Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-003737 01/07/2019

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

TRANSPACIFIC DEVELOPMENT COMPANY, et al. MICHAEL J PONZO

v.

LEXINGTON INSURANCE COMPANY, et al. TIMOTHY M STRONG

BRET S SHAW
THOMAS P BURKE II
MICHAEL N POLI
BENNETT EVAN COOPER
JUDGE KILEY
DAVID WARD
10077 GRAGAN'S MILLS ROAD
SUITE 540
THE WOODLANDS TX 77380

UNDER ADVISEMENT RULING

Defendants Rimkus Consulting Group, Inc. ("RCG") and Heidi M. Watton ("Watton") (RCG and Watton collectively, "Rimkus") request an award of attorney fees pursuant to A.R.S. § 12-349, Rules 11 ("Rule 11") and 37 ("Rule 37") of the Arizona Rules of Civil Procedure, and "this Court's inherent power."[1] Defendants Rimkus Consulting Group, Inc. and Heidi M.

[1] Although Rimkus initially cited A.R.S. § 12-341.01 as an alternative basis for its requested fee award, Fee Motion at p. 1, it has since made clear that it no longer seeks relief pursuant to that statute. *See* Rimkus Consulting Group and Heidi Watton's Reply in Support of Their Motion for Attorneys' Fees at p. 2.

Watton's Motion for Attorneys' Fees ("Fee Motion") at p. 12. *See also* Rimkus Consulting Group and Heidi Watton's Motion for Rule 11 Sanctions ("Rule 11 Motion") at p. 1 ("In addition to the sanctions warranted under other authorities identified in the [Fee Motion], sanctions are warranted pursuant to Rule 11."). Rimkus asserts that a fee award is warranted as a sanction because, it contends, Plaintiffs Transpacific Development Company *et al*. "deliberately obfuscated the truth throughout this litigation." Fee Motion at p. 1. In support of this accusation, Rimkus argues, first, that the Plaintiffs "engaged in gamesmanship regarding their preliminary expert affidavit by withholding important information from their expert." *Id*. at pp. 5-6. Citing the deposition testimony of the Plaintiffs' expert, Dilip Khatri ("Khatri"), Rimkus contends that the Plaintiffs and their agents withheld information from Khatri about the status of a complaint that had been filed against Watton with the Arizona Board of Technical Registration (the "Board") even when Khatri expressly inquired about its status, and that, when Khatri learned, at his deposition, that the Board had dismissed the complaint against Watton, he disclaimed his preliminary expert opinion affidavit. *Id*. at pp. 6-7. As a result, the Plaintiffs' claim against Rimkus was dismissed for failure to comply with A.R.S. § 12-2602. *Id*. at p. 7. *See also* Minute Entry of July 25, 2018 at p. 11.

Rimkus also argues that sanctions are warranted because the Plaintiffs "willfully ignored or grossly delayed fulfilling" their discovery obligations, including by "fail[ing] to search for relevant documents" or to disclose any documents "from their internal files" until April 11, 2018, after this litigation had been pending for over two years. Fee Motion at pp. 8, 9. Prior to then, Rimkus argues, the only documents the Plaintiffs disclosed were from the files of their public adjuster, and even this disclosure "'conveniently'…omitted the most damning…emails" sent to or received by their public adjuster, such as, for example, emails that purportedly reflect the Plaintiffs' awareness that the appraiser they selected "would *not* be impartial during the appraisal." *Id*. at pp. 9-10 (emphasis in original).

In response, the Plaintiffs assert that no sanction or other fee award is warranted. Plaintiffs' Opposition to Defendants Rimkus Consulting Group, Inc. and Heidi M. Watton's Motion for Attorneys' Fees ("Response to Fee Motion") at p. 2. In support of their position, they assert, *inter alia*, that Rimkus "could have…avoided a significant amount" of the fees it claims had it accepted a settlement offer the Plaintiffs made in early 2018. *Id*. at p. 9. The Plaintiffs contend that, if Rimkus "had proceeded with the $15,000 settlement offer proposed by the Plaintiffs," Rimkus could have avoided tens of thousands of dollars in fees that it subsequently incurred and now seeks to recover. *Id*.

Rimkus replies that it was justified in rejecting the Plaintiffs' settlement offer because the Plaintiffs refused to "release" their claims against Rimkus with prejudice in connection with the settlement, offering "a dismissal without prejudice and [a] covenant not to sue" instead. Rimkus Consulting Group, Inc. and Heidi M. Watton's Reply in Support of Their Motion for Attorneys'

Fees ("Reply in Support of Fee Motion") at p. 9. Believing that settling on those terms "would not wholly preclude further litigation," Rimkus insisted on a full release instead, which the Plaintiffs rejected due to concerns about the impact a release may have on their claims against Defendant Lexington Insurance Company. *Id.* at p. 10.

