

ORDERED.

Dated: November 19, 2020


Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:

Chapter 7

Able Body Temporary Services, Inc.,
Professional Staffing – A.B.T.S., Inc.,
Westward Ho II, LLC,
Westward Ho, LLC,
YJNK II, Inc.,
YJNK XI CA, LLC,
ABTS Holdings, LLC,
Able Body Gulf Coast, Inc.,
Cecil B. DeBoone, LLC,
Organized Confusion, LLP,
Preferable HQ, LLC,
Rotrpick, LLC,
Training U, LLC,
USL&H Staffing, LLC,
YJNK III, Inc.,
YJNK VIII, Inc.,

Case No. 8:13-bk-06864-CED
Case No. 8:13-bk-06866-CED
Case No. 8:13-bk-06867-CED
Case No. 8:13-bk-06868-CED
Case No. 8:13-bk-06869-CED
Case No. 8:13-bk-06875-CED
Case No. 8:13-bk-06879-CED
Case No. 8:13-bk-06881-CED
Case No. 8:13-bk-06883-CED
Case No. 8:13-bk-06888-CED
Case No. 8:13-bk-06891-CED
Case No. 8:13-bk-06894-CED
Case No. 8:13-bk-06896-CED
Case No. 8:13-bk-06897-CED
Case No. 8:13-bk-06899-CED
Case No. 8:13-bk-06902-CED

Debtors.

Christine L. Herendeen, as Chapter 7
Trustee of the above captioned Debtors,

Adv. Pro. No. 8:15-ap-118-CED
Lead Case

Plaintiff,

Jointly administered with:

v.

Adv. Pro. No. 8:15-ap-111-CED
Adv. Pro. No. 8:15-ap-112-CED

Regions Bank,

Defendant.

Adv. Pro. No. 8:15-ap-113-CED
Adv. Pro. No. 8:15-ap-114-CED
Adv. Pro. No. 8:15-ap-115-CED
Adv. Pro. No. 8:15-ap-116-CED
Adv. Pro. No. 8:15-ap-117-CED
Adv. Pro. No. 8:15-ap-119-CED
Adv. Pro. No. 8:15-ap-120-CED
Adv. Pro. No. 8:15-ap-121-CED
Adv. Pro. No. 8:15-ap-122-CED
Adv. Pro. No. 8:15-ap-123-CED
Adv. Pro. No. 8:15-ap-124-CED
Adv. Pro. No. 8:15-ap-125-CED
Adv. Pro. No. 8:15-ap-126-CED

**ORDER DENYING TRUSTEE HERENDEEN’S MOTION FOR ADVERSE INFERENCE
OR, ALTERNATIVELY, TO PRECLUDE REGIONS FROM OFFERING EVIDENCE IN
SUPPORT OF CERTAIN DEFENSES AND AFFIRMATIVE DEFENSES**

THESE JOINTLY ADMINISTERED ADVERSARY PROCEEDINGS came before the Court on Plaintiff *Trustee Herendeen’s Motion for Adverse Inference or, Alternatively, to Preclude Regions from Offering Evidence in Support of Certain Defenses and Affirmative Defenses* (the “Adverse Inference Motion”),¹ the opposition filed by Defendant Regions Bank (“Regions”),² and Plaintiff’s reply.³ The parties have agreed that the Court may consider the Adverse Inference Motion on the papers.⁴

Plaintiff requests that the Court draw an adverse inference that documents allegedly withheld by Regions (the “Missing Documents”) would have been unfavorable to Regions in these proceedings. Alternatively, Plaintiff requests that the Court prohibit Regions from introducing evidence predicated on the Missing Documents to establish certain of its defenses and affirmative defenses. In support of her claims that Regions engaged in bad-faith discovery abuses and failed to

¹ Doc. No. 429.

² Doc. No. 445.

³ Doc. No. 451.

⁴ Doc. No. 447.

produce the Missing Documents, Plaintiff incorporates the *Motion for Terminal Sanctions Striking All Regions Bank's Defenses* (the "Terminal Sanctions Motion") that she previously filed in Adv. Pro. No. 8:14-ap-653-CED.⁵ In addition, Plaintiff attached the affidavit of Catherine Ghiglieri, her expert on banking laws and regulations.⁶

Plaintiff defines the Missing Documents, all of which relate to bank accounts maintained by the Debtors at Regions (the "Debtor Accounts") as:

1. Backup for the bank statements for the Debtor Accounts, such as the front and back of deposit tickets and checks, dated prior to mid-May 2010.
2. Regions' policies and procedures, such as Regions' Uncollected Funds Policy and its Bank Secrecy Act/Anti-Money Laundering ("BSA/AML") Monitoring and Reporting Operations Department's policies.
3. Reports from DepositChek, a software monitoring program to identify potential deposit fraud, which produced an "Advance Report" and a "Returns Report."
4. BSA/AML alerts generated by Searchspace, a software program used to monitor and detect abnormalities in deposit accounts,⁷ and the disposition of the Searchspace alerts.⁸

