10/20/2016 5:09:37 PM
Chris Daniel - District Clerk Harris County
Envelope No. 13360823
By: Bonnie Lugo
Filed: 10/20/2016 5:09:37 PM

CAUSE NO. 2014-40964

ERIC TORRES, ADAM SINN, XS CAPITAL MANAGEMENT, L.P., and ASPIRE COMMODITIES, L.P., Plaintiffs	§	IN THE DISTRICT COURT OF
	§	HARRIS COUNTY, TEXAS
v.	§	
CRAIG TAYLOR and ATLAS COMMODITIES, L.L.C., Defendants	§	157TH JUDICIAL DISTRICT

CAUSE NO. 2015-49014

ERIC TORRES, Plaintiff,	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
S. JAMES MARSHALL, Defendant.	§	157TH JUDICIAL DISTRICT

DEFENDANTS' MOTION FOR DEATH PENALTY SANCTIONS

Defendants/Counter-Plaintiffs Craig Taylor ("Taylor"), S. James Marshall, and Atlas Commodities, LLC ("Atlas") (collectively "Defendants") file this Motion for Death Penalty Sanctions against Eric Torres pursuant to Rules 215 and 13 and under this Court's inherent authority as follows:

I. TORRES DESTROYED CRITICAL EVIDENCE

This case is entirely about what was said to whom. Virtually all actionable statements were made via text message. Texts are the key evidence in this case. Knowing that he was legally obligated to preserve his phone and his text messages, with his own motion to quash and Defendants' motion to compel production of his texts pending – long after being served with

requests for production, Eric Torres destroyed his. Torres' text messages are critical to Defendants' defenses and counterclaims. Death penalty sanctions are appropriate.

On December 23, 2013, after settling another lawsuit between them, Adam Sinn texted a photo to Craig Taylor. The photo was of (among others) Sinn and Eric Torres making an obscene gesture toward the camera. Through counsel, Taylor asked that they stop.

Counsel for Sinn said that the photo had been sent to people who do business with Atlas, Taylor's company, wishing them "Happy Holidays from Atlas." Noting that disparaging Atlas in that way was a violation of the settlement agreement's non-disparagement clause and in light of the various contradictory explanations Plaintiffs had offered, counsel for Defendants wrote again to counsel for Plaintiffs on December 24, 2013, demanding that

> …no files related to this be deleted. Please direct both of your clients to place a litigation hold on all related documents, **phones** and computers. **They are not to dispose of any electronic device**.

Exhibit A at p. 4 (emphasis added). Torres knew at the time that he had been instructed to preserve evidence – not just because notice had been provided to his counsel as required by the settlement agreement – but because these emails had been forwarded to him.[1] His response at the time to Defendants' request that text messages be provided was both succinct and consistent with his subsequent destruction of evidence: "fuck them."[2]

Plaintiffs first contended that this entire episode was a misunderstanding – that the vulgar message was in fact not sent to people who do business with Atlas, but to people who do business with *Aspire*, Sinn's company. Then Plaintiffs said that no text ("Happy Holidays" or anything else) was sent with the picture at all, but would not identify the recipients or any responses they received.

[1] [redacted]

[2] *Id*. at 97:23.

Since first receiving the picture, Defendants asked only to be shown the texts the Plaintiffs claimed would exonerate them. Defendants first asked that the texts be provided so that litigation could be avoided, even if they were shown only to counsel. Plaintiffs refused and then when mediation failed, they filed suit on July 17, 2014.

In response to Plaintiffs' suit, Defendants counterclaimed on August 18, 2014, pointing to January 7, 2014 correspondence from counsel for Defendants, saying that

> If this was all a mistake, proving it is easy (which I guess you don't deny since you promise to provide some of the evidence to Mr. Clote [the mediator]). What makes absolutely no sense at all is to insist on spending thousands of dollars going through a mediator instead of just forwarding the requested information. It does make sense if Mr. Sinn and Mr. Torres have something to hide, though.

Defendants' Original Counterclaim at p. 10, paragraph 40.

