which was responsive to one or more of the above-referenced discovery requests generally seeking information concerning the condition of the roof prior to the 2005 loss in dispute. The document in question is a two-page fax on Sherwood letterhead dated July 1, 1999 from “Eric” to “Uzi.” (See Document No. 63-2). It is undisputed that “Eric” is Mr. Eric Richman, a former Sherwood Vice President of Production, and “Uzi” is Mr. Uzeil Frydman, Sherwood’s C.E.O. The first page of the document is a hand-written note from Richman to Frydman relaying information obtained in a conversation with Mr. Bernard Giroux, a real estate broker, about the “New Bedford Property,” i.e., the Premises. Id. Included is a notation that “Roof needs replacement in certain areas.” Id. The second page is a broker sheet providing details about the Premises which confirms that the referenced “New Bedford Property” is the building in dispute. Id.

Standard of Review

PMAI moves for discovery sanctions under Fed. R. Civ. P. 37. Fed. R. Civ. P. 37(b)(2) provides in relevant part: “If a party...fails to obey an order to provide...discovery...the court...may” make such orders in regard to the failure as are just. Among the sanctions authorized are “dismissing the action” and directing that certain “designated facts be taken as established for purposes of the action, as the prevailing party claims.” Fed. R. Civ. P. 37(b)(2)(A)(i), (v). “District courts’ authority to dismiss an action as a sanction for noncompliance with a discovery order is well established.”

Vallejo v. Santini-Padilla, 607 F.3d 1, 7 (1st Cir. 2010). However, dismissal is a harsh sanction and should only be imposed when a party's misconduct is "extreme." See Young v. Gordon, 330 F.3d 76, 81 (1st Cir. 2003); and Tower Ventures, Inc. v. City of Westfield, 296 F.3d 43, 46 (1st Cir. 2002). The issue of sanctions, if warranted, is a fact-specific inquiry of both substantive factors and procedural considerations. Vallejo, 607 F.3d at 8. The substantive factors include "the severity of the violation, the legitimacy of the party's excuse, repetition of violations, the deliberateness vel non of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the court, and the adequacy of lesser sanctions." Id. (quoting Robson v. Hallenbeck, 81 F.3d 1, 2 (1st Cir. 1996)). The procedural considerations primarily examine "whether the offending party was given sufficient notice and opportunity to explain its noncompliance or argue for a lesser penalty." Id. (quoting Malloy v. WM Specialty Mortg., 512 F.3d 23, 26 (1st Cir. 2008)).

Sherwood cross-moves for sanctions under Fed. R. Civ. P. 11. Rule 11(b) authorizes sanctions for filings presented for "any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," as well as unsupported legal and factual arguments. See Citibank Global Mkts., Inc. v. Rodriguez Santana, 573 F.3d 17, 32 (1st Cir. 2009) (citing Young v. City of Providence, 404 F.3d 33, 39 (1st Cir. 2005)). The Rule effectively proscribes the following conduct: "when a party files a pleading that has no reasonable factual basis; (2) when a party files a pleading that is based on legal theory that has no reasonable chance of success and that cannot be advanced as reasonable argument to change existing law; and, (3) when a party files a pleading in bad faith or for improper purpose." Mills v. Brown, 372 F. Supp. 2d 683, 693 (D.R.I. 2005). Rule 11(b) is not a strict liability provision and a showing of at least "culpable carelessness" is required before a violation can be found. Citibank Global Mkts., 573 F.3d at 32.

Discussion

Although these Motions are hotly contested, it is undisputed that the July 1, 1999 fax was responsive to PMAI's discovery request(s) and should have been produced by Sherwood. PMAI argues that sanctions are warranted because "[i]t is abundantly obvious that Sherwood's willful attempt to hide this document was done for the purpose of thwarting appropriate discovery." (Document No. 63-1 at p. 8). Sherwood counters that sanctions are not warranted because the fax was "inadvertently omitted from Sherwood's earlier productions" to PMAI. (Document No. 64 at pp. 6, 8).

It is no surprise that PMAI does not have a "smoking gun" and relies upon circumstantial evidence to try to establish that the fax was willfully and intentionally withheld. As noted above, PMAI served discovery requests early on seeking documents regarding the condition of the roof prior to the date of the claimed loss and, on January 6, 2009, Sherwood responded that "there are no documents in its possession, custody and/or control." On October 16, 2009, PMAI filed an Emergency Motion to Compel Discovery and Extend Pretrial Deadlines. (Document No. 46). PMAI took issue with the completeness of Sherwood's response to Document Request No. 5 and sought leave to serve a document subpoena on the law firm opposing Sherwood in Massachusetts litigation regarding the Premises in dispute. In Request No. 5, PMAI requested production of "[a]ny and all documents evidencing the interest of [Sherwood] and/or others in the [Premises] and all liens on the [Premises]." Sherwood did not object to the Request and responded that it "has already produced the lease entered into for the subject property between [Sherwood] and New Bedford Redevelopment Authority ["NBRA"] on May 3, 2000." (Document No. 46 at 1-2).

