

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, FIDELITY &
GUARANTY INSURANCE COMPANY, THE
TRAVELERS INDEMNITY COMPANY OF
CONNECTICUT, AND ST. PAUL MERCURY
INSURANCE COMPANY,

Plaintiffs,

v.

CENTEX HOMES and DOES 1 through
10 inclusive,

CENTEX HOMES,

Counterclaimant,

v.

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, et al.,

Counterdefendants.

) Case No. 11-3638-SC
)
) Related Cases: 12-0371-SC,
) 13-0088-SC
)
) ORDER DENYING MOTION FOR
) CIVIL CONTEMPT SANCTIONS

1 **I. INTRODUCTION**

2 The above-captioned plaintiffs (collectively, "Travelers") now
3 move to find Defendant Centex Homes ("Centex") in civil contempt
4 for failing to comply with a Court order regarding the filing of
5 certain documents under seal. ECF No. 173 ("Mot."). The motion is
6 fully briefed. ECF Nos. 177 ("Opp'n"), 180 ("Reply").¹ The matter
7 is appropriate for resolution without oral argument per Civil Local
8 Rule 7-1(b). For the reasons set forth below, the Motion is
9 DENIED.

10
11 **II. BACKGROUND**

12 Centex, a general contractor and homebuilder, is named as an
13 additional insured on a number of insurance policies issued by
14 Travelers. Homeowners have sued Centex in several construction
15 defect actions, and Centex tendered those actions to Travelers for
16 defense and indemnity. This case arises out of a dispute between
17 the parties over whether Travelers has breached its duty to defend;
18 whether Centex has a right to appoint its own counsel, Newmeyer and
19 Dillion LLP ("N&D"), to defend it in the underlying construction
20 defect actions; and whether Travelers has a duty to pay for all the
21 amounts billed by N&D, among other things.

22 The parties recently filed cross-motions for summary judgment.
23 In connection with those motions, Travelers filed invoices that N&D
24 had submitted to Centex for its work on the underlying construction
25 defect cases. Pursuant to the parties' stipulated protective
26 order, Travelers brought an administrative motion to determine

27 _____
28 ¹ Pursuant to a stipulation by the parties and with the Court's
leave, ECF No. 187, Centex also filed a surreply brief, ECF No. 190
("Surreply").

1 whether those invoices should be filed under seal. ECF No. 158
2 ("Admin. Mot."). The invoices filed by Travelers, which were
3 attached to the declaration of Lindsee B. Falcone ("Falcone"), list
4 the date of the work performed, the attorney that performed the
5 work, a description of the work, the number of hours billed, and
6 the total fees for professional services rendered. ECF No. 158-2
7 ("Falcone Decl.") Exs. A-H.

8 The motion to seal was granted in part and denied in part.
9 ECF No. 163 ("Sealing Order"). The Sealing Order directed Centex
10 to file unredacted versions of the billing records under seal with
11 the Court and redacted versions in the public record. Id. at 4.
12 Only the descriptions of the work performed were to be redacted
13 from the billing records filed to the public record. Id. On March
14 4, 2013, Centex filed in the public record versions of the invoices
15 which look identical to the invoices attached to the Falcone
16 Declaration, except that the description of the work performed was
17 redacted. ECF No. 166.

18 Travelers now argues that the invoices Centex lodged with the
19 Court on March 4, 2013 do not fully comply with the Court's Sealing
20 Order. Mot. at 4. The crux of the argument is that there are
21 purportedly two sets of N&D invoices, and that Centex filed the
22 first set when it should have filed the second (or perhaps both).
23 The first set of invoices, the so-called "paper invoices," were
24 attached to the Falcone Declaration. See id. Centex lodged a
25 redacted copy of these invoices with the Court on March 4. The
26 second set, the so-called "electronic invoices," were purportedly
27 produced later in discovery, after Travelers learned of their
28 existence at the deposition of Centex's general counsel. The

1 electronic invoices, which Travelers filed in connection with the
2 instant motion, do not appear to be formal invoices. Rather, they
3 appear to be spreadsheets containing data concerning N&D's billing
4 that may have been used to generate the paper invoices. See ECF
5 No. 173-1 ("Perea Decl.") Ex. E. When Centex's general counsel
6 discussed these spreadsheets at his deposition, he stated: "Well,
7 it's not a printed bill. I get my bill electronically." Perea
8 Decl. Ex. C at 10.

