

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

UNITED STATES OF AMERICA EX	*	
REL. CORI RIGSBY AND KERRI	*	
RIGSBY	*	RELATORS
	*	
VS.	*	CASE NO. 1:06cv00433-LTS-RHW
	*	
STATE FARM INSURANCE	*	
COMPANY, ET. AL.	*	DEFENDANTS
	*	
	*	
* * * * *		

**HAAG ENGINEERING CO.’S JOINDER IN STATE FARM’S POST-HEARING BRIEF
[345] AND SUBMISSION OF ITS INDIVIDUAL POST-HEARING BRIEF**

COMES NOW, Defendant, Haag Engineering Co. (“Haag”), by and through its attorneys of record, and submits its Joinder in State Farm Fire & Casualty Company’s (“State Farm”) post-hearing brief [345] and its own individual post-hearing brief in connection with Defendants’ dispositive motions.

INTRODUCTION

In this case, the Rigsbys claim that Haag, Forensic Engineering & Analysis Corporation (“FAEC”), and State Farm conspired to submit false flood claims to the Federal Government. The Court has limited the Rigsbys’ allegations to the handling of the Thomas C. and Pamela McIntosh flood claim [261]. The basis for the Rigsbys’ claims against Haag is the existence of the Haag Hurricane Katrina Storm Damage Survey (“the Survey”), a copy of which was introduced into evidence as Exhibit A to D-32 and D-38. Importantly, the only claim asserted by the Rigsbys against Haag is for conspiracy.¹

First, it is important to point out the timeline of events for the McIntosh flood and wind insurance claims along with the actions of the defendants related to same.

- **August 29, 2005:** Hurricane Katrina hit the Gulf Coast.
- **September 5, 2005:** The McIntoshes reported their Hurricane Katrina claim to State Farm.²
- **September 20, 2005:** Kerri Rigsby and Cody Perry inspected the McIntosh home and scoped the loss.³
- **September 24, 2005:** Cody Perry entered notes in the Activity Log reflecting he observed an exterior water line at 10 feet and an interior water line at 5 feet.⁴
- **October 2, 2005:** State Farm issued payment to the McIntoshes in the amount of \$250,000.00 for flood damage to their residence.⁵
- **October 4, 2005:** The McIntosh flood claim was closed.⁶
- **October 4, 2005:** State Farm requested an engineer inspect the McIntosh home.⁷
- **October 12, 2005:** Brian Ford issued his report for the McIntosh home.⁸
- **October 20, 2005:** Jack Kelly issued his report for the McIntosh home.⁹
- **October 24, 2005:** Haag shipped via UPS two-day delivery 100 bound copies of the Survey to State Farm.¹⁰

The above timeline of events has not been disputed by the Rigsbys. Accordingly, same will be taken as true in ruling upon Defendants' dispositive motions.

¹ See Relators' Consolidated Pre-Hearing Response to All Dispositive Motions [264], pg. 4.

² See File/Supporting Information marked as D-3, Bates number SJ000869.

³ See hearing testimony of Kerri Rigsby; see also File/Supporting Information marked at D-3, Bates number SJ000869; see also Activity Log marked D-5, Bates number SJ000226.

⁴ See Activity Log entry dated 9-24-05 marked as D-3, Bates number SJ000873.

⁵ See copy of checks marked as D-3, Bates number SJ000892.

⁶ See Activity Log entry dated 10-04-05 marked as D-3, Bates number SJ000872.

⁷ See P-8, Job Assignment Sheet, Bates numbered RIGSBY-001952, which Haag objects to on relevancy grounds.

⁸ See Ford report marked as P-1, which Haag objects to on relevancy grounds.

⁹ See Kelly report marked as P-2, which Haag objects to on relevancy grounds.

¹⁰ See Affidavits of Paul O'Connor, marked as D-32 and D-38.

Second, in addition to the timeline, it is important to note that the Rigsbys cannot say that the Survey had anything to do with the McIntosh claim. Notably, Kerri Rigsby testified at the hearing on May 21, 2009:

Q. (By Mr. Beers) You were talking about the McIntosh home. You didn't even have the Haag report at the time you adjusted the McIntosh.