In the Emergency Motion, PMAI indicated that it had learned about the existence of litigation in Massachusetts between Sherwood and NBRA regarding the Premises lease and that Sherwood was arguing in that case that the lease was “void ab initio.” (Document No. 46). Thus, PMAI argued that documents regarding a dispute about ownership of the property should have been produced in response to Request No. 5.⁴ Sherwood objected and contended that the discovery was irrelevant and that the “insurable interest” argument made by PMAI was a “phantom issue.” (Document No. 52-1). After hearing, I ordered Sherwood to supplement its Response to Request No. 5 by producing, by November 13, 2009, all non-privileged, responsive documents to PMAI and granted PMAI leave to serve a document subpoena on NBRA’s law firm in the Massachusetts litigation.

On November 9, 2009, PMAI’s counsel received the subpoena response from the Massachusetts law firm which included Bates-stamped documents⁵ “NB 3046” and “NB 2670.” (Document No. 63-1 at p. 6). These two documents constitute the July 1, 1999 fax in dispute. Shortly thereafter, Sherwood directly produced a similar set of documents to PMAI pursuant to my October 21, 2009 Order which also included documents “NB 3046” and “NB 2670.” Id.

After thoroughly reviewing the extensive submissions of both sides, I conclude that PMAI has not established by either direct and/or circumstantial evidence that Sherwood willfully and intentionally withheld the July 1, 1999 fax from discovery. PMAI argues that the only reason the fax was ultimately produced by Sherwood was because it knew that PMAI would get the fax in response to the document subpoena it served (over Sherwood’s objection) on opposing counsel in

⁴ PMAI also took issue with Mr. Frydman’s refusal to answer questions at his deposition about the NBRA litigation. (Document No. 46 4 at pp. 1 3).

⁵ PMAI argues (without dispute from Sherwood) that an agent of Sherwood Bates stamped the documents for production in the Massachusetts litigation. The date of production is unclear.

the Massachusetts litigation. Sherwood counters that it was not specifically aware, at the time, that the fax was within the three-thousand page production in the NBRA case and simply produced all of the non-privileged NBRA case documents after the Court granted PMAI's Motion to Compel. Since both explanations are plausible and PMAI has not produced sufficient evidence to prove its suspicion, there is no basis to find that the fax was willfully and intentionally withheld.

However, there is a question as to the thoroughness of the search conducted by Sherwood for responsive documents. As previously noted, PMAI was forced to move to compel as to its document requests, and Sherwood's counsel responded that Sherwood was "not trying to prevent discovery but if compelled to respond to the document request now, the response would be incomplete and would have to be amended" and that it had "produced the initial disclosure that is presently available to [Sherwood] and will fully respond as soon as all documents, some of which have not yet been created, are available." (Document No. 11 at p. 1). Ultimately, in early 2009, Sherwood represented, as to the document requests in dispute, that "there are no documents in its possession, custody and/or control." In hindsight, it reasonably appears that Sherwood was in possession of the July 1, 1999 fax at the time and did not produce it.

In support of its Opposition, Sherwood presents the Affidavit of Robert Fine, its first lawyer. (Document No. 66-4). Attorney Fine represented Sherwood when the document requests were served and PMAI's Motion to Compel was litigated but he had been replaced by Attorney Oliverio when the responses were served. Sherwood did not present an Affidavit from Attorney Oliverio. Attorney Fine's Affidavit provides absolutely no insight into the reasonableness of the document search conducted by Sherwood. He simply states that "[c]onsistent with my practice, I sent copies of the document requests to Sherwood's President, Uziel Frydman, with instructions to gather all

