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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

GUAM INDUSTRIAL SERVICES, INC
d.b.a. GUAM SHIPYARD, and
MATTHEWS POTHEN,

Plaintiffs,

vs.

ZURICH AMERICAN INSURANCE
COMPANY, a corporation, and
STARR INDEMNITY & LIABILITY
COMPANY, a corporation,

Defendants.

CIVIL CASE NO. 11-00014

As consolidated with

ZURICH AMERICAN INSURANCE
COMPANY, a corporation: and
STARR INDEMNITY & LIABILITY
COMPANY, a corporation,

Plaintiffs,

vs.

GUAM INDUSTRIAL SERVICES, INC.
d.b.a. GUAM SHIPYARD; MATTHEWS
POTHEN; THE UNITED STATES OF
AMERICA, by and through the Secretary of
Transportation for the Maritime
Administration,

Defendants.

CIVIL CASE NO. 11-0031

ORDER
RE: SANCTIONS

On April 15, 2013, the court granted Defendants' request for sanctions regarding its motion to compel a limited video inspection of the dry dock Machinist which the court had previously ordered on October 31, 2011. Pursuant to the court's instructions, Defendants filed

1 their affidavit of fees and costs on May 3. Plaintiffs filed an opposition and objection to
2 Defendants' request for money sanctions on May 10. Defendants filed a reply to the opposition
3 on May 22.

4 BACKGROUND

5 On October 15, 2011, Defendants filed a motion for a limited inspection of the floating
6 dry dock, Machinist. Plaintiffs opposed the motion. After a telephonic hearing, the court
7 granted Defendants' request and ordered that Plaintiffs make the dry dock Machinist available
8 for inspection by J. Arthur Waddington on November 3, 2011. In addition, the court ordered
9 that a local videographer/photographer with no ties to Defendants be allowed to accompany
10 Waddington for the purpose of videotaping the inspection.

11 Defendants were not able to videotape the inspection conducted on November 3, 2011
12 and brought a motion on July 13, 2012 to compel the video inspection of the dry dock. In their
13 motion, Defendants also requested sanctions for Plaintiffs' failure to allow the video taking to
14 take place. The court heard the motion on August 29, 2012 and granted Defendants' request to
15 compel the video inspection of the dry dock but took the request for sanctions under
16 advisement.

17 On April 15, 2013, the court granted Defendants' request for sanctions. In keeping with
18 the sanctions order, Defendants filed their affidavit¹ alleging that their reasonable costs and
19 attorneys' fees were \$12,259.00. Plaintiffs filed an opposition and objection to Defendant's
20 money sanctions request.

21 The award of sanctions that the court has ordered stems from its discovery order of
22 October 31, 2011. Therein, the court granted a motion by Defendants and ordered GISI to have
23 its dry dock, the Machinist, available for a limited inspection by J. Arthur Waddington on
24 November 3, 2011. The court also ordered that a local videographer accompany Waddington
25 for the purpose of videotaping the inspection. The inspection was limited in its scope to those
26 "compartments or tanks of the Machinist...identified...at the hearing, which ...Waddington was
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28 ¹See affidavit of Thomas C. Sterling filed herein on May 1, 2013.

1 previously unable to inspect in order to complete his work of determining the appropriate scope
2 of work and cost of refloating and repairing the Machinist”. Since GISI’s facilities were located
3 within Naval Base, Guam, the court issued a separate order directing GISI to issue a letter of
4 sponsorship to inform the United States Navy that the individuals named in the sponsorship
5 letter were “invitees” of GISI for purposes of the inspection order. In its order, the court
6 emphasized that the four individuals named in the sponsorship letter were entirely responsible
7 for meeting any and all other entry and security requirements that Navy imposed.

8 Prior to the inspection date, counsel for GISI sent an email to Defendants’ counsel
9 recommending that Defendants clear the video taking matter with US Navy security. This
10 recommendation was based upon information GISI provided to counsel that pictures or videos
11 taken within the base were subject to and at the discretion of the Navy and a camera permission
12 slip had to be obtained. In the meantime, GISI issued a memo² to its security personnel not to
13 allow video and camera equipment into the GISI facility unless it came with a camera pass.

