SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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COMPLEX STRATEGIES, INC. and DIRECT EFFECT CONSULTS, INC.,

Plaintiffs,

-against-

AA ULTRASOUND, INC., CAROL HOPKINS, STEVENIE HOPKINS, JACKSON HEIGHTS CARDIOVASCULAR IMAGING AND ULTRASOUND, P.C., and IRENE SCHULMAN MEDICAL, P.C.,

Defendants.

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TRIAL/IAS PART: 12
NASSAU COUNTY

Index No. 605909-14
Motion Seq. No. 2
Submission Date: 10/7/16

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition.....x
Memorandum of Law in Opposition.....x

This matter is before the Court for decision on the motion *in limine* filed by Plaintiffs Complex Strategies, Inc. ("Complex") and Direct Effect Consults, Inc. ("Direct") ("Plaintiffs") on September 27, 2016 and submitted on October 7, 2016. For the reasons set forth below, the Court 1) grants Plaintiffs' application to preclude Defendants from producing testimony, documents, or other evidence relating to communications between Plaintiffs and Defendants, but denies Plaintiffs' application to draw an adverse inference against Defendants with respect to that testimony/documents/other evidence; and 2) with respect to Plaintiffs' motion as it relates to testimony, documents or other evidence relating to a) the 2006 Agreement, the 2007 Agreement,

and the 2009 Agreement, b) revenues received by Defendants from medical service providers referred by Complex and Direct, c) reimbursements from insurance carriers and government payors such as Medicare and Medicaid for ultrasound testing services, and d) moneys paid to, or owing to, Complex and Direct by Defendants, refers Plaintiffs' application for an adverse inference to trial, and will permit Plaintiffs to examine Defendants' witnesses about the matters regarding which Plaintiffs seek an adverse inference, but denies Plaintiffs' application to preclude Defendants from offering or producing that testimony/documents/other evidence.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order granting Plaintiffs' motion *in limine* 1) drawing an adverse inference against Defendants AA Ultrasound, Inc., Carol Hopkins, Stevenie Hopkins, Jackson Heights Cardiovascular Imagine and Ultrasound, P.C., and Irene Schulman Medical P.C. ("Defendants") that the production of required documents, had they been made, would support Plaintiffs' claims against Defendants; and 2) precluding Defendants from a) producing testimony, documents, or other evidence relating to communications between Plaintiffs and Defendants; b) producing testimony, documents, or other evidence relating to the 2006 Agreement, the 2007 Agreement, and the 2009 Agreement; c) producing testimony, documents, or other evidence relating to revenues received by Defendants from medical service providers referred by Complex and Direct; d) offering testimony, documents or other evidence relating to reimbursements from insurance carriers and government payors such as Medicare and Medicaid for ultrasound testing services; and e) producing testimony, documents, or other evidence relating to moneys paid to, or owing to, Complex and Direct by Defendants.

Defendants advise the Court that they do not intend to admit any email, text message, letter or other communication between the parties at trial and, therefore, Defendants take no position on Plaintiffs' application to preclude the admission of such evidence (Walters Aff. in Opp. at ¶ 5). Defendants otherwise oppose the motion.

B. The Parties' History

As noted in a prior decision by the Court in this action, this is an action for, *inter alia*, breach of written agreements. In support of the motion now before the Court, counsel for Plaintiffs ("Plaintiffs' Counsel") provides a copy of the Verified Complaint (Ex. A to McEntee Aff. in Supp.). The Complaint outlines the facts concerning Plaintiffs' claims for relief, including the circumstances under which Plaintiffs and Defendant AA Ultrasound, Inc. ("AAU") entered into the 2006 Agreement, 2007 Agreement and 2009 Agreement ("Agreements") that are the subject of this action. The Complaint (*see* Comp. at ¶¶ 43-47) alleges that 1) in 2011, AAU stopped providing Complex and Direct with its full contractual share of revenues for the medical service providers that Complex and Direct had originated, resulting in a reduction in revenues from AAU in 2009, 2010 and 2011; 2) by the end of March 2012, AAU had stopped sharing any revenues with Complex and Direct, even though the 2009 Agreement did not expire until September 2012; 3) during this period, AAU failed to provide back-up documentation that would allow Plaintiffs to determine the exact amount of revenues to which they were entitled, in violation of the parties' agreement; 4) beginning in or about 2011, AAU began to divert revenues from medical service providers procured by Plaintiffs to companies affiliated with Defendants Carol Hopkins ("Hopkins") and Stevenie Hopkins ("Stevenie"), including Defendants Jackson Heights Cardiovascular Imaging and Ultrasound, P.C. ("Jackson Heights") and Irene Schulman Medical, P.C. ("Schulman Medical"); and 5) James Guardino ("Guardino"), the principal of Plaintiffs, discovered this diversion in 2012 .

