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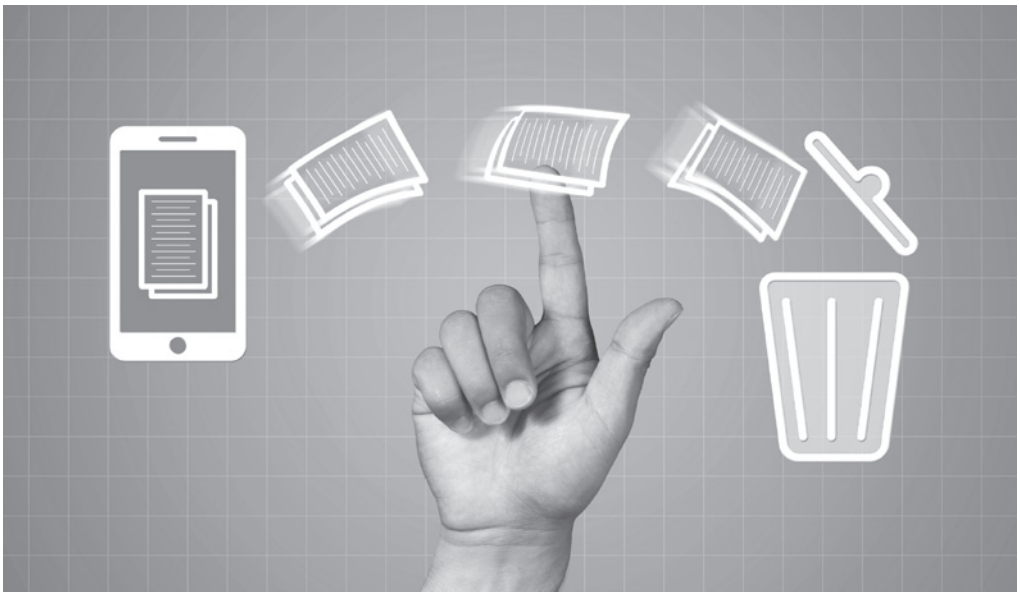
State E-Discovery

'Pegasus' and ESI Audit Trails

By **Mark A. Berman**



ISTOCK

It has been six months since the New York Court of Appeals issued its decision in *Pegasus Aviation I v. Varig Logistica S.A.*,[1] sustaining the concept that spoliation of electronically stored information (ESI) may be predicated upon negligence and, since then, very few cases have construed it. However, a recent Fourth Department decision, *Sarach v. M&T Bank*,[2] raised the issue of what constitutes "willful" or "negligent" spoliation when it comes to the normal company practice of overwriting ESI, and the appropriate sanction or penalty for such conduct. The dissent in *Sarach* cites *Pegasus* and it demonstrates that there is a lack of clarity in the law among judges and practitioners as to when an adverse inference or other sanction should be issued as a remedy for spoliation, and when an entity that becomes aware of an accident is on notice to preserve evidence. Two recent trial court cases, *Platinum Equity Advisors v. SDI*[3] and *Aydin v. Elwood Properties*[4] also rely upon *Pegasus* in analyzing whether the duty to preserve ESI also applies to entities "related" to a party in a litigation. *Gilbert v. Highland Hosp.*[5] demonstrates that a narrow demand for ESI seeking the digital "audit trail" of electronic health records in order to try to establish a specific legal point may be granted.

MARK A. BERMAN, *a partner at commercial litigation firm Ganfer & Shore, chairs the Commercial and Federal Litigation Section of the New York State Bar Association.*

Unclear Impact of 'Pegasus'

In *Sarach*, plaintiff sought preaction disclosure and the preservation of evidence in April 2010. Defendant opposed, but represented to the motion court that it had voluntarily undertaken preservation of surveillance videotapes, and ultimately "consent[ed] to an order of preservation." In October 2010, the court granted plaintiff's application and ordered defendant to preserve all "video tapes, including but not limited to security and surveillance video related to the

subject accident." After an action had been commenced, in 2014 plaintiff requested videos related to the accident, and defendant's counsel advised that the video was no longer available due to the normal business practice of overwriting videos after 90 days, which overwriting had occurred 14 months before the October 2010 preservation order had been issued and one year after the accident had taken place in 2009. Nevertheless, the court granted plaintiff's motion, pursuant to CPLR 3126, to strike the answer on the ground that defendant had violated the court's order of preservation.

