

FOR UPLOAD. NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF SAINT CROIX

HEIDI NIELSEN-ALLEN,

Plaintiff,

Civ. No. 2001/70 FR

v.

INDUSTRIAL MAINTENANCE CORP.,
(IMC), HESS OIL VIRGIN ISLANDS
CORP., (HOVIC), HOVENSA LLC.,
and AMERADA HESS,

Defendants.

ORDER ON DEFENDANT HOVENSA'S MOTION FOR SANCTIONS
AGAINST PLAINTIFF'S COUNSEL

THIS MATTER came for consideration on defendant HOVENSA's motion for sanctions against plaintiff's counsel for allegedly breaching the terms of a confidentiality agreement entered in a related case. Plaintiff filed an opposition and defendant HOVENSA replied thereto¹.

In its motion HOVENSA claims that during court-ordered mediation in the discrimination case of *Virginia Moorehead v. HOVENSA*, plaintiff's counsel disclosed to the mediator and her client, the settlement amount reached in this case, in violation of the confidentiality agreement. Plaintiff counters that HOVENSA's motion, which recounts what transpired in the mediation, itself violates the applicable rules of confidentiality and should be stricken.

¹HOVENSA subsequently filed a motion to seal a portion of the motion for sanctions. Plaintiff has also filed a motion to strike this motion by HOVENSA for sanctions against plaintiff's counsel, in *Moorhead v. HOVENSA, LLC.*, D.Ct.Civ.No. 2003/004.

DISCUSSION

HOVENSA asserts that plaintiff's counsel's disclosure, to the mediator, of the settlement amount reached in a different, unrelated case, constitutes bad faith and is sanctionable. Plaintiff argues that the disclosure was within the context of mediation; that the mediator's communications are confidential; and that Local Rule of Civil Procedure 3.2(4) & (5) prevent HOVENSA from disclosing any matter discussed in mediation in a subsequent motion for sanctions. Plaintiff also argues that the confidentiality provision in the Moorhead settlement agreement does not apply to Moorhead's attorney.

Mediation is a process designed to facilitate settlement and is not a trial in itself. Indeed, the purpose of confidentiality in mediation is to promote "a candid and informal exchange regarding events in the past This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes." (Nat. Conf. of Comrs. On U. State Laws, U. Mediation Act (may 2001) § 2.

Thus, there is a strong preference for confidentiality within the mediation context. Title 28 U.S.C. § 652(d) allows each local court to adopt rules prescribing disclosure of mediation communications. Pursuant to such statute, this Court promulgated LRCi 3.2 which not only makes such communications inadmissible, but creates a mediation privilege, giving the

holder the right "to refuse to disclose, and to prevent any person present at the proceeding from disclosing communications made during such proceeding." LRCi 3.2(4). The sole exception to this rule allows the mediator to notify the referring judge that a party acted in bad faith. LRCi 3.2(e)(2). Thus, the creation of the mediation privilege in this court indicates a strong desire to protect the sanctity of the mediation proceedings.

A majority of jurisdictions recognize and enforce such a privilege. In *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*, 25 P.3d 1117, (Cal. 2001), the Court ruled that there were "no exceptions to the confidentiality of mediation communications Neither a mediator nor a party may reveal communications made during mediation." In *Sheldone v. Pennsylvania Turnpike Commission*, 104 F.Supp.2d 511, (W.D. Pa. 2000), the Court explained that the mediation privilege established in local rules was "rooted in the imperative need for confidence and trust", and that disclosure of communications uttered in mediation would violate such trust. *Id.* at 513. The Court continued:

If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then *counsel of necessity will feel constrained to conduct themselves in a cautious, tightlipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements . . . , thereby expediting cases at a time when . . .*

judicial resources . . . are sorely taxed.

Id. citing Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979) cert. den. 444 U.S. 1076 (1980) (Emphasis in original). The Court in *Calka v. Kucker Kraus & Bruh*, 167 F.3d 144 (2d Cir. 1999) found that a confidentiality rule similar to the one in this case was violated where the attorney disclosed confidential statements in a sanctions motion. The privilege was also used to bar the use of statements as a basis for criminal charges in *U.S. v. Gullo*, 672 F.Supp. 99, 103 (W.D.N.Y. 1987) and a contractor's admissions at a mediation proceeding were ruled inadmissible in a subsequent criminal prosecution in *Byrd v. State*, 367 S.E.2d 300, 302 (Ct. App. Ga. 1988).

