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New York State E-Discovery Law

BY MARK A. BERMAN

Spoliation of Electronically Stored Information

Spoliation has been "defined as the destruction or significant alteration of evidence, or the failure to preserve crucial items as evidence in pending or reasonably foreseeable litigation."[1]

In *House of Dreams, Inc. v. Lord & Taylor, Inc.*,[2] "spoliation" was defined as "the deliberate destruction, or the significant and meaningful alteration of, a document or instrument constituting evidence" going on to state that it is a "form of obstruction of justice."[3]

Successful spoliation applications, which may be predicated on intentional or negligent conduct, can determine the outcome of a litigation. Accordingly, it is imperative that litigation counsel be aware of New York "spoliation" law as it relates to electronically stored information, where such information can be deleted with no more than the push of a button.[4]

New York Courts

It is well-settled that New York courts have broad discretion "to impose sanctions under CPLR 3126 when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection."[5] New York law "recognizes two forms of spoliation of evidence: where the evidence was destroyed willfully or in bad faith, and where there was negligent destruction of evidence."[6]

Courts have "upheld the imposition of…sanctions in cases where a litigant 'negligently… disposes of crucial items of evidence…before his or her adversary had an opportunity to inspect them.'"[7] In the first instance, however, a successful spoliation application requires that the party which allegedly "spoiled" the evidence had a duty to preserve it.[8]

The trial court in *Donner v. One Network*,[9] recently addressed the various degrees of sanctions that may be issued where there is spoliation. If the evidence lost was "essential for the opposing party's claim," striking a pleading may be appropriate; if "a party has gained an unfair advantage or has prejudiced the nonresponsible party," the lesser sanction of preclusion may be appropriate; or if the spoliation "is not central to the case" or not prejudicial, the court may impose an even lesser sanction or no sanction.[10] In finding the destruction of e-mails concerning plaintiff's alleged "for cause" termination not to have "irreversibly prejudiced" plaintiff "because he appears to have sufficient documentation to prove his claims," the court decided not to strike defendant's pleading, but instead found that defendant is "precluded from offering any evidence or testimony as to its defense that it fired [plaintiff] for cause."[11]

Courts have held that it must be "conclusive"[12] that data was "'willfully discarded or destroyed to frustrate the plaintiff's interests' [for a court to]… strik[e]… defendant's answer."[13]

'Friel' reversed the striking of an answer predicated upon the lower court's finding of spoliation where plaintiffs had "inspected the hard drive and obtained the relevant information prior to its destruction."

As the Second Department held in *Playball at Hauppauge, Inc. v. Narotzky*,[14] "[t]he deletion of computer data by the plaintiff['s]…son left [defendant] without the ability to defend against the plaintiffs' allegations of mismanagement and waste of corporate assets" and accordingly, "[p]rior to trial, the plaintiffs' fiduciary claim against [defendant] was dismissed on spoliation of evidence grounds."[15] Similarly, in *Long Island Diagnostic Imaging, P.C. v. Stony Brook Diagnostic Assocs.*,[16] the court held that "[d]espite several court orders directing the defendants to produce billing records, including computer databases, the defendants purged their databases in 1993. The back-up tapes which were ultimately produced pursuant to court order were compromised and unusable. The striking of a party's pleading is a proper sanction for a party who spoliates evidence."[17]

'Evolving Rule'

"The 'evolving rule' is that a spoliator of key physical evidence is 'properly punished by the striking of its pleading…even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided that it was on notice that the evidence might be needed for future litigation.'"[18]

However, where there is no willful or contumacious behavior, courts "look to the extent that the spoliation of evidence may prejudice a party."[19] In *American Business*,[20] the defendant, among other things, was alleged to have been on notice of the subject dispute and then failed to appropriately preserve the physical computer of a former critical employee, but instead created a compact disk (CD) containing the computer's contents and produced such CD.[21] The court, apparently acknowledging that negligent spoliation took place, stated that "while there is evidence that defendant and/or its counsel took an irresponsible attitude to complying with discovery obligations, plaintiff has failed to establish that defendant engaged in willful or contumacious behavior, or that plaintiff has suffered extreme prejudice so that the harsh remedy of striking defendant's answer is required as a matter of fundamental fairness."[22] "Where spoliation does not result in prejudice, it will be disregarded."[23]

"[U]nder a theory of 'spoliation,' the Court will only strike an alleged spoliator's pleading if, as a result of his destruction of evidence, its opponents are 'prejudicially bereft of appropriate means to confront a claim by incisive evidence.'"[24] Thus, the court in *House of Dreams* denied a motion to strike a pleading where, inter alia, there was no evidence of "mens rea" and "no evidence that material 'erased' from defendants' electronic system cannot be reconstructed from [backup-disaster-recovery] tapes; or even, failing reconstruction, that any missing evidence was so 'central to the case' that without it plaintiff would be deprived of the means of proving his claim."[25] The court further noted that even were spoliation found, the "drastic sanction" of striking an answer "should only be imposed in 'extreme

Mark A. Berman, *a partner at Ganfer & Shore, has extensive experience in securities and general commercial litigation.*

circumstances' with due regard to the spoliator's culpable state of mind and 'after consideration of alternative, less drastic sanctions.'"[26]

In *Friel v. Rev. Charles E. Papa*,[27] the Second Department recently reversed the striking of an answer predicated upon the lower court's finding of spoliation where plaintiffs had "inspected the hard drive and obtained the relevant information prior to its destruction" and therefore they would "not be deprived of the means of proving their case."[28] The Appellate Division ruled that "the plaintiffs failed to show that the evidence destroyed was central to their case or that they were prejudiced by its destruction."[29] The lower court had stricken defendant's answer finding that "defendants' discarding of the computer hard drive, months after same was demanded, has deprived the plaintiffs of appropriate means to confront a claim with incisive evidence, especially where the defendant…denies the plaintiff's allegations."[30]

Consistent with requiring legal prejudice in order to strike a party's pleading resulting from spoliation, the court in *Ignolia v. Barnes & Noble College Booksellers, Inc.*,[31] denied dismissing plaintiff's case. In *Ignolia*, legal prejudice was not found where defendant's forensic expert was able to identify and delineate all files intentionally "deleted" from plaintiff's computer through the installation of two computer programs, File Shredder and History Kill, subsequent to defendant's demand and a court order requiring the inspection of the computer's hard drive.[32] However, the court required plaintiff to bear the cost of defendant's forensic computer expert.[33]

Striking a Pleading

A court's consideration of whether to strike a pleading is also dependent on the status of the case,[34] and a court may decide to hold a spoliation hearing[35] or may choose to wait until trial to determine the facts concerning an alleged spoliation claim before ruling on whether to strike a pleading as in *Glass v. Physicians Billing Serv., Inc.*[36]

In *Glass*, electronic records and computer backup were destroyed by defendant allegedly in the ordinary course of business one month after its notice to plaintiffs that it was phasing out its business and one month before being notified by plaintiff of a request for documents and prior to commencement of litigation.[37] Defendant contended that plaintiff had been given access to its computer database during the course of the litigation that contained "all" the information plaintiff sought. The court ruled that "[t]hough some sanction, such as preclusion of evidence, or even striking of defendant's answer, may yet prove to be appropriate, the court finds that striking of defendant's answer at this time would be premature, while so many factual issues surrounding the handling and use of this evidence are unresolved. The issue will be resolved at the time of trial."[38]

Conclusion

Simply, counsel and parties need to ensure that electronically stored information is properly preserved. A demonstration of willful spoliation will no doubt result in severe sanctions.

But, what will inevitably become increasingly common are applications predicated upon negligent spoliation resulting from inadvertent destruction or loss or from routine document retention policies. In connection with such motions, courts will need to determine what type of notice the party in possession of the information had of the need to preserve it, when such materials were destroyed and under what circumstances, did the requesting party have access to such materials at some point, and whether the party seeking the materials would be legally prejudiced by not having access to such information in connection with the litigation and, if so, to what extent.

1. *Am. Bus. Training, Inc. v. Am. Mgmt. Ass'n*, Index No. 603909/02, at *5 (N.Y. Sup. Ct. April 11, 2005) (citing *Miller v. Weyhaeuser Co.*, 3 A.D.3d 627, 771 N.Y.S.2d 200 (3rd Dept. 2004) and *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999)).

2. Index No. 122902/02 (N.Y. Sup. Ct. March 15, 2004).

3. *House of Dreams*, at *18 (citing Black's Law Dictionary, 5th ed. at p. 1257.).

