STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 12568

NORTHFIELD INVESTMENTS, INC.,

Plaintiff,

v.

REGIONS BANK and KELLAM & PETTIT, P.A.,

Defendants,

and

REGIONS BANK,

Third-Party Plaintiff,

v.

LAWRENCE J. SHAHEEN and J. MICHAEL SHAHEEN, REGIONAL CONSTRUCTION AND DESIGN, INC., NORTH REGIONAL I, LLC, NORTH REGIONAL II, LLC, and PROPERTY ASSET DEVELOPMENT, INC.,

Third-Party Defendants.

ORDER

Defendant/Third-Party Plaintiff Regions Bank ("Regions") has filed a Motion for Sanctions under Rule 26(g) of the North Carolina Rules of Civil Procedure. After considering the Motion, the Court file, the parties' briefs and supporting materials, and the arguments of counsel, the Court makes the following:

FINDINGS OF FACT

A.

THE CLAIMS

1. Plaintiff Northfield Investments, Inc. ("Northfield") is a North Carolina corporation engaged in real estate development. (Compl. ¶ 1.)

2. Regions is a bank headquartered in Alabama and doing business in Mecklenburg County, North Carolina. (Compl. ¶ 2; Ans. ¶ 2.)

3. On 3 March 2005, Northfield and Regions executed a loan agreement (the "Loan Agreement") whereby Regions loaned Northfield up to $3,050,000.00 (the "Construction Loan") to finance a real estate development project Northfield undertook in Charlotte, North Carolina. (Compl. ¶ 6; Ans. ¶ 6.)

4. The Construction Loan was secured by property located at 13329 York Center Drive, Charlotte, North Carolina (the "Property"). (Compl. ¶ 6; Ans. ¶ 6.)

5. Northfield also signed a promissory note (the "Promissory Note") on 3 March 2005 that set a repayment schedule on the Construction Loan. (Compl. ¶ 6, Ex. C; Ans. ¶ 6.)

6. Third-Party Defendants Lawrence J. Shaheen and J. Michael Shaheen (collectively, the "Shaheens"), who were officers and shareholders of Northfield, provided commercial guaranties (the "Guaranties") on the Construction Loan in favor of Regions. (Compl. ¶ 7, Exs. D, E; Ans. ¶ 7, Exs. D, E.)[1]

7. According to Regions, Northfield failed to make timely payments on the Construction Loan on 3 June 2006 and 3 July 2006. (Counterclaims ¶ 26; Ans. to Counterclaims ¶ 26.)

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[1] On 9 February 2010, Third-Party Defendant Lawrence J. Shaheen filed for Chapter 7 bankruptcy protection in the Western District of North Carolina. Notice of Bankruptcy Case Filing, No. 10-30314 (Bankr. W.D.N.C. Feb. 9, 2010).

8. On 5 July 2006, Regions notified Northfield that it was in default. (Counterclaims ¶ 27; Ans. to Counterclaims ¶ 27.)

9. On or about 28 September 2006, the parties agreed in writing to modify and extend the payment terms of the Construction Loan (hereinafter the "Modification Agreement"). (Compl. ¶ 9; Ans. ¶ 9, Ex. F ¶ 3.)

10. On or about 23 May 2007, Regions again declared a default on the Construction Loan and initiated foreclosure proceedings on the Property. (Compl. ¶ 15; Ans. ¶ 15.)

11. On 11 June 2007, Northfield executed an agreement (the "Purchase Agreement") to sell a portion of the Property to Ted and Ann Mageau (the "Mageaus"). (Disc. Mot. ¶ 2, Ex. A.)

12. The Purchase Agreement was the subject of settlement discussions between Northfield and Regions in the summer of 2007 as they attempted to resolve their dispute. (Regions Br. 3.)

13. Among other things, the Loan Agreement required that Regions approve the Purchase Agreement. (Disc. Mot. ¶ 9.)

14. Ultimately, Regions did not approve the Purchase Agreement. (Disc. Mot. ¶ 13.)

15. Northfield's Complaint, filed on 25 June 2007, sought to enjoin Regions from foreclosing on the Property. (Compl. ¶¶ 19-25.) The Complaint also alleged claims against Regions for tortious interference with prospective business advantage, fraud, negligent misrepresentation, and unfair and deceptive trade practices. (Compl. ¶¶ 26-50.)

16. On 5 July 2007, the Court denied Northfield's Motion for a temporary restraining order, and Northfield subsequently withdrew its Motion for preliminary injunction. (6 July 2007 Order at 1; Withdr. Mot. Prelim. Inj. at 1.)

