HCP. 8806
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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA GENERAL CIVIL DIVISION

NEXTGEN RESTORATION, INC. a/a/o CHARLES SWISTON,

CASE NO.: 10-CA-023772

DIVISION: D

Plaintiff,

vs.

HOMEOWNERS CHOICE PROPERTY & CASUALTY INSURANCE COMPANY,

Defendant.

_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR FRAUD UPON THE COURT

THIS CAUSE came before this Court for evidentiary hearing on December 13, 2012 on Defendant's Motion to Dismiss for Fraud Upon the Court. The Court having reviewed the Court file; received evidence; heard argument; and being otherwise advised in the premises, finds as follows:

Charles Swiston, who is 74-years young, testified that his home at 2555 W. Platt Street, Tampa, Florida suffered water damage on or about June 20, 2009. Mr. Swiston's home was insured at the time by the Defendant. Mr. Swiston contacted NextGen Restoration, Inc. ("NextGen") to get an estimate for the repair of the water damage to his residence. Mr. Swiston met with David Sweet, the COO of NextGen, at his residence, and Mr. Swiston testified that Mr. Sweet gave him an initial verbal estimate of between

$8,000.00 to $9,000.00 to make the needed repairs, but Mr. Swiston acknowledged he did not get this estimate in writing.

Mr. Swiston authorized NextGen to make the indicated repairs. Mr. Swiston received incremental invoices from NextGen and noticed some discrepancies. The first invoices submitted by NextGen were admitted at the evidentiary hearing as Defendant's Composite Exhibit #1 and Composite Exhibit #2, respectively. Mr. Swiston noticed that the two invoices contained a duplicate charge for "containment barriers". The containment barriers are actually plastic sheets that are taped to the walls to prevent dust from spreading throughout the home. Mr. Swiston testified that one set of containment barriers was put upstairs and a second set was put downstairs by subcontractors, but that they were only put up and taken down one time. After noticing these duplicate charges, Mr. Swiston contacted his insurance company and an insurance adjuster came out and met with Mr. Swiston and his wife.

After meeting with the insurance adjuster and reviewing all of the invoices, Mr. Swiston testified there were other incorrect charges in the invoices submitted by NextGen. Specifically, as reflected in Defendant's Composite Exhibit #3, NextGen claimed it had replaced the drywall of the entire kitchen ceiling (comprising an area of approximately 89.22 square feet), and had painted all of the kitchen walls and kitchen ceiling (comprising an area of approximately 346.08 square feet). Mr. Swiston testified, however, that the only area of the kitchen where drywall was replaced and painted was an area in the tray portion of the ceiling next to an air conditioning vent, a total area of approximately 3x3 feet. Mr. Swiston affirmatively stated that the drywall of the entire

kitchen ceiling was not replaced, and that the entire kitchen ceiling and walls were not painted. (*See,* Defendant's Composite Exhibit #5 reflecting photos of the area at issue.)

Mr. Swiston next testified that there was no water damage to his living room or dining room, however, during the water extraction process, NextGen placed dryers in the home which began over-drying causing gaps to occur in the crown molding of the Swistons' living and dining rooms. Mr. Swiston testified that he notified NextGen of the same, and that they stopped the drying process and made patches to the gaps in the crown molding. A review of Defendant's Composite Exhibit #3, however, reflects that NextGen charged for sealing, priming and painting the entire living and dining room, which Mr. Swiston unequivocally testified did not happen.

Mr. Swiston testified that his home also suffered some water damage to some of the drywall and wood flooring in an upstairs hallway, next to a closet housing the air handler. NextGen's invoice contained a charge for replacing 95 square feet of drywall, however, a photo of the area at issue in Defendant's Composite Exhibit #5 reflects a significantly smaller area, which Mr. Swiston confirmed was the area of the wall next to the upstairs closet that was actually repaired. Mr. Swiston also testified that as reflected in the photos of Defendant's Composite Exhibit #5, NextGen did not complete the work on the inside of the air handler closet and left the interior walls unpainted.

Mr. Swiston next testified that a portion of the wood floors near the entry to his den/office were damaged, but that NextGen charged for removing and replacing all of the wood floor in the den/office (approximately 111.27 square feet), even though only a significantly smaller portion of the wood floors near the entry of the den/office is what was actually replaced. NextGen also charged $98.95 for removing and replacing the

contents of Mr. Swiston's den/office in order to do this work, but Mr. Swiston testified that this never happened, and that it is empirically impossible for this to have happened as all of the furniture in the den/office is built-in.

Finally, Mr. Swiston testified that NextGen submitted a charge for cleaning up his home. Mr. Swiston testified, however, that no individual associated with NextGen cleaned up his home, but that instead he, his wife, and their daughter cleaned up the home after NextGen completed their work.

Marie Swiston, wife of Charles Swiston and herself 72 years young, testified that there was a $2500.00 deductible for their insurance coverage, and that she wrote and delivered a check payable to NextGen in the amount of $2,500.00, but that this amount was never credited in any of NextGen's invoices. Mrs. Swiston also confirmed Mr. Sweet's initial verbal quote of approximately $8,000.00 for the repair and restoration work for her home due to the water damage. Mrs. Swiston recalled receiving at least two bills from NextGen, which were then forwarded to Defendant. The Defendant would then send the checks for payment to the Swistons, who would in turn sign them and turn them over to NextGen for payment. Mrs. Swiston then confirmed the testimony of Mr. Swiston regarding the work NextGen billed for that was not performed, or which constituted a duplicate charge.

Courtney White testified as the Defendant's corporate representative. Mr. White confirmed that the Defendant issued an insurance policy to the Swistons which was in effect when the Swistons made their water damage claim in 2009. Mr. White testified that Dale Treger was the insurance adjuster who met with the Swistons to inspect their property after the Swistons noticed the discrepancies in the bills. Mr. White testified that

NextGen was hired by the Swistons to perform water extraction, mold remediation and any attendant repairs to the home due to the water damage. After NextGen completed their work, Defendant received three (3) invoices for payment from NextGen. Mr. White identified Defendant's Composite Exhibit #1 as the invoice for the water extraction work in the amount of $9,010.22, which contains charges for the containment barriers. Mr. White identified Defendant's Composite Exhibit #2 as the invoice for the mold remediation work in the amount of $7,236.38. Mr. White confirmed this invoice contained a duplicate charge for the containment barriers. Mr. White identified Defendant's Composite Exhibit #3 as the invoice for the restoration work in the amount of $15, 427.21. Mr. White also identified Composite Exhibit #5 as the photos of the Swistons home taken by the on-site insurance adjuster, Mr. Treger.

In addition to the billing discrepancies previously noted by the Swistons, which Mr. White confirmed, Mr. White also testified that NextGen charged twice for repair work to 178.32 sq. feet of flooring in the upstairs hallway - first in the mold remediation invoice and again in the restoration work invoice.

Mr. White also testified that when NextGen filed the current lawsuit on December 13, 2010, attached to the Complaint was an invoice reflecting an alleged final balance due of $18,572.22 (admitted as Defendant's Exhibit #6) - constituting $9,010.22 allegedly owed by the Defendant for the water extraction work; $7,236.38 allegedly owed by the Defendant for the mold remediation work; and $15,427 allegedly owed for the restoration work. However, after defense counsel asked for clarification for the amounts due and owing, counsel for NextGen then sent to defense counsel a letter dated September 27, 2011 containing an invoice now alleging a final balance due of $20,136.84. This invoice

contained the same initial charges of $9,010.22 for water extraction, $7,236.38 for mold remediation, and $15,427.21 for the restoration work. This updated invoice now contained, however, credit for partial payments totaling $19,260.11, including an apparent credit of $2500 for payment by the Swistons of their deductible. NextGen was now also requesting payment in the amount of $7,723.14 for alleged finance charges on the overdue balances. (*See,* Defendant's Composite Exhibit #7). Notably, even though these invoices contain different amounts and different information, they have the same Invoice # of "253" and the same date of "8/18/09".

Robert Sweet, COO of NextGen, denied ever giving a verbal estimate to the Swistons. Mr. Sweet did testify that he prepared a water mitigation, mold remediation and restoration "scope" of the work to be done, which was sent to the Defendant, in which the estimated charges for the water extraction and mold remediation were more final than for the charges related to the restoration. Mr. Sweet testified that on July 17, 2009, he sent an "estimate" to Glenn Smith, an outside adjuster who was assigned by the inside adjuster to process the claim, for the restoration portion of the work in the amount of $15,427.21.

Mr. Sweet had no good explanation as to the discrepancies in the bills, however, regarding the duplicate charges or the charges for work never performed. For example, Mr. Sweet testified that he originally estimated approximately half of the office/den wood flooring would need to be replaced, because his flooring guy thought he would need extra room, so that was included in the restoration scope of work. Likewise, Mr. Sweet testified that he originally estimated that the whole kitchen ceiling would need to be replaced, as opposed to just the ceiling tray. What Mr. Sweet could not explain, however,

is why the initial estimated price for this work remained in the final bill that was attached to the Complaint as due and owing. Similarly, Mr. Sweet testified that he had "heard" that the living room and dining rooms were not painted as reflected in his initial estimate, but Mr. Sweet could not explain why these charges still remained in the final invoice attached to the Complaint.

Defendant filed its Motion to Dismiss for Fraud on December 6, 2012, however, the allegations of overbilling had first been raised by Defendant in its Motion for Summary Judgment filed on March 12, 2012. Furthermore, Plaintiff was clearly on notice before this lawsuit was even filed that there were alleged billing discrepancies in the invoices submitted by Plaintiff. Nonetheless, Plaintiff continued its pursuit of payment for duplicate charges for the construction of the containment barriers, when Plaintiff knew or should have known that this was a duplicate charge; Plaintiff continued its pursuit of payment for clean-up of the Swiston home when Plaintiff knew or should have known no such clean-up by Plaintiff occurred; and finally and most significantly, Plaintiff continued pursuit of payment for the entire "estimated" amount of the restoration work, when Plaintiff knew or should have known significant amounts of the estimated work had never been performed.

On December 12, 2012, almost two years after filing this lawsuit, and one day before the evidentiary hearing on the pending motion to dismiss, Plaintiff filed a Notice of Withdrawal of $15,427. 21 of its restoration claim and asked that the matter be transferred to the county civil division. The Court denied this motion, and candidly the Court views this as an admission by Plaintiff that its allegations in the Complaint were not factually accurate.

The Second District Court of Appeal most recently stated the legal standard for fraud on the court in *Ramey v. Haverty Furniture Companies, Inc.*, 993 So. 2d 1014, 1018 (Fla. 2d DCA 2008):

> A trial court has the inherent authority to dismiss an action as a sanction when the plaintiff has perpetrated a fraud on the court. Such power is indispensable to the proper administration of justice, because no litigant has a right to trifle with the courts. It is a power, however, which should be exercised cautiously and sparingly, and only upon a clear showing of fraud, pretense, collusion, or similar wrongdoing." . . . A "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 or unfairly hampering the presentation of the opposing party's claim or defense.

The burden of proof for the moving party is the heightened clear and convincing evidence standard. *See, Howard v. Risch, Jr.*, 959 So.2d 308, 314 (Fla. 2d DCA 2006). "When reviewing a case for fraud, the 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." *Aruzman v. Saud,* 843 So.2d 950, 952 (Fla. 4th DCA 2003), citing to *Cox v. Burke,* 706 So.2d 43, 46 (Fla. 5th DCA 1998).

After considering the proper mix of factors and carefully balancing the policy favoring adjudication on the merits with the need to maintain the integrity of the judicial system, the Court finds that Defendant has established by clear and convincing evidence that Plaintiff set in motion a scheme intended to perpetrate a fraud upon the Court. The Plaintiff attached to its Complaint, and incorporated by reference, an invoice which contained numerous duplicate and fraudulent billing entries. Even after being put on notice before instituting this lawsuit that there were problems with its invoices, Plaintiff persisted in pursuing a claim for damages which it knew it was not entitled to receive.

Furthermore, it is obvious that Plaintiff was simply doctoring its invoice to achieve its goals, as established by the invoice originally attached to the Complaint and the updated invoice later provided by Plaintiff's counsel containing the same invoice number and issuance date.

Waiting until the eleventh hour to attempt to withdraw the improper charges does not mitigate the obvious lack of regard exhibited by this Plaintiff to our court system. As noted by the Second District Court of Appeal, "[t]ampering with the administration of justice in the manner indisputably shown here involves far more than injury to a single litigant. It is wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Ramey,* 933 So.2d at 1020-21(citations and quotations omitted). The Court views Plaintiff's intent to sue upon a fraudulent invoice as a prime example of attempting to trifle with the courts.

It is therefore **ORDERED** and **ADJUDGED** that Defendants' Motion to Dismiss for Fraud Upon the Court is hereby **GRANTED**. Defendant shall submit a Final Judgment in its favor along with a Final Disposition Form.

DONE AND ORDERED, in Chambers in Tampa, Hillsborough County, Florida, this _____ day of February, 2013.

ORIGINAL SIGNED

FEB 15 2013

MICHELLE SISCO

CIRCUIT JUDGE

MICHELLE SISCO, Circuit Judge

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