New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 247—NO. 38
TUESDAY, FEBRUARY 28, 2012

STATE E-DISCOVERY

First Department Weighs In on ESI Preservation

By **Mark A. Berman**

The Appellate Division, First Department, recently issued two decisions that provide critical guidance as to when electronically stored information (ESI) must be preserved and the legal ramifications of the failure to do so. In addition, a recent trial court decision found that an assertion that there was no additional ESI to be produced needed to be supported by an expert affidavit indicating what computer systems were searched, when the search occurred, what types of ESI was searched for, and what search was performed.

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Reasonably Anticipated

The First Department in *VOOM HD Holdings LLC v. EchoStar Satellite LLC*[1] held that "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents," including ESI, and this is the case "whether the organization is the initiator or the target of the litigation."[2] Such "hold" must suspend a system's automatic-deletion function, and otherwise preserve e-mails. The court held that such a rule provides "litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered."

Suspend Automatic Deletion

In *Voom*, the defendant had not implemented a litigation hold on ESI until after litigation had actually been commenced, and the "hold" did not suspend defendant's automatic deletion of e-mails, which automatically and permanently purged, after seven days, any e-mails sent and deleted by an employee from defendant's computer servers. It was not, however, until four months after the commencement of the lawsuit, and nearly one year after defendant was on notice of anticipated litigation, that defendant suspended the automatic deletion of relevant e-mails from its servers.

As a result of such failure, plaintiff moved for sanctions under the doctrine of spoliation. Plaintiff argued that defendant's actions and communications demonstrated that it should have reasonably anticipated litigation prior to plaintiff's commencement of the action. The motion court agreed, holding that defendant should reasonably have anticipated litigation no later than the date its corporate counsel sent plaintiff a letter containing defendant's notice of an alleged breach of contract, a demand and an explicit reservation of rights. The First Department observed that the lower court properly held that:

> in addition to failing to preserve electronic data upon reasonable anticipation of litigation, no steps whatsoever had been taken to prevent the purging of e-mails by employees during the four-month[3] period after commencement of the action. [Defendant] continued to permanently delete employee e-mails for up to four months after the commencement of the action, relying on employees to determine which documents were relevant in response to litigation, and to preserve those e-mails by moving them to separate folders. As the [motion] court put it: "[Defendant's] purported litigation hold failed to turn off the automatic delete function and merely asked its employees—many of whom, presumably were not attorneys—to determine whether documents were potentially responsive to litigation, and to then remove each one from [defendant's] pre-set path of destruction."

Looking to Practical Realities

The motion court further noted "that even if the duty to preserve arose only upon the filing of the complaint, [defendant] still violated the duty since it had lost, at a minimum, e-mails from [a period of several days] as the result of the seven-day automatic purge policy." The motion court also rejected defendant's argument that since the parties were seeking to resolve the matter, "no reasonable anticipation of litigation existed."

The First Department adopted the motion court's view that this would "ignore the practical reality that parties often engage in settlement discussions before and during litigation, but this does not vitiate the duty to preserve" and that "would allow parties to freely shred documents and purge e-mails, simply by faking a willingness to engage in settlement negotiations." The First Department viewed the situation as where

> [s]ides to a business dispute may appear, on the surface, to be attempting to work things out, while preparing frantically for litigation behind the scenes, [defendant] and amicus's approach would encourage parties who actually anticipate litigation, but do not yet have a notice of a "specific claim" to destroy their documents with impunity.

The First Department noted that "[i]n the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process." The First Department further noted that:

> Regardless of its nature, a hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee. The hold should, with as much specificity as possible, describe the ESI at issue, direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve electronically stored evidence. In certain circumstances, like those here, where a party is a large company, it is insufficient, in implementing such a litigation hold, to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel.

The First Department, rejecting the position that "'in the absence of pending litigation' or 'notice of a specific claim" defendant should not be sanctioned for discarding items in good faith and pursuant to normal business practices," stated that "[t]o adopt a rule requiring actual litigation

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or notice of a specific claim ignores the reality of how business relationships disintegrate." The court noted that in this case defendant's "reliance on its employees to preserve evidence 'does not meet the standard for a litigation hold.'"

In 'Voom,' the First Department held that a litigation hold must suspend a computer system's automatic-deletion function, and otherwise preserve e-mails.

Negligence Is Sufficient

The First Department held that:

> [a] party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense (see Zubulake, 220 FRD at 220). A "culpable state of mind" for purposes of a spoliation sanction includes ordinary negligence (id.; see also Treppel v. Biovail Corp., 249 FRD 111, 121 [S.D.N.Y. 2008]). In evaluating a party's state of mind, Zubulake and its progeny provide guidance. Failures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail (see Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d at 471).
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> The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, however, relevance must be proven by the party seeking spoliation sanctions (id.).

