IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Plaintiffs,

v.

Defendants.
_____/

No. ADR Local Rule Decision 09-001

REDACTED OPINION AND ORDER RE COMPLAINT ALLEGING VIOLATION OF ADR LOCAL RULES

ORIGINAL OPINION FILED UNDER SEAL

The ADR Magistrate Judge has considered carefully the papers that the parties have submitted in connection with Defendants' ADR Complaint. This Opinion and Order addresses the issues raised and resolves the complaint.

I
FACTUAL CONTEXT

Plaintiffs filed three lawsuits alleging claims against several Defendants arising from their financing the purchase of three properties with those Defendants and failing to make payments on their mortgages, resulting in foreclosure actions. Counsel stipulated to mediation through the Court ADR Program, and the trial judge referred the three cases to mediation. This quick referral to mediation resulted from a special procedure this Court has initiated to deal with the significant number of lawsuits growing out of the housing collapse.

"Jim Blank", was appointed as mediator[1]. He hosted a mediation session and filed a Certification of ADR Session stating that the cases were not settled, further phone discussions were expected, and the mediation was continuing. Subsequently, he filed a second Certification of ADR Session, again stating that the cases were not settled and continuing the mediation. The parties continued to negotiate, with Mr. Blank's assistance, by telephone. To date, Mr. Blank has not certified that the mediation is concluded.

[1] Pseudonyms and redaction have been used to protect confidentiality and preserve anonymity.

In a declaration filed in support of the ADR Complaint that is before the Court, Counsel for Defendants avers that she received a telephone call from a real estate broker alleging that the Plaintiffs were removing items from one of the three properties. Thereafter, Counsel for Defendants called Counsel for Plaintiffs to inform him that Defendants were withdrawing from the ongoing mediation negotiations and to demand that Plaintiffs cease "stripping the property."

Counsel for Plaintiffs avers, in a declaration filed in support of Plaintiffs' motions to enforce a purported settlement agreement, that he emailed Counsel for Defendants indicating that negotiations were continuing. He also declares that he spoke with her that same day regarding Defendants' decision to stop the negotiation process. Counsel for Plaintiffs also alleges (without explaining how he was in a position to know what the broker and defense counsel said in conversations that he does not claim he was privy to) that "Sam Jones", broker for the sale of these properties, informed Counsel for Defendants "numerous times" that the allegations of "stripping the property" were not true.

Defendants moved forward with the pending foreclosure sales of all three properties, and Defendants, as beneficiaries under the mortgages, took title.

Plaintiffs thereafter filed six motions, including motions in each case to enforce a purported settlement agreement and to vacate title, seeking to reverse the foreclosure sales based on Plaintiffs' contention that the parties had reached a settlement agreement. It is undisputed that Plaintiffs attached a redlined, unsigned version of a settlement agreement to those motions. In addition, Plaintiffs briefly discussed the mediation process and substance in the memoranda in support and in Counsel for Plaintiff's declaration. Defendants filed objections to the six motions and filed motions to strike each of the six motions based on the confidentiality provisions of ADR L.R. 6-12 and the Federal Rules of Evidence.

Defendants also filed an ADR Complaint alleging a material violation of ADR L.R. 6-12, a breach of mediation confidentiality from attaching the draft settlement agreements and discussing the mediation in the six motions. The ADR Magistrate Judge issued an Order Requiring Response. Plaintiffs filed a timely response.

II
DEFENSE COUNSEL'S ADR COMPLAINT

Having conducted numerous settlement conferences, the Court is distressed by the sequence of events that apparently occurred between counsel. One of the most sensitive stages in mediation negotiations arrives when the parties are struggling after in person mediation sessions through extended follow-up negotiations to decide whether to accept proposed terms of settlement or to close the proceedings without an agreement. It is at this critical stage that all participants in the process must be especially vigilant to make sure that communications are clear and understood, that the parties understand the consequences of the alternative routes they confront and of the decisions they are being asked to make, and that those decisions are made on as solid a footing as possible. Perhaps the most important responsibility of counsel during this stage of any mediation negotiation, especially in heavily contested matters such as these cases, is to counsel their clients to pursue a thoughtful response, rather than a reactive one.

Upon receiving the report alleging that Plaintiffs were "stripping the property," Defendants could have asked the mediator to assist in addressing the issue. Instead, Defendants decided unilaterally to stop the mediation negotiations and swiftly foreclose on all three properties. It is quite relevant to Defendants' ADR Complaint that the mediation negotiations were continuing. Mr. Blank was readily available to assist Defendants in this matter, but Defendants chose not to call upon his assistance. Instead, Defendants initiated the cascade of events that brought this matter before the Court.