On the same day Defendants filed their counterclaim – August 18, 2014 – they served interrogatories and requests for production on Sinn and Torres. Among the documents Defendants sought were text messages sent or received by Torres since August 15, 2013 (the date the underlying settlement agreement was signed) which mentioned any of the Defendants. Exhibit B. Torres produced no documents in response. Exhibit C.

On September 22, 2014 – the same day they refused to produce any documents in response to Defendants' requests – Plaintiffs moved to quash and for protection, claiming that the sole issue before the court was whether the sending of the picture to Taylor constituted a breach of the settlement agreement. Exhibit D. On September 29, 2014, Defendants responded and moved to compel, pointing to the various contradictory explanations given by the Plaintiffs about what they had said and to whom. Exhibit E.

On October 29, 2014, the Court held a hearing on Plaintiffs' Motion for Protection and Defendants' Motion to Compel. It ruled from the bench that (among other things) Torres was to

produce text messages responsive to the discovery served by Defendants. On November 3, 2014 the parties submitted a written order conforming to the Court's ruling from the bench. Exhibit F. That order was signed on November 11, 2014.

In the meantime – sometime in October 2014 – Torres got rid of his phone.

[redacted]

[redacted]

[redacted] On September 13, 2016, Torres gave a second deposition at which his counsel elicited the following testimony:

> Q. Eric, did you -- with regards to the telephone that you had on or around December 12th, 2013, did you destroy that phone?
>
> A. No, I did not.
>
> Q. (BY MR. BUSCHI)· Did you take a hammer to it?
>
> A. No, I did not.
>
> Q. Did you burn it?
>
> A. No.
>
> Q. What happened to that phone?
>
> A. I turned the phone over when I transferred my mobile service. I turned it over to T-Mobile.

Exhibit H, September 13, 2016 Deposition of Eric Torres at p. 30:12-30:24 (objections omitted). Of course whether Torres took a hammer to his phone or burned it makes no difference. He gave it to someone knowing he could never get it back. It is just as unavailable as it would have been had he demolished it with a hammer. That he wants credit for destroying evidence by giving it to someone he could never get it back from instead of setting it on fire himself speaks directly to his state of mind and intent to create a veneer of deniability.

Counsel for Torres then elicited the following:

> Q. Okay. And before you turned it over to T-Mobile, had you checked that phone for documents relevant to this case or –

A. Yes.

Q. I apologize. I jumped in front of you there.

A. Sure.

Q. Did you check your phone for document – that phone that you turned in, before you turned it in, did you check that phone for documents, text messages, e-mails, the like before turning it in that were relevant to this case?

A. Yes, I had.

Q. And at the time you turned it in, were there any relevant texts or documents on the phone?

A. No, there was not.

Id. at 31:20-32:3. [redacted]

What Torres apparently wants is credit for not smashing critical evidence to pieces with a hammer, so he asks the Court to give him the benefit of the doubt that he searched for responsive material but could not find any because he intentionally deleted it after receiving notice to preserve

evidence almost a year before, after filing suit, after receiving discovery asking for exactly the material he deleted, and while motions related to the requested production were pending.

Torres does admit that he made derogatory statements about Taylor and admits it is possible that he revealed the confidential details of the settlement agreement to third parties not entitled to know them – he just does not remember any of the details:

[redacted]

Whether Torres regularly deletes texts is irrelevant. His duty was to preserve evidence (which would include not deleting relevant texts after receiving notice). But even if Torres deleted all of his texts, as the Court is aware, any minimally competent computer

expert could have recovered some or all of them with commonly available software. His phone is all that would have been needed.

That he disposed of his phone ten months after being instructed to preserve its contents, three months after filing this suit, and just as the Court was ruling material on it was to be produced cannot be a coincidence. The purpose was to deprive the Defendants of it, subverting discovery and prejudicing the Defendants' rights. The material at the heart of this case, Torres' text messages, were, as Torres intended, lost forever. Defendants have been prejudiced in a way that cannot be remedied.

