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A Digital Picture May or May Not Be Worth a Thousand Words

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Digital images taken from whatever source, including surveillance cameras, personal digital cameras and cellphones, are now ubiquitous, with shots taken for reasons of security, to memorialize social events, and to document accidents. Such demonstrative evidence can often be conclusive of a material issue in a case, and that is likely why a famous New York sportscaster used the catchphrase "Let's go to the videotape!" when reviewing a controversial play. However, digitally stored images for litigation purposes are only as good as their having actually recorded the entirety of the specific event at issue[1] and thereafter preserved so that they can be produced in discovery, and then, of course, properly authenticated for evidentiary purposes. Such electronically stored information (ESI) in digital form, however, is as potentially fleeting as emails, and can easily be deleted, overwritten, lost or destroyed for the best or worst reasons.

More and more decisions, as addressed below, are being issued that necessarily address spoliation sanctions for the failure to preserve such digital videos and photographs, and courts are having to weigh the equities of the circumstances under which such images have been "lost" when determining the appropriate sanction. Specifically, the "intent" of the spoliator and the degree of actual "legal" prejudice suffered by the movant are carefully scrutinized by courts, which are skeptical of such motions and struggle to balance the appropriate level of spoliation sanction based on the specific facts of the case. Frequently, courts order that the spoliation sanction be an adverse inference charge at trial, but such decisions often do not note whether such charge would require that an adverse inference be taken or merely permits the jury to make such inference. In either case, as most cases settle, an adverse inference charge due to "lost" ESI often will not necessarily have the desired salutatory effect, and the spoliator will not be appropriately "punished" for being "unable" to produce the often dispositive piece of ESI evidence.

In an action seeking damages for personal injuries asserted against a landlord for allegedly failing to provide proper security, plaintiff in *Suazo v. Linden Plaza Assoc.*[2] cross-moved for summary judgment seeking to strike defendants' answer for spoliation of video evidence of the attack, or in the alternative, for an adverse inference. The motion court struck the complaint, finding the failure to preserve the video "willful" and "indefensible" where the demand for the tape was made within six months of the incident, and defendants shortly after the attack viewed the video, which depicted the events surrounding the attack and the identity of the alleged assailants, and "captured the action or inaction of the defendants' security guard." The First Department[3] modified the motion court's ruling to grant the cross-motion by reducing the spoliation sanction to an adverse inference to be charged at trial. The First Department held:

> [s]ince defendants were "on notice of a credible probability that [they would] become involved in litigation"[4] (*Voom HD Holdings v. EchoStar Satellite*, 93 AD3d 33, 43 [1st Dept. 2012]), plaintiff demonstrated that defendants' failure to take active steps to halt the process of automatically recording over 30- to 45-day-old surveillance video and to preserve it for litigation constituted spoliation of evidence (id. at 41, 45). However, spoliation of the video did not "leave[] [plaintiff] prejudicially bereft of appropriate means to confront a claim [or defense] with incisive evidence" (*Kirkland v. New York City Hous. Auth.*, 236 AD2d 170, 174 [1st Dept. 1997] [internal quotation marks omitted]). At trial plaintiff may present testimony of the two deponents who viewed the video to establish that the assailants were not allowed into the building by a tenant (see *Schozer v. William Penn Life Ins. of N.Y.*, 84 NY2d 639, 644-645 [1994]). Therefore, the motion court erred in striking defendants' answer. Accordingly, the appropriate sanction is an adverse inference charge (see *Ahroner v. Israel Discount Bank of N.Y.*, 79 AD3d 481, 482-483 [1st Dept. 2010]; *Tommy Hilfiger v. Commonwealth Trucking*, 300 AD2d 58, 60 [1st Dept. 2002]).

In *Jennings v. Orange Regional Medical Center*,[5] shortly after an incident, plaintiff's attorney sent a letter to defendant requesting that it preserve all

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records in its possession, including video footage. The letter was stapled to the back of plaintiff's incident file and never forwarded to defendant's risk management department. After joinder of issue, and after the defendant denied possessing video footage of the incident, plaintiff moved to strike defendant's answer on spoliation grounds. The court held that "any videotape footage of the incident that may have existed was, in the ordinary course of business, overwritten by new videotape footage within approximately [30] days after the date of the recording." Based on such facts, the Appellate Division held that the motion court improvidently granted plaintiff's spoliation motion to the extent of precluding defendant from introducing evidence at trial that the alleged perpetrator was being supervised by its employees as plaintiff still "can testify about how and where the incident occurred and subpoena other individuals who may have witnessed the incident." The Appellate Division determined that the appropriate sanction would be to direct that a negative inference charge be given at trial with respect to the unavailable video footage.

In *Giuliano v. 666 Old Country Road*,[6] the motion court found that, although plaintiff demonstrated that defendant intentionally or negligently disposed of the video recording of the underlying accident, plaintiff's ability to "prove her case without that recording was not fatally compromised." As such, the Appellate Division found that the appropriate sanction, rather than striking defendant's answer, was to direct that an adverse inference charge be given at trial against defendant with respect to the unavailable recording.