A review of the emails exchanged between counsel in connection with their settlement discussions makes plain that Rimkus and the Plaintiffs never reached a meeting of the minds with respect to settlement. *See* Exhibit E to Response to Fee Motion and attachments thereto. Further, the Court cannot say that either side took an unreasonable settlement position. Because the Court cannot say that Rimkus acted unreasonably in refusing to enter into a settlement that did not include a release of the Plaintiffs' claims against it, the Court finds that Rimkus's unwillingness to accept the Plaintiffs' settlement offer has no bearing on whether or not Rimkus is entitled to the fees it now claims.

The Plaintiffs further assert that no sanctions are warranted because, they contend, they have asserted "legitimate claims" in this lawsuit. Response to Fee Motion at p. 5. While a court should certainly consider the legal merits of a party's position in determining whether to enter sanctions against that party, that factor alone is not dispositive. Even if a party asserts a valid claim, the manner in which that party conducts itself during litigation may nonetheless warrant the imposition of sanctions. *See, e.g., ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 55, 952 P.2d 286, 293 (imposing sanctions against counsel who represented plaintiff on a meritorious claim to collect a debt the defendants admitted they owed, based on the manner in which plaintiff's counsel conducted himself during the proceedings, including by "churn[ing]" the file in order to make the case "needlessly complex and a burden" on defendants) (internal quotations omitted). The Court therefore finds that the merits of the claims asserted by the Plaintiffs, while a factor to be considered, is not dispositive of Rimkus's request for fees.

In further support of their position that a fee award is not warranted, the Plaintiffs argue that, to the extent that Rimkus seek fees pursuant to Rule 37, such a fee award is unavailable because Rimkus "did not submit a certificate of good faith consultation pursuant to Rule 37(a)(1) with their [Fee Motion]." Response to Fee Motion at p. 4.

A party must attach a "good faith consultation certificate" to motions for relief pursuant to Subsections (a) and (f) of Rule 37. *See* Ariz.R.Civ.P. 37(a)(1) ("Subject to Rule 26(d), a party may move for an order compelling disclosure or discovery" but "must attach a good faith consultation certificate" to the motion); Ariz.R.Civ.P. 37(f)(1)(A) (party moving for sanctions for opposing party's "fail[ure]…to appear for his or her deposition" or to "serve [his or her] answers, objections, or written response" to "interrogatories under Rule 33" or "requests for production under Rule 34…must attach a good faith consultation certificate" to the motion). Here, however, Rimkus seeks relief pursuant to Subsections (b) and (c) of Rule 37. *See* Fee

Motion at p. 12. Those subsections do not require the moving party to attach a good faith consultation certificate to its motion. *See* Ariz.R.Civ.P. 37(b) (authorizing imposition of sanctions for a party's "fail[ure] to obey an order to provide or permit discovery," without requiring good faith consultation certificate); Ariz.R.Civ.P. 37(c)(2) (authorizing imposition of sanctions for a "disclosure under Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete," without requiring good faith consultation certificate). The Court therefore agrees with Rimkus that the Rule 37 sanctions they seek "are not contingent upon a meet-and-confer requirement." Reply in Support of Fee Motion at p. 6.

The Plaintiffs go on to argue that, to the extent that Rimkus seeks sanctions pursuant to A.R.S. § 12-349, no such sanctions may be awarded unless Rimkus establishes that the Plaintiffs "brought a claim (1) without substantial justification, (2) that is groundless, and (3) is not made in good faith." Response to Fee Motion at p. 4, *citing City of Casa Grande v. Ariz. Water Co*., 199 Ariz. 547, 555, 20 P.3d 590, 598 (App. 2001). As Rimkus correctly argues, however, A.R.S. § 12-349 also authorizes an award of fees if a party or its counsel "unreasonably expands or delays the proceeding" or "engages in abuse of discovery." Reply in Support of Fee Motion at p. 7, *quoting* A.R.S. § 12-349(A)(3), (4). The Court therefore rejects the Plaintiffs' contention that sanctions are available under A.R.S. § 12-349 only if Rimkus establishes each of the three elements discussed in *Casa Grande*. *See, e.g., Solimeno v. Yonan*, 224 Ariz. 74, 81-82 227 P.3d 481, 488-89 (App. 2010) (holding that defendants' actions that necessitated "a new trial" after mistrial was declared "significantly delayed and expanded the litigation," which was "sufficient for an award of sanctions under A.R.S. § 12-349(A)(3)"; "Under A.R.S. § 12-349(A)(3), the relevant question is whether a party's or attorney's actions caused unreasonable delay and expansion of the proceedings.") (internal punctuation omitted).