14 On November 3, 2011, the day of the inspection, Defendants’ representatives (Plaintiffs’
15 invitees) appeared at the naval base security office, the Visitors Control Center (VCC). The
16 VCC had been previously informed that certain individuals were coming to the “Machinist” dry
17 dock for the purpose of conducting a limited inspection and at the same time video taping the
18 inspection. The VCC had been apprised by Defendants of the nature and purpose of their entry
19 into Navy base and provided a copy of the October 31, 2011 court order. The VCC was
20 specifically made aware that Defendants intended to video the Machinist and that Mr. Castro
21 had his video equipment in one of the cars entering the base facility. The VCC issued the
22 necessary passes and the individuals then proceeded to GISI’s facility.

23 When the individuals came to the GISI facility, they were asked if they had secured a
24 camera pass. Since there was no camera pass, the video and camera equipment were not
25 allowed within the facility. Thus, the inspection on board the Machinist went forward on
26 November 3, 2011 without the video taping of the inspection as ordered by the court.

27
28 ²See Memo dated November 2, 2011 from Administrative Manager to G4S Security.

1 DISCUSSION

2 In opposition to Defendants’ sanction request, Plaintiffs again argue that a monetary
3 sanction is not appropriate since Plaintiffs’ conduct regarding the discovery order was
4 substantially justified.

5 GISI’s conduct in failing to allow the video inspection was based upon its understanding
6 of 18 U.S.C. §§795, 797, and CFR §705.5. Based upon the two statutes and the regulation, GISI
7 had a reasonable belief that a camera pass was required. Whether or not the Navy actually
8 enforced these statutes or regulation, GISI should not be punished for what it reasonably
9 understood to be its security obligations.

10 Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure provides for the various
11 sanctions that are available when a party does not obey a discovery order. Instead of or in
12 addition to those sanctions, Rule 37 (b)(2)(c) provides that the court “must order the disobedient
13 party, the attorney advising that party, or both, to pay the reasonable expenses, including
14 attorney’s fees, caused by the failure” unless the court finds that the failure was “substantially
15 justified or other circumstances make the award of expenses unjust”.

16 It is not disputed herein that GISI did not obey a discovery order. Thus, sanctions are
17 appropriate against Plaintiffs. In order to avoid the sanction mandated under the Rule, GISI
18 must show that its failure to comply with the discovery order was “substantially justified”. Was
19 GISI substantially justified when it refused to allow the video camera which was brought to the
20 dry dock for video taping the inspection of the Machinist because of a reasonable belief on its
21 part that it was part of the security requirements of the Navy?

22 In *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988), the
23 U.S. Supreme Court resolved the meaning of the phrase “substantially justified”. The phrase
24 does not mean “justified to a high degree”, but is satisfied if there is a “genuine dispute” or “if
25 reasonable people could differ” as to the appropriateness of the contested action. Substantial
26 justification means “justified in substance or in the main”, i.e., “justified to a degree that could
27 satisfy a reasonable person”. The standard for its determination is no different from the
28 “reasonable basis in law and fact” formulation adopted by the Ninth Circuit Court and the vast

1 majority of the other Courts of Appeal.

2 In *Pierce*, the Supreme Court carefully pointed out that its analysis did not convert the
3 statutory term “substantially justified” into a “reasonably justified’ analysis. A finding that a
4 party is substantially justified does not depend on that party’s position being substantially
5 correct. A party’s position “can be justified even though it is not correct” and its “position can
6 be substantially (i.e., for the most part) justified if a reasonable person could think it correct,
7 that is, if it has a reasonable basis in law and fact”.

8 GISI’s response to sanctions request has been that it had a reasonable belief that a
9 camera pass was required. At the time of the discovery order, there were no reference sources
10 or other guidance that it could have used to determine if a camera pass was actually necessary.
11 GISI’s belief was based upon its reading of two statutes and a regulation which governed video
12 taking within naval facilities. GISI should not be penalized for then understanding and
13 interpretation of the statutes and regulation, especially since the court has now made it clear to
14 GISI that the statutes and regulation which it has relied upon has no application.

15 Reasonable belief, however, is not the standard of review or analyses under Rule 37.
16 The substantially justified standard is not met merely because GISI reasonably believed that a
17 camera pass was required. In order to meet the substantially justified threshold, GISI must show
18 that its position was justified in substance or in the main to a degree that would satisfy a
19 reasonable person. Or put in another way, GISI’s position would be substantially justified if a
20 reasonable person could think its position was correct because it had a reasonable basis in fact
21 or law.