4. Whether an independent cause of action for spoliation exists under New York law, however, is unsettled. See *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 483-84, 775 N.Y.S.2d 754, 756-57 (2004) (declining to endorse a spoliation cause of action, where the alleged spoliator had no notice of an impending lawsuit and "no duty, court order, contract or special relationship" obligating it to preserve the evidence.); *SAT Intern. Corp. v. Great White Fleet (US) Ltd.*, 2006 WL 661042, at *12 (S.D.N.Y. March 16, 2006) ("The New York Court of Appeals has not explicitly recognized…the cause of action for spoliation of evidence.").

5. *Puccia v. Farley*, 261 AD2d 83, 85, 699 N.Y.S.2d 576, 577 (3rd Dept. 1999) (citing *Matthews v. McDonald*, 241 A.D.2d 808, 661 N.Y.S.2d 80 (3rd Dept. 1997) and *Matter of Cullen*, 143 A.D.2d 746, 533 N.Y.S.2d 454 (2nd Dept. 1988)).

6. *American Bus.*, at *5 (citing *Squitieri v. City of New York*, 248 A.D.2d 201, 669 N.Y.S.2d 589 (1st Dept. 1998) and *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 666 N.Y.S.2d 609 (1st Dept. 1997)).

7. *Cummings v. Control Tractor Farm & Country*, 281 A.D.2d 792, 793, 722 N.Y.S.2d 285, 286 (3rd Dep't 2001) (quoting *Abar v. Freightliner Corp.*, 208 A.D.2d 999, 1001, 617 N.Y.S.2d 209, 212-13 (3rd Dept. 1994)).

8. The duty to preserve electronically stored information under New York law will be the subject of my next article.

9. Index No. 601015/04, at *12-13 (N.Y. Sup. Ct. Dec. 17, 2006).

10. Id. at *13.

11. Id.

12. See *Lehrman v. Moose*, Index No. 600151/03, at *1 (N.Y. Sup. Ct. Sept. 4, 2003) (denial of motion for sanctions due to alleged spoliation based on plaintiff's alleged deletion of electronic materials from defendant's computers or servers; defendant only submitted self-serving, conclusory affidavit that materials had been deleted).

13. *Reingold v. Vill. of Garden City*, Index No. 35222/97, at *8 (Nassau Co. Sup. Ct. Aug. 12, 2004) (quoting *Vaughn v. City of New York*, 201 A.D.2d 556, 558, 607 N.Y.S.2d 726, 729 (2nd Dept. 1994)) and (citing Siegel, Supplementary Practice Commentaries, 2004 Electronic Update, McKinney's Cons. Laws of New York, Civil Practice Laws & Rules, C3126:8 and *Osterhoudt v. Wal-Mart Stores, Inc.*, 273 A.D.2d 673, 709 N.Y.S.2d 685 (3rd Dept. 2000)).

14. 296 A.D.2d 449, 745 N.Y.S.2d 70 (2nd Dep't 2002).

15. *Playball*, 296 A.D.2d at 450, 745 N.Y.S.2d at 71-72.

16. 286 A.D.2d 320, 320, 728 N.Y.S.2d 781, 782 (2nd Dept. 2001).

17. Id. See also *Delponte v. King Kullen Grocery Co.*, Index No. 6434/04, at *4-5 (Queens Co. Sup. Ct. April 25, 2006) (videotape reviewed by defendant, but defendant "elected not to preserve" it and it was erased even though relevant images, according to defendant's policy, "can be saved and preserved"; answer stricken); *Huntley v. Compare Foods and Greyben Realty Corp.*, 2004 WL 2187600, at *2, 4 Misc. 3d 1027(A), 798 N.Y.S.3d 344 (Nassau Co. Dis. Ct. Sept. 24, 2004) ("[D]efendants are "spoliater[s] [sic.] of key physical evidence and the videotape and photographs… were lost during the litigation process and while defendant had notice or knowledge of this action and a duty to preserve these items"; answer stricken).

18. *Reingold*, at *8 (quoting *DiDomenico*, 252 A.D.2d at 53, 682 N.Y.S.2d at 459).

19. *Puccia*, 261 A.D.2d at 85, 699 N.Y.S.2d at 577 (quoting *Kirkland*, 236 A.D.2d at 175, 666 N.Y.S.2d at 612-13).

