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STATE E-DISCOVERY

Recent Rulings Focus On Spoliation of ESI

By **Mark A. Berman**

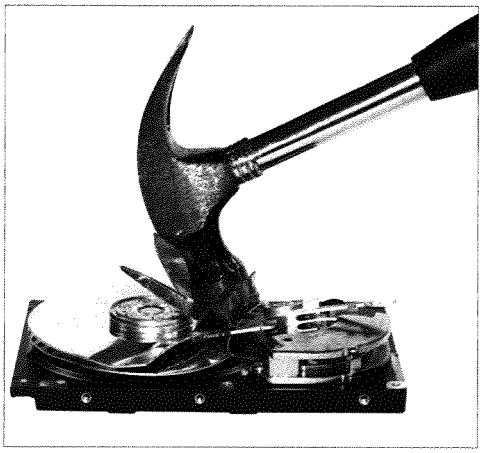
Significant New York state court decisions have recently been rendered on the issue of spoliation of electronically stored information (ESI).

The Appellate Division, First Department, in *Ahroner v. Israeli Discount Bank of New York*,[1] which affirmed that an adverse inference instruction under the circumstances was an appropriate sanction for ESI spoliation, set forth the standard needed to demonstrate that ESI spoliation has occurred and made clear that grossly negligent conduct may serve as a predicate for such a sanction.

In a decision in *Ahroner* on renewal of the underlying decision that was issued two months before the Appellate Division ruled,[2] the motion court held that defendant at trial would have the opportunity to rebut the adverse inference.

The decisions discussed here emphasize that the "punishment must fit the crime" and that any spoliation sanction should be proportionate under the circumstances to the degree of mens rea of the offending party. This means taking into account the failure to comply with disclosure requests and court orders, if any; appropriate and timely notice of an obligation to preserve the ESI; and, significantly, the relevance of the ESI and "prejudice" to the moving party, which would include any negative effect on the actual prosecution or defense of an action, as well as the monetary expense of moving for a spoliation sanction.

In *Ahroner*, the appeals court held that on a motion for spoliation sanctions "involving the destruction of electronic evidence, the party seeking sanctions must establish that (1) the party with control over evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed[3] with a 'culpable state of mind,' and (3) the destroyed evidence



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was 'relevant' to the moving party's claim or defense. A culpable state of mind,' for purposes of a spoliation inference, includes ordinary negligence."

The First Department found that since the "drive was destroyed either intentionally or as the result of gross negligence, the court properly drew an inference as to the relevance of the emails stored on the drive." The court held that the trial court also properly "exercised its discretion in limiting its sanction against defendants to an adverse inference charge," noting that the sanction was "proportionate[4] as it did not permit the jury to infer that any e-mails on the drive would support plaintiff's claims, but only that any e-mails would not support defendants' defense or contradict plaintiff's claims."[5]

Even before the First Department ruled in *Ahroner*, defendant had moved for renewal of the motion court's ruling that had granted the sanction of an adverse inference instruction.[6] The motion court, in denying renewal, noted that Southern District Judge Shira A. Scheindlin last year in *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp. 2d 456, describes three types of adverse inference instructions, the "harshness of which should be based on 'the nature of the spoliating party's conduct—the more egregious the conduct the more harsh the instruction.'"[7]

The motion court noted that Judge Scheindlin wrote:

> In the most harsh form, when a spoliating party acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true.[8] At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory presumption, however, is considered to be rebuttable. The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating parties evidence must be considered by the jury, which must decide whether to draw an adverse inference against the spoliating party.[9]

The motion court found that it had imposed an appropriate sanction by directing that the following adverse be given at trial: "the emails on the hard drive would not support defendants' defense that Ahroner was terminated as part of an overall plan to reorganize and help the Bank remain profitable and because his position was being eliminated, and would not contradict evidence introduced by Ahroner that he was terminated as a result of discrimination based on age and religion."