documents in the discovery requests and send them to me for production to” PMAI. Id., ¶ 4. He does not further describe the “instructions” given or whether there were any follow-up communications with anyone at Sherwood regarding the scope of the requests, the search conducted or the documents he received from Sherwood. Sherwood also submits two lengthy Affidavits from its CEO, Mr. Frydman. (Document Nos. 66-1 and 70). Mr. Frydman’s Affidavits are equally unhelpful. He explains that he delegated the document search and states that “[a]s CEO of a multinational company with operations all over the world, I was not personally involved in the gathering of documents responsive to the requests, but directed my employees to gather all documents requested as directed by counsel.” (Document No. 66-1 at ¶ 6). In particular, he indicates that he “directed Sherwood’s CFO, Christopher Willi, and others to gather all documents relating to the requests, such documents to be provided to Sherwood’s counsel for production.” Id. ¶ 5. Despite the fact that he makes clear that he was “not personally involved in the gathering of documents responsive to the requests,” Mr. Frydman attempts to explain, “on personal knowledge,” in his sworn Affidavit, why the July 1, 1999 fax was not discovered. Specifically, he testifies that:

This document was not discovered in Sherwood’s search for responsive documents because it resided in a different file from the potentially responsive documents forwarded to counsel for production. The July 1, 1999 fax was located in files relating solely to negotiations between Sherwood, the City of New Bedford, and the New Bedford Redevelopment Authority to bring Sherwood to New Bedford. The document was not in files that were reasonably believed to have potentially responsive documents, as the negotiation file was unrelated to the physical property, operations, repairs, or any other topic responsive to the document requests.

Id., ¶ 8. He further explains in his Second Affidavit that “[t]he July 1, 1999 fax was placed by Sherwood in the only existing file in 1999, the file regarding negotiations with the City of New Bedford to purchase an entirely different building.” (Document No. 70, ¶ 27).

Mr. Frydman does not explain how he learned and has “personal knowledge” of these detailed facts when he also indicates that he was not personally involved in the gathering of responsive documents. Sherwood did not provide an Affidavit from Mr. Willi or any of the others who may have been directly involved in the document search. Thus, the Court has no competent basis upon which to conclude that Sherwood conducted a reasonably diligent search of its records for responsive documents.

It is undisputed that the July 1, 1999 fax was responsive to PMAI’s discovery requests and was not timely produced by Sherwood. In fact, Sherwood’s response to each of the discovery requests in issue was that “there are no documents in its possession, custody and/or control.” Rule 26(g), Fed. R. Civ. P., requires that the signer of a discovery response (counsel or party) certify that the response was made after “reasonable inquiry.” See also Phinney v. Paulshock, 181 F.R.D. 185, 203 (D.N.H. June 4, 1998) (meaning “a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand.”). The reasonable inquiry standard is an objective one, and bad faith is not necessary for finding a violation. Lockheed Shipbuilding Co. v. Ins. Co. of N.A., C.A. No. 90-0587P, 1993 WL 358442 at ** 4-5 (D.R.I. April 2, 1993). See also Lancellotti v. Fay, 909 F.2d 15, 19 (1st Cir. 1990) (Applying Rule 11’s reasonable inquiry clause, the Court observed that “a pure heart no longer excuses an empty head.”).

Sherwood's explanation for failing to produce the July 1, 1999 fax is that it was located in a file related to negotiations with the City of New Bedford and the NBRA to bring Sherwood to New Bedford, and that it "reasonably believed" that documents about the condition of the roof prior to the 2005 loss would not be located in such file. Frankly, it seems that a file regarding "negotiations...to bring Sherwood to New Bedford" (Document No. 66-1 at ¶ 8) could possibly contain documents regarding the condition of potential sites under consideration. However, even if Sherwood is given the benefit of the doubt, there are two flaws in its argument.

First, even prior to this case being filed, Sherwood was involved in litigation with the NBRA regarding the interpretation of its Lease of the Premises and, in particular, whether the NBRA had agreed to accept rent payments under the Lease in lieu of property taxes. (Document No. 46-3). Thus, the NBRA "negotiations" file would have been relevant to that dispute and presumably reviewed by Sherwood and/or its representatives in connection with the NBRA litigation. In other words, the file was not collecting dust and, in fact, some, or all of it, was apparently produced in the NBRA litigation. Second, PMAI served Document Request No. 5 on Sherwood in July 2008 which requested "[a]ny and all documents evidencing the interest of the plaintiff and/or others in the property and all liens on the property." (Document No. 8-1). Sherwood responded narrowly noting only that it had already produced the 2000 Lease with the NBRA. However, at the time it made that response, Sherwood had previously agreed in the pending Massachusetts litigation that the NBRA did not have the authority to enter into a lease with Sherwood for the Premises and thus its actions were ultra vires and the Lease was null and void ab initio. (Document Nos. 46-2 and 46-3). In fact, on August 27, 2007, Sherwood asserted its own counterclaim seeking a declaration to such effect. Id. While the Lease alone would likely have been responsive to Request No. 5 in normal

circumstances, the issues at play in the Massachusetts litigation complicated matters, and production of the Lease alone was not responsive as I ruled on October 21, 2009 in granting PMAI's Motion to Compel. Thus, if Sherwood had initially taken seriously its discovery obligations to PMAI, it would have looked to the Massachusetts litigation and thus likely the NBRA negotiations file for potentially responsive documents. That search may have then earlier led Sherwood to other responsive documents including the July 1, 1999 fax.

