IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TODD ATTOE and MICHELLE ATTOE,

Plaintiffs,

v.

WHIRLPOOL CORPORATION,

Defendant.

ORDER

14-cv-145-wmc

Plaintiffs Todd and Michelle Attoe claim a freezer manufactured by defendant Whirlpool Corporation malfunctioned and caused a fire that destroyed their property on April 30, 2012. In turn, Whirlpool brought a motion for sanctions less than two months after plaintiffs filed suit, claiming that the Attoes had committed spoliation by taking no steps to preserve the allegedly defective freezer or the surrounding fire scene. (Dkt. #4.) In its motion, Whirlpool contends that evidence crucial to its case has been now irretrievably lost due to weather and time, and warrants the dismissal of the Attoes' case pursuant to Federal Rule of Civil Procedure 37.[1]

---

[1] There is some question as to whether Rule 37 is the proper source of authority to sanction spoliation that occurred *before* the commencement of discovery. *See* 7 *James Wm. Moore et al.*, *Moore's Federal Practice* § 37.120[3] (3d ed. 2014). Even among courts that reject Rule 37 as a source of the court's authority, however, there is a general consensus that courts have the inherent power to sanction pre-discovery spoliation. *See, e.g.*, *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (upholding sanctions imposed under inherent power for pre-litigation spoliation); *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 266-69 (8th Cir. 1993) (same); *see also Shepherd v. Am. Broadcasting Cos., Inc.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) (Rule 37(b) could not support sanctions where no discovery order was violated, but inherent powers "fill[] the gap"); *In re Pradaxa (Dabigatran Etexilate) Prods. Liability Litig.*, No. 3:12-md-02385-DRH-SCW, 2013 WL 5377164, at *6-8 (S.D. Ill. Sep. 25, 2013) (analyzing Rule 37 and inherent powers and concluding that the court "has the authority to impose sanctions for the pre-litigation destruction of evidence (if not under Rule 37 then under the court's inherent authority or a combination of the two)"). In any event, while the Attoes vociferously challenge the applicability of any portion of Rule 37 to defendant's motion, they do not appear to argue that the court lacks the inherent authority to impose sanctions for actual spoliation.

The Attoes vehemently dispute Whirlpool's characterization of the events surrounding their case. In fact, the parties dispute almost every fact Whirlpool asserts is material to resolving its motion, including:

- When Whirlpool was first apprised of the Attoes' potential suit against it. Whirlpool contends that it did not learn of the fire until October 25, 2012, at which time it immediately requested preservation of the fire scene. (*See* Brian K. Nunning Aff. (dkt. #6) ¶ 4.) The Attoes contend that they notified Whirlpool in May of 2012, but that no one ever got in touch with them. (Todd Attoe Aff. (dkt. #12) ¶¶ 4-5.)
- Whether Todd Attoe removed items from the fire scene. Whirlpool's fire investigator, Kevin Hecksher, avers that Todd Attoe acknowledged removing some tools and hauling material out of the fire scene, which now prevents him from forming a hypothesis as to whether those items contributed to the fire.[2] (Kevin M. Hecksher Aff. (dkt. #5) ¶ 11.) Todd Attoe avers that he never removed any items from the fire scene. (Todd Attoe Aff. (dkt. #12) ¶ 6.)
- Whether the freezer has been preserved. Hecksher avers that it was not. (Kevin M. Hecksher Aff. (dkt. #5) ¶ 21.) Todd Attoe avers that the freezer has been covered with a blue tarp since the fire occurred. (Todd Attoe Aff. (dkt. #12) ¶ 7.)

[2] Contrary to the Attoes' objection, this statement by a party opponent is not hearsay. *See* Fed. R. Evid. 801(d)(2).

- Whether the fire scene has been preserved. Hecksher avers that the Attoes failed to preserve the site, as well as the electrical distribution system that served the garage and its electrical circuitry, and that because the scene had frozen over, he was unable to process it. (Kevin M. Hecksher Aff. (dkt. #5) ¶¶ 21, 23.) In contrast, Todd Attoe avers that he preserved the scene since the fire, at significant cost to himself and his family. (Todd Attoe Aff. (dkt. #12) ¶ 7.)
- Whether defendant has been given adequate access to the freezer and fire scene. Whirlpool asserts that its efforts have been thwarted as to both, while plaintiffs claim Whirlpool's experts have been allowed to visit the fire scene twice and could have taken possession of the freezer anytime under appropriate conditions.

In light of the wealth of factual disputes on this record, the court is unable to resolve the pending motion for sanctions without an evidentiary hearing. *See Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 725 & n.8, 599 N.W.2d 411 (Ct. App. 1999).[3]

[3] In briefing the motion for spoliation sanctions, the parties rely almost exclusively on Wisconsin state law. Most courts that have considered the question hold that "federal law applies to the imposition of sanctions for the spoliation of evidence." *Sherman v. Rinchem Co., Inc.*, 687 F.3d 996, 1006 (8th Cir. 2012) (collecting cases from Second, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits); see also *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804, 806 (7th Cir. 1995) (noting that "the federal rules of procedure and evidence always apply in federal litigation, whether or not they determine the outcome"); *Kucik v. Yamaha Motor Corp., U.S.A.,* No. 2:08-CV-161-TS, 2009 WL 5200537, at *2 & n.1 (N.D. Ind. Dec. 23, 2009) (applying federal law on spoliation in diversity action) (citing *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008)). To justify dismissal for spoliation, Wisconsin courts require a party's conduct to be "egregious," meaning it "consists of a conscious attempt to affect the outcome of the litigation, or a flagrant, knowing disregard of the judicial process." *Am. Family Mut. Ins. Co. v. Golke*, 2009 WI 81, ¶ 42, 319 Wis. 2d 397, 768 N.W.2d 729. Under federal law, a showing of "bad faith" is required, *Trask-Morton*, 534 F.3d at 681, with "bad faith" meaning "destruction for the purpose of hiding adverse information." *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998). The parties do not suggest