Torres' texts cannot be recovered from the people he communicated with – they claim both not to have them anymore and not to remember what they were. Evan Caron – a third party, a "trader in the industry, and a friend of"[3] Torres' who appears in the photo, for example, testified that his phones mysteriously break apart all the time:

Q. In December of 2013, what kind of phone did you have?

A. I don't -- I don't recall.

Q. Was it an iPhone?

A. No, I don't believe so.

Q. Was it a Galaxy?

A. Maybe it was a Samsung.

Q. Something like that?

A. Probably.

Q. And I understand that between December 24th, 2013, and the time that you received your subpoena, the phone was damaged and replaced, is that right?

A. I -- I don't recall. I mean, the glass screen phones break all the time.

[3] [redacted]

Q. I'm asking about your phone specifically.

A. I don't recall. I -- I don't treat my phone as a -- as a possession. It's something that is replaceable. So I believe if that's what your records show, then it's quite possible that it was replaced.

Q. Was there water damage to it?

A. I -- I don't recall.

Q. So you don't recall how this water damage might have occurred?

A. I've had many phones over the -- over the last year or two years. I mean, they break. They fall in the toilet. I mean, I've had my phone fall in the urinal multiple times. It's an embarrassing story, but yeah. I've had my phone crack, drop. Phones break pretty easily.

Q. So any texts that you have between, say, August 2013 and March 2014 between you and Eric Torres are no longer available, is that right?

A. Not -- not to me.

Q. Not available to you?

A. Yeah.

Exhibit I, Deposition of Evan Caron at p. 26:9-27:18. Sean Kelly, another trader who appears in the picture, apparently lives in Chicago – outside of the Court's subpoena range. Others who may have texted with Torres – and who Sinn testified received the picture – also live out of state, have refused to respond, or have been the subject of Plaintiffs' motions to quash and for protection.

Despite his admissions that he has disparaged Taylor and that he sends and receives text messages, Torres has not produced a single text message in this litigation. This is because, as he has explained, his texts are unavailable as a sole and direct result of the fact that he disposed of his phone.

Through his text messages, Defendants are in possession of substantial evidence that Sinn breached the non-disparagement clause. Torres has admitted that he used derogatory language

about Taylor to third parties – including the third parties who received the picture via text – but he has made sure that the texts he sent and received are unavailable. Torres has testified that though he is fairly certain the comments he made were derogatory, he simply cannot remember the specifics – specifics the Defendants would have on paper if Torres had not destroyed the evidence despite his legal obligation to preserve it.

Torres' text messages are essential to Defendants' case. That is precisely why he destroyed them. Defendants have been severely prejudiced because they have been deprived of key evidence. Torres' pleadings should be stricken and a default judgment rendered in favor of Defendants.

II. ARGUMENT AND AUTHORITIES

Striking pleadings or granting a default judgment is among the most severe sanctions a court may impose. Courts must ordinarily impose lesser sanctions in order to gain compliance before resorting to more serious ones. There are only a few exceptions to this rule, the most prominent of which is exactly what Torres did – the destruction of relevant evidence.

The Texas Supreme Court has ruled repeatedly that a party's deliberate "destruction of relevant evidence justified death-penalty sanctions." *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 18, n. 5 (Tex. 2014) citing *Cire v. Cummings*, 134 S.W.3d 835, 841 (Tex. 2004). From Justice Baker's "oft-cited concurring opinion in"[4] *Trevino v. Ortega*, 969 S.W.2d 950, 959 (Tex.1998):

> [C]ourts have found that a dismissal or default judgment is justified when a party destroys evidence with the intent to subvert discovery. Thus, courts can dismiss an action or render a default judgment when the spoliator's conduct was egregious, the prejudice to the nonspoliating party was great, and imposing a lesser sanction would be ineffective to cure the prejudice.