Plaintiff's Counsel provides copies of the Agreements, as well as the following: documents (Exs. B - L to McEntee Aff. in Supp.): the letter from Plaintiffs' Counsel to Hopkins and AAU dated September 24, 2012; Plaintiffs' First Notice for Discovery and Inspection dated February 19, 2015; the Preliminary Conference Stipulation and Order dated April 1, 2015 ("Order"); excerpts from the transcript of the deposition upon oral examination of Hopkins held on September 21-23, 2015; the Notice to Return Deposition Transcripts for Hopkins dated March 24, 2016; excerpts from the transcript of Stevenie's deposition held on September 23, 2015; an email chain dated June 9, 2011, marked as Plaintiffs' Deposition Exhibit 37; and the Notice to Return Deposition Transcripts for Stevenie, dated March 24, 2016.

Plaintiffs' Counsel affirms that, after the issuance of the Order, Defendants produced certain income tax returns for certain of the Defendants, and printouts of certain accounting ledgers and, later, after multiple applications to the Court, produced data from a medical billing program called Gazelle. Plaintiffs' Counsel affirms, however, that Defendants failed to produce most of the requested documents, including correspondence or emails among Defendants or between Complex and Direct and Defendants; Explanation of Benefit ("EOB") forms that would reflect reimbursements from insurance carriers and government payors such as Medicare and Medicaid for ultrasound testing services; documents relating to the processing of electronic claims clearinghouses; documents identifying all referring medical service providers of AAU; and documents identifying all medical service providers referred by Plaintiffs to Defendants. Plaintiffs submit that Defendants' explanation for these failures is inadequate, and that the Court should grant the relief requested.

In opposition, counsel for Defendants ("Defendants' Counsel") affirms that, during the course of this litigation, Defendants have produced their tax returns, general accounting ledgers and copies of all payments made to Plaintiffs. He affirms that Defendants produced accounting ledgers which list the referring physicians that Plaintiffs provided to AAU, and that Defendants have produced all records created by Gazelle. Defendants' Counsel affirms that the Gazelle program database files provided to Plaintiffs include all relevant business and accounting information, including 1) reimbursements from insurance carriers and government programs such as Medicare and Medicaid for all services provided, including ultrasound testing services, 2) the identities of all referring medical service providers of AAU, including every provider referred by Plaintiffs, 3) the identities of all patients receiving ultrasound testing services and the referring physician from which those patients originated, 4) the date that each claim of each patient is filed, 5) the date that each claim of each patient is collected, 6) the amount of each claim that is actually collected and the corresponding write-off, and 7) the method of payment for services and the source of each payment, *e.g.*, insurance carrier or government program. Defendants' Counsel affirms that Plaintiffs have used the Gazelle data to formulate a 161-page forensic accounting report, which was provided to Defendants' Counsel on October 4, 2016. This report contains, in summary form, the data that Plaintiffs contend were not produced.

Defendants' Counsel affirms that Defendants do not intend to admit any email, text message, letter or other communication between the parties at trial and, therefore, Defendants take no position with respect to Plaintiffs' application to preclude the admission of this evidence. Defendants' Counsel affirms that he has repeatedly offered to provide Plaintiffs with any bank authorization or insurance provider authorizations to obtain payment and EOB data. He affirms that insurance carriers and government programs such as Medicare and Medicaid hold such EOB data even when Defendants did not. Defendants submit that there are no relevant EOB data that are not also present in the Gazelle database.

C. Parties' Positions

Plaintiffs note that, by letter to Defendants Hopkins and AAU dated September 24, 2012, counsel for Plaintiffs advised Hopkins and AAU that, because litigation or arbitration might be required to resolve the parties' disputes, AAU and its affiliated companies "must preserve, and may not destroy, conceal, or alter, all documents and data in paper or electronic form containing information relating to Complex and Direct..." and that AAU "must take every reasonable step to preserve this evidence, including the suspension of data destruction and backup tape recycling policies." Plaintiffs submit that, as evidenced in the deposition testimony of Defendants Hopkins and Stevenie (*see* Ps' Memo. of Law in Supp. at pp. 6-16), Defendants admitted under oath that they did not comply with their obligation to preserve, search for and produce documents relevant to the claims in this action. Plaintiffs contend, further, that Defendants made no effort to locate documents that might be responsive to Plaintiffs' document demands, and that their explanations, including their contention that they did not communicate by email for business purposes, are untrue. Under these circumstances, Plaintiffs submit, Defendants' failure to preserve, search for and produce documents was willful and warrants the relief sought in Plaintiffs' motion.

