

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GREAT NORTHERN STOREHOUSE,)
INC., d/b/a FROG ROCK CAFÉ, and)
MOOSEHEAD LIMITED PARTNERSHIP,)
)
Plaintiffs)
)
v.) Civil No. 00-7-B
)
PEERLESS INSURANCE COMPANY and)
THE NETHERLANDS INSURANCE)
COMPANY,)
)
Defendants)

**ORDER ON PLAINTIFFS'
MOTION TO STRIKE TESTIMONY
AND FOR SANCTIONS (DOCKET NO. 45) AND ON
DEFENDANTS' MOTION TO AMEND ANSWER (DOCKET NO. 53)**

Plaintiffs move for discovery sanctions against Defendants. Defendant Netherlands Insurance Company ("Netherlands") moves for leave to amend its Answer to add an affirmative defense based on advice of counsel to Plaintiffs' claim for unfair settlement practices. As a sanction for the discovery violations described in this Order, Plaintiffs request that I preclude Maurice Trombley from testifying consistent with statements contained in his deposition errata sheet, *see* FED. R. CIV. P. 30(e), and that I either prohibit Defendants from raising any defense to Plaintiffs' claim for bad faith breach of the contract of insurance or, "at the least," deny Defendants' motion to amend their Answer. I now **DENY** Defendant's Motion for Leave to Amend its Answer, **DENY** Plaintiffs' Motion to Strike Testimony, **IN PART**, and **GRANT** Plaintiffs' Motion for Sanctions, **IN PART**.

Background

Maurice Trombley is a Large Loss Consultant with the Peerless Insurance Company who was assigned Plaintiffs' claim on behalf of The Netherlands Insurance Company. (Affidavit of Maurice Trombley, attached to Defendants' Statement of Undisputed Material Facts, Docket No. 33.) Trombley was the final decision-making authority on whether to accept or deny Plaintiffs' claim. (Plaintiffs' Responsive Statement of Material Facts, Docket No. 43, Exhibit 1 at 105.)

In Plaintiffs' First Request for Documents, dated January 14, 2000, Plaintiffs requested production of "[a]ny and all documents relied upon by the Defendant to deny the Plaintiffs' claims" (*Id.*, Exhibit 4 at ¶ 1.) Defendants First Response, filed February 22, 2000 and updated March 23, 2000, indicates that no documents existed. (*Id.*, Exhibit 5.)

The parties conducted Trombley's deposition on August 4, 2000. Trombley testified on that date that his decision to deny Plaintiffs' claim was based, in part, on the advice of defense counsel, whom he retained following the fire "to make sure all rights [were] taken care of" (Trombley Depo. at 21-22.) In addition, Trombley testified that he relied on several reports, including a report prepared by a private investigator retained by defense counsel. Defendants refused production of this document. (*Id.* at 69-70.) Toward the conclusion of his deposition, plaintiff counsel asked Trombley if he relied on any factual information provided by his counsel when he denied Plaintiffs' claim. Trombley indicated he had. (*Id.* at 106.) Plaintiff counsel inquired whether the information provided had been "reduced to any form of document" or had been recorded in Trombley's notes. Trombley indicated that it had not. (*Id.* at 107.) Trombley then indicated that there were no additional facts revealed in either the investigator's report or in

his communications with defense counsel that had formed a basis for his denial of the claim and had not been disclosed during the deposition. (*Id.* at 109, 113.)

The discovery period ended on August 31, 2000. On September 8, 2000, Defendants filed their Motion for Summary Judgment in which Netherlands moved for summary judgment on Plaintiffs' claim for unfair settlement practices based, *inter alia*, on the fact that its claim settlement conduct was based on the "advice of counsel."¹ In support of this motion, they argued that they had not unreasonably delayed their denial of Plaintiffs' claim because, *inter alia*, it was not until "May 5, 2000, [that] Lecomte, Emanuelson, Motejunas & Doyle completed its legal analysis relative to the coverage issues and opined that Netherlands Insurance Company had a good faith basis to deny liability." (Defendants' Motion for Summary Judgment, Docket No. 32, at 4.) On September 15, 2000, Plaintiffs received a "Partial Privilege Log" that listed, *inter alia*, a letter dated May 5, 2000 from defense counsel to Trombley.² Defense counsel indicated the letter was being withheld pursuant to the attorney-client privilege. (Affidavit of Tyler Kolle, Esq., Docket No. 44, Exhibit A.)

On September 18, 2000, Plaintiffs received four pages of errata sheets pursuant to FED. R. CIV. P. 30(e), signed by Trombley, that changed the answers he had provided during his deposition testimony. In particular, Trombley expanded his prior answers to the bases for his opinion that Plaintiffs set the fire to include "[o]ther indications [as] detailed in coverage opinion letter from counsel dated May 5, 2000." (*Id.*, Exhibit D.) Additionally, in the place of a prior answer of "yes" to the question, "Are all the reports . . . upon which you've . . . based your decision to deny this claim included in the files that we have marked here today," Trombley now

¹ Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment are addressed in a Recommended Decision also issued on this date.