Plaintiff contends that because of Regions' obstruction, discovery abuses, and failure to produce the Missing Documents, they are unavailable to her to rebut Regions' defenses to her claims

⁵ Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 362. The Terminal Sanctions Motion was filed jointly by Plaintiff and Angela Welch, the trustee in the related Chapter 7 case of the Debtors' principal, Frank Mongelluzzi, Case No. 8:11-bk-01927-CED. Plaintiff later withdrew from the Terminal Sanctions Motion without prejudice (Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 456). On March 4, 2019, the Court entered an order that, *inter alia*, denied the Terminal Sanctions Motion "to the extent that it requests the Court to strike Regions' affirmative defenses and enter a default judgment in Plaintiff's favor," and "RESERVED on the issue of a lesser sanction." (Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 643, p. 14).

⁶ Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 311, Ex. A.

⁷ Doc. No. 445, p. 27.

⁸ Doc. No. 429, pp. 9-10.

for the avoidance of fraudulent transfers and for damages for aiding and abetting and unjust enrichment. Specifically, Plaintiff asserts that the Missing Documents would have shown that:

1. “Regions had knowledge of the kite prior to June 28, 2010 and in the 5 month period of time during which the Bank Statement Backup was not produced (from December 2009 through mid-May 2010);”

2. “Regions’ actions violated its uncollected funds policy and the policies and procedures of the BSA/AML Monitoring and Reporting Operations Department;” and

3. “Regions did not have a security interest emanating from grants of provisional credit in the 5 month period of time during which the Bank Statement Backup was not produced (from December 2009 through mid-May 2010).”⁹

In its opposition to the Adverse Inference Motion, Regions contends, first, that the Missing Documents either do not exist or that Regions produced all of the documents that could be located. For example, Regions asserts that it produced the BSA/AML policies and procedures manuals; that it produced the DepositChek Advance Notification of Return Report, but the Debtor Accounts did not appear on the reports; that the Debtor Accounts did not appear on any Searchspace alerts; and that Regions did not have an “uncollected funds policy” and there is no evidence that such a policy ever existed.¹⁰

Second, Regions contends that Plaintiff did not show that the Missing Documents are crucial. Regions argues that Plaintiff’s complaints about the Missing Documents relate only to her ability to rebut Regions’ defenses, not to her ability to prove her prima facie case, and that the Missing Documents are only cumulative to other evidence that Plaintiff has presented in the case.¹¹

⁹ Doc. No. 429, p. 31.

¹⁰ Doc. No. 445, pp. 31-34.

¹¹ Doc. No. 445, pp. 34-39.

Third, Regions contends that Plaintiff has not shown that Regions tampered with or concealed any of the Missing Documents in bad faith. Regions characterizes Plaintiff's examples of bad faith as relating to "general discovery conduct," not to the disposal of evidence, and explains that the Missing Documents either never existed or no longer existed because of routine retention procedures.¹²

Fourth, Regions contends that the alleged Missing Documents do not support the requested sanction.¹³ And fifth, Regions contends that Plaintiff seeks an adverse inference with respect to claims that she cannot pursue under the Eleventh Circuit's decision in *Isaiah v. JPMorgan Chase Bank*,¹⁴ and the request must therefore be denied as moot.¹⁵

Regions also filed a recent decision of the Eleventh Circuit Court of Appeals as additional authority in opposition to the Adverse Inference Motion.¹⁶ In *Tesoriero v. Carnival Corporation*,¹⁷ the plaintiff filed a negligence action against the Carnival cruise line and asserted that Carnival did not preserve a chair that had collapsed when she sat on it. The plaintiff asked the court to impose spoliation sanctions against Carnival by drawing the adverse inference that Carnival had notice of the chair's defect from the fact that Carnival had disposed of the chair. The trial court granted summary judgment in favor of Carnival. On appeal, the Eleventh Circuit affirmed, holding that the court may draw an adverse inference only when a party acted in bad faith in failing to produce the evidence, which usually means that the party destroyed the items for the purpose of hiding adverse evidence. The court held that a party's mere negligence in losing or destroying evidence is not sufficient.¹⁸ In addition, the court held that spoliation sanctions are not appropriate if the "practical importance of

¹² Doc. No. 445, pp. 39-41.

¹³ Doc. No. 445, pp. 41-42.

¹⁴ 960 F.3d 1296 (11th Cir. 2020).

¹⁵ Doc. No. 445, pp. 42-43.

¹⁶ Doc. No. 453.

¹⁷ 965 F.3d 1170 (11th Cir. 2020).

