



Atty Sanctioned for Deleting Emails in Real Estate Dispute

January 4, 2017

By: Carolina Bolado

A Florida judge last week sanctioned a real estate fund's former attorney for destroying email servers after being sued, a decision that shifts the burden at trial to the attorney accused of scamming the fund out of \$1 million in commissions.

In a Dec. 29 decision, Judge Bronwyn Miller granted Progress Residential LP's motion for spoliation against Erik Wesoloski and his company Title Capital Management LLC for destroying 1.4 terabytes of data in September 2013, shortly after Progress filed suit accusing Wesoloski, who had been hired to handle due diligence of foreclosure sales, of manipulating data in order to inflate his commission.

"TCM and Wesoloski had a duty to preserve the electronically stored information, yet directed its destruction, and then failed to disclose to opposing counsel and the court the fact that it no longer existed," Judge Miller said. "Only one conclusion may be gleaned: the evidence was critical to establishing plaintiff's claim and equally compelling evidence may not be garnered."

The judge said that at trial, she will give the jury an instruction that the plaintiff has proved its liability case and that the defendant now bears the burden of proving its case.

"To get an order granting spoliation isn't too common, especially when the severity of the sanction is literally slipping the burden of proof from the plaintiff to the defendant," Kozyak Tropin & Throckmorton LLP's Javier Lopez, who represents Progress, said.

Lopez's client is a real estate fund that purchases properties to then rent out. In early 2013, the company hired Wesoloski and his company to conduct due diligence on potential purchases, according to the order. He made a 4 percent commission on these deals.

But by May 2013, the real estate fund terminated its contract with Wesoloski after finding that data had been manipulated to inflate Wesoloski's commission, which in the five months the contract was in effect had totaled \$2 million.

At that point, the parties engaged in extensive settlement negotiations that eventually failed. Progress sued in September 2013 and then spent the next two years trying to get access to emails from Wesoloski and his employees. In late 2015, Wesoloski revealed that the servers hosting the emails had been deleted two years prior.

“Under these circumstances, Wesoloski, a licensed Florida attorney, was certainly aware that analyst emails generated in conjunction with bid sheets and the computation of carrying costs were relevant to the dispute,” Judge Miller said. Lopez said a date has not been set for trial, but the parties will head to court-ordered mediation this month.

“With this order, the price of poker has gone up,” he said. “We tried to mediate in February, but it was unsuccessful. But the landscape has changed dramatically.”

Progress is asking for the extra \$1 million in commission that it claims Wesoloski made by manipulating data, as well as punitive damages and attorneys' fees and costs.

An attorney for the defendants could not immediately be reached for comment.

Progress Residential is represented by Monica M. McNulty, Gail A. McQuilkin, Javier Lopez and

Douglas A. Wolfe of Kozyak Tropin & Throckmorton LLP.

The defendants are represented by Raul E. Espinoza and Giancarlo Foschini of Raul E. Espinoza PL.

The case is Progress Residential LP v. Title Capital Management LLC, case number 2013-030433-CA, in the Eleventh Judicial Circuit Court of Florida.