IN THE FOURTH JUDICIAL CIRCUIT
COURT, IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NO.: **16-2009-CA-007958**
DIVISION: **CV-F**

OCEANSIDE 932 CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation,

Plaintiff,

vs.

LANDSOUTH CONSTRUCTION, LLC, a Florida limited liability company, and FISHER & SIMMONS ARCHITECTS, INC., a Florida Corporation,

Defendants.
_____/

FILED BEFORE ME
1/5, 2012
CIRCUIT JUDGE
Hugh A. Eaton, Jr.
CIRCUIT JUDGE

FILED
JAN 06 2012
CLERK CIRCUIT COURT

LANDSOUTH CONSTRUCTION, LLC, a Florida limited liability company,

Third Party Plaintiff,

vs.

DIVISION 7 WATERPROOFING & CONCRETE RESTORATION, INC., a Florida corporation, FIRST COAST ACRYLIC AND DECKING, INC., a dissolved Florida corporation, WINDOR SOUTH, INC., a dissolved Florida corporation,

Third Party Defendants.
_____/

ORDER STRIKING PLEADINGS
AND ENTERING DEFAULT AGAINST LANDSOUTH

On January 4, 2011, this Court heard argument and received evidence in connection with the Plaintiff, Oceanside 932 Condominium Association, Inc.'s ("Oceanside"), Motion for Sanctions (the

"Motion") (and specifically to strike the pleadings and/or enter a default) against Defendant, Landsouth Construction, LLC ("Landsouth").

Oceanside contends that the series of discovery tactics employed by Landsouth have prejudiced and hampered Oceanside's ability to prosecute and obtain adequate relief in this case. For the reasons set forth below, this Court grants the Motion, and will strike Landsouth's pleadings and enter a default as to liability against Landsouth:

Findings of Fact and Conclusions of Law

The inherent powers of a court "to perform efficiently its judicial functions, to protect its dignity, independence and integrity" necessarily include the authority to impose appropriate sanctions. Rose v. Palm Beach County, 361 So. 2d 135, 136, n.3 (Fla. 1978). Thus, a trial court has the inherent authority to impose severe sanctions, including entry of a default, when fraud has been perpetrated on the court. Tri Star Invest., Inc. v. Miele, 407 So. 2d 292, 293 (Fla. 2d DCA 1981). Here, Landsouth has abused the discovery process, and has deprived Oceanside of a fair assessment and presentation of its case:

I. Oceanside sought to discover the policies of insurance held by Landsouth which may have provided coverage.

1. The availability of insurance will guide and frame a claimant's strategy in a construction defect case -- especially when pursuing claims against a general contractor with multiple existing claims, and where the potential of bankruptcy exists.[1]

2. Prior to the commencement of litigation, on October 18, 2007, Oceanside served Landsouth with a demand that Landsouth produce all of its insurance policies that may provide

[1] Landsouth has multiple pending claims against it (including a multi-million dollar damages case that was set for trial on December 12, 2011 before the Honorable Judge Davis in Nassau County styled *Dunes Club Villas Owners Association, Inc. v. Landsouth Construction, LLC, et al.*, Case No.: 2010-CA-545).

coverage for Oceanside's claims, pursuant to Section 627.4137, Florida Statutes. (Plaintiff's Exhibit ("Ex.") 1, Tab 1). Landsouth failed to produce any insurance policies to Oceanside in response to this demand.

3. Shortly after the commencement of this action, in August 2009, Oceanside served Landsouth with its First Request for Production of Documents, requesting that Landsouth produce: (i) "all policies of insurance for the Project which may provide coverage for the claims asserted in the Complaint"; and (ii) "all correspondence or written notification received from any insurers asserting any coverage defense or reservation of rights for the claims asserted in the Complaint." On September 4, 2009, LandSouth responded to the First Request for Production, stating that it would produce all documents responsive to both requests. (Ex. 1, Tab 2)

4. Landsouth produced to Oceanside only two (2) insurance policies -- both of which were issued by Crum & Forster. The two policies produced by Landsouth provide for coverage during the periods July 1, 2006 through July 1, 2007 and July 1, 2007 through July 1, 2008. Both policies provide for $1M in coverage per "occurrence" and $2M in aggregate. By producing only those policies, Landsouth misrepresented that it had no insurance during a critical time period, August 2008, when Tropical Storm Faye caused new and additional property damage at the condominium.

5. Oceanside's counsel, Peter Hargitai, testified that the existence of only two policies was a setback, but not a surprise, inasmuch as the key third party defendant subcontractors, Windor South (window subcontractor) and DPS Exterior (stucco subcontractor), had either let their insurance lapse or refused to defend. Each subcontractor company is no longer in business. Thus, obtaining coverage under the two existing Landsouth policies was paramount. Landsouth also failed to

produce any reservation of rights letters to Oceanside -- leading Oceanside to believe that there were no significant issues as to coverage under the two policies.

II. Oceanside prosecuted its case based upon the representation that only two (2) policies existed, covering events from July 2006 - July 2008.

6. Oceanside spent over two years developing a breach of warranty case. In that regard, it retained multiple expert witnesses, timely served expert reports, prepared and served written discovery, and took and defended lay and expert depositions. It believed it could not, however, prepare a case that would result in its claims being covered if the claims were for occurrences after June, 2008 (having been deprived of the critical insurance information as outlined). Oceanside's case was complete, and its positions solidified by its expert reports and witness testimony upon the close of discovery on August 2, 2011.

III. After discovery had been closed, and approximately a month prior to trial, Oceanside learned that Landsouth intentionally failed to disclose multiple additional policies that would have provided coverage.

7. On November 15, 2011, through the independent efforts of Oceanside's counsel, Oceanside discovered that Landsouth may have withheld from disclosure and production additional insurance policies. Thereafter, on November 17, 2011, believing that Landsouth had failed to mediate in good faith on two separate occasions and that there may be additional undisclosed policies, Oceanside send a demand to Landsouth's counsel, requesting the immediate production of all policies, and filed the underlying instant Motion.

8. The following day, on November 18, 2011, Landsouth forwarded to the counsel for Oceanside a "policy matrix." (Ex. 1, Tab 16) The policy matrix disclosed four (4) excess policies that Landsouth had previously failed to produce, in addition to a primary policy, and excess policy,

covering the critical period July 1, 2008 through July 1, 2009, the period for which Landsouth had falsely represented it lacked coverage. Most notably, the existence of policies covering the damages manifested as a result of Tropical Storm Faye (in the amount of $2M, and an excess policy of $5M also issued by Crum & Forster) were withheld from production. These are the most important policies that provide the greatest amount of coverage; but they were concealed from Oceanside, though disclosed to others in unrelated litigation. Landsouth's witness, James Pyle (the owner and President of Landsouth), admitted that he had knowledge and possession of this key policy, but could provide no legitimate excuse as to why it was not produced in September 2009.

IV. Landsouth withheld from production the reservation of rights letters issued by Crum & Forster -- which would have been critical in developing Oceanside's case in chief and analyzing settlement opportunities.

9. After receiving the policy matrix, Oceanside learned for the first time in a November 18, 2011 email from Crum & Forster's counsel, Lauren Curtis, that Crum & Forster was seeking to exclude coverage under various fact-based exclusions under the policies, including the "continued/progressive damage" exclusion and the "completed operations exclusion." (Ex. 1, Tab 17) Both Landsouth and its carrier, Crum & Forster, ignored Oceanside's written requests for an explanation as to why both the policies and reservation letters had been withheld from production for more than 2 years (and less than 2 months from trial). Both Landsouth and Crum & Forster failed to provide Oceanside's counsel any explanation.

10. Through its counsel, Landsouth represented to Oceanside that a Crum & Forster reservation of rights letter of November 25, 2011 was "the only [such] letter I am aware of." (Oceanside's Motion, Exhibit H). However, after receiving a copy of Crum & Forster's November 25, 2011 reservation of rights letter, Oceanside discovered that Landsouth was aware of reservation

of rights letters dated July 6, 2009 and February 24, 2011 (Ex. 1, Tab 18). In fact, Crum & Forster's November 25, 2011 letter states: "Crum & Forster will continue to provide LandSouth with a defense in the litigation with appointed defense counsel, Al Frith, subject to a full reservation of rights, as previously outlined in the reservation of rights letters sent to you on July 6, 2009 and February 24, 2011. . .." (Id.) This Court finds it extremely troubling that Landsouth has not produced these coverage-based letters. As of the date of this hearing, the additional reservation of rights letters have not been produced despite Oceanside's discovery requests and continued written demands.

11. Moreover, Landsouth has represented to this Court, in opposing the Motion, that it believed that the July 2006 through 2007 and July 2007 through July 2008 policies were the only policies that "it thought may provide coverage for the claims asserted in the Complaint." (Landsouth's opposition to the Motion at 13). This contention is belied by Landsouth's responses to various third party defendants' interrogatories requesting relevant insurance policies. In response to those requests, Landsouth identified six (6) different insurance policies (Ex. 1, Tab 20, Tab 21). However, as it has done throughout this case, Landsouth also withheld the existence of the July 2008 through July 2009 policies from these responses.

V. Not only did Landsouth conceal the critical policies and the coverage letters, it concealed the facts that would have created claims under the undisclosed policies.

12. After the close of discovery, and almost two (2) years after Oceanside's discovery request, Landsouth produced over 5,500 pages of relevant documents to Oceanside. Landsouth failed to produce more than 100 pages of daily reports which show relevant work performed by Landsouth's subcontractors during the July 1, 2008 through July 1, 2009 policy period. (Ex. 1, Tab 6). Counsel for Landsouth represented to this Court that the documents were not produced until years

after they were requested because counsel lost the disk upon which they were copied. However, Peter Helton, Landsouth's Quality Assurance Manager and author of the daily reports, testified that the daily reports were stored on Landsouth's server. More to the point, they were also provided to Landsouth's counsel by Mr. Helton via email on September 25, 2009. (Ex. 1, Tab 11). These documents reflect Landsouth's post-Faye attempted remedial efforts and water testing and were always in the possession of Landsouth's counsel -- but were withheld from production until discovery was closed and expert reports were finalized.

13. Landsouth failed to produce hundreds of photos showing attempted remedial work performed by Landsouth's subcontractors during the 2008/2009 policy period. (Ex. 1, Tab 5). These pictures potentially reflect post-Faye efforts to conceal rotten wood and rusted studs behind new layers of caulk and drywall.

14. Landsouth failed to produce reports generated by another subcontractor and moisture and mold specialist, Skyetec, reflecting moisture intrusion and mold growth in the condominium units at Oceanside. (Ex. 1, Tab 7). Landsouth had had them in their possession since April 8, 2008 (Ex. 1, Tab 14).

15. Landsouth also withheld from production a water test video documenting water intrusion through a window at Oceanside. (Ex. 1, Tab 10, Tab 12). Rather than produce this water test video as compelled by this Court in its August 1, 2011 Order, Landsouth withheld production of the video until its expert witness, Raul Webb, and former Quality Assurance Manager, Peter Helton, were no longer subject to deposition questioning. (Ex. 1, Tab 23).

16. Landsouth also failed to produce documents relating to its arbitration action with its stucco subcontractor, DPS Exterior, that show that Landsouth, itself, was claiming that DPS's

workmanship was inferior (and retained experts to establish that fact). Ex. 1, Tab 8 (Landsouth's Response To DPS Exterior's Tenth Interrogatory regarding DPS's breach of contract); Ex. 1, Tab 9 (Landsouth's disclosure of three expert witnesses to testify regarding DPS's poor workmanship at Oceanside 932). These documents, which were withheld for years until expert reports were finalized, might judicially estop Landsouth from denying liability based upon the workmanship of DPS. Moreover, in response to interrogatories in this case seeking the identification of persons with relevant knowledge of the claims, Landsouth never disclosed the identify of the experts it had retained and disclosed in the DPS Arbitration -- such that Oceanside was deprived of the opportunity to depose those individuals. Again, Landsouth's counsel claims that he "lost a disk," but it appears that Landsouth did not worry about the production of the files despite Oceanside's discovery request. (Ex. 1, Tab 15).

17. Even had Landsouth not concealed these critical documents until after the close of discovery, Oceanside would still have been unaware that coverage was available during that time frame. Oceanside's case has been prejudiced by multi-layered actions and inactions that prevented it from creating a successful case under a critical policy period.

VI. Oceanside was deprived of an opportunity to develop facts establishing covered claims in 2008/2009, and otherwise present its case to address and rebut the coverage positions adopted by Crum & Forster.

18. Oceanside has sought to develop a case to prove that Landsouth breached its statutory warranty as a result of faulty workmanship performed during construction and leading up to the filing of this lawsuit. However, Landsouth's discovery abuses have substantially prejudiced Oceanside's ability to present *covered* claims, and otherwise present evidence to rebut the coverage defenses maintained by Crum & Forster -- such that Oceanside may ultimately be denied relief.

19. Oceanside provided evidence that, had Oceanside known about the 2008/2009 policy, Crum & Forster's coverage position, and the evidence reflecting additional poor workmanship post-Faye, Oceanside could have developed a case that would have overcome the potential insurance coverage issues Crum & Forster sought to raise. Such case could also have created a likelihood of success on the merits.

20. Landsouth's failure to produce the policies and coverage positions has no doubt prejudiced Oceanside's ability to present additional *covered* claims and thus may result in the ultimate prejudice -- no recovery.

VII. Two days before Oceanside received a copy of Crum & Forster's coverage position (which position had been concealed for years), Crum & Forster filed a Declaratory Judgment action seeking a ruling that the facts established by Oceanside are not covered by the 2008/2009 policies.

21. On November 23, 2011, Crum & Forster filed a Complaint in the United States District Court, Middle District of Florida, seeking a declaratory judgment excluding coverage under its policies, including specifically the 2008/2009 policies. (Ex. 1, Tab 19) However, the evidence establishes that, to the extent that Oceanside's case has not included arguments that trigger coverage under these policies, it is entirely due to the fact that the 2008/2009 policies, as well as all coverage-related correspondence by Crum & Forster, had been withheld from production. Simply put, Crum & Forster is ultimately attempting to rely on Landsouth's discovery abuses to judicially foreclose coverage on the policies kept secret.

VIII. Landsouth has unfairly prejudiced the presentation of Oceanside's claim.

22. Landsouth withheld documents and information that Oceanside required to claim damages for poor workmanship after Tropical Storm Faye. Even had that evidence been timely

produced, Oceanside had no way of knowing that there was coverage for damages occurring during that time period -- and thus had no idea of the significance of the belatedly produced evidence. Moreover, Oceanside was deprived of the benefit of Crum & Forster's coverage letters, such that it couldn't address and rebut the purported exclusions upon which Crum & Forster relies.

23. This Court heard evidence by Landsouth's witnesses, who were unable to present any legitimate excuse as to why the documents described herein were withheld from production. Their own testimony, coupled with the documentary evidence received by this Court, establish that: (i) Landsouth never conducted an adequate search of its records in response to Oceanside's initial request for production; (ii) Landsouth always had possession of the documents and policies that it failed to produce until the eve of trial; and (iii) Landsouth misrepresented to this Court, on numerous occasions, the reasons for its discovery abuses.