When Plaintiffs responded with six motions to enforce the purported settlement agreement and vacate the title, Defendants chose to file a complaint for violation of the ADR Local Rules, supported by exhibits reaching almost six inches in height, rather than pursue the more expeditious and inexpensive alternative of first attempting informal resolution provided in ADR Local Rule 2-4. That rule outlines the procedures to be followed whenever those involved in a court-connected mediation believe a violation of the ADR Local Rules has occurred. The first section of that rule provides for an informal resolution of the violation by consulting with the ADR Director or his designee, without prejudice to subsequently pursuing the more formal complaint procedure if the

informal one does not resolve the matter. Regrettably, Defendants chose instead to jump immediately to the formal complaint process, incurring the expense of filing an ADR Complaint and voluminous exhibits, which may have been unnecessary had Defendants sought the ADR Director's assistance.

The Complaint is notable for including voluminous irrelevant and extraneous matter. Only one of the ten exhibits Defendants appended to the ADR Complaint has any bearing on the issues relevant to the violation of the ADR Local Rules. Defendants' pleading required everyone involved to sort through unrelated issues and materials that were included for the apparent purpose of demonstrating Defendants' belief that the underlying litigation is without merit and that Plaintiff's counsel is a vexatious litigant. The merits of the litigation, however, are irrelevant to the issue of violations of the ADR Local Rules, and if appropriate to raise should be directed to the judge assigned to make decisions in the case, not to the ADR Magistrate Judge. Indeed, the whole mediation process is designed to resolve disputes through communication and cooperation, rather than to escalate them. While the Court by no means condones violations of the ADR Local Rules, the Court is troubled by Defendants' hasty escalation of this dispute into an overly contentious, massively papered dispute that likely would have been handled more efficiently, and with less expense and unnecessary invective, through informal resolution pursuant to ADR Local Rule 2-4(a), and could certainly have been so handled with a more properly focused complaint, stripped of extraneous arguments and irrelevant piles of exhibits. Accordingly, the Court ADMONISHES Defendants for failing to do so and unnecessarily escalating and padding this dispute. However, the Court recognizes that Defendants were not without provocation by Plaintiffs' improper disclosures, as addressed next.

III
PLAINTIFF'S SIX MOTIONS

Defendants' contributions to this situation by no means excuse Plaintiffs' failure to follow ADR L.R. 6-12 and the California Evidence Code provisions regarding confidentiality. In their response to the Order Requiring Response, Plaintiffs essentially argue that the parties, in fact, had reached a settlement and that Plaintiffs only introduced limited information from the mediation process necessary to establish this settlement and prevent a manifest injustice. The Court is not

persuaded by either argument.

It is not disputed that the settlement discussions Plaintiffs briefly described in their six motions occurred in the course of a mediation with Mr. Blank and that the redlined settlement agreements Plaintiffs attached to their motions were prepared in the course of that mediation. Even briefly describing the mediation discussions and attaching the draft agreements clearly violated the California mediation statutory scheme, California Evidence Code Sections 1115 to 1128 and in particular Section 1119. It is also not disputed that the redlined settlement agreements Plaintiffs attached to their motions were not signed nor were they presented orally to any court in a form meeting the requirements of California Evidence Code Section 1118. Therefore, Plaintiffs' reliance on California Code of Civil Procedure Section 664.6 is misplaced and fails to excuse their violation of mediation confidentiality.

In addition, Plaintiffs' filing violated the rules of this Court. ADR Local Rule 6-12 requires that: "...this court, the mediator, all counsel and parties, and any other persons attending the mediation shall treat as 'confidential information'...anything that happened or was said, any position taken, and any view of the merits of the case expressed by any participant in connection with any mediation. 'Confidential information' shall not be:...(2) disclosed to the assigned judge; or (3) used for any purpose...in any pending or future proceeding in this court." While ADR Local Rule 6-12(b)(6) provides an exception for "disclosures as are otherwise required by law," there was no such legal requirement here.

Plaintiffs correctly state in their Response that the Commentary to ADR Local Rule 6-12 recognizes that there may be limited circumstances ". . . in which the need for disclosure outweighs the importance of protecting the confidentiality of a mediation," one of which is the ". . . need to prevent manifest injustice. . . ." Citing *Olam v. Congress Mortgage Company*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999), the Commentary further explains that in those circumstances a court may, after applying appropriate balancing tests that are sensitive to the policies supporting confidentiality of mediation proceedings, "...consider whether the interest in mediation confidentiality outweighs the asserted need for disclosure."