The Court rejects the Plaintiffs' contentions that an award of sanctions is unavailable to Rimkus, and finds, instead, the conduct of which Rimkus complains *could* warrant the imposition of sanctions pursuant to statute and/or court rule. For example, A.R.S. § 12-349 could apply to authorize an award of all fees and costs incurred by Rimkus after October 14, 2016, the date by which the Court ordered the Plaintiffs to serve a preliminary expert opinion affidavit. *See* Minute Entry of August 16, 2016 at p. 4. Had the Plaintiffs failed to serve a preliminary expert opinion affidavit by the October 14, 2016 deadline set by the Court, the Court would have been required to dismiss their claims against Rimkus, and Rimkus would have incurred no further fees or costs in this matter. *See* A.R.S. § 12-2602(F) ("The court…*shall dismiss* the claim…without prejudice…if the claimant fails to file and serve a preliminary expert opinion affidavit after…the court has ordered the claimant to file and serve an affidavit.") (emphasis added). Instead, the Plaintiffs served the affidavit of an expert who later disavowed his affidavit after learning that his opinions were based on a misapprehension of facts he considered relevant. Under these circumstances, as Rimkus notes, the Plaintiffs can fairly be said to have expanded or delayed the proceedings as to Rimkus by serving on a preliminary expert opinion affidavit that kept "Rimkus

in the case for nearly two years." Reply in Support of Fee Motion at p. 7. Sanctions under A.R.S. § 12-349 are therefore available *if* Rimkus establishes, as A.R.S. § 12-349(A) requires, that the Plaintiffs and/or their counsel acted "unreasonably" or otherwise with wrongful intent. *See* A.R.S. § 12-349(A)(3), (4) (with certain exceptions, "the court shall assess reasonable attorney fees [and] expenses…if the attorney or party…[*u*]*nreasonably* expands or delays the proceeding" or "[e]ngages in abuse of discovery.") (emphasis added).

Likewise, an award of fees or other sanctions may be available to Rimkus under Rule 11 and/or Rule 37 if Rimkus can establish that the Plaintiffs and/or their counsel acted with the mental state required by those rules. Ariz.R.Civ.P. 11(b), (c) (authorizing sanctions against party or attorney who "sign[s] a pleading, motion or other document" for "any *improper* purpose" or after failing to make a "*reasonable* inquiry" into the factual and legal support for the contentions in the document) (emphasis added); Ariz.R.Civ.P. 37(c)(2) (authorizing sanctions against party and/or attorney who makes a disclosure that he or she "*knew or should have known* was inaccurate or incomplete") (emphasis added). *See also Obert v. Republic Western Ins. Co.*, 264 F.Supp.2d 106, 121 (D.R.I. 2003) (imposing sanctions pursuant to Rule 11 after holding that "[i]t is patently unreasonable for attorneys to file a false affidavit with the Court…"); *Tygris Asset Finance, Inc. v. Abboud*, 2011 WL 5184437 at *4 (N.D.Ill., Nov. 1, 2011) ("Filing multiple motions and sworn affidavits containing false allegations is precisely the type of egregious conduct that warrants sanctions under…Rule 11…").

The Court does not believe, however, that its "inherent powers" would be a proper basis for the imposition of sanctions in this case. While it is true that trial courts have "the inherent power to sanction bad faith conduct during litigation independent of the authority" granted by court rules, *Hmielewski v. Maricopa County*, 192 Ariz. 1, 4, 960 P.2d 47, 50 (App. 1997), it is also true that such powers are to be exercised with restraint. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 111 S.Ct. 2123, 2132 (1991) ("Because of their very potency, inherent powers must be exercised with restraint and discretion."). This is particularly true where, as here, the alleged misconduct is already governed by existing statute and rules of court, rendering resort to the Court's "inherent powers" unnecessary. *See Elizabeth W. v. Georgini*, 230 Ariz. 527, 529, 287 P.3d 821, 823 (App. 2012) ("[A] trial court's inherent powers end where statutes and rules begin."). *See also Campbell v. Thurman*, 96 Ariz. 212, 214, 393 P.2d 906, 908 (1964) ("Where statutes and rules exist covering the situation[,] it is unnecessary and improper to look to the common law for inherent powers."). *Cf. Carroll v. Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 292 (5th Cir. 1997) (trial court may properly "rely on its inherent power to impose sanctions" when "a party's deplorable conduct is not effectively sanctionable pursuant to an existing rule or statute"). As Rimkus itself correctly notes, "[s]anctions under a [c]ourt's inherent powers are intended to allow a court to punish a litigant *whose misconduct is not clearly sanctionable under other powers available to it*." Reply in Support of Fee Motion at pp. 7-8 (emphasis added). Because the alleged misconduct by the Plaintiffs and their counsel, if

established by Rimkus, would be sanctionable under existing statute and court rules, the Court declines to rely on its "inherent powers" as an alternative basis for an award of sanctions.