¹⁸ 965 F.3d at 1184.

the evidence” in the litigation is minimal. In *Tesoriero*, the court found that the record did not show that Carnival acted in bad faith in disposing of the chair, or that the chair would have had any practical importance in showing that Carnival had notice that the chair was broken.¹⁹

Since the Eleventh Circuit’s ruling in *Tesoriero*, the District Court in the Southern District of Florida has twice relied on the Eleventh Circuit’s summary of the “fundamental principles of spoliation sanctions” in denying requests for such sanctions.²⁰ For example, in *Hoover v. NCL (Bahamas) Ltd.*, the court emphasized that (1) an adverse inference can be drawn only when the absence of evidence is predicated on bad faith which, in the spoliation context, means destruction for the purpose of hiding adverse evidence, and (2) even if bad faith is shown, the missing evidence must be crucial to the moving party’s prima facie case or defense.²¹ In addition, the court addressed Fed. R. Civ. P. 37(e) which relates to the failure to preserve electronically stored information. Under Rule 37(e)(2), a court may presume that lost information is unfavorable to another party “only upon a finding that the party acted *with the intent to deprive another party of the information’s use* in the litigation.”²² In *Hoover*, the court found that the party seeking an adverse inference did not establish that the other party acted with the required intent under Rule 37(e)(2).²³

The Court has carefully considered the Adverse Inference Motion in light of the sixteen pending motions for partial summary judgment filed by Plaintiff in these sixteen jointly administered adversary proceedings²⁴ and Regions’ seven issue-specific motions for summary judgment.²⁵ As the parties are well aware, the Court has previously expressed its concerns regarding Regions’ perceived

¹⁹ *Id.* at 1186-87.

²⁰ *GBS Investment Group v. United Specialty Insurance Company*, 2020 WL 5356562, at *10 (S.D. Fla. Aug. 11, 2020); *Hoover v. NCL (Bahamas) Ltd.*, 2020 WL 4505634, at *7 (S.D. Fla. Aug. 5, 2020).

²¹ 2020 WL 4505634, at *7.

²² Fed. R. Civ. P. 37(e)(2)(emphasis added).

²³ *Hoover v. NCL (Bahamas) Ltd.*, 2020 WL 4505634, at *12.

²⁴ Doc. Nos. 290, 291, 292, 293, 294, 295, 296, 298, 302, 303, 304, 305, 306, 307, 312, 313.

²⁵ Doc. Nos. 297, 299, 301, 308, 310, 322, 323.

dilatory tactics in producing documents to Plaintiff, including (a) Regions’ refusal to cooperate in defining the “search terms” to be used by Plaintiff’s consultant to search Regions’ email system for relevant emails;²⁶ (b) Regions’ representation that certain documents were only available on a secure laptop computer that could not be moved from Birmingham, Alabama, even though Regions’ attorneys and employees were unable to access the documents stored on the laptop *for two days* after Plaintiff’s attorney traveled to Birmingham, and even though the laptop was ultimately delivered to Tampa, Florida;²⁷ and, (c) Regions’ written representations, through counsel, that all documents responsive to Plaintiff’s discovery requests had been produced when, in fact, the representations were not true.²⁸

However, on the record presented by Plaintiff in support of the Adverse Inference Motion, the Court cannot find that Regions intentionally withheld documents from production, acted in bad faith in failing to produce documents, or destroyed, tampered with, or concealed documents. In addition, with respect to certain of the documents such the DepositChek Advance Notification of Return Report and Searchspace alerts, the Court cannot find that any such documents even existed.

Further, as the Court’s rulings on the parties’ pending motions for partial summary judgment will demonstrate, the Court concurs with Regions that the alleged “Missing Documents” do not have an impact on Plaintiff’s prima facie case on her fraudulent transfers claims, her aiding and abetting claims, or her unjust enrichment claims. Finally, as the Court held in its earlier order denying the

²⁶ See Doc. No. 90, Transcript of April 4, 2016 hearing, pp. 58-63.

²⁷ In the Terminal Sanctions Motion, Plaintiff alleged that “Regions required the Trustees to unnecessarily travel to Alabama to review alerts that were allegedly only available on a computer at Regions’ counsels’ office. This turned out to be a ruse and a clear effort to drive up expense for the discovery process. The laptop was not connected to any system, but rather Regions downloaded certain of its alerts into a file and made the Trustees search the alerts on the laptop. Regions never informed the Trustees that the alerts were in paper form as testified to by Mr. Jakeman.” (Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 362, p. 16).

²⁸ In the Adverse Inference Motion, Plaintiff asserts that there are “five (5) examples of Regions’ counsel declaring that ‘all responsive documents were produced’ in the Terminal Facts Statement, all of which were false.” (Doc. No. 429, p. 7, n. 11 (citing Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 363, pp. 22-24, 39, 64)).

Terminal Sanctions Motion, the Court may consider a less drastic sanction for the alleged abuses, and it is appropriate to reserve jurisdiction on this issue.²⁹

Accordingly, it is

ORDERED that the Adverse Inference Motion is **DENIED**; however, the Court reserves jurisdiction to address the issues of monetary sanctions for Regions' alleged discovery abuses.

The Clerk's office is directed to serve a copy of this order on interested parties via CM/ECF.

²⁹ Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 643, pp. 7-8.