On appeal, the Fourth Department majority held that a sanction was warranted inasmuch as defendant "willfully fail[ed] to disclose information" that the court had ordered to be preserved. Nevertheless, the majority held that the motion court abused its discretion in striking defendant's answer, but concluded that an appropriate sanction would be an adverse inference charge given at trial. The dissent noted that such sanction had been imposed by the majority sua sponte without a request by either party. In any event, the majority ruled that it was unable to conclude that defendant's failure to comply with the order was "anything but willful."

The dissent noted that the majority was rightfully concerned about defendant's counsel indicating that the video had been preserved, but that "should not cause [the court] to overlook our precedent and the fundamental facts, which should compel us to conclude here that the evidence was destroyed pursuant to normal business practices and that the evidence was not contumaciously or willfully destroyed." As such, according to the dissent, a sanction under CPLR 3126 was not justified. Rather, a hearing to determine the appropriate sanction should have been ordered pursuant to Part 130 of the Rules of the Chief Administrator of the Courts.

Two recent trial court cases rely upon 'Pegasus' in analyzing whether the duty to preserve ESI applies to entities "related" to a party in a litigation.

The dissent noted that the majority had failed to address the three-prong analysis for spoliation adopted by *Pegasus*. The majority's analysis did not address the first prong, whether "the party having control over the evidence possessed an obligation to preserve it *at the time of its destruction*"[6] because, as noted by the dissent, that would not be possible as the video had been overwritten within ninety days of plaintiff's accident, months before pre-action discovery had been sought or the preservation order issued. Significantly, the dissent found, as a matter of law and fact, that defendant was on "'notice of an impending lawsuit' at the time the surveillance video was overwritten" and had a duty to preserve the video within such ninety day period.

The dissent differed with the majority on the relief ordered, arguing that the more appropriate remedy would have been "'to restore balance to the litigation' by precluding defendant from introducing at trial evidence of the video's content as part of its direct case." The dissent stated that while *Pegasus* indicated that an adverse inference charge, among other remedies, may be an appropriate sanction, it did not hold "that all such remedies are suited to all forms of spoliation, i.e., negligent, grossly negligent, and willful." The dissent noted that, upon finding that the "destruction of evidence was solely the result of negligence—such as through normal business practices—thereby fulfilling the second prong of the *Pegasus* analysis, i.e., a 'culpable state of mind,' an adverse inference charge would be inappropriate because it would be inconsistent with its traditional use as an evidentiary inference that the missing evidence was unfavorable to the spoliator or that destruction of the evidence showed a *consciousness* of a weak case." (emphasis added). The dissent also mentioned that "[t]he federal courts recently grappled with this issue in connection with [ESI] and, with respect to ESI, they have rejected an adverse inference charge premised on negligent conduct."

From a litigator's perspective, *Sarach* raises the broader issue of when is an entity pre-litigation on notice to preserve ESI and what is the preferred "reward" to be granted to the victor upon a finding of spoliation: a specific preclusion order granted in advance of trial or an often undefined adverse inference charge, the language of which is to be determined at a future date, where the defendant at trial may be given the opportunity to present evidence regarding the reasons why the evidence no longer exists; where plaintiff may be required to show the relevance of the missing evidence (or would it be legally presumed); and where the jury may be given the choice to decide if the adverse inference—a presumption which may be rebutted—should be applied. The dissent noted that it "foresee[s] confusion and randomness at the trial court level," but the broader issue to a commercial litigator is, where most cases settle, what type of sanction is most advantageous to it.

Spoliation of ESI by Non-Parties

In *Platinum*, even though, as a general matter, sanctions for the destruction of evidence are applied against the entity responsible for the destruction of the evidence, plaintiffs sought dismissal of a pleading on spoliation grounds because defendant failed to preserve ESI generated by representatives of non-party Celerant Capital—Nathan Kronfrost, Jamie Better, and Don Rice—and its affiliate non-party Celerant Consulting. Plaintiffs contended that, since Kronfrost, Better, and Rice allegedly participated in the due diligence and negotiation of the transaction, their documents are relevant to defendant's claims for breach of the representations and warranties in the underlying agreement. The issue before the motion court was whether defendant exercised sufficient control over these non-parties and their employees and consultants such that defendant—"which is not alleged to have failed to meet its own obligations to preserve or produce documents relevant to this action—can be held liable for spoliation sanctions based on the [non-parties'] nonproduction." Plaintiffs did not contend that the defendant was involved in the destruction of the non-parties' ESI. Instead, plaintiffs asserted that the non-parties should be deemed the "embodiment" of defendant, since defendant is the successor to the holding company formed by one non-party with other non-parties to complete the transaction.

From a litigator's perspective, 'Sarach' raises the broader issue of when is an entity pre-litigation on notice to preserve ESI and what is the preferred "reward" to be granted to the victor upon a finding of spoliation.