17. The Court did, however, conditionally stay the foreclosure sale provided Northfield posted an appeal bond, but the sale proceeded when Northfield did not post the bond. (14 Aug. 2007 Order at 1.)

18. At the foreclosure sale held on 2 August 2007, Regions was the only bidder on the Property. (Disc. Mot. ¶ 14; Brf. Supp. Def.'s Mot. Partial Summ. Judgmt. at 5, Ex. H.)

19. Regions subsequently assigned its rights in the Property to third party DM Financial, LLC ("DM Financial"). (Disc. Mot. ¶ 14; Brf. Supp. Def.'s Mot. Partial Summ. Judgmt. at 5-6, Ex. I.)

20. Regions answered the Complaint on 28 September 2007 and also filed Counterclaims and a Third-Party Complaint.

21. Regions's pleading included a host of affirmative claims against Northfield, the Shaheens, and other entities owned by the Shaheens (collectively, the "Third-Party Defendants") arising from the alleged breach of the Promissory Note, the Guaranties, the Modification Agreement, and the Loan Agreement. (Counterclaims ¶¶ 56-137.)

22. On 1 October 2007, the case was designated as mandatory complex business, and it was assigned to me on 2 October 2007.

23. On 4 March and 16 March 2009, Northfield voluntarily dismissed its remaining claims against Regions. (4 Mar. 2009 Not. of Dism.; 16 Mar. 2009 Voluntary Dism.)

B.

NORTHFIELD'S AND THE SHAHEENS' COUNSEL

24. In the summer of 2007, Northfield was represented by Ray Smith, III ("Smith"), who was admitted *pro hac vice*. (*See* Compl. at 10; Withdrawal Mot. Prelim. Inj. 1; Mot. Withdraw Appeal 1; Regions Br. 17.)

25. Northfield's local counsel at the time were J. Scott Hale and Jason Buckland, but they were allowed to withdraw on 25 September 2007. (*See* Compl. at 10; 25 September 2007 Order Allowing Withdr. and Subst.)

26. The Court also permitted Smith to withdraw as Northfield's counsel on 25 October 2007. (25 October 2007 Order on Mot. Withdraw 1; Mot. Withdraw and Substitution 1.)

27. On that same day, Brett E. Dressler ("Dressler") was substituted as Northfield's counsel. (25 October 2007 Order on Mot. Withdraw 1.) Dressler also represented the Shaheens and the other Third-Party Defendants (collectively with the Shaheens, the "Third-Party Defendants") as of at least 18 October 2007. (*See* Designation of Mediator 1.)

28. Subsequently, on 20 July 2009, Charles H. Rabon, Jr., filed a notice of appearance as counsel for Northfield and the Third-Party Defendants.

29. On 23 July 2009, the Court admitted Eric S. Bland ("Bland") and Ronald L. Richter, Jr. ("Richter"), *pro hac vice* as counsel for Northfield and the Third-Party Defendants.

30. The Court permitted Dressler to withdraw as counsel for Northfield and the Third-Party Defendants on 17 August 2009.

C.

THE DISCOVERY MOTION

31. On 20 August 2009, Northfield and the Third-Party Defendants moved for leave to depose Regions's counsel, Tricia M. Derr ("Derr") (hereinafter the "Discovery Motion").

32. Northfield and the Third-Party Defendants sought to depose Derr regarding when she transmitted to her client the Purchase Agreement and other documents related to settlement negotiations between Northfield and Regions in the summer of 2007. (Disc. Mot. ¶¶ 8-11.)

33. Northfield and the Third-Party Defendants contended there was good cause for the Discovery Motion based on their belief that Derr "failed to timely transmit the Purchase Agreement to Regions so that Regions could adequately assess the offer, respond in good faith to its customer and agree to have its lien released upon the closing of the Purchase Agreement . . . " (Disc. Mot. ¶ 11.)

34. According to Northfield and the Third-Party Defendants, Derr's purported failure to timely transmit the Purchase Agreement to her client caused the sale to the Mageaus to collapse. Northfield and the Third-Party Defendants alleged further that the sale would have reduced Northfield's debt to Regions and thus reduced the amount of Regions's claims in the litigation. (Disc. Mot. ¶ 13.)

35. In further support of the Discovery Motion, Northfield and the Third-Party Defendants alleged that a Regions officer testified in his deposition that he had not received copies of settlement documents transmitted by Northfield to Derr. (Disc. Mot. ¶ 12.) In fact, however, the officer testified only that he could not recall whether he received the relevant documents. (Disc. Mot. Ex. E at 37.)