Although I conclude that PMAI has not established that Sherwood willfully and intentionally withheld the July 1, 1999 fax, I find that Sherwood did not, under the totality of the circumstances, conduct a reasonably diligent search for responsive documents. As to sanctions, the requests of PMAI for dismissal of this suit, an award of reimbursement of all of PMAI's defense costs and an "additional sanction" of \$10,000.00 payable by Sherwood to PMAI, are simply too harsh under these circumstances and are all rejected.

As an alternative, I conclude that it is reasonable to impose an evidentiary sanction as well as an award of fees and costs incurred by PMAI in pursuing the instant Motion and defending Sherwood's Counter-motion for Sanctions. See Fed. R. Civ. P. 37(b)(2)(A)(i) and (C).

Needless to say, the parties differ sharply as to the relevance and importance of the July 1, 1999 fax. PMAI contends that it is a key piece of evidence as to the pre-loss condition of the roof and that the production of the document after the close of discovery has substantially prejudiced PMAI's case preparation. In particular, PMAI argues that it would have questioned deponents about the document and may have deposed other witnesses including Mr. Richman, the author of the fax, and Mr. Giroux, the realtor who apparently gave Mr. Richman the information that the roof needed replacement in certain areas. For instance, there is a factual dispute about whether Mr. Frydman

asked a roofer, Mr. Breault, to prepare an estimate to replace the entire roof prior to the 2005 loss. At his deposition, Mr. Frydman denied that he made such a request in or about September 2005 and stated that “[t]here was no reason on God’s earth for me to ask any roofer to replace the roof three months before the roof had a major leak where in October there was no leaks.” (Document No. 64-8 at p. 4). If PMAI’s attorney had the July 1, 1999 fax at the time, he could have used it for impeachment purposes and asked Mr. Frydman if Mr. Richman’s fax notifying him that the “roof needs replacement in certain areas” could be such a reason. Since PMAI’s attorney did not have the fax at the time, he could not have asked the question of Mr. Frydman and has forever lost the opportunity to do so under those circumstances, i.e., without Mr. Frydman’s advance notice that the fax would be used in that fashion.⁶

Sherwood attempts to minimize the importance of this single fax and contends that “[t]he evidence will show that Mr. Frydman was unaware of the document, that Sherwood based no actions on that document, and that the roof was not in such an aged and deteriorated condition that it needed to be replaced.” (Document No. 64 at p. 14).⁷ Sherwood also contends that PMAI has made no

⁶ There is also a factual dispute about a second document (NB 2435) apparently obtained by PMAI after Mr. Frydman’s deposition. Sherwood indicates that it is a page of Mr. Frydman’s handwritten notes from 2000 about Section 41.2 of the Premises Lease which, in part, required Sherwood to invest \$700,000 to renovate the Premises. Although the notes are ambiguous, there is a reference on one line to “roof,” “repair and replace,” and “\$600 700.” (Document No. 73 2 at p. 3). PMAI argues it is more evidence that the roof needed replacement. Sherwood counters that it was part of a list of six potential items to meet the \$700,000 investment requirement and did not refer to the “roof” itself but rather a beam that needed to be replaced at a total cost of \$600.00 to \$700.00. (Document Nos. 75 at p. 4 and 75 2 at ¶ 4). While Sherwood’s reading is possible, the \$600 700 notation next to Item 6, the last item on the list, could also be short hand for a total estimate (\$600,000 to \$700,000) of the cost of all of the items on the list since the purpose was to determine how to spend at least \$700,000 for renovations. Further, it seems odd to include a \$600.00 to \$700.00 repair on such a list since it only constitutes .10% of the total required investment of \$700,000 and thus would not be a material expenditure. In any event, the primary point made by PMAI is that it has also forever lost the opportunity to question Mr. Frydman about this document under the circumstances of his initial deposition.