On this point, Texas courts are unambiguous: "We concluded the circumstances in Primo were more like cases in which death penalty sanctions were inappropriate because lesser sanctions

[4] *Brookshire Brothers* at 16.

were not first considered or tested; they did not involve the deliberate destruction of dispositive evidence." *In re RH White Oak, LLC*, No. 14-15-00789-CV, 2016 WL 3213411, at *8 (Tex. App. – Houston [14th Dist.] June 9, 2016) (no writ history); "Generally, courts will uphold the use of death penalty sanctions if a party acts in flagrant bad faith, such as by destroying or fabricating evidence that is material to the case. Actions that callously disregard the rules of discovery warrant a presumption that the actor's claims are meritless because the very purpose of discovery is "'to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.'" *Khan v. Valliani*, 439 S.W.3d 528, 535 (Tex.App.—Houston [14th Dist.] 2014, no pet.) (internal citations omitted). Torres destroyed material evidence while that evidence was not only subject to pending discovery, but subject to at least two pending motions. Death penalty sanctions are appropriate.

In *Plorin v. Bedrock Foundation and House Leveling Co., Inc*., 755 S.W.2d 490 (Tex.App.-Dallas 1988, writ denied), homeowners sued a foundation company for negligently leveling their floor. Less than two weeks after suit was filed, the parties agreed to an inspection for discovery and settlement purposes. Before the inspection could be conducted, the homeowners had the floor repaired and leveled, destroying the evidence. The district court imposed death penalty sanctions and the Dallas Court of Appeals upheld them:

> Having concluded that the trial court was empowered to dismiss the Plorins' action, we must address whether it abused its discretion in doing so. The Plorins by their actions totally destroyed essential evidence pertaining to the case while Bedrock's discovery request was pending. The Plorins might well have been within their rights to repair the alleged defects in Bedrock's work immediately after it was completed, or in the weeks that followed, or even after suit was filed. For the Plorins to do so after agreeing to Bedrock's request to inspect the defects of which the Plorins were complaining, even after the agreed to inspection had been postponed at the Plorins' request, was a flagrant abuse of discovery.

Id. at 491. Torres' conduct is even more egregious. By his own admission, he kept the evidence for nearly a year after receiving notice to maintain it on December 24, 2013 and disposed of it not just as discovery to him was pending, but as motions related directly to that discovery were either to be decided or were already decided against him in October 2014.

Torres did nothing to preserve the evidence. Even if he had deleted the texts within his phone before disposing of it, he could have sent that phone to any one of hundreds of forensic examiners who could have recovered some or all of them for less than $500. Instead – after making the unilateral decision to destroy evidence and getting caught doing it – he says he looked for responsive information and found none. Dismissal of Torres' claims and default in favor of Defendants "fit[s] the abuse. Having destroyed the evidence pertaining to [his] claims, [Torres is] barred from asserting them." *Plorin* at 492.

Defendants move that Plaintiffs' live pleading be stricken and that judgment in favor of Defendants be entered in an amount to be proven at trial.[5] A proposed order is attached.

[5] Defendants adopt, as if fully set out above, their application for attorneys' fees filed in connection with their motion for summary judgment. Ex. CC to Defs.' Trad. Mot. Partial Summ. J. filed September 16, 2016.

Respectfully submitted,
BERG FELDMAN JOHNSON, LLP

By: /s/ Geoffrey Berg

Geoffrey Berg (gberg@bergfeldman.com)
Texas Bar No. 00793330
Kathryn E. Nelson (knelson@bergfeldman.com)
Texas Bar No. 24037166
4203 Montrose Boulevard, Suite 150
Houston, Texas 77006
713-526-0200 (tel)
832-615-2665 (fax)

ATTORNEYS FOR CRAIG TAYLOR, S. JAMES MARSHALL, AND ATLAS COMMODITIES, LLC

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served by electronic filing, certified mail return receipt requested, email, or facsimile on October 20, 2016 as follows:

Kenneth M. Krock
kkrock@rk-lawfirm.com
Megan N. Brown
mbrown@rk-lawfirm.com
Matthew M. Buschi
mbuschi@rk-lawfirm.com
Rapp & Krock, PC
3050 Post Oak Boulevard, Suite 1425
Houston, Texas 77056

/s/ Geoffrey Berg
Geoffrey Berg