Rebuttable Presumption

However, the First Department held that such presumption of relevance is rebuttable :

> [w]hen the spoliating party's conduct is sufficiently egregious to justify a court's imposition of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants permitting the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

The First Department noted that "[s]ince [defendant] acted in bad faith or with gross negligence in destroying the evidence, the relevance of the evidence is presumed and need not have been demonstrated by [plaintiff]." The Court noted that

> "[i]n any event, the record shows that the destroyed evidence was relevant" where certain "e-mails—a handful only fortuitously recovered, and highly relevant—certainly permitted the inference that the unrecoverable e-mails, of which the snapshots were but a representative sampling, would have also been relevant."

Missing Evidence Critical

With respect to prejudice,[4] the First Department rejected defendant's assertion that "the missing e-mails were merely cumulative of other evidence, asserting that since [plaintiff] had other means to prove its case, it could not have suffered prejudice from the destruction of e-mails that occurred" and held that such assertion "is insufficient to rebut the presumption." Critically, "[a]lthough [plaintiff] may have other evidence to point to, the missing evidence is from a crucial time period during which [defendant] appears to have been searching for a way out of its contract.... Evidence from this vital time period is not entirely duplicative of other evidence."

A hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee.

Accordingly, the First Department affirmed the motion court's finding that defendant's "conduct, at a minimum, constituted gross negligence" and that "a negative, or adverse inference against [defendant] at trial was an appropriate sanction, rather than striking [defendant's] answer, since other evidence remained available to [plaintiff], including the business records of [defendant] and the testimony of its employees, to prove [plaintiff's] claims."

The First Department in *Holme v. Global Minerals and Metals Corp.*,[5] also recently affirmed the grant of an adverse inference charge against defendants due to spoliation of electronic records, holding that:

> [d]efendants had an obligation to preserve such records because they should have foreseen that the underlying litigation might give rise to the instant enforcement action; the records were destroyed with a culpable state of mind; and they are relevant to plaintiff's claims of fraudulent conveyances.

Detailed IT Affidavit Required

In *Scarola Ellis LLP v. Padeh*,[6] after defendant advised that he possessed no additional documents, the court "directed defendant to produce an affidavit from a system administrator or other similar computer systems specialist which stated there were no responsive documents and also detailed the search methods used." In response, defendant produced an affidavit from a computer engineer stating that he found no documents on the internal network or servers. The motion court found the affidavit to be insufficient and directed that a supplemental affidavit be provided by the computer engineer, explaining which computers and system were searched, the date of the search, what kind and type of search or additional searches if necessary were performed, whether a search was made for other types of electronically stored documents other than e-mails, whether a search was made for deleted content, and what the origins were of the nine e-mails attached as exhibits in the opposition to the motion for summary judgment.

The motion court further held that such an affidavit:

> must document a thorough search conducted in good faith. It should include details such as where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found.[7]

1. 2012 WL 265833, 2012 N.Y. Slip Op. 00658 (1st Dept. Jan. 31, 2012).
2. Id. (quoting "The Sedona Conference, Commentary of Legal Holds: The Trigger and The Process," 11 Sedona Conf. J. 265, 267 (Fall 2010)).
3. Defendant took a "snaphot" of the relevant e-mail accounts four days after the action was commenced.
4. The motion court made the critical observation that vexes courts confronted with spoliation claims, and noted that defendant's argument puts plaintiff in the "dicey position of asking it to identify [defendant's] e-mails that no longer exist and that [plaintiff] never had the opportunity to review because they were destroyed by [defendant]." *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, Index No. 600292/08 at *31 (Sup. Ct. N.Y. Co. Nov. 8, 2010). The motion court, at **39-40 citing to *Teppel v. Bioval Corp.*, 249 F.R.D. 111, 123 (S.D.N.Y. 2008), stated that it is "'not incumbent upon the plaintiff to show that specific documents were lost,'" but rather, "'[i]t would be enough to demonstrate that certain types of relevant documents existed and that they were necessarily destroyed by the operation of the autodelete function on [the defendant's] computers or by other features of its routine document retention program.'"
5. 90 A.D.3d 423, 934 N.Y.S.2d 30 (1st Dept. 2011).
6. 33 Misc.3d 1233(A), 2011 WL 6182119 (Sup. Ct. N.Y. Co. Dec. 8, 2011).
7. Id. (quoting *Henderson–Jones v. City of New York*, 87 AD3d 498, 505, 928 N.Y.S.2d 536, 542 (1st Dept. 2011)).

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