⁷ This argument triggers two counterpoints. First, the fax was directed to Mr. Frydman by a subordinate about a significant business issue (leasing or purchasing a building) and thus he presumably reviewed it at the time even though he may not currently recall. Second, it seems unlikely that Mr. Giroux, the listing realtor, would tell Mr. Richman that the roof needed replacement in certain areas if that was inaccurate since he was trying to sell or lease the building.

showing that the fax was “accurate or was ever read or relied upon by Mr. Frydman or anyone else at Sherwood.” Id. at p. 8. Those arguments beg the question since the fax was produced after the close of discovery, and PMAI had no opportunity to question deponents about the fax or pursue other related discovery.

The actual importance of the fax lies somewhere in the middle. It is plainly relevant since it reports on the pre-loss condition of the roof, but it is not as dispositive as suggested by PMAI. Based on Sherwood’s failure to produce the July 1, 1999 fax in response to my Orders dated December 2, 2008 granting PMAI’s Motions to Compel and Sherwood’s failure to conduct a reasonably diligent search for responsive documents, PMAI’s Motion for Sanctions is GRANTED in part, such that it is an established fact in this case going forward that, at least as of July 1, 1999, areas of the roof of the Premises needed replacement and that no areas of the roof were replaced from July 1, 1999 and at least through December 1, 2005. See Fed. R. Civ. P. 26(g)(3) and 37(b)(2)(A)(i). In addition, PMAI is awarded its reasonable costs and fees in pursuing its Motion for Sanctions and defending against Sherwood’s Counter-motion for Award of Attorneys’ Fees and Costs. See Fed. R. Civ. P. 26(g)(3) and 37(b)(2)(C).

As to Sherwood’s Counter-motion for Award of Attorneys’ Fees and Costs (Document No. 69), it is DENIED. First, it is premised on the contention that PMAI’s Motion for Sanctions was “groundless” and, as discussed above, it was not “groundless.” Secondly, Sherwood accuses PMAI’s counsel of making false and misleading representations to the Court at the January 6, 2010 hearing. I have thoroughly reviewed the transcript of the January 6, 2010 hearing and conclude that PMAI’s attorney did not make any sanctionable arguments to the Court. Although the January 6, 2010 argument was spirited and heavy on rhetoric, I do not see any basis in the record for concluding that

PMAI's attorney willfully sought to mislead the Court or made any intentional misstatements to the Court. As an example, Sherwood points to the following statement of PMAI's counsel:

And then to find out six years before the alleged storm event they were told that the roof needed to be replaced in certain areas yet admit they never repaired or replaced the roof before this loss six years later?

(Document No. 68 at p. 10). Sherwood contends that the statement was false because PMAI's counsel was "acutely aware" that Sherwood repaired the roof during its occupancy and prior to the 2005 loss. I was aware at the time, from preparing for the hearing and reviewing the parties' summary judgment papers, that the roof was regularly tar patched by Mr. Camara over the years. Thus, I interpreted PMAI's arguments as referring to the absence of more extensive repairs beyond the tar patching and believe that is how the argument was intended to be received by me. In any event, later in the hearing, PMAI's attorney made the following statement that would have clarified any misperception:

The argument that somehow patches were made or repairs were made, that's true, they went up there with tar, but it's uncontroverted that they never replaced any of the roof."

(Document No. 68 at p. 50) (emphasis added).

Finally, it is difficult for Sherwood to credibly seek sanctions for misleading the Court when Mr. Frydman's First Affidavit submitted in response to PMAI's Motion for Sanctions contained at least one inaccuracy. Mr. Frydman testified in his Affidavit that, Mr. Richman, the author of the July 1, 1999 fax "left the company shortly after sending the fax." (Document No. 66-1 at ¶ 7) (emphasis added). It is apparent that this portion of the Affidavit was intended by Sherwood to further explain how the fax fell through the cracks and was not initially disclosed. However, PMAI produced

Sherwood emails authored and received by Mr. Richman in 2002 which show that he was still a Sherwood employee at that time. (Document No. 71-1). While the meaning of “shortly” can be debated, it cannot reasonably be interpreted as nearly three years and thus the statement in Mr. Frydman’s Affidavit was inaccurate. Accordingly, Sherwood is not itself on strong ground when it accuses PMAI of such behavior.

Conclusion

For the foregoing reasons, Defendant’s Motion for Sanctions (Document No. 63) is GRANTED in part and DENIED in part as specified herein. Plaintiff’s Motion for Award of Attorneys’ Fees and Costs (Document No. 69) is DENIED. Defendant shall submit for consideration a properly supported (see Local Rule Cv 54.1) Application for Fees and Costs as awarded herein within fourteen (14) days; Plaintiff may reply within fourteen (14) days thereafter.

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
September 30, 2010