A. I don't know if I was talking about the McIntosh home.

MR. BEERS: Let's play 36.

(video played.)

BY MR. BEERS:

Q. That's not true, is it?

A. I don't know when I looked at the Haag report. It came in around that time, but I'm not sure when.

Q. State Farm never got it until the end of October. You adjusted the McIntosh home on the 20th of September. You had not looked at the Haag report.

A. Then I must have looked at it after.¹¹

. Kerri Rigsby further testified:

Q. (By Mr. Canada) Do you see the publication date on that document?

A. Yes, sir.

Q. What does it say?

A. October 2005.

Q. Okay. And if there has been evidence already introduced into this hearing that indicates that this report wasn't sent

from Haag, the physical reports weren't sent until

October 24th, you have no reason to dispute that, do you?

A. No, sir.¹²

Thus, contrary to Kerri Rigsby's earlier protestations in the Complaint and Amended Complaint, she cannot say that the Haag Survey had anything to do with the McIntosh claim.

After taking evidence and hearing testimony from the witnesses called at the hearing on Defendants' dispositive motions, the following facts are not in dispute:

- The McIntoshes sustained flood damage to their residence as a result of Hurricane Katrina.
- Haag was not involved in the adjustment of the McIntoshes' Katrina claims.
- The Survey was not transmitted to State Farm until after the McIntosh flood claim had been inspected, adjusted and closed.

Further, no evidence whatsoever was introduced by the Rigsbys to show that Haag conspired with State Farm and/or FAEC to submit false flood claims. In fact, there was no testimony or evidence introduced showing that: 1) Haag has ever communicated with FAEC, 2) Haag transmitted the Survey to FAEC in October 2005, 3) State Farm instructed FAEC to rely on the Survey, or 4) **the Survey was false.**

Finally, the Rigsbys fail to acknowledge that the Survey was an independent publication that State Farm independently purchased and the Survey did not provide data for any one property. Conversely, the Survey was a general collection of data taken from the Gulf Coast states affected by Katrina, and it contained a note in its front cover which read:

Please Note: Values of wind speed and storm surge herein are point measurements and may or may not be representative of the winds and

¹¹ See Hearing Transcript, pg 106, ln. 20 through pg. 107, ln. 8.

¹² See Hearing Transcript, pg. 113, ln. 4-14.

*storm surge that occurred in other locations, even within the same city, town, or community.*¹³

The front cover also contains a copyright date of October 2005.¹⁴ Additionally, the Survey contained pictures and examples of both wind and water damage to structures by Hurricane Katrina.

Based upon a review of the undisputed timeline of events, facts, and testimony presented to the Court, Haag is entitled to summary judgment as a matter of law, because there is no genuine issue of material fact related to Haag. There simply is no evidence of a conspiracy between Haag and its co-defendants, and no such evidence was put forth by the Rigsbys.

LAW AND ARGUMENT

A. Motion for Summary Judgment Standard.

The United States Court of Appeals for the Fifth Circuit has set forth the standard for determining when summary judgment is appropriate as follows:

[S]ummary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.”

Blakely v. State Farm Mutual Automobile Ins. Co., 406 F.3d 747, 750-51 (5th Cir. 2005); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

A party is entitled to summary judgment on all or any part of a claim in which there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson*, 477 U.S. at 247. The moving party has the initial burden of showing that there is no genuine issue of material fact. *Id.*; *Anderson*, 477 U.S. at 256. The

¹³ See Exhibit A to the Affidavit of Paul O’Connor, marked as Exhibits D-32 and D-38 (bold and italics are in the

burden on the moving party may be discharged by “showing”, i.e. pointing out to the District Court, that there is any absence of evidence to support the nonmoving party’s case. *Celotex*, 477 U.S. 317.

Once the moving party has carried its burden under Rule 56(c), the nonmoving party must do more than merely show that there is some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The non-movant may not rest on mere denials of pleading, but must set forth specific facts showing a genuine issue for trial. *Anderson*, 477 U.S. at 248, 256. The non-movant cannot satisfy his summary judgment burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

In this case, Haag is entitled to summary judgment, because the Rigsbys have failed to create a genuine issue of material fact relative to Haag. Consequently, Haag must be dismissed from this action with prejudice.

