

an opinion that the product was defective, and (5) failed to provide his expert with sufficient information which would have allowed him to render a meaningful opinion.

Counsel contends that his inquiry into the facts was reasonable because he “interview[ed] the Plaintiffs and obtain[ed] the Police Investigation Report, medical records, and a statement from Mr. Williams.” Brief in Opposition to Motion for Sanctions (Doc. No. 62 at 10). Counsel also looked at the gun and stated that it “was obvious, even to a lay person, that this evidence corroborated Plaintiffs’ account of this incident.” (*Id.*). Counsel asserts that Defendants have threatened to seek Rule 11 Sanctions from the outset of the case and have used it as a tool to harass and intimidate Plaintiffs into dropping their lawsuit. He argues that he was not required to disbelieve his client based merely on Defendants’ contrary assertions and contends that Defendants disingenuously mischaracterized the evidence in this case because Plaintiff never claimed that “a bullet was discharged from the firearm, went sideways, exited the left side of the firearm, and struck his left hand.” (*Id.* at 5). Finally, Counsel claims that he was not required to retain an expert prior to filing the Complaint because “[o]bviously” an expert retained at this early stage would not be “privy to discovery documents and other relevant materials.” (*Id.* at 11).

II. Background

In order to properly assess whether Counsel’s inquiry into the underlying facts was reasonable under the circumstances, both prior to filing suit and thereafter, the Court must first consider the timeline of events to determine what information Counsel possessed and when he possessed it:²

² Specifically, the Court must analyze whether the assertions made in various documents submitted throughout the course of litigation were made with reasonable belief, formed after a reasonable inquiry under the circumstances, that they were well-grounded in fact.

from the side of the gun, and not the muzzle. He notified Defendants of his retention on October 17, 2007, and told them the allegedly defective firearm was in his possession and was available for review. Defendants took Counsel up on his offer and arranged for two different inspections of the firearm to take place prior to the filing of the Complaint. The first inspection occurred on July 8, 2008, but, as explained earlier, was cut short. The second inspection took place on June 11, 2009, and a detailed examination of the interior components of the gun was conducted by Defendants' firearms consultant. For reasons that remain unclear, Counsel did not bring his own firearms consultant to either inspection and apparently determined that it would be unnecessary to hire his own firearms consultant to examine the gun at any point in the two years prior to his filing suit.⁶

The June 11, 2009, inspection of the firearm at best raised serious concerns regarding the veracity of Plaintiff's story and at worst completely refuted Plaintiff's account of the incident because the physical evidence revealed that the interior components of the gun were not damaged and were very much intact, indicating that the bullet could not have exited the firearm from anywhere other than the muzzle. Realizing that Counsel had absolutely no evidentiary support for the allegations he was lodging, Defendants, by letter dated September 9, 2009, rejected the settlement demand of \$93,250 and informed Counsel that they were unwilling to settle because the inspection made clear that "there was absolutely nothing defective with the firearm in question." (Doc. No. 56-8). Defendants stated that they would be happy to review any expert opinions to the contrary and cautioned Counsel that "*if Mr. Ellis proceeds any further with this matter, Beemiller, Inc. will seek all appropriate remedies available to it.*" (Id.) (emphasis added).

⁶ Instead, Counsel arranged for photographs and videos of the inspection to be taken.

since his retention in October of 2007. The purported reason Counsel provides for not retaining an expert in the two years before he filed suit is because “[o]bviously, an expert retained prior to drafting a Complaint would not be privy to discovery documents and other relevant materials.” Brief in Opposition to Motion for Sanctions (Doc. No. 62 at 11). Counsel makes no attempt to inform the Court which particular “discovery documents” and “relevant materials” were needed to inform his expert and guide his analysis and the Court cannot fathom how any paper documents could be more relevant to a determination that his client was injured by a defective product than the actual product itself. Counsel’s assertion, while not inaccurate as a general proposition, is completely inapposite as applied to these facts because this clearly is not a case where discovery was needed to obtain the salient information and materials from the other party’s possession. See Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1012 (2d Cir.1986) (counsel’s “reliance on the information supplied by his clients was reasonable” where “the relevant information was largely in the control of the defendant,”; see also Morda v. Klein, 865 F.2d 782, 785-86 (6th Cir. 1989) (“It would be particularly difficult to fault plaintiffs for a lack of pre-filing inquiry when, as here, defendants have refused plaintiffs access to material information that would bear on certain allegations made in the complaint.”)).

Counsel had the gun, the only piece of evidence which any consultant or expert would need in determining the existence of a defect. The probability that a pre-filing inspection of the firearm would have turned up important evidence was *substantial*, thus rendering Counsel’s failure to conduct such an investigation inexcusable.

Reliance

reviewing the fee petition. Counsel's position as to the reasonableness of the amount of Defendants' requested fees/costs is due no later than December 17, 2012. The Court will then determine the amount of monetary sanctions to be awarded against Counsel and his law firm.

Date: November 19, 2012

s/Alan N. Bloch
United States District Judge

ecf: Counsel of record