Applying the cloak of mediation to the facts of this matter appears inequitable to HOVENSA who negotiated settlement of the *Nielsen-Allen* case and applied confidentiality thereto for the express purpose of avoiding having such settlement amount established as a benchmark in future similar employment cases. Such result highlights the need for exceptions to mediation confidentiality, which has been the subject of several scholarly discussions. See e.g., Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 Rutgers Law Journal, 155 (1994). The commentaries lament the fact that statutes which provide a blanket protection for mediation

communications create a conflict with an attorney's duty to report unethical or criminal conduct which may occur during such proceedings. See, also, Lee & Geisler, *Confidentiality in Mediation*, 3 Harv.Negot.L.Rev. 285 (1998); Feerick, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J.Disp. Resol. 95 (1995). To that end, certain courts have attempted to carve exceptions such as in cases of ongoing or future criminal activity; if a court determines that fairness to third parties warrants disclosure; or to "uphold the administration of justice." *Id.* at 113. However, because of the importance of the policies involved in mediation, at least one commentator has suggested that exceptions be established only after "thoughtful analysis as to their policy ramifications" and that the confidentiality rules should "provide some means by which participants safely may address their concerns." 3 Harv.Negot.L.Rev. at 296. However, he cautions against judicially created exceptions which do not reflect a "carefully deliberated evaluation that fully addresses the issue's complexity." *Id.* at 285. As stated in *Foxgate*, "we do not agree with the Court of Appeal that the court may fashion an exception for bad faith in mediation because failure to authorize reporting of such conduct during mediation may lead to "an absurd result" or fail to carry out the legislative policy of encouraging mediation." 25 P.3d at 1128. Accordingly, the Court finds that the mediation privilege set forth in LRCi 3.2 prohibits

consideration of HOVENSA's motion for sanctions.

Further, even if HOVENSA's motion was to be considered, HOVENSA acknowledges that no specific rule or statute was violated in this instance, and asks the Court to invoke its inherent powers to sanction the plaintiff. It is well settled that the Court's inherent powers to sanction conduct before it must be premised on a finding of bad faith. *Roadway Express Inc. v. Piper*, 447 U.S. 752, 767 (1980); *Republic of the Philippines v. Westinghouse Elec. Co.*, 43 F.3d 65, 75 (3d Cir. 1991); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 560-65 (3d Cir.1985); *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 160 (3d Cir.1984). Thus, HOVENSA must establish that the targeted conduct in this case was undertaken "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991). Because the mediation was court ordered in this case, the Court has authority over the parties' conduct.

The Court notes that plaintiff's counsel made the statements in the context of a mediation proceeding which is, itself confidential. The mediator to whom the comment was made, and Ms. Moorhead, are also bound by the rule of confidentiality.² The cases cited by the defendant involve much more substantial publication, and to parties outside of mediation. See, e.g. *Toon v. Wackenhut Corrections Corp.*, 250 F.3d 950, (5th Cir. 2001) (Court found bad faith where attorney deliberately filed

²This is likely of little solace to HOVENSA in consideration of the gist of this Order.

confidential materials without seal); See also *Lawson v. Brown's Daycare Center, Inc.*, (unsealed disclosure to court in disciplinary complaint).

The Court recognizes that a rule which imposes a blanket restriction on disclosing all communications made in mediation may imply immunity from sanctions by shielding parties who disobey court orders or otherwise violate ethical rules in such context, and that LRCi 3.2 should be amended to provide for appropriate exceptions to the rule. However, in this case, the conduct targeted is nothing more than the attorney's statement to the mediator in the presence of Ms. Moorhead, that the current case should settle for the same dollar amount as a similar but unrelated, case. The mediator has no power to decide and is only a facilitator of settlement. Thus, such statement did not interfere with the trial process and was not published to any party outside of the litigation itself.

Upon consideration, the Court finds that the conduct in question does not support the finding of bad faith required for imposition of a sanction. Because the Court found that HOVENSA's motion may not be considered and that even if it was to be considered, the subject conduct by plaintiff's attorney would not qualify as sanctionable conduct, the Court need not consider plaintiff's argument regarding whether the confidentiality agreement in the *Moorhead* matter applied to plaintiff's counsel.

Accordingly, it is hereby **ORDERED AS FOLLOWS:**

1. that HOVENSA's motion for sanctions is DENIED.
2. the attorney's portion of settlement proceeds deposited with the Court pursuant to the Order dated November 11, 2003 shall not be disbursed and shall remain on deposit pending further Order of the Court (i.e., to allow HOVENSA to file any timely appeal of this Order).

ENTER:

Dated: January 28, 2004

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

Nielsen-Allen v. IMC et al.
Civ. No. 2001/70
Order
Page 9

A T T E S T:
Wilfredo F. Morales
Clerk of Court

By: _____
Deputy Clerk

cc: Lee J. Rohn, Esq.
C. Beth Moss, Esq.