² The letter, which is defense counsel's legal opinion on the coverage issues in this case, can be found attached as Exhibit B to the Affidavit of Tyler N. Kolle, Esq., Docket No. 44.

wishes to answer, "I have been informed that the coverage opinion letter dated May 5, 2000 should also have been included among the documents should [sic] have been marked, however, was [sic] inadvertently not produced." (*Id.*) Similarly, where he once answered that his correspondence with defense counsel was never in writing or recorded in notes, he now wishes to respond that he received a "coverage opinion letter dated May 5, 2000." (*Id.*)

Discussion

Plaintiffs request that sanctions be imposed on Defendants for discovery violations. First, they ask the Court to prevent any reference at trial to the revised answers contained in Trombley's Rule 30(e) errata sheet. Second, they ask the Court to bar any reference to the factual information provided to defense counsel by the private investigator, which was not disclosed at Trombley's deposition. Third, they ask the Court to prohibit Defendants "from raising any defense to Plaintiffs' claims that their conduct . . . constituted a breach of their duty of good faith in the insurance contract." (Motion to Strike Testimony and For Sanctions, Docket No. 45, at 5-6.)

1. Trombley's Errata Sheet

Pursuant to FED. R. CIV. P. 30(e):

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. . . .

Plaintiffs complain that Trombley's revisions should not be allowed because his explanation for the relevant changes, "more complete answers", are not reasons at all.

Rule 30(e) allows deponents to provide revised answers to deposition questions, including answers contradictory to those provided at the deposition. The Rule does not "require

a judge to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes'—even if those reasons 'are unconvincing.'" *Podell v. Citicorp Diners Club*, 112 F.3d 98, 104 (2nd Cir. 1996) (quoting *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981)). The Rule merely requires that the deponent abide by a restricted time frame for making the changes and recite the reasons for any changes. *See* FED. R. CIV. P. 30(e). However, "when a party amends his testimony under Rule 30(e), 'the original answer to the deposition questions will remain part of the record and can be read at the trial.'" *Podell*, 112 F.3d at 104 (quoting *Lugtig*, 89 F.R.D. at 641). Though a reason must be supplied for the changes, *see, e.g., Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 803-04 (N.D. Ind. 1996) (granting motion to strike where deponent submitted changes without explanation), there is no indication that the explanation must be any more in-depth than the reasons provided by Trombley herein. For this reason, I am unpersuaded that Rule 30(e) itself justifies any exclusion of Trombley's reference to defense counsel's opinion letter. For this reason, Trombley's revisions will be permitted to supplement his original deposition answers. However, as described in the following section, Trombley will not be permitted to testify regarding his reliance on the May 5 letter of counsel or its contents.

2. Defendants' Motion for Leave to Amend Their Answer

Defendants seek leave to amend their answer to add the affirmative defense of "advice of counsel and other experts". Leave to amend is to be freely given "when justice so requires". Fed. R. Civ. P. 15; *see Forman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should . . . be 'freely given'"). However, there are certain instances when amendment need not be allowed, such as a situation where the

amendment would be futile. *See Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 59 (1st Cir. 1990) ("Where an amendment would be futile or would serve no legitimate purpose, the district court should not needlessly prolong matters.").

In the present case, because I believe Defendant committed an egregious discovery violation, I conclude that allowing Defendant's amendment would cause undue delay in these proceedings. For the same reason, I conclude that allowing the amendment would be futile. As discussed, *infra*, I am granting Plaintiffs' motion for sanctions to the extent that it seeks to prevent Trombley from testifying regarding his reliance on the May 5th letter from defense counsel, Gerald W. Motejunas.

3. May 5th letter—factual content and use as evidence of good faith

The May 5, 2000 letter is over twenty-seven pages long. It contains a great deal of information, the majority of which will probably be admitted at trial because it had previously been disclosed to Plaintiffs through other discovery. Defendants contend the letter is simply a "regurgitation" of facts established through discovery and otherwise made admissible. However, Plaintiffs assert that there are also "facts" in the letter which were never revealed during discovery. I have no way to settle that argument on this record, but I do know and the record does reflect that Plaintiffs diligently sought all discoverable material from Defendants and attempted to pursue each and every fact upon which Defendants relied for their affirmative defenses. There were at least four formal conferences with me during the discovery phase, one of which I held in person in order to try to get the Defendants to cooperate with the Court's discovery process. (See Docket Nos. 8, 10, 22, and 29). Plaintiffs asked Defendant Netherlands in supplemental discovery specifically authorized by me to provide "each and every fact" on which it relied for its affirmative defenses. No mention was ever made of *the fact of a May 5th*

letter from Mr. Motejunas. Not only were Plaintiffs not put on notice through any pleadings that Defendants intended to interject the rather complex affirmative defense of advice of counsel (see discussion pp. 10 – 16 in Plaintiffs' Objection to Defendants' Motion for Summary Judgment, Docket No. 42), but also the Defendants deliberately withheld any information about any "facts" which might have alerted them to Defendants' reliance on this sort of evidence. I refer specifically to the deposition of Trombly wherein Mr. Motejunas states that he removed the entire post-suit correspondence file between counsel and Trombly because the materials were "attorney-client communications, as well as materials that are within the work-product doctrine." (Trombly Dep. at 28.)