The court indicated that such charge would be fashioned in accordance with CPLR 3126(a) and is consistent with the charges contained in New York Pattern Jury Instructions:

> Notably, neither the PJI charges nor the original decision precludes the defendants from presenting evidence that the emails on Bastante's hard drive were not relevant to Ahroner's claims. Thus, the original decision is not at odds with the Pension decision's clarification that the spoliating party should have an opportunity to rebut the inference created by the bad faith or grossly negligent destruction of evidence.

The lower court further noted that:

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while the *Pension* decision held that under certain circumstances, the presumption of relevance and prejudice can be rebutted by the spoliating party as a matter of law, this court finds that a jury should determine the issue in the instant case, particularly given the circumstances involved, which include the wiping clean of a hard drive that the Bank specifically agreed to preserve and to have examined by a forensic expert, and defendants' reliance on their own self-serving testimony as to the relevance of the emails at issue."

Evidence Preclusion

In *Chambers v. 37-32 104th Street Realty Corp.*,[10] defendant testified at a deposition that she had sent more than 50 letters to tenants telling them not to open certain stairwell windows from which rainwater would enter a building, but she was unable to provide copies "because the computers on which she produced the letters are unavailable and she has no copies."

The court granted plaintiff's motion to strike defendants' answer on spoliation grounds "to the extent that defendants are precluded from presenting any evidence related to a showing that tenants were asked/advised to keep the windows on the landings closed/locked or that they sent letters to defendant to keep the windows closed/locked."

The court further noted that the order may be revised if, prior to trial, additional information is "presented or adduced to show that defendant's inability, reluctance or refusal to produce the letters in question is knowing or deliberate."

Adverse Inference

In *Wisniewski v. Pacoa*,[11] plaintiff sought summary judgment or, alternatively, an adverse inference charge, predicated on the alleged spoliation of a real-time surveillance video depicting where plaintiff claimed the accident occurred. Although plaintiff served a demand for surveillance materials, and defendant initially responded that "it had no surveillance materials," a tape was produced following the warehouse manager's deposition.[12]

The warehouse manager testified that he did not know how long the surveillance system maintained images, but was aware that at a certain time the system writes over what was previously recorded.

However, the property manager testified that the surveillance tape he viewed did not depict plaintiff and there was nothing in the "surveillance tape from the date of [p]laintiff's accident that suggested...that the surveillance was tampered with or otherwise not authentic."

Reviewing what is necessary to demonstrate spoliation, the court observed that:

> where a party negligently or intentionally destroys essential physical evidence 'such that its opponents are prejudicially bereft of appropriate means to confront a claim with incisive evidence, the spoliator may be sanctioned by the striking of its pleading.' Even in situations where 'the evidence was destroyed before the spoliator became a party, [a sanction may justified] provided [the offender] was on notice that the evidence might be needed for future litigation.'

However, "[w]here a party did not discard crucial evidence in an effort to frustrate discovery, and cannot be presumed to be responsible for the disappearance of such evidence, spoliation sanctions are inappropriate." Similarly, where the evidence lost is not central to the case, or its destruction is not prejudicial a sanction may not be appropriate.

Ultimately, the determination of whether to impose sanctions for spoliation is a matter within the broad discretion of the court.

The court found no evidence in the record to establish that defendants "intentionally destroyed and/or edited" the video.

While the court indicated that it was not convinced that the loss of the "'relevant' portions of the surveillance video places the [p]laintiff at any significant disadvantage in proving his claim that he slipped and fell on a patch of ice at the subject premises," the court held that:

> the [p]laintiff nevertheless, may be entitled to an adverse inference charge, pursuant to Pattern Jury Instructions 1:77.1 at trial with respect to the loss of the relevant video. That is, even though the [p]laintiff fails to demonstrate that the surveillance tape is crucial or key evidence such as to warrant the extreme sanction of striking the...[a]nswer or granting...summary judgment...if it becomes clear that a sanction for losing the 'relevant' portions of the surveillance tape is warranted, an adverse inference charge may be given at the time of trial.

While the sanction of striking a pleading or summary judgment may not be appropriate under the circumstances, adverse inferences depending on the true 'prejudice' demonstrated can and will be imposed against the offending party at trial.