36. Although Derr offered to discuss with opposing counsel the merits of the Discovery Motion, Bland insisted there was no reason to discuss it unless Derr would consent to be deposed and agree on the parameters of her deposition. (Disc. Mot. Exs. B, C; Pl.'s Resp. ¶¶ 12-14.)

37. On 31 August 2009, Derr filed the Motion for Sanctions, which included a series of e-mails between her and Northfield's former counsel, Smith, as well as e-mails between Derr and Regions. These exhibits show that Derr promptly transmitted the settlement documents to her client.

38. Northfield and the Third-Party Defendants withdrew the Discovery Motion on 3 September 2009.

39. In an affidavit filed on 29 December 2009, Derr requested sanctions be awarded against Northfield and the Third-Party Defendants (and/or their counsel) in the form of attorney fees in the amount of $33,389.50.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Rule 26(g) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that the signature of an attorney or party on a discovery request certifies that "to the best of his knowledge, information, and belief formed ***after a reasonable inquiry***," the request is consistent with the rules, warranted by existing law or a good faith argument to change existing law, and not made for an improper purpose, and not unreasonable or unduly burdensome or expensive under the relevant circumstances. N.C.R. Civ. P. 26(g) (emphasis added).

2. "If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, ***shall*** impose upon the person who made the certification, the party on whose behalf the request . . . is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee." *Id.* (emphasis added).

3. Analyzing Rule 11, our North Carolina Supreme Court has held that a party's inquiry is objectively reasonable if, "given the knowledge and information ***which can be imputed to a party***, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law." *Bryson v. Sullivan*, 330 N.C. 644, 661-62, 412 S.E.2d 327, 336 (1992) (emphasis added).

4. The Court finds it appropriate to hold Northfield, the Third-Party Defendants, and their counsel to that same reasonable inquiry standard when analyzing a motion for sanctions under Rule 26(g). *See Turner v. Duke Univ.*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 713 (1989) (like Rule 11, Rule 26(g) requires "that when an attorney or party signs a . . . document, he certifies to the best of his knowledge that it has not been served for an improper purpose and is not unnecessarily burdensome or expensive.").

5. Northfield and the Third-Party Defendants have been represented by seven lawyers in this litigation. Nevertheless, these parties were still obligated to satisfy the requirements of Rule 26(g) before filing the Discovery Motion. In particular, it was their responsibility to ensure, after making a reasonable inquiry, that they had a good faith basis for seeking to depose opposing counsel and that the request was "not unreasonable or unduly burdensome or expensive" under the relevant circumstances. N.C.R. Civ. P. 26(g).[2]

6. Northfield and the Third-Party Defendants did not satisfy their obligation in this case.

7. Northfield and the Third-Party Defendants contend they had a good faith basis for believing that Derr had not transmitted the Purchase Agreement to her client because (1) Northfield's prior attorney (Smith) had previously informed Northfield that Derr had not responded to Smith's inquiries on the subject from June 2007 through August 2007, and (2) the deposition of one of Regions's officers gave Third-Party Defendant Lawrence J. Shaheen "the

[2] Allowing a deposition of opposing counsel is an unusual, if not extraordinary, remedy because it would likely result in counsel being disqualified as an advocate at trial. *See* N.C. Rev. R. Prof'l Conduct 3.7. In that regard, this Court agrees with the view of the Eighth Circuit that "the increasing practice of taking opposing counsel's deposition [is] a negative development in the area of litigation, and one that should be employed only in limited circumstances." *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), *cited in In re Fotso*, No. 05-29843PM, 2006 Bankr. LEXIS 4206, at *4-5 (Bankr. D. Md. 2006) ("[D]epositions of opposing counsel should be limited to circumstances where the parties seeking to take the deposition have shown that: (1) no means exists to obtain the information other than to depose opposing counsel; (2) the information sought is relative [sic] and non-privileged; and (3) the information is critical to the preparation of the case.").

impression" that Derr had been dilatory in transmitting the settlement documents to her client. (Shaheen Aff. ¶ 6.)

8. This scant evidence, however, falls far short of the reasonable inquiry contemplated by Rule 26(g). To begin with, Northfield and the Third-Party Defendants do not indicate when they last spoke to Smith on the point of Derr's cooperation with respect to the proffered settlement documents.

