UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

ATALIAN US NEW ENGLAND, LLC	:	
v.	:	C.A. No. 20-00133-JJM
JAMES NAVARRO, et al.	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

Pending before me for a report and recommendation (28 U.S.C. § 636(b)(1)(B)) is Plaintiff Atalian US New England, LLC's Motion for Sanctions Against Defendant TAJ Contract Cleaning, LLC ("TAJ"). (ECF No. 52). TAJ objects. (ECF No. 63). Plaintiff filed a Reply. (ECF No. 65). TAJ also moves for leave to file a Counterclaim. (ECF No. 50). Plaintiff objects and argues that the request is dilatory and should be denied due to the bad faith outlined in its Motion for Sanctions. (ECF No. 54). A hearing was held on May 19, 2021. For the following reasons, I recommend that Plaintiff's Motion for Sanctions (ECF No. 52) be GRANTED and TAJ's Motion for Leave to File a Counterclaim (ECF No. 50) be DENIED.

Discussion

Plaintiff's Memorandum (ECF No. 52-1) outlines in detail its allegation that TAJ's principal intentionally destroyed evidence in this case by deleting relevant data from a smartphone and laptop computer before producing those devices to Plaintiff for imaging. Plaintiff additionally alleges that TAJ's principal, an IT professional, took steps to cover his tracks and manipulate evidence by uploading "applications and documents to the laptop and backdated information in an

attempt to make it appear that data had not been deleted and that the uploaded documents had been present on the laptop for years." (ECF No. 52-1 at pp. 1-2). Plaintiff's allegations are persuasively supported by the clear and detailed report of a digital forensic expert (ECF No. 52-11) and by highly suspicious circumstantial evidence. Based on my review of the parties' submissions, I find that TAJ willfully deleted and manipulated relevant evidence with the intent to deprive Plaintiff of the information's use in this litigation and to mislead the Court.

Despite being given a lengthy extension of time to review the report of Plaintiff's digital forensic expert and to respond to the Motion, TAJ has not submitted a rebuttal expert report or otherwise attempted to controvert the expert's findings. Thus, Plaintiff's expert report is uncontroverted and, as previously stated, clear and persuasive. At the hearing, TAJ's counsel, consistent with his ethical obligations as a member of the Bar, candidly advised that he could not say that "nothing happened here" or that "no efforts were taken to wipe the phone and computer." He conceded that decisions were made relative to discovery that "probably weren't good decisions." To be clear, there is no allegation that TAJ's counsel was involved in or aware at the time of the bad decisions being made by his client. TAJ thus focused its argument on a claimed lack of prejudice to Plaintiff and the contention that default judgment was too harsh a sanction. It argues that Plaintiff is unreasonably using this situation opportunistically to score a "knockout blow." (ECF No. 70-1 at p. 2). TAJ faults Plaintiff for failing to take reasonable and proportional steps to replace any lost information and failing to determine if any lost information was duplicative of information already in Plaintiff's possession. Id.

Plaintiff seeks default judgment to sanction TAJ's "fraud on the justice system." (ECF No. 52-1 at p. 2). TAJ counters that an adverse jury instruction is the most appropriate and proportional remedy. (ECF No. 70-1 at p. 3). Rule 37(e), Fed. R. Civ. Proc., deals with the consequences of a

party's failure to preserve electronically stored information. In a case like this where the Court finds that there was intent to deprive the opposing party of relevant information, the Court has the discretion to presume that the lost information was unfavorable to the party who failed to preserve it; instruct the jury of this adverse presumption; or dismiss the action or enter default judgment. Rule 37(e)(2), Fed. R. Civ. Proc. In addition, where intent is shown, "there is no need separately to establish prejudice" so TAJ's arguments as to prejudice are immaterial. See Wai Feng Trading Co. Ltd. v. Quick Fitting, Inc., C.A. No. 13-33WES, at *7 (D.R.I. Jan. 7, 2019). In essence, the finding of intent to deprive supports the inference that the information was unfavorable and that the opposing party was prejudiced by the loss of information. See Charlestown Capital Advisors, LLC v. Acero Junction, Inc., No. 18-CV-4437 (JGK), 2020 WL 5849096 at *9 (S.D.N.Y. Sept. 30, 2020).

This case involves more than the destruction of evidence. It also involves willful efforts to manipulate and fabricate evidence and to conceal what was done. At this point, it seems impossible to effectively unscramble the egg and determine what is genuine and what is tainted. TAJ's proposed sanction of an instruction that the jury must presume that the lost information was unfavorable to it is plainly ineffective since it is nearly impossible, at this point, to attempt to reliably identify the nature of the lost information or to reliably determine what information actually existed during the relevant period. Unfortunately, a default judgment is the only effective sanction to remedy this intentional discovery violation and to deter this party, and others, from engaging in this type of misconduct in future proceedings. The interests of justice and upholding the credibility of our civil litigation system dictate the entry of default judgment as the only reasonable sanction on this record, and I so recommend.

Conclusion

For the foregoing reasons, I recommend that Plaintiff's Motion for Sanctions (ECF No. 52) be GRANTED and that Default Judgment enter against TAJ as to all claims in Plaintiff's Amended Complaint; and further recommend that TAJ's Motion for Leave to File a Counterclaim (ECF No. 50) be DENIED.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
June 10, 2021