I do not intend, as Defendants rather blithely suggest, to allow Plaintiffs any additional discovery on the issue of advice of counsel. At the time the letter was disclosed, September 12, 2000, discovery had been closed for two weeks and dispositive motions were due. The notion that Plaintiffs could have or should have pursued additional discovery at that point in time is simply ridiculous. Defendants assert that the letter was not provided because of "inadvertence." Given the history, I simply cannot accept that claim, but even if I were to assume the most innocent of omissions on Defendants' part, the sanction which I impose would be justified by such egregious negligence on their part and such obvious prejudice to the other party.

SANCTIONS IMPOSED

To begin, I consider that precluding Defendants from raising *any* defense to Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is extreme. However, because I consider the Defendants' conduct to have egregiously violated the discovery rules, I **GRANT** the Plaintiffs' motion and impose the following sanctions: Maurice Trombley will **NOT** be permitted to testify regarding his reliance or the Defendants' reliance on the advice of

counsel as contained within the errata submissions either as a ground for denying Plaintiffs' claim or as a ground for challenging Plaintiffs' claims for breach of the covenant of good faith and fair dealing or for unfair settlement practices. Additionally, Defendants will not be permitted to present in evidence any facts revealed in the May 5th letter that were not previously made known to the Plaintiffs during the discovery period.

Conclusion

As a natural consequence of this ruling, Netherlands's Motion to Amend their Answer to include "the advice of counsel" as an affirmative defense to Plaintiffs' claims is **DENIED**.

Further, Plaintiffs' Motion to Strike the Deposition Testimony is **DENIED**, but as a result of the sanction imposed, Defendants will not be able to admit any testimony concerning the May 5th letter or advice of counsel as contained within the errata submissions. The original testimony as to all matters will remain part of the record and Plaintiffs may examine Trombly on that testimony should any of the errata testimony be admitted for some purpose other than supporting an advice of counsel affirmative defense or revealing the contents of the May 5th letter.

Plaintiffs' Motion for Sanctions is **GRANTED** to the limited extent indicated above.

CERTIFICATE

- A. The Clerk shall submit forthwith copies of this Order to counsel in this case.
- B. Counsel shall submit any objections to this Order to the Clerk in accordance with Fed. R. Civ. P. 72.

So Ordered.

Dated this 29th day of December, 2000

Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-7

GREAT NORTHERN STORE, et al v. PEERLESS INSURANCE, et al Filed: 01/13/00
Assigned to: JUDGE D. BROCK HORNBY Jury demand: Both
Demand: \$0,000 Nature of Suit: 110
Lead Docket: None Jurisdiction: Diversity
Dkt# in other court: None

Cause: 28:1332 Diversity-Insurance Contract

GREAT NORTHERN STOREHOUSE, INC TYLER N. KOLLE, ESQ.
dba 784-3586
FROG ROCK CAFE [COR LD NTC]
plaintiff BERMAN & SIMMONS, P.A.
P. O. BOX 961
LEWISTON, ME 04243-0961
784-3576

v.

PEERLESS INSURANCE, CO. DANIEL A. PILEGGI, ESQ.
defendant 942-4644
JAMES S. NIXON, ESQ.
GROSS, MINSKY & MOGUL, P.A.
P.O. BOX 917
23 WATER ST.
BANGOR, ME 04401
207-942-4644

MARIE CHEUNG-TRUSLOW, ESQ.
GERALD W. MOTEJUNAS, ESQ.
LECOMTE, EMANUELSON, MOTEJUNAS
& DOYLE
PRESIDENTS PLACE
1250 HANCOCK STREET
QUINCY, MA 02169
(617) 328-1900

PEERLESS INSURANCE, CO. DANIEL A. PILEGGI, ESQ.
counter-claimant 942-4644
JAMES S. NIXON, ESQ.
GROSS, MINSKY & MOGUL, P.A.
P.O. BOX 917
23 WATER ST.
BANGOR, ME 04401
207-942-4644

MARIE CHEUNG-TRUSLOW, ESQ.
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PRESIDENTS PLACE
1250 HANCOCK STREET
QUINCY, MA 02169
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dba
FROG ROCK CAFE
counter-defendant

TYLER N. KOLLE, ESQ.
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[COR LD NTC]
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P. O. BOX 961
LEWISTON, ME 04243-0961
784-3576

NETHERLANDS INSURANCE COMPANY
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942-4644
JAMES S. NIXON, ESQ.
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P.O. BOX 917
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LECOMTE, EMANUELSON, MOTEJUNAS
& DOYLE
PRESIDENTS PLACE
1250 HANCOCK STREET
QUINCY, MA 02169
(617) 328-1900

MOOSEHEAD LTD PARTNERSHIP
plaintiff

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784-3586
BERMAN & SIMMONS, P.A.
P. O. BOX 961
LEWISTON, ME 04243-0961
784-3576

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(617) 328-1900

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LEWISTON, ME 04243-0961
784-3576

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(See above)

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942-4644
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P.O. BOX 917
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BANGOR, ME 04401
207-942-4644

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