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STATE E-DISCOVERY

Proportionality in ESI Spoliation Sanctions and Facebook Discovery

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Litigators and the courts understand that the "punishment must fit the crime." As such, the sanction for an ESI spoliation offense often does not merit that a party's pleading be stricken, although sought in most instances. Rather, recent decisions review in detail the circumstances surrounding digital or electronic spoliation claims, and courts seek to craft a balanced sanction upon reviewing the "prejudice" to both sides, which might be the issuance of an adverse inference charge or a preclusion order. Alternatively, courts may direct further discovery, including depositions, in an attempt to be able to more clearly evaluate the circumstances under which ESI spoliation occurred, or defer issuing a sanction until a later date, with the goal of then being able to determine the appropriate sanction on a proper record.

Facebook discovery is also becoming more refined. Movants are seeking to compel Facebook evidence predicated upon "narrower" ESI requests. In addition, movants are first reviewing what is publicly available on Facebook or from other public sources in order to convince a court that private Facebook evidence should be produced where it would "contradict" positions taken by the opposing party. Movants also are suggesting that any review of private Facebook postings be done in camera.

Adverse Inference Sanction

In *Ware v. Atlantic Towers Apt.*,[1] plaintiff tripped on a premises owned and operated by two codefendants, and the court held that these codefendants "failed to preserve video surveillance footage by recording it on DVD or CD when it was 'on notice of a credible probability' that they would become involved in litigation as a result of Plaintiff's accident." A third codefendant, however, had visited the premises, and he testified that he and the night security guard had watched a video that showed that plaintiff fell on her own. Both plaintiff and the third codefendant moved for a spoliation sanction.

The court took into account defendants' "history of providing belated, evasive and incomplete disclosure," including the name of the security guard, and that defendants had not set forth what steps they had made to preserve and search for such video footage. The court found that, where the third codefendant would be prevented, under the "Best Evidence Rule," from testifying to what he saw on the video, the loss of the video deprived it of "key and incisive evidence" that would have rebutted plaintiff's testimony that sought to place liability on such third codefendant. Accordingly, the court struck defendants' cross-claims against the third codefendant. With respect to the plaintiff, the court held that an adverse inference charge would be the appropriate sanction. However, plaintiff failed to set forth the adverse inference sought. The court deferred until trial to decide what may be the appropriate charge because to craft one earlier might prejudice the third codefendant as it could allow for an inference contrary to the third defendant's testimony of what he observed on the video, which it was precluded from testifying to under the Best Evidence Rule.

Preclusion Order Sanction

In *Hameroff and Sons v. Plank*,[2] while defendant contended that certain emails were irrelevant, it provided no explanation for its failure to produce them. However, the court noted that the "relevance of destroyed documents is presumed if the destruction was intentional or willful." Further, the court found that their relevance was established by defendant's reliance on one of them in support of its motion for summary judgment. The court indicated that, despite numerous deadlines and multiple court orders regarding discovery, defendant had not objected to plaintiff's demands and that such "pattern of noncompliance gave rise to an inference that the nondisclosure was willful." As such, the court precluded defendant from offering evidence concerning the critical stipulation of settlement, which defendant alleged had been breached by plaintiff.

In *Acosta v. MTA Bus*,[3] defendant MTA failed to produce a certain videotape, even though its report of an accident indicated that "investigation of security cameras in area showed incident never occurred." Each MTA employee swore that they had not viewed such tape. The court noted that while "it is clear that a party may not be held responsible for the spoliation of evidence that it never actually possessed or controlled and then destroyed," it is "inconceivable" that the MTA had not timely raised such issue. Nevertheless, as a prophylactic measure,

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the court, while denying the motion to strike defendant's pleading, held that the MTA shall be "barred from making any reference to, or offering into evidence at trial, any purported surveillance tape(s) showing, or failing to show, the alleged incident in question, unless said surveillance tapes are provided to plaintiff's counsel within thirty (30) days."

Determination Deferred

In *Howard-Banks v. Flynn Meyer Hempstead*,[4] when defendant first became aware of the "possibility of legal action," defendant sought to have a surveillance tape copied onto a flash drive. Defendant then put the videotape back into its 30 day rotation schedule. Unfortunately, the transferring to the flash drive was not successful and no tape then existed which would reflect the event. Plaintiff's motion to strike defendant's answer was denied, but defendant was ordered to produce the flash drive provided to its investigator, and that if "it cannot be located, the investigator and the insurance company representative who received it are to be produced and deposed concerning the flash drive as well as its content."

In *Signature Med. Mgmt. Group v. Levy*,[5] a legal malpractice action, plaintiff asserted that defendant law firm failed in an arbitration to properly produce source data relied upon by its expert, which resulted in the exclusion of a certain exhibit, an expert report and expert testimony. Plaintiff claims that the arbitration would have settled on a more favorable basis if such source data had been produced. Plaintiff moved to strike defendant's answer on the basis that emails concerning the source data sent to and by the individual attorney who represented it had been deleted by defendant law firm's outside computer consultant after the defendant attorney had left his law firm. Because plaintiff had not established that the emails could not be reconstructed where plaintiff itself may possess, or may have the ability to recover, them, the court denied plaintiff's motion to strike with leave to seek an appropriate sanction at trial. The court held that a lesser sanction may be appropriate upon a showing that "defendants were responsible for the destruction of the emails and that plaintiff has been prejudiced."