Plaintiffs inexplicably neglected to consider, or to include in their Response, the final

sentence of that commentary, which provides the guidance most applicable to this situation: "Nothing in this commentary is intended to imply that, absent truly exigent circumstances, confidential matters may be disclosed without prior approval by the court." Instead, Plaintiffs incorrectly assert in their Response: "There is also, to the best of plaintiffs' counsel's knowledge, no otherwise prescribed manner of presenting the evidence Plaintiffs needed to support their contention of enforceable settlement agreements that does not at least seemingly initially violate the confidentiality rule." The final sentence of the commentary provides an alternative that Plaintiffs failed to pursue.

Plaintiffs, like all counsel who practice in this Court, are presumed to know the ADR Local Rules, and Plaintiffs do not claim ignorance of the Rules as a defense. If Plaintiffs wished to rely on an unsigned, redlined settlement document, they could have, and *should have*, first requested permission from the trial judge to make reference to and attach those materials to the six motions. If Plaintiffs had filed a motion requesting that the trial judge give them permission to include these materials with a careful explanation avoiding reference to confidential information about the mediation, this entire situation could have been avoided. Defendants could have opposed the motion. And the trial judge would then have been able to perform the balancing test set forth in *Olam*, weighing mediation confidentiality against the asserted need for disclosure to prevent a manifest injustice. (Of course, the fact that the settlement document is unsigned and contains redlined material would also be considered by the trial judge). Indeed, it remains possible for Plaintiffs to seek the trial judge's indulgence to allow them to belatedly pursue this procedure now, although having jumped the gun and breached the confidentiality of the mediation before requesting the judge's permission, Plaintiffs may have further damaged their prospects. Plaintiffs' failure to follow this procedure and to make reference to this sentence in the Commentary in their Response requires the Court to ADMONISH Plaintiffs for their conduct.

IV
FEE-SHIFTING SANCTIONS

Under controlling precedent from the Court of Appeals for this Circuit, although a district court may not impose fines against counsel or fee-shifting sanctions on a party for a merely

negligent violation of a local rule, a willful violation of a local rule is subject to monetary sanctions. *Zambrano v. City of Tustin*, 885 F.2d 1473, 1480-82 (9th Cir. 1989). Mediation is now a well-accepted practice in this Court and virtually every court in this country. Confidentiality is such a foundational principle of mediation that every attorney must be held to know that it is improper to include information such as Plaintiffs included in their six motions to the trial judge. This Court, therefore, can only conclude that Plaintiffs' conduct was willful and could subject them to fee-shifting sanctions under *Zambrano.* Under the particular circumstances of this case, however, the Court declines to impose sanctions for several reasons.

First, Defendants' own conduct undermines their request for further sanctions. Defendants could have enlisted the assistance of Mr. Blank in his capacity as mediator to guide a problem-solving process to address their concerns and perhaps to settle the cases, or requested the assistance of the ADR Director to set up an informal complaint resolution process, pursuant to ADR L.R. 2-4(a). The former might have prevented Plaintiffs from filing the offending six motions and the latter could have been conducted expeditiously to prevent any harm to Defendants arising from those six motions.

Second, Defendants fail to set forth in their ADR Complaint any clear request or basis for fee-shifting sanctions. Defendants only request that "...sanctions be awarded to..." them. While Defendants included copious material that was completely irrelevant to their complaint, Defendants failed to included in counsel's declaration any statement about the particular form of sanctions to which counsel believed Defendants were entitled, such as the number of hours counsel spent on activities allegedly caused by Plaintiffs' improper inclusion of confidential mediation information. Under these circumstances, this Court is not inclined to allow Defendants to cure this serious omission. Nor is this Court inclined to allow this ADR complaint process to spin further into an even fuller blown evidentiary proceeding, especially where it is not clear that the conduct for which unspecified sanctions are requested caused serious or irreversible harm to Defendants.

Third, an avenue for potentially fruitful mediation remains available here. The foreclosure sales resulted in title to the three properties passing to Defendants. The trial judge has not yet heard Plaintiffs' motions to enforce the purported settlement agreement and vacate title or Defendants'

responsive motions to strike. The Court encourages Plaintiffs to withdraw their motions and Defendants to withdraw their responsive motions, preferably by stipulation, without prejudice to refiling appropriate motions if necessary. This will allow the parties to complete their mediation with Mr. Blank in a final effort to resolve this litigation. For all these reasons, the motion for any further sanctions to Defendants is DENIED.

In addition, the parties are hereby ORDERED to return to conclude the uncompleted mediation with Mr. Blank as expeditiously as possible and encouraged to delay any consideration of their respective motions to take full advantage of the opportunity.

IT IS SO ORDERED.

ELIZABETH D. LAPORTE
UNITED STATES MAGISTRATE JUDGE

November 2009