The court reviewed the First Department's decision in *Pegasus*[7] which analyzed the nature of the relationship between "legally and organizationally distinct entities." In *Pegasus*, the Appellate Division concluded that the subsidiary's ESI was "sufficiently under the [corporation's] 'practical control' to trigger a duty on their part to ensure that those materials were adequately preserved."[8] The court in *Platinum*, however, found the facts did not demonstrate such "practical control" as defendant was not the sole shareholder of the non-parties (which were not joined in the action) and there was no demonstration that defendant was involved in formulating any of the non-parties' business strategy and there was no admission that defendant could obtain the non-parties' documents upon request.

In *Aydin* the motion court denied plaintiffs' cross-motion to strike defendant's pleading for spoliation or, alternatively, to preclude defendant landlord from using or making reference to a certain video concerning the accident made by its tenant. In moving for summary judgment, defendant landlord relied upon the testimony of plaintiff's non-party

employer-tenant who had watched the video. The video was not preserved and was recorded over as part of a continuous loop within two weeks of the accident. The defendant landlord had no control over the video, and the court stated that "there is no claim, much less any evidence that [the landlord] had any reason to think that it would be a party to an action stemming from any litigation involving a slip and fall at a nursing room that it transferred possession and control over pursuant to a lease agreement." In the end, relying upon *Pegasus*, the court denied the requested relief for a spoliation sanction, as the credibility of the non-party witnesses who viewed the video would be subject to cross-examination and there was no prejudice to either party since both had access to the same evidence.

ESI 'Audit Trails'

In *Gilbert*, a medical malpractice action, the court granted plaintiff's motion to compel the production of the "audit trail" of decedent's electronic health records (EHRs)[9] where the medical records produced to date had not indicated whether an emergency attending physician had reviewed decedent's medical records and plan of care prior to her discharge from the emergency department and plaintiff wanted to quantify the level of such care. The motion court noted that, in addressing the "audit trail" for EHRs, one commentator described it as follows:

> The audit trail is a document that shows the sequence of events related to the use of and access to an individual patient's EHR ["electronic health records"]. For instance, the audit trail will reveal who accessed a particular patient's records, when, and where the health care provider accessed the record. It also shows what the provider did with the records—e.g., simply reviewed them, prepared a note, or edited a note. The audit trail may also show how long the records were opened by a particular provider. Each time a patient's EHR is opened, regardless of the reason, the audit trail documents this detail. The audit trail cannot be erased and all events related to the access of a patient's EHR are permanently documented in the audit trail. Providers cannot hide anything they do with the medical record. No one can escape the audit trail. (2011 Health L. Handbook §10:9 "The positive effect of EHRs on reducing health care provider liability—the audit trail").

The motion court agreed that the "audit trail *will* account" for the attending physician's accessing and viewing decedent's EHRs, a topic plaintiff "may wish to explore further during a deposition or on cross-examination." The motion court noted that system metadata is relevant if the authenticity of a document is questioned or, as here, "if establishing who received what information and when is important to the claims or defenses of a party."[10]

1. 26 N.Y.3d 543, 26 N.Y.S.3d 218 (2015).
2. 2016 N.Y. App. Div. LEXIS 4723, 2016 N.Y. Slip Op 04820 (4th Dep't June 17, 2016).
3. 2016 N.Y. Misc. LEXIS 2103, 2016 N.Y. Slip Op 50887(U) (Sup. Ct. N.Y. Co. June 7, 2016).
4. Index No. 601016/2014 (Sup. Ct. Nassau Co. Feb. 16, 2016).
5. 31 N.Y.S.3d 397 (Sup. Ct. Monroe Co. March 24, 2016).
6. Id.
7. 118 A.D.3d. 428, 987 N.Y.S.2d 350 (1st Dep't 2014), rev'd on other grounds, 26 N.Y.3d 543, 26 N.Y.S.3d 218 (2015).
8. Id.
9. This author addressed the production of EHR "audit trails" in two prior articles: Mark A. Berman, "Medical Malpractice E-Discovery, Preservation and Privilege Logs," NYLJ Vol. 254 No. 43, Sept. 1, 2015, and Hon. John M. Curran and Mark A. Berman, "Gremlins and Glitches," New York State Bar Association Journal, May 2013.
10. *Aguilar v. Immigration and Customs Enf't Div. of U.S. Dep't Homeland Sec.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008).

GANFER & SHORE, LLP
ATTORNEYS AT LAW

360 Lexington Avenue
New York, New York 10017
212.922.9250
mberman@ganfershore.com