22 A reasonable person is a hypothetical person used as a legal standard. It is a person who
23 exercises the degree of attention, knowledge, intelligence, and judgment that society requires of
24 its members for the protection of their own and of others’ interest³. Was GISI’s position herein
25 one that could have satisfied a reasonable person?

26 GISI’s President and Chief Operating Officer testified that there was no specific
27 _____

28 ³See reasonable person definition, Black’s Law Dictionary, Ninth Edition.

1 directive from Navy that required the company to impose a camera pass for any person or entity
2 desiring to take pictures or video at the dry dock facility. He did say that he was required to
3 follow security requirements on the premises which were imposed by law or regulation because
4 of its lease agreement with GEDA. Thus, GISI imposed a camera pass requirement issued by
5 the VCC in order to bring video equipment into the GISI facility. Did GISI's position on the
6 camera pass have a reasonable basis in law? GISI refers to the prior referenced statutes and
7 regulation as the basis for its position.

8 18 U.S.C. §795 makes it a criminal offense to take photos in installations designated by
9 the President as vital military and naval installations or equipment. 18 U.S.C. § 797 makes it a
10 criminal offense to publish or sell photographs taken of vital military or naval installations or
11 equipment. 32 CFR §705.5 governs the taking of photos on board naval ships, aircraft and
12 installations by the general public. Visitors are prohibited from taking photographic equipment
13 on board a naval ship or aircraft or into a naval activity or to take photos within a naval
14 jurisdiction unless specifically authorized by the officer in command or higher authority. Guests
15 of the Navy who wish to take pictures within naval jurisdictions will be advised of areas where
16 photography will be permitted.

17 Would a reasonable person believe that a camera pass was required to enter the dry dock
18 area to video tape the inspection at the Machinist? The statutes and regulation cited by GISI
19 deal with taking photographs within a vital military and naval installation or equipment, taking
20 photographs on board a naval ship, aircraft, and naval installations in general. The scope of the
21 federal mandate applies in general to a naval operation activity, i.e., an area where there is Naval
22 jurisdiction, as in a naval ship, an aircraft, a vital military and naval installation and the like.
23 Naval jurisdiction would encompass those areas within a naval facility where it maintains
24 complete and 100% control. In looking at the above-referenced statutes and regulation, the
25 reasonable person would conclude that those mandates apply solely to military owned or
26 controlled activities. When compared to the activities that occur at GISI's dry dock, a
27 reasonable person would conclude that GISI's activities are private in nature and generally not
28 subject to the control of the Navy. The reasonable person would conclude that GISI is not

1 government-owned but privately-owned. Moreover, the reasonable person would conclude that
2 GISI is a privately owned and operated institution as opposed to the naval installation which is
3 government- (military)-owned and government-operated. A reasonable person would further
4 conclude that the Navy would have no interest in the dry dock's operation. A reasonable person
5 would also conclude that taking a video of an inspection at the Machinist would not be the
6 taking of a photograph on board a naval ship or an aircraft. Moreover, GISI is not a naval
7 installation. Based upon a reading of the pertinent statutes and regulation, the court finds that
8 GISI's position that a camera pass was needed to video tape within its premises could not be
9 correct because it did not have a reasonable basis under the law. Thus, its position in denying
10 access of the video equipment unto their premises based upon its belief that a camera pass was
11 required could not be said to be substantially justified.

12 Furthermore, GISI's position could not have had a reasonable basis in fact. The papers
13 filed herein clearly show that the GISI's invitees went through VCC⁴ and were not required to
14 procure a camera pass. Had there been a Navy policy which prohibited the bringing of video
15 equipment into the GISI premises without a camera pass, VCC would certainly have issued one.
16 But none was issued by VCC. Furthermore, the invites were personally escorted to the GISI
17 facility by Mr. David Dimmick, its Deputy Security Officer, who was aware of the video taking
18 that was to occur within the GISI facility. GISI argues that it had a duty to enforce and comply
19 with Navy regulations regarding taking photographs within the naval installation because it did
20 not have physical control of the use of the camera from the time of its entrance within the gate
21 to the GISI facility. It is argued that the videographer could be taking pictures during the
22 interim. The court does not find this position reasonable because the cameras were to be used
23 only for video taking the inspection at the Machinist and nothing else. There was no court
24 authorization for video taping anything else but the inspection at the Machinist.