20. See *American Bus.*, at *6-7 (denial of motion to strike pleading and enter a default where party failed to meet its burden of coming forward with "a 'clear-cut showing' that defendant willfully or contumaciously failed to comply with court orders or destroyed evidence, or that defendant failed to identify the key players involved and to attempt to gather relevant information").

21. Id. at *8-9.

22. Id. at *10 (citations omitted).

23. *American Bus.*, at *6 (citing *Lane v. Fisher Park Co.*, 276 A.D.2d 136, 718 N.Y.S.2d 276, (1st Dept. 2000)).

24. *House of Dreams*, at *18 (quoting *Foncette v. L.A. Express*, 295 A.D.2d 471, 472, 744 N.Y.S.2d 429, 430-31 (2nd Dept. 2002)).

25. Id. at *21 (citing *Mylonas v. Town of Brookhaven*, 305 A.D.2d 561, 759 N.Y.S.2d 752 (2nd Dept. 2003)).

26. Id. at *18 (quoting *Matthias v. Jacobs*, 197 F.R.D. 29, 37 (S.D.N.Y. 2000), vacated on other grounds, 167 F. Supp.2d 606 (S.D.N.Y. 2001)).

27. 2007 WL 178921, 36 A.D.3d 754, __N.Y.S.2d__ (2nd Dept. Jan. 23, 2007).

28. 2007 WL 178921, at *1.

29. Id.

30. *Friel v. Papa*, Index No. 4285/04, at *2 (Nassau Co. Sup. Ct. May 5, 2006). See also, *Friel v. Papa*, Index No. 4285/04, at *2 (Nassau Co. Sup. Ct. Dec. 14, 2006) (reargument granted and trial court adhered to prior ruling; "[D]efendant maintains that although the defendant willfully discarded the computer hard drive in question months after it [was] duly demanded as part of discovery, that the discarding of the hard drive does not make it impossible for plaintiffs to prove their claim").

31. Index No. 05-3002, at *2 (Nassau Co. Sup. Ct. July 25, 2006).

32. Id.

33. Id. See also *Ansolone v. 6645 Owners Corp.*, Index No. 113553/01, at *5-6 (N.Y. Sup. Ct. Feb. 21, 2006) (failure to produce records due to "change in computer programming" did not warrant striking of answer and a "lesser sanction of preclusion may be appropriate."); *European American Bank v. Miller*, Index No. 38819/97, at *3 (Kings Co. Sup. Ct. May 7, 2002) (bank expunged computerized history of event one year after litigation began; motion to strike complaint denied because lack of history would not prevent defendant from establishing his defenses and plaintiff had not gained an unfair advantage as a result of the missing information).

34. See *McCarthy v. Philips Electronic North*, Index No. 112552/03, at *1-2 (N.Y. Sup. Ct. May 16, 2006) (denial of motion for sanctions that alleged spoliation of a certain email where "at this juncture, given that (1) plaintiffs have yet to inspect the server or provide an affidavit from its IT expert concerning the ability to obtain such email from the server and (2) plaintiff has yet to attempt to obtain said email from [a certain defendant's] computer and/or server").

35. See *Betancourt v. Ioannou*, Index No. 103568/04, at *2 (N.Y. Sup. Ct. Jan. 18, 2007) (spoliation claim referred to referee to report on the issues of "(1) whether defendants willfully discarded or destroyed their file and/or hard drive to frustrate plaintiff's interests and, if so (2) what would be the appropriate sanction."); *Reingold*, at *8 ("A spoliation hearing shall be held to determined when the offending…data was deleted and whether defendant was on notice that the data was needed for future litigation, and also whether data was 'willfully discarded or destroyed to frustrate' plaintiff's interests.") (citations omitted.)

36. Index No. 603729/00, at *4-5 (N.Y. Sup. Ct. Nov. 29, 2002). See also *Arnez v. Duane Reade, Inc.*, 2006 WL 2353209, at *2, 12 Misc. 3d(A) (Richmond Co. Sup. Ct. May 3, 2006) (surveillance tape was reused in normal course of business and CD on to which the information was copied could not be located; no sanctions awarded as videotape was recycled in normal course of business and plaintiff failed to establish defendant had notice of lawsuit at such time; no showing that failure to produce CD was due to willful, contumacious or in bad faith, but plaintiff would be permitted to introduce evidence of the CD recording at trial and submit New York Pattern Jury Instruction 1:77—the adverse inference charge for failing to produce documents).

37. Id. at *2-4.

38. Id. at 5.