9. The fact that Smith may have (during some unspecified timeframe) suggested to Northfield that Derr was unresponsive to inquiries made in 2007 on the subject of the Purchase Agreement is a thin reed indeed on which to support a motion seeking to depose opposing counsel two years later.

10. Moreover, had Northfield and the Third-Party Defendants (or their new counsel) spoken with Smith prior to filing the Discovery Motion, it is difficult to believe that Smith would not have refuted the factual premise for taking Derr's deposition and made the relevant e-mails on the subject available to his former client, particularly since Smith was personally involved on behalf of Northfield in the discussions and e-mails surrounding the settlement negotiations. *See* N.C. Rev. R. Prof'l Conduct 1.16(d) ("[u]pon termination of representation, a lawyer shall . . . [surrender] papers and property to which the client is entitled[.]").

11. Similarly, the fact that a Regions officer testified in a deposition that he could not recall whether he saw the proposed settlement documents[3] does not (without more) provide a good faith basis for believing that Derr in fact did not transmit the documents to her client.

12. The Court holds that the knowledge of Northfield's prior counsel, including the e-mails between Smith and Derr refuting the factual basis for taking Derr's deposition, should be

[3] Northfield and the Third-Party Defendants misstate the evidence on this point when they allege in their brief that Regions's representative testified at deposition that he had not received copies of settlement documents.

imputed to Northfield and the Third-Party Defendants and their new counsel for purposes of determining whether they undertook a reasonable inquiry. Alternatively, a reasonable inquiry by Northfield and the Third-Party Defendants would have revealed the information contained in the e-mails without the need to file the Discovery Motion, which in turn would have made clear to these parties that their Discovery Motion was unreasonable.

13. The Court also notes that counsel for Northfield and the Third-Party Defendants declined to discuss the merits of the Discovery Motion with Derr, insisting that the only issue left to discuss was the parameters of her deposition.

14. Had counsel for Northfield and the Third-Party Defendants honored the "meet and confer" requirement of Rule 18.6 of the General Rules of Practice and Procedure for the North Carolina Business Court, they likely would have discovered that the Discovery Motion was not supported by the facts. *See Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 2009 NCBC 9 ¶¶ 18-19 (N.C. Super. Ct. Mar. 26, 2009), http://www.ncbusinesscourt.net/opinions/2009_NCBC_9.pdf ("Judges and lawyers should resurrect the original intention of the discovery rules, which was to make discovery a more cooperative and less adversarial system designed to reduce, not increase, the cost of litigation…. Our system of civil justice cannot function effectively and economically unless lawyers . . . make cooperation [and] communication . . . cornerstones" of discovery).

15. Derr, however, is not without fault here. Had Derr held her fire on the Motion for Sanctions and instead selected—as her first option—to deliver to counsel for Northfield and the Third-Party Defendants the series of e-mails confirming that she had promptly transmitted the relevant settlement documents to her client, that likely would have ended the matter.

16. Nevertheless, the primary responsibility for the dispute before the Court lies with Northfield, the Third-Party Defendants, and their counsel for (1) failing to conduct the reasonable inquiry mandated by Rule 26(g) before filing the Discovery Motion, and (2) refusing to meet and confer with Derr to resolve the issue.

17. Accordingly, the Court will award monetary sanctions, which will consist of some reasonable amount as reimbursement for the attorney fees incurred by Regions in this dispute. In arriving at that amount, however, the Court will consider that Derr bears some responsibility for the escalated motions practice in this case.

18. Regions has filed an affidavit attesting to the attorney fees it has incurred in responding to the Discovery Motion.

19. Northfield and the Third-Party Defendants shall have five (5) days from the entry of this Order to respond to Regions's fee affidavit.[4] Regions shall not be allowed to file a reply unless the Court, in its discretion, finds it necessary.

CONCLUSION

The Court **GRANTS** the Motion for Sanctions. The Court will enter an award of sanctions after considering Regions's fee affidavit and the response of Northfield and the Third-Party Defendants.

SO ORDERED, this the 18th day of March, 2010.

/s/ Albert Diaz
Albert Diaz
Special Superior Court Judge

[4] There does not appear to be any bar to awarding sanctions against Third-Party Defendant Lawrence J. Shaheen, despite the automatic stay in place by virtue of his Chapter 7 bankruptcy filing. *See Alpern v. Lieb*, 11 F.3d 689, 690 (7th Cir. 1993) (Rule 11 sanctions fall within the exception to automatic stay in 11 U.S.C. § 362(b)(4)). If Shaheen believes the law is otherwise, he should address the point in his response to Regions's fee affidavit.