25 Thus, the court thus concludes that GISI's failure to allow the camera into its facility
26 based upon its reasonable belief that a camera pass was required was not substantially justified.

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28 ⁴See Sterling affidavit filed on July 13, 2012.

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2 Since the court has determined that Plaintiffs' conduct was not substantially justified, the
3 court must next determine whether there are other circumstances that exist that make an award
4 of expenses unjust.

5 In addressing this issue, the court notes that Defendants did not immediately file a
6 motion to compel after the November 3, 2011 failed video inspection. Defendants spent time
7 trying to determine whether the Navy had any objections to the video taping on board the
8 Machinist and whether there was a camera pass requirement. Defendants produced a letter
9 addressed to Defendants' counsel which came from D.W. Hopkins of the Navy legal
10 department. The letter advised Defendants that the Department of the Navy had no objections to
11 the discovery order. Specifically, the letter made reference to the "videographer/photographer"
12 video taping the inspection. The letter⁵ was issued by the Department of the Navy by direction
13 of the Commander. Based upon this letter, Defendants inquired whether Plaintiffs were now
14 willing to allow a video taping of the Machinist, short of seeking court intervention. Plaintiffs
15 responded that the letter was not conclusive of the issue.

16 The court takes cognizance that Plaintiffs had an opportunity to avoid the sanctions that
17 are being sought had they allowed Defendants to come back to its facility to do the previously
18 ordered video taping. However, Plaintiffs placed no reliance upon the Department of the
19 Navy's letter. Plaintiffs responded that the Department of the Navy's response to Defendants'
20 counsel was not dispositive of the issue. Having been apprised of the Navy's position relative to
21 the video taping on board the Machinist, Plaintiffs should have inquired with Navy whether a
22 camera pass was indeed needed or whether their policy was sound. If the Navy were letting its
23 position known to Defendants that it had no objections to the video taping and Plaintiffs were
24 insisting on Defendants procuring a camera pass, it would appear to the court that Plaintiffs may
25 not have been acting in good faith. At a minimum, it should have checked with Navy regarding
26 its camera pass policy. Moreover, GISI had been placed on prior notice that their "invitees"

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28 ⁵See Exhibit "A" of Supplemental Affidavit of Thomas Sterling, filed August 17, 2012.

1 went through Mr. Dimmick, VCC's Deputy Security Officer, to obtain their entry passes and he
2 saw it fit not to issue any camera pass even though he knew that video taping was going to take
3 place on board the dry dock.

4 As the court has pointed out above, Plaintiffs seem to be insisting that Defendants get a
5 camera pass from Navy when Navy did not believe that it was necessary or required. That being
6 the case, it can not be said that there was a "genuine dispute" between Plaintiffs and Defendants
7 because the camera pass was one that had to be issued by Navy. Plaintiffs have taken lightly the
8 existence of the court order authorizing the video taping on board the Machinist and Plaintiffs
9 have also taken lightly the Department of the Navy's position that it had no objections to the
10 video taping on board the Machinist. What else must be provided Plaintiffs to seriously
11 consider the repercussions of a failure to comply?

12 Based upon the above considerations, the court finds that there are no other
13 circumstances that exist that would make an award of expenses unjust. Therefore, the court
14 finds that sanctions are appropriate herein.

15 **Reasonable Fees and Costs**

16 GISI also objects to the \$12,259.00 amount claimed by Defendants as their reasonable
17 fees and costs. The amount claimed is said to be unjust because it is unreasonable for the
18 services performed. It also alleged that the amount spent on the motion and inspection was
19 unreasonable and that the billing rate was unreasonable for some of the services performed.
20 Plaintiffs ask the court to disregard the \$12,259.00 amount requested as excessive and substitute
21 it with a reasonable amount.

22 In a Rule 37(b)(2)(c) sanction, the court must order the party not complying with the
23 court order to pay all the expenses including a reasonable attorney fee incurred by the moving
24 party as a result of the failure to comply. This includes the expenses incurred in the motion for
25 sanctions.