Specific Preservation Notice

The court in *Wisniewski* found that a letter sent by prior counsel to defendant was "insufficient" and did not constitute the "requisite 'notice to preserve' evidence relating to a potential lawsuit" and there was not "enough information available to the [d]efendants on the day of the incident to indicate that these materials 'might' became necessary in the future," as such, the "loss of said materials can not be construed as having been intentional."

Conclusion

The risks associated with not sending an appropriate preservation notice and with potential "negligent" spoliation of evidence need to be always considered.

Further, while the sanction of striking a pleading or summary judgment may not be appropriate under the circumstances, adverse inferences depending on the true "prejudice" demonstrated can and will be imposed against the offending party at trial.

1. 79 A.D.2d 481, 913 N.Y.S.2d 181 (1st Dep't 2010).

2. *Ahroner v. Israel Discount Bank of New York*, Index No. 602192/03 (Sup. Ct. N.Y. Co. Sept. 30, 2010).

3. See *Sinrich v. Fernwood Enterprises, Inc.*, Index No. 603799/08 at 4 (Sup. Ct. N.Y. Co. Jan. 25, 2011) ("court finds that [d]efendants have demonstrated that they have produced all responsive documents (or have otherwise accounted for them in a privilege log); and that there is insufficient evidence in the record to do anything more than speculate that responsive [emails] have been either lost or destroyed by [d]efendants").

4. See *W & W Glass, LLC v. 1113 York Avenue Realty Company LLC*, — N.Y.S.2d —, 2011 WL 1308418 at *1 (1st Dep't Apr. 7 2011) (First Department reversed lower court decision striking answer as the "record fails to support the motion court's determination that defendants' failure to comply with discovery obligations was willful, or in bad faith. Absent such showing, the motion court erred in imposing the "harshest available penalty" against defendants. Finally, we note that the record discloses no evidence of defendants' repeated failures to comply with the court's discovery orders. Indeed, there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR 3126 premature in this case."); *Williams v. New York City Transit Authority*, 26 Misc. 3d 1207(A), 906 N.Y.S.2d 784, 2010 WL 58307, at *4 (Sup. Ct. Kings Co. 2010) (Striking a pleading was not appropriate when missing electronic data was ultimately produced even if "willful" or "inept and evinced a total disregard for...discovery obligations under the CPLR"; however, a monetary sanction representing the time expended in addressing the issue was granted.).

5. Id. at 482-83, 913 N.Y.S.2d at 182. The lower court's initial decision in *Ahroner* was analyzed in this author's article entitled "Recent Decision Stress Needs to Preserve Electronic Data," Berman and Taback, N.Y.L.J., Sept 22, 2009.

6. *Ahroner*, Index No. 602192/03, at 1 (Sup. Ct. N.Y. Co. Sept. 30, 2010).

7. Id. at 6 (quoting *Pension Committee*, 685 F.Supp. 2d at 470).

8. See *Ashley MRI Management Corp. v. Perkes*, Index No. 1915/05 at 17 (Sup. Ct. Nassau Co. Feb. 1, 2010) (court denied plaintiff's motion to strike defendant's answer, but permitted it "leave to argue at trial as to any adverse inferences to be drawn from [d]efendants' conduct, if the testimony establishes that [d]efendants have willfully failed to comply with their discovery obligations.").

9. *Ahroner*, Index No. 602192/03, at 6 (Sup. Ct. N.Y. Co. Sept. 30, 2010) (quoting *Pension Committee*, 685 F.Supp. 2d at 470) (emphasis in original).

10. Index No. 29238/08 (Sup. Ct. Queens Co. Mar. 11, 2011).

11. 31 Misc. 3d 1204(A), 2011 WL 1205464, 2011 N.Y. Slip Op. 50485 (Sup. Ct. Nassau Co. Mar. 31, 2011).

12. Id. at *3. Counsel entered into an agreement that the defendant witness would be produced for further testimony, at plaintiff's election, following plaintiff's receipt of the tape.

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