In *Mendez v. La Guacatala*,[7] an assault case at a bar, defendant received a letter within two weeks of the assault, demanding preservation of surveillance video. Defendant testified that he did not review the surveillance video or make an effort to preserve it, as he did not understand the import of the letter, a claim that the motion court found to be "unconvincing." Defendant was "certain" that the incident had been recorded by video, but testified that the police only required the video to be kept for 30 days. Although the video recorded "every area of the premises,"[8] it was automatically erased 30 days after the underlying incident. The Appellate Division agreed with the motion court that plaintiff demonstrated defendants intentionally or negligently disposed of the video, but found that because plaintiff's ability to prove his case without the video was not fatally compromised as plaintiff could testify at trial about the alleged assault by defendants' employees, the appropriate sanction was to direct that a negative inference charge be issued at trial against defendants with respect to the unavailable video surveillance.

In *Kramer v. Macerich Property Management*,[9] in an action seeking to recover for personal injuries that occurred at a mall, plaintiffs cross-moved to strike defendant's answer alleging spoliation of surveillance evidence. Recordings from the surveillance camera were stored on a hard drive, and periodically erased. In the event of an accident, company policy was to segregate the recording and preserve it. It was admitted that the recording showed at least part of the accident and that it was reviewed by a security supervisor and then disposed of. The motion court denied a preclusion sanction, holding that "plaintiffs did not come forward with any evidence that they sought to either preserve or inspect the surveillance video, that they [were] prejudiced by the destruction of the video, or that defendants acted in bad faith, willfully or contumaciously." The motion court, however, found that, where plaintiff was available to testify, a witness existed and photographs of the area were available, the appropriate sanction was an adverse inference to be given at trial.

Courts are having to weigh the equities of the circumstances under which digital images have been "lost" when determining the appropriate sanction.

In *Evans v. New York City Transit Auth.*,[10] where plaintiff tripped and fell on a sidewalk, the issue was whether the complaint should be stricken because plaintiff did not exchange in discovery photographs that she took with her cell phone on the date of the alleged accident. Plaintiff claimed that she had lost her cell phone almost a year after the accident, but prior to commencement of the action, and that the computer to which she "may" have transferred the photographs had been returned as defective. Thus, as plaintiff claimed that she did not possess any other additional photographs and defendants could not demonstrate willful noncompliance with discovery, the motion to strike plaintiff's complaint was denied.

In *Bardy v. Staples*,[11] defendant sought to strike plaintiff's complaint for the failure to produce photographs and a video reenactment of the accident recorded on a cellphone. Plaintiff testified that he took the photographs and video in the event he chose to later sue for his injuries. Plaintiff testified that the cellphone became damaged and contents were not preserved but that, as a "layman," he did not understand the consequences of his actions on the litigation. The court noted that, while defendant demonstrated the cell phone was disposed of, at least, negligently, and that plaintiff thought it might later be needed for litigation purposes, defendant did not establish that it was "prejudicially bereft" of a means of defending the action simply by being deprived of the opportunity to view the video. The court found that defendant offered no evidence to support its position that plaintiff sought to "hide" evidence from defendant. The court, exercising its discretion and "given the circumstances of the case," held that an adverse inference charge may be appropriate, but reserved the matter to the trial judge who would be in a "better position to determine whether it is warranted after hearing the evidence as well as the testimony of the witnesses."

1. As surveillance videos do not necessarily capture all the relevant events, courts are circumspect concerning spoliation motions based on speculative claims that an accident might have been actually captured on a surveillance video. See, e.g., *Cuevas v. 1738 Associates*, 96 A.D.3d 637, 638, 946 N.Y.S.2d 576, 576 (1st Dept. 2012) (Appellate Division found that the motion court appropriately denied plaintiff's motion for a spoliation sanction where there was a lack of concrete evidence that the accident was even recorded in the first place and where plaintiff was still able to pursue her claim through the deposition testimony of a non-party witness).

2. Index No. 308261/09 (Sup. Ct. Bronx Co. March 19, 2012).

3. 2013 N.Y. Slip. Op. 00407, 2013 WL 322684, at *2 (1st Dept. Jan. 31, 2013).

4. See *S.B. v. U.B.*, 38 Misc.3d 487, 494-95, 953 N.Y.S.2d 831, 838 (Sup. Ct. Kings Co. Oct. 31, 2012), in which spoliation was found, and the sanction issued was preclusion of testimony as to the "existence, or contents, of the diary at any hearing." The court also stated that

> a party is responsible for preserving evidence when they are on notice that it may be needed for litigation. This responsibility to preserve evidence may extend to items that are not in the possession of a party when that party negligently fails to take steps to assure its preservation…. Although [the party] and her counsel may not have had access to the un-redacted diary, [the party] was on notice, once she utilized and submitted the entries, that the un-redacted diary may be needed for litigation. As she submitted the excerpts of the diary, [the party] was the party responsible for preserving it, and should have taken steps to ensure the diary's preservation.

5. 102 A.D.2d 654, 958 N.Y.S.2d 168 (2d Dept. Jan. 9, 2013).

6. 100 A.D.3d 960, 962, 954 N.Y.S.2d 215, 217 (2d Dept. 2012).

7. 95 A.D.3d 1084, 1085-86, 944 N.Y.S.2d 313, 314-15 (2d Dept. 2012).

8. Index No. 30401/09 (Sup. Ct. Queens Co. May 12, 2011).

9. Index No. 6672/10 (Sup. Ct. Queens Co. March 29, 2012).

10. Index No. 102654/09 (Sup. Ct. N.Y. Co. Jan. 9, 2013).

11. Index No. 10214/11 (Sup. Ct. Queens Co. Dec. 17, 2012).