26 In his affidavit, Defendants' counsel, Thomas C. Sterling, states that Defendants'
27 reasonable attorney fees are \$12,259.00. In order to assess the reasonableness of the request, the
28 court has divided Defendants' billing into four groupings. The four groupings represent the

1 hours spent in preparation and filing the motion; the hours spent for purposes of filing its reply
2 memorandum; the hours spent in preparation for the court hearing and attendance; and the hours
3 spent subsequent to the issuance of the court order compelling the video taking. The request for
4 costs also includes a charge of \$471.50 which represents a charge for a GRT equivalent
5 payment.

6 Counsel spent 21.95 hours in preparation for filing the motion. Some of these hours
7 were spent making inquiries from the Navy regarding GISI's camera pass policy. Some hours
8 were spent attempting to arrange a video taping session on the Machinist without court
9 intervention. Some hours were spent in consultation with co-counsel and in research and
10 preparation in filing the motion. Plaintiffs argue that the true value of the motion might more
11 reasonably be \$1000-\$1500.00. This argument, however, fails to take into consideration the
12 efforts made by Defendants in evaluating and rebutting Plaintiffs' position regarding the camera
13 pass. Defendants also met and conferred with Plaintiffs prior to filing the motion. The court
14 finds that the motion to compel was not the typical motion. It was not a matter of determining
15 relevancy or privilege for discovery purposes, but rather the failure to comply based upon the
16 disobedient party's belief that a camera pass was necessary in order to allow the video
17 equipment into its premises. In reviewing Defendants' billing, there were items included which
18 dealt with emails from among counsel. The court will exclude from the total amount claimed a
19 reasonable amount of hours that it believes was spent in consultation among counsel as well as
20 those hours not found reasonable. Based upon these considerations, the court finds that 15
21 hours would be reasonable for the motion undertaking and will disallow 6.95 of the hours
22 claimed therein.

23 Similarly, the court finds that Defendants spent 13.2 hours in formulating its reply to
24 Plaintiffs' opposition. The court will reduce this number by two (2) hours. Plaintiffs filed
25 several pleadings in opposition to the motion to compel and sanctions. The court finds that 11.2
26 hours would be a reasonable number of hours to have spent on the reply.

27 Likewise, Defendants billed 3.3 hours for preparation and attendance in court for the
28 motion hearing. The court will reduce this number by .3 hours.

1 Finally, Defendants billed 8.7 hours for worked performed after the motion hearing. The
2 court will reduce this number by two (2) hours.

3 The court will therefore allow a total of 35.9 hours of the submitted billing as
4 Defendants' reasonable costs and attorneys' fees. Taking 35.9 hours and multiplying that
5 amount by Mr. Sterling's hourly rate of \$250 equals the sum of \$8,975.00. Defendants have
6 added a GRT equivalent amount to their costs and desire to pass this cost to the Plaintiffs. The
7 court will not impose the equivalent GRT amount upon Plaintiffs. The court therefore finds that
8 Defendants' reasonable costs and attorney fees in this matter is the sum of \$8,975.00. The court
9 hereby orders Plaintiffs to pay this amount within 30 days.

10 CONCLUSION

11 The court has considered Defendants' request for their reasonable costs and attorneys'
12 fees herein, as shown in the affidavit of their counsel Thomas C. Sterling, filed on May 1, 2013.
13 The court has also re-considered Plaintiffs' opposition to the sanctions request and their
14 arguments that their conduct was substantially justified, or in the alternative that Defendants'
15 requested amounts were not reasonable costs and fees. Based upon the reasons stated herein
16 above, the court finds:

17 1. Plaintiffs failed to comply with a court order which required the video taking of an
18 inspection on board the dry dock Machinist on November 3, 2011.

19 2. Plaintiffs' belief that a camera pass issued by VCC was required prior to entry into
20 the GISI facility was not substantially justified because their belief had no reasonable basis in
21 law and fact.

22 3. There exists no other circumstances which would make an award of expenses unjust.

23 4. Defendants are entitled to receive from Plaintiffs the sum of \$8,975.00 as their
24 reasonable costs and attorneys' fees. Plaintiffs shall make this payment within 30 days of this
25 order.



26 /s/ **Joaquin V.E. Manibusan, Jr.**
27 **U.S. Magistrate Judge**
28 **Dated: Aug 26, 2013**