Defendants oppose the motion, submitting that in light of the fact that Defendants produced responsive records and documents to Defendants during discovery, it would be inappropriate for the Court to impose sanctions against Defendants. While conceding that the Gazelle data were produced late, Defendants contend that mere lateness is not a basis for the imposition of sanctions and submit, further, that the Gazelle data contain all information relevant to Plaintiffs' claims. Defendants submit, further, that the tax documents and accounting ledgers

produced were adequate and appropriate responses to Plaintiffs' other demands. Defendants also contend that executed copies of the relevant contracts were already in Plaintiffs' possession, as were any email communications between Defendants and Plaintiffs. Defendants also argue that Plaintiffs had alternative avenues to obtain desired information, as evidenced by their issuance of a subpoena to a non-party bank, and that Plaintiffs could have accepted Defendants' offer to sign authorizations for insurance carriers and government programs. Defendants contend that, even if they were negligent in failing to disclose certain materials to Plaintiffs so as to give rise to an adverse inference, that inference is rebuttable because of the adequate discovery produced by Defendants, because Plaintiffs possess certain materials that they sought from Defendants, and because there are other entities from which Plaintiffs could have obtained certain information.

RULING OF THE COURT

A. Relevant Discovery Principles

CPLR § 3101(a) broadly mandates full disclosure of all matter material and necessary in the prosecution or defense of an action, and this provision is liberally interpreted in favor of disclosure. *Francis v. Securitas Security Services USA, Inc.*, 102 A.D.3d 739, 740 (2d Dept. 2013), citing, *inter alia*, *Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 954 (1998); *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968).

A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015), citing *Voom HD Holdings LLC v. Echostar Satellite LLC*, 93 A.D.3d 33, 45 (1st Dept. 2012), quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D 212, 220 (S.D.N.Y. 2003). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d at 547, citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. at 220. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or

defense. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d at 547-548, citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D at 220.

Under the common law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence. *Peters v. Hernandez*, 2016 N.Y. App. Div. LEXIS 5877, * 2 (2d Dept. 2016), quoting *Morales v. City of New York*, 130 A.D.3d 792, 793 (2d Dept. 2015) and citing CPLR § 3126; *Neve v. City of New York*, 117 A.D.3d 1006, 1008 (2d Dept. 2014); *Samaroo v. Bogopa Serv. Corp.*, 106 A.D.3d 713, 713-714 (2d Dept. 2013). The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to prove its claim or defense. *Peters v. Hernandez*, 2016 N.Y. App. Div. LEXIS 5877 at * 2, citing *Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 A.D.3d 717, 718 (2d Dept. 2009), quoting *Lawson v. Aspen Ford, Inc.*, 15 A.D.3d 628, 629 (2d Dept. 2005).

B. Application of these Principles to the Instant Action

In light of Defendants' consent, the Court grants Plaintiffs' application to preclude Defendants from producing testimony, documents, or other evidence relating to communications between Plaintiffs and Defendants. The Court denies Plaintiffs' application to draw an adverse inference against Defendants with respect to that testimony/documents/other evidence based on the Court's conclusion that Plaintiffs would be as likely as Defendants to be in possession of communications between the parties.

With respect to Plaintiffs' motion as it relates to testimony, documents or other evidence relating to a) the 2006 Agreement, the 2007 Agreement, and the 2009 Agreement, b) revenues received by Defendants from medical service providers referred by Complex and Direct, c) reimbursements from insurance carriers and government payors such as Medicare and Medicaid for ultrasound testing services, and d) moneys paid to, or owing to, Complex and Direct by Defendants, the Court refers Plaintiffs' application for an adverse inference to trial, and will permit Plaintiffs to examine Defendants' witnesses about the matters regarding which Plaintiffs seek an adverse inference, but denies Plaintiffs' application to preclude Defendants from offering or producing that testimony/documents/other evidence based on the Court's conclusion that Defendants' conduct was not sufficiently egregious to warrant that sanction..

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for trial on October 18, 2016 at 9:30 a.m.

ENTER

DATED: Mineola, NY
October 11, 2016

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
OCT 13 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE