

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FIRST SENIOR FINANCIAL GROUP	:	
LLC, PHILLIP J. CANNELLA, III	:	
AND JOANN SMALL,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	NO. 12-cv-1247
	:	
"WATCHDOG," AND JOHN DOE	:	
DEFENDANTS 1-9,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

JOYNER, J.

APRIL 3, 2014

Before the Court are Plaintiff's Motion for Sanctions Based on Defendant Watchdog's Spoliation of Evidence (Doc. No. 134) and Defendant Watchdog's Response in Opposition thereto (Doc. No. 138); Plaintiffs' (Doc. No. 153) and Defendant Watchdog's (Doc. No. 154) Supplemental Briefs; as well as Defendant's Response to Plaintiffs' Supplemental Brief (Doc. No. 158). For the following reasons, it is hereby ORDERED that the Motion for Sanctions is GRANTED in part and DENIED in part. An Order follows.

II. BACKGROUND

Defendant Krista Brennan ("Brennan") is the creator of websites, including truthaboutcannella.com and truthaboutcannella.net, which contain information portraying the business and ethical practices of Plaintiffs First Senior

Financial Group LLC, Phillip J. Cannella III, and Joann Small in a severely negative light. Brennan, or "Watchdog" as she refers to herself on these websites, insists that the information on her sites is true. Plaintiffs, however, argue that it is disparaging and defamatory.

Brennan's educational background consists of bachelor's degrees in communication studies and business, a master's degree in organizational and industrial psychology, and significant credits toward a master of science in information science focusing on the management of information technology. (Tr. 155-6). She has held jobs for which she acquired domain names for clients and designed websites for them. (Tr. 157). Among other positions she has held, Brennan worked for 4 years as the Director of Technology for the Vanguard Charitable Endowment Program, and worked as a Senior Executive at Stellar Financial, Inc., where she was responsible for management of the company's financial software product, software development, and technology operations, among other things. (Pl. Ex. L, Resume of Krista Cantrell Brennan). Although she knows how to install most kinds of software, Brennan asserts that she does not know how to install an operating system on a computer. (Tr. 156). Brennan once applied for a position as Chief Operating Officer with Plaintiff First Senior Financial Group prior to the commencement of litigation, but was not given an offer of employment. (Tr.

157-8, 160.) At present, Brennan has a diagnosis of an advanced form of secondary progressive multiple sclerosis ("MS") with associated loss of sensory ability and mobility, which impedes her ability to walk, read, or type; she also suffers from nystagmus, which makes it difficult for her to read or use a computer. (Tr. 166-67).

In March 2012, Plaintiffs commenced suit in this Court alleging defamation, tortious interference with business relationships, civil conspiracy, and violations of the Lanham Act. See (First Amended Complaint, Doc. No. 9). In August 2012, the Court granted Plaintiff's Motion for Alternative Service, allowing service by e-mail upon Defendant Watchdog. (Order of August 29, 2012, Doc. No. 17). Default Judgment for failure to appear, plead, or otherwise defend the action was entered against Watchdog in November 2012. (Doc. No. 56). Brennan maintains that she did not learn of the lawsuit until December 2012. (Def. Resp. Ex. A ¶ 3).

In February 2013, Brennan first appeared in the present action by filing a Motion to Vacate the Default Judgment that had been entered against her. (Doc. No. 82). The Court scheduled an evidentiary hearing to determine whether Brennan had received notice of the action and whether service had been effectuated by e-mail. (Doc. No. 89). On June 13, 2013, the Court ordered the Defendant to:

[I]dentify any and all electronic devices from which she accessed her email accounts truthaboutcannella@yahoo.com and watchdog@truthaboutcannella.net and any documents or records related to the website truthaboutcannella.net. Defendant Watchdog shall then submit these devices and computers for a forensic examination. Defendant Watchdog may select the expert used for the forensic examination, and the Plaintiffs shall pay for the forensic examination. (Doc. No. 97 ¶ 1).

On June 25, Brennan identified the computer of her mother Rose Ann Cantrell (the "target computer") to be the only readily-identifiable and accessible computer from which she accessed these email accounts.¹ (Defendant Watchdog's Identification of Computers, Pl. Ex. D). Plaintiffs' counsel did not respond to Brennan's identification of computers at that time. (Doc. No. 112-1 at ¶¶ 13-15).

The target computer at Ms. Cantrell's residence, 160 Whispering Oaks Drive in West Chester, PA, was always located in the kitchen area. (Tr. 31, 70, 153). Ms. Cantrell used the target computer on a daily basis to check her bank statements. (Tr. 35, 70, 154). While living with her mother, Brennan had frequent and easy access to the target computer as well. (Tr. 154). At the time, she lived on the ground floor of the house, the same floor

¹ Brennan also identified several other computers, including computers owned by Immaculata University, a computer she sold at a yard sale in April 2012, computers belonging to personal friends, a laptop she borrowed from a man in Texas, a computer belonging to Steve Watts in Texas, a computer belonging to stranger in Panera Bread, and publicly-available computers at a K-Mart store. (Pl. Ex. D). None of these are accessible at present.

where the computer was located. Id. On two occasions with unknown dates, Ms. Cantrell asked individual contractors to make repairs to her computer; she also asked her son-in-law, David Borda, to help her access her email at times. (Tr. 41-44). Brennan was not always at Ms. Cantrell's house while she was living there; she took three trips away of approximately 4-6 weeks, including in the summer of 2012 and the winter of 2012-2013. (Tr. 185).

On June 28, 2013, Brennan moved out of her mother's house in West Chester and flew to Texas. (Tr. 188; Def. Ex. A-2). She did not alert her counsel to the fact that she was leaving Pennsylvania. (Tr. 176). Two Facebook posts on June 28 and 29 indicated her location as Houston, Texas. (Pl. Ex. 3,4).

On July 1, Plaintiff's newly-appointed counsel contacted Brennan's counsel to discuss the status of the forensic examination, and Brennan's counsel reminded him of the previous identification of computers. (Doc. No. 112-1 at ¶ 15-16).

On July 3, 2013, counsel for the parties conducted a telephone conference outside of the Court's presence. Counsel for Brennan, Mr. Cohen, suggested the retention of IT Acceleration ("ITA"), a local IT firm, to complete the forensic examination. (Affidavit of Sidney S. Liebesman, Pl. Ex. F at ¶ 5). Brennan's counsel also suggested that a device called "EZ Imager" be used. Id. ¶ 6; Tr. 175. This device could be used by sending a USB drive with imaging software to the house of Ms. Cantrell, where

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