The question is when that hearing should occur -- now, after submission of expert reports, after summary judgment submissions or at the completion of discovery. Assuming for the moment sanctionable conduct took place, neither side's submissions provide context for arriving at an appropriate sanction. The court is inclined to wait until discovery has progressed to the point that fuller context is possible, but nevertheless will take up the motion as soon thereafter as possible to provide the most meaningful relief possible.

In egregious cases of spoliation, dismissal of a lawsuit altogether may be appropriate. *See, e.g., Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992) (upholding dismissal as sanction where plaintiffs willfully violated protective order by arranging for "private" expert inspection of evidence and evidence was accidentally destroyed). As the Seventh Circuit has recognized, "sanctions can be employed for a wide array of purposes, but they cannot replace lost evidence." *Id.* at 225.

Even so, dismissal is the most drastic of sanctions typically reserved for affirmative, conscious acts of destruction of material, even crucial, evidence. *See, e.g.*, *Allstate Ins. Co. v. Sunbeam Corp*, 53 F.3d 804 (7th Cir. 1995) (dismissal appropriate where plaintiff discarded gas grill components before filing suit); *Sentry Ins. v. Royal Ins. Co. of Am.*, 196 Wis. 2d 907, 539 N.W.2d 911 (Ct. App. 1995) (exclusion equivalent to dismissal appropriate when plaintiff negligently disposed of evidence and intentionally removed component parts, preventing defendant from pursuing a viable defense). Accordingly, rather than dismissal, some lesser sanction may be more appropriate here depending upon the circumstances.

---

these standards are materially different, and so the court will use Wisconsin state law as a source of guidance while adhering to principles of federal law. *Cf. Flury*, 427 F.3d at 944 (using Georgia state law as a guide where it was relied upon by the district court and parties and was "wholly consistent with federal spoliation principles").

Indeed, the court has discretion to enter a sanction of its choosing so long as it is "proportionate to the circumstances." *Bryant v. Gardner*, 587 F. Supp. 2d 951, 968 (N.D. Ill. 2008); *see also* 7 *James Wm. Moore et al., Moore's Federal Practice* § 37.121, at 37-207 to 39-209 (3d ed. 2014) (discussing less severe sanctions that courts have imposed in spoliation cases). A hearing will assist the court in understanding those circumstances and crafting appropriate sanctions, if any.

The Attoes requested a continuance in the event the court saw the need for an evidentiary hearing on defendant's motion to dismiss, so that they may conduct discovery, including depositions of the affiants supporting Whirlpool's motion and several other parties who may have knowledge relevant to resolving the spoliation claims. Discovery has been ongoing in this case for over four months now, and presumably the Attoes have been able to acquire much, if not all, of the information they need to prepare for a hearing. For example, in their written response to the motion to dismiss, plaintiffs' counsel alluded to as yet undisclosed expert opinions establishing that defendant's freezer is responsible for the fire based on evidence already available, which have now been disclosed, as will be defendant's response expert's opinions by October 17 and both side's rebuttal experts by November 14. Moreover, consistent with the discussion at yesterday's telephonic hearing, within 60 days defendant's counsel is also to produce Sara Yircott for deposition, as well as the affiants supporting Whirlpool's motion to dismiss, understanding that any expert depositions should take place after Whirlpool has completed its October 17th expert disclosures.

With the benefit of these experts' reports and any briefing the parties may wish to provide greater context in advance of the evidentiary hearing, particularly as to the impact

any actual spoliation may have on resolving the underlying liabilities and damages issues in this case, the court is confident that it will have sufficient information to resolve the pending motion to dismiss. Accordingly, the court will hold an evidentiary hearing on Monday, December 15, 2014, at 9:00 a.m. As discussed at yesterday's telephonic hearing, both sides should file *all* expert reports with the court no later than November 15, 2014. Additionally, the parties may supplement their spoliation briefing by December 5, 2014. At the December 15 hearing, the parties should be prepared to address the evidentiary disputes above, as well as their theories of liability and defenses.

ORDER

IT IS ORDERED that:

(1) an evidentiary hearing on the above-mentioned factual disputes is to be held on December 15, 2014, at 9:00 a.m.;

(2) the parties shall file all expert reports, including rebuttal reports with the court by November 17, 2014;

(3) the parties may supplement their spoliation briefing no later than December 5, 2014;

(4) a pre-hearing telephone conference call shall take place on December 10, 2014 at 9:00 a.m, plaintiffs' counsel shall initiate the call to the court; and

(5) to the extent not already completed, the parties shall cooperate in arranging the timely depositions of Ms. Yircott and all other affiants supporting the defendant's motion, as well as other reasonably related discovery in advance of the December 15th hearing.

Entered this 2nd day of October, 2014.

BY THE COURT:
/s/

WILLIAM M. CONLEY
District Judge