

## Case Summary

### In re A&M Florida Properties II, LLC

2010 Bankr. LEXIS 1217 (S.D.N.Y. Bankr. Ct. April 7, 2010)

**Court Orders Monetary Sanctions for Failure to Produce Requested Emails in a Timely Manner**

During the discovery phase of a suit alleging the breach of a purchase and sale contract, the Bankruptcy Court for the Southern District of New York ordered monetary sanctions against the plaintiff and its counsel for their failure to timely produce requested emails that remained hidden due to a misunderstanding of the plaintiff's email retention procedures.

Plaintiff GFI Acquisition sued American Federated Title Corporation for the alleged breach of their \$41 million agreement for the sale of four properties. GFI alleged that American Federated failed to disclose certain lock-out features contained in loans GFI promised to assume upon the sale. At issue were several emails that American Federated had sent GFI that would allegedly demonstrate GFI's knowledge of the loan terms.

When GFI's initial search did not produce the relevant emails, American Federated requested a more extensive search. GFI subsequently produced an additional 346 documents but did not find the emails. The parties hired a joint computer forensic expert to search GFI's email system; this search likewise failed to produce the emails American Federated was sure GFI had in its possession.

After the initial forensic search, GFI's counsel discovered that GFI's email system allowed its users to archive email. A second search of the archive email discovered nearly 10,000 relevant emails previously undisclosed to American Federated. The joint computer expert produced a small portion of the new emails to American Federated and the rest to GFI for privilege review. Due to further misunderstandings, however, GFI's counsel failed to review the emails for more than two months. American Federated eventually received a full production, including the emails that it had expected in the initial production.

#### Decision

American Federated filed a motion for sanctions, arguing that GFI had obstructed its discovery with unnecessary delays and costs. The court found both dismissal of GFI's action and an adverse inference instruction too harsh, noting that there was no evidence that GFI or its counsel had acted in bad faith. Instead, monetary sanctions were warranted. The court reasoned that the initial production would have disclosed all relevant email if GFI's counsel had made a diligent effort to learn about and search all of GFI's email system, including the archived mail. Because counsel's failure to investigate the email system caused the need for additional motions and forensic searches, the court ordered GFI and its counsel to reimburse American Federated for both its motion costs and its half of the forensic searches.