B. The Rigsbys failed to introduce evidence of a conspiracy between Haag and a co-defendant.

In Relators’ Consolidated Pre-Hearing Response to All Dispositive Motions [264], pg. 4, Relators admitted that the only claim against Haag is conspiracy to submit a false claim. In Count III of the First Amended Complaint (¶¶ 123-134), the Rigsbys allege a violation of 31 U.S.C. § 3729(a)(3). Section (a)(3) imposes liability on “[a]ny person who . . . conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.” 31 U.S.C. § 3729(a)(3). A conspiracy claim necessarily includes a showing of a false or fraudulent claim.

“General civil conspiracy principles apply to conspiracy claims under the False Claims Act.” *U.S. ex rel. Wilkins v. North American Const. Corp.*, 173 F.Supp.2d 601, 639 (S.D.Tex.

original).

2001) (citing *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 546 n. 3 (7th Cir.1999)). “To allege civil conspiracy, the government and the relator must plead ‘that the defendants ... had an agreement to commit an illegal act which resulted in the plaintiff’s injury.’” *Id.* citing *Thomas v. City of New Orleans*, 687 F.2d 80, 83 (5th Cir.1982) (quoting *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir.1979)). To prevail on a conspiracy claim under 31 U.S.C. § 3729(a)(3), Relators “must prove (1) that there was an agreement with another party to submit a false claim, and (2) that one or more conspirators performed an act to effect the object of the conspiracy.” *U.S. ex rel. Gudur v. Deloitte Consulting LLP*, 512 F.Supp.2d 920, 931 (S.D.Tex. 2007) (citing *Wilkins*, 173 F.Supp.2d at 639 & n. 33; *United States ex rel. Graves v. ITT Educational Services, Inc.*, 284 F.Supp.2d 487, 509 (S.D.Tex.2003), *aff’d* 111 Fed.Appx. 296 (5th Cir.2004), *cert. denied*, 544 U.S. 978, 125 S.Ct. 1869, 161 L.Ed.2d 730 (2005)).

With respect to Haag, in this case, the Court does not even need to reach the issue of whether a false or fraudulent claim was submitted to the government, **because the Survey did not exist until after the McIntosh flood claim was investigated, adjusted, paid, and closed.** Likewise, it is undisputed that there was no agreement between Haag and State Farm to falsely submit the McIntosh flood claim to the federal government, nor was there an act to carry out such an objective. Accordingly, Haag must be dismissed from this lawsuit.

CONCLUSION

The Rigbys’ initial allegations claimed that State Farm relied on the Haag Survey to adjust the McIntosh claim. The evidence has shown that The Haag Survey did not exist at the time the McIntosh flood claim was adjusted and submitted to the government. In fact the uncontroverted evidence presented at the hearing was that State Farm did not have the Haag Survey at any time during the handling of the McIntoshes’ claim. Finally, the Relators have

¹⁴ *Id.*

failed to put forth any evidence of any wrongdoing, nevertheless fraud or conspiracy, against Haag, and they certainly have put forth no genuine issue of material fact before the Court relative to Haag. Therefore, the claims against Haag must be dismissed with prejudice.

Respectfully submitted, this 13th day of August, 2009.

HAAG ENGINEERING CO.

By: /s/ Kathryn Platt
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CERTIFICATE OF SERVICE

This is to certify that the undersigned attorney for Galloway, Johnson, Tompkins, Burr & Smith, served a copy of the above and foregoing HAAG ENGINEERING CO.'S JOINDER IN STATE FARM'S POST-HEARING BRIEF AND SUBMISSION OF ITS INDIVIDUAL POST-HEARING BRIEF upon all counsel of record and Judge L. T. Senter, Jr. via email only on June 8, 2009 and is serving same via all counsel of record and interested persons via the Court's Electronic Notification System on this 13th day of August, 2009.

/s/ Kathryn Platt
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