9 In its moving papers, Travelers argues that Centex should have
10 lodged the electronic invoices with the Court because, unlike the
11 paper invoices, they show that N&D offered Centex a "line item
12 discount." Mot. at 5. Travelers contends that this discount is
13 central to its claim that N&D was providing Centex with a discount
14 for attorney services yet billing Travelers for the full
15 undiscounted amount. Travelers concludes that Centex should be
16 held in civil contempt for "hiding the ball."

17

18 **III. DISCUSSION**

19 To prevail on its motion for civil contempt, Travelers must
20 establish by clear and convincing evidence that (1) a Court order
21 was in effect, (2) the order required specified conduct by Centex,
22 and (3) the Centex failed to comply with the Court's order. See
23 United States v. City of Jackson, 359 F.3d 727, 731 (5th Cir.
24 2004). The Court finds that Travelers has not even come close to
25 proving the third element.

26 In its moving papers, Travelers argues that the so-called
27 electronic invoices were subject to the Sealing Order and thus
28 should have been lodged with the Court. Mot. at 4-5. This

1 argument borders on the frivolous. Travelers never filed the
2 electronic invoices in connection with the Administrative Motion --
3 it only filed the paper invoices. Accordingly, it is entirely
4 unclear why Centex should have interpreted the Sealing Order to
5 pertain to documents that were not before the Court. If Travelers
6 wanted Centex to file the electronic invoices in connection with
7 its motion for summary judgment, Travelers should have attached the
8 electronic invoices to the Falcone Declaration or the
9 Administrative Motion. In short, Centex's conduct was consistent
10 with the Sealing Order: Centex filed a version of the paper
11 invoices in the public record with the work descriptions redacted.

12 Travelers asserts two new arguments on reply.² First,
13 Travelers argues that the electronic invoices and paper invoices
14 are one and the same. Reply at 3. As an initial matter, this
15 argument is contrary to the facts set forth in Travelers' moving
16 papers. See Mot. at 5 ("The [N&D] paper invoices produced by
17 Centex in discovery did not contain any indication on them of a
18 line item discount like the electronic versions described by
19 [Centex's general counsel]."). Further, the argument is contrary
20 to the evidence before the Court. The paper invoices, which are
21 attached to the Falcone Declaration and which Centex lodged with
22 the Court, look nothing like the electronic invoices. Compare
23 Falcone Decl. Exs. A-H with Perea Decl. Ex. E.

24 Second, Travelers argues on reply that the paper invoices
25 lodged with the Court contain secret redactions. Reply at 3-4.

26 ² The Court is generally not inclined to address new arguments
27 raised on reply. The Court makes an exception here since
28 Travelers' new arguments do nothing to alter the Court's
conclusion, and because Centex was allowed to respond to these
arguments on surreply.

1 Specifically, Travelers contends that the original paper invoices
2 contained a column meant to include the total cost for each billing
3 entry and that the entire column was deleted -- without any
4 redaction notation -- but for the total charges at the bottom of
5 each invoice. Id. The "secretly deleted column" supposedly
6 reflects the line item discounts offered to Centex. This is a
7 serious charge, and Travelers has not offered evidence to back it
8 up. For example, Centex has not produced any N&D invoices which
9 include subtotals for each billing entry. Further, Joseph
10 Ferrentino ("Ferrentino"), a partner at N&D, has filed a
11 declaration stating it is not N&D's custom and practice to include
12 such a column in its invoices. ECF No. 190-2 ("Ferrentino Decl.")
13 ¶ 6. In any event, if Travelers believed that the paper invoices
14 had been doctored, it is unclear why it submitted them without
15 comment in support of its motion for summary judgment.

16

17 **IV. CONCLUSION**

18 In sum, Travelers has produced no evidence that even remotely
19 suggests that Centex failed to comply with the Court's Sealing
20 Order. Accordingly, Travelers' motion to hold Centex in civil
21 contempt is DENIED.

22

23 IT IS SO ORDERED.

24

25 Dated: June 24, 2013

26


UNITED STATES DISTRICT JUDGE

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