IX. Florida law supports striking of Landsouth's pleadings under the circumstances.

Where a party and its counsel have committed a fraud on the court, Florida law strongly supports the striking of pleadings and the entry of a default. Tramel v. Bass, 672 So. 2d 78, 84 (Fla. 1st DCA 1996) (striking pleadings). "The requisite fraud on the court occurs where 'it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense.'" Cox v. Burke, 706 So. 2d 43, 46 (Fla. 5th DCA 1998) (emphasis added); Gehrmann v. City of Orlando, 962 So. 2d 1059, 1061 (Fla. 5th DCA 2007). "[T]he striking of pleadings and entering of a default should be employed where a party acts with bad faith,

willful disregard or gross indifference to an order of the court, or acts in a manner that evinces deliberate callousness." Tramel, 672 So. 2d at 83. Moreover, a deliberate disregard of the court's authority will justify striking of pleadings and entering of a default. Id.

In analyzing this issue, a court should "consider the proper mix of factors" and "carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system." Gehrman, 962 So. 2d at 1061-62. "The trial court has the inherent authority, within the exercise of sound judicial discretion, to [enter a default] when a [party] has perpetrated a fraud on the court, or where a party refuses to comply with court orders." Id. (citing Kornblum v. Schneider, 609 So. 2d 138, 139 (Fla. 4th DCA 1992)).

Florida case law is clear that "repeated lies in discovery" or "repeated discovery violations" will support a finding of fraud on the court. Gehrmann, 962 So. 2d at 1059 (Fla. 5th DCA 2007); **O'Vahey v. Miller, 644 So. 2d 550, 550 (Fla. 3d DCA 1994)**, review denied, **654 So. 2d 919 (Fla. 1995)** (a party's repeated discovery violations, uncovered only by "the assiduous efforts of opposing counsel," "constituted such serious misconduct" that dismissal of the case was warranted); Saenz v. Patco Transport, Inc., 969 So. 2d 1145, 1145 (Fla. 5th DCA 2007) (not an abuse of discretion to dismiss claims where there were repeated discovery violations and attempts to conceal material facts); **Bailey v. Woodlands Co., Inc., 696 So. 2d 459 (Fla. 1st DCA 1997)**. Moreover, deliberate disregard of the Court's authority or behavior evincing deliberate callousness to the discovery process requires the striking of pleadings and the entry of a default. See Mercer v. Raine, 443 So. 2d 944 (Fla. 1983); Morgan v. Campbell, 816 So. 2d 251 (Fla. 2d DCA 2002); Austin v. Liquid Distributors, 928 So. 2d 521 (Fla. 3d DCA 2006); Hutchinson v. Plantation Bay Apartments, 931 So. 2d 957 (Fla. 1st DCA 2006).

As set forth above, Oceanside has been prejudiced: (i) in its ability to present facts to trigger coverage for the 2008/2009 policy period; and (ii) in its ability to address and rebut the coverage position maintained by Crum & Forster. Also, Landsouth has enabled Crum & Forster to argue that Oceanside selected the wrong path by which to travel, having previously instructed Oceanside that there was only one path. Oceanside has clearly and convincingly shown that Landsouth has substantially prejudiced and hampered its presentation of its claims in this action.

This Court further finds that Landsouth's consistent discovery violations and presentation of false and misleading responses and communications constitute a fraud upon this court. Landsouth's tactics evidence willful disregard of the authority of the court and constitute bad faith and gross indifference to the orders and directives of this court.

Based upon the totality of the foregoing, Landsouth's pleadings are hereby stricken, and a default judgment shall be entered by this Court as to liability. Oceanside shall proceed to trial to establish the amount of its damages.

This Order shall not affect any claims or defenses asserted between Landsouth and the third-party Defendants.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 5th day of January, 2012.

HUGH A. CARITHERS
CIRCUIT JUDGE

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