Facebook Discovery

In *Paccione v. Bradica*,[6] plaintiff in his verified bill of particulars claimed that the injuries he suffered as a result of an accident were permanent in nature and caused limitation in motion, and, as a result, he has "chronic pain and discomfort, mental anguish and distress, anxiety, depression, mental and emotional suffering and impairment of ability." Where plaintiff changed his deposition testimony concerning physical altercations that occurred, as well as trips and vacations he took, post-accident, defendant asserted that, based on such discrepancies, "private information sought from the Plaintiff's Facebook page are relevant and discoverable... as [plaintiff] has placed his physical condition in issue pertaining to his normal daily activities and enjoyment of life."

Plaintiff's change in testimony was predicated upon postings on plaintiff's public Facebook page. The court found that defendants demonstrated that plaintiff's Facebook profile contained information that was "probative" of the issue of the extent of plaintiff's alleged injuries and "it is reasonable to believe that other, private portions of his Facebook records may contain further evidence relevant to that issue." The court found that since plaintiff's testimony "contradicted" what he stated in his Facebook postings, allowing defendants "access to other portions of the [p]laintiff's Facebook records is reasonably calculated to lead to discovery of relevant information." Accordingly, the court ordered an in camera review of plaintiff's Facebook records from the date of the accident, including "private and public portions of the account, as well as any records previously deleted or archived."

In *Wilson v. Fantastic Trans*,[7] defendant asserted that because plaintiff claimed that she can no longer teach dance and perform at fundraisers due to the injuries she sustained in the accident, her photographs and postings on Facebook regarding her dance performance are relevant. The court directed plaintiff to produce "any and all relevant pictures or postings from her personal Facebook account which demonstrate Plaintiff dancing or instructing dance class after the date of the accident."

In *Jennings v. TD Bank*,[8] after an Internet search revealed that plaintiff's Facebook account contained a picture of her in front of a cruise ship holding scuba gear on a beach, defendant moved to compel plaintiff to provide her Facebook postings. The court held the information contained on plaintiff's Facebook account is "material and necessary, and plaintiff's privacy concerns are outweighed by defendants' need for the information." The court found that the photograph on "public, unblocked portions of plaintiff's profile through an internet search" "contradicts" plaintiff's verified bill of particulars as to "permanent and continuing physical injuries," "preventing [her] from enjoying normal fruits of social activities" and that the incident "contributed to plaintiff living a lesser quality of life, including loss of enjoyment of life than plaintiff would have otherwise experienced."

The court found that the picture was indicative that "there may be more" relevant information on plaintiff's Facebook account. The court noted that defendant's request was "narrowly tailored" because it only sought information regarding the "alleged incident." The court held the review of such postings relevant because plaintiff not only put her "physical condition" at issue, but also her "enjoyment of life and social activities." Finally, the court noted that because plaintiff "voluntarily and purposefully" posted such photograph, it is "reasonable to believe that there is relevant information in addition to that photograph." As such, the court ordered an in camera review of "all current historical Facebook pictures, videos or relevant status postings from [plaintiff's] personal Facebook account since the date of the alleged incident, including any records previously deleted or archives and plaintiff shall not take steps to delete or alter existing information and posts of her Facebook accounts. If plaintiff is unable to recover any deleted material, plaintiff is directed to obtain her entire record from Facebook, including any records previously deleted or archived by the operators of Facebook."

In *Pereira v. City of New York*,[9] plaintiff objected to the production of authorizations for his Facebook and MySpace accounts on the grounds that such demands were overbroad and "no showing had been made that such discovery would result in relevant evidence bearing on the claims." In response, defendant submitted several photographs from plaintiff's Facebook account that were publicly available depicting plaintiff playing golf and traveling and other postings on a blog referring to plaintiff's sport skills. While originally denying such activity, plaintiff, after being shown such post-accident photographs, changed his testimony. As such, the court found that, where the publicly available postings were "probative of the issue of the extent of plaintiff's injuries," it is "reasonable to believe that other portions of his Facebook account may contain" further relevant information. Accordingly, the court ordered an in camera review of photographs showing sporting activities as well as "all status reports, e-mails, photographs and videos posted on plaintiff's media sites since the date of the subject accident, to determine which of those materials, if any, are relevant to his alleged injuries."

1. 40 Misc. 3d 1213(A), 2013 WL 3770686, 2013 N.Y. Slip Op. 51177(U) (Sup. Ct. Kings Co. July 19, 2013).
2. 108 A.D.3d 908, —N.Y.S.2d— (3d Dept. 2013).
3. Index No. 1355/2012 (Sup. Ct. Queens Co. June 4, 2013).
4. Index no. 15906/2011 (Sup. Ct. Nassau Co. June 14, 2013).
5. Index No. 11724/2009 (Sup. Ct. Nassau Co. July 12, 2013).
6. Index No. 12383/2011 (Sup. Ct. Nassau Co. May 1, 2013).
7. Index No. 18563/2010 (Sup. Ct. Nassau Co. June 24, 2013).
8. Index No. 601947/2012 (Sup. Ct. Nassau Co. July 8, 2013).
9. 40 Misc. 3d 1210(A), 2013 WL 3497615, 2013 N.Y. Slip Op. 51091(U) (Sup. Ct. Queens Co. June 19, 2013).