The Plaintiffs and their counsel deny having acted unreasonably or in bad faith, asserting that "there is no objective proof of any intentional or knowing concealment of evidence or misrepresentation by any of the Plaintiffs or their agents." Response to Fee Motion at p. 5. They dispute, for example, Khatri's contention that they had misinformed him about the status of the complaint against Watton, contending that, at all relevant times, they "reasonably believed" that Khatri's affidavit "was based on all pertinent information then available." *Id.* at p.7. *See also* Plaintiffs' Opposition to Defendants Rimkus Group, Inc.'s and Heidi Watton's Motion for Rule 11 Sanctions at p. 3 ("Plaintiffs reasonably believed [Khatri] was fully aware of everything he felt he needed to prepare his preliminary opinion, including the outcome of the complaint against Ms. Watton."). They further contend that "there is no objective proof that any documents or information was intentionally withheld or concealed by the Plaintiffs or their agents," arguing that their good faith is shown by the fact that, upon learning that their disclosures were incomplete, "they promptly spent significant resources to try to rectify the situation." Response to Fee Motion at p. 8. They assert that no sanctions should be imposed "without the benefit of an evidentiary hearing" to determine "what [Khatri] knew when he submitted his affidavit of merit and why he later disavowed it," and whether the Plaintiffs and/or their counsel "intentional[ly] or knowing[ly]" concealed or withheld documents. *Id.* at pp. 5, 7.

Rimkus contends that no evidentiary hearing was necessary because, they assert, the Court already made factual findings that the Plaintiffs' conduct was "sanctionable." Reply in Support of Fee Motion at p. 4. This is not accurate. The Court dismissed the Plaintiffs' claims against Rimkus not as a sanction, but due to the Plaintiffs' failure to comply with A.R.S. § 12-2602. Minute Entry of July 25, 2018 at p. 11. A dismissal pursuant to A.R.S. § 12-2602(F) is not a "sanction." *See Boswell v. Fintelmann*, 242 Ariz. 52, 54, 392 P.3d 496, 498 (App. 2017) ("Dismissal for failure to serve the expert affidavit" required by A.R.S. § 12-2602 is not "a dismissal as a sanction for a discovery violation…"). In denying the Plaintiffs' request to substitute a new expert in place of Khatri, the Court found that "the Plaintiffs have failed to establish good cause for their request to substitute expert witnesses at this stage of the case." Minute Entry of July 25, 2018 at p. 8. The Court's holding that the Plaintiffs failed to establish good cause for their request to substitute a new expert witness after the close of discovery does not, however, establish that the Plaintiffs and/or their counsel engaged in conduct warranting the imposition of sanctions. Whether good cause existed for the Plaintiffs' request to substitute a new expert after the close of discovery and whether the Plaintiffs and/or their counsel engaged in sanctionable misconduct are distinct issues. Nothing in the Court's ruling of July 25, 2018 constitutes a determination that the Plaintiffs and/or their counsel acted with the mental state required for the imposition of sanctions pursuant to A.R.S. § 12-349, Rule 11, or Rule 37.

The Court will, therefore, grant the Plaintiffs' request for an evidentiary hearing at which the parties will have the opportunity to present evidence on the issues of whether the Plaintiffs and/or their counsel acted with the mental state required for the imposition of sanctions pursuant to A.R.S. § 12-349, Ariz.R.Civ.P. 11, and/or Ariz.R.Civ.P. 37, including whether, as Rimkus alleges, the Plaintiffs "engaged in gamesmanship regarding their preliminary expert affidavit by withholding important information from their expert" and/or "willfully ignored or grossly delayed fulfilling" their discovery obligations by failing to appropriately search for and disclose relevant documents. Fee Motion at pp. 5-6, 8-9.

In accordance with the foregoing,

IT IS ORDERED setting a telephonic Status Conference on **February 26, 2019** at **9:00 a.m**. (**30 minutes allotted**) to discuss the scheduling of further proceedings and the setting of such additional deadlines for discovery as may be appropriate. Counsel for Defendants Rimkus Consulting Group, Inc. and Heidi M. Watton shall initiate the joint call to the Court at (602) 372-3839.