

<b>Fitzpatrick v Toy Indus. Assoc., Inc.</b>
2009 NY Slip Op 30083(U)
January 5, 2009
Supreme Court, New York County
Docket Number: 116548/05
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN  
Justice

PART 17

Ritzpatrick, RUTH

- v -

TOY INDUSTRY ASSN. INC. AND  
THOMAS P. CONLEY

MOTION INDEX NO.

116548/09

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits: Not accepted as it was not filed.

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon for foregoing papers, It is ordered that this

*motion*  
*and other motion are decided for*  
*affidavit*

**FILED**

JAN 16 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/5/09

[Signature]  
**EMILY JANE GOODMAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
RUTH FITZPATRICK,  
Plaintiff,

-against-

Index No.: 136548/05

TOY INDUSTRY ASSOCIATION, INC. and  
THOMAS P. CONLEY,  
Defendants.

**FILED**  
JAN 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
EMILY JANE GOODMAN, J.S.C.:

In this action, plaintiff, formerly a high level executive of defendant Toy Industry Association, Inc. (TIA),<sup>1</sup> alleges that she was fired by defendants in retaliation for having complained of a hostile working environment created by the lewd conduct of defendant Thomas P. Conley.

Here, plaintiff seeks an order, pursuant to CPLR 3126, striking the answer, and a judgment in her favor, based on defendants' alleged destruction of electronically-stored information (ESI). In her supplemental briefing, plaintiff also claims that defendants withheld relevant documents.<sup>2</sup> Plaintiff also seeks leave to reargue a stipulation and order concerning the location of the deposition of Arnold Rubin.<sup>3</sup> Defendants cross-move for sanctions, pursuant to Rule 130-1.1.

*Background*

In the complaint, plaintiff alleges that Conley embarked on a campaign of retaliation against her in response to her opposition to, and complaints about, his unlawful conduct at work. She further

<sup>1</sup>In her complaint, plaintiff states that she was vice president of finance and administration.

<sup>2</sup>Plaintiff was permitted to submit evidence that she states, and defendants do not dispute, was turned over to her after the motion was fully submitted.

<sup>3</sup>In a separately filed stipulation, the parties resolved that portion of plaintiff's motion requesting depositions of additional parties.

alleges that Conley, and/or TIA, contacted attorneys in order to develop a plan to terminate her, began to smear her reputation, solicited other employees for negative statements about her, informed her that she could not be given certain compensation because she filed an EEOC complaint, and then terminated her employment.

Plaintiff contends that in November 2004, during interviews conducted by a company acting as TIA's human resources arm, three top female executives complained about Conley's lewd, sexist and racist behavior. She further contends that in December 2004, a member of the executive committee of TIA's board (Executive Committee) circulated the resume of a man who would eventually replace her at TIA, and TIA hired counsel in connection with her employment.

Plaintiff submits a letter, dated February 18, 2005, that Conley sent to the Executive Committee members stating that plaintiff's employment with TIA should be terminated. Plaintiff asserts that when Conley called an Executive Committee meeting, on February 19, 2005 to fire her, a board member reported that plaintiff and two other female TIA executives intended to file sexual harassment complaints with the EEOC. The female executives did so in March 2005.

It is undisputed that on March 24, 2005, in relation to plaintiff having filed a claim with the EEOC for hostile work environment, an Executive Committee member sent an e-mail message to TIA's information technology (IT) manager, Danny Lau, about preserving documents and data relevant to plaintiff's EEOC charges, likely to be requested in related litigation (Preservation Notice). The Preservation Notice discusses plaintiff's EEOC hostile work environment claim, and the importance of preserving documents related thereto, whether in paper or electronic form. It also states that the recipient should retain documents relating to plaintiff's work performance and evaluations, any sexual conduct by Conley in the presence of any TIA employee, or complaints made by any TIA employees about such conduct. According to the notice, all documents, including ESI,

were to be retained regardless of any company document retention or destruction policy, and e-mails were to be reviewed for relevant documents and preserved in folders.

Defendants state that on March 25, 2005, TIA contracted with Iron Mountain, an electronic data management company, for off-site back up of its computer servers. The parties dispute the relative accessibility of the data TIA stored with Iron Mountain, but do not dispute that during the course of this litigation, TIA discontinued Iron Mountain's services.

Defendants state that TIA's decision to terminate plaintiff was a unanimous one, made by the Executive Committee, a group comprised of five senior executives of outside toy companies, in August 2005. Defendants assert that plaintiff was a negative force at TIA, and that Conley began looking for a replacement for plaintiff in the latter half of 2004, apparently before she complained of sexual harassment.

On September 6, 2005, TIA terminated plaintiff's employment. On September 15, 2005, plaintiff's attorney sent a letter to TIA's counsel requesting that TIA preserve documents, including ESI, of Conley and TIA's board members, relating to plaintiff, and modify routine destruction policies in order to preserve ESI. On September 23, 2005, approximately two weeks after plaintiff's employment with TIA was terminated, she filed a second claim against defendants with the EEOC, alleging that TIA terminated her employment in retaliation against her for having filed the earlier March 2005 EEOC claim. On November 29, 2005, plaintiff commenced this action in which she alleges that defendants unlawfully retaliated against her for complaining about Conley's conduct at TIA and filing the March 2005 EEOC complaint.<sup>4</sup>

Plaintiff's counsel states that on November 15, 2006, during the parties' negotiations for a discovery stipulation and order, defendants' counsel sent an e-mail to her stating that Conley's

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<sup>4</sup>Conley has since left his position as president of TIA.

computer hard drive was in the hands of a computer forensics expert (Pl. Moving Aff., Exh. J). Thereafter, the parties entered into a lengthy stipulation and order (January 2, 2007 Order), pursuant to which defendants agreed to search the file paths of Conley's computer hard drive for pictorial images of a sexually explicit, pornographic, racially or ethnically derogatory or off-color nature (Off-Color Images), if any. Defendants also agreed that they would perform searches for ESI consisting of communications to current or former TIA board, advisory and Executive Committee members, or Drew Kugler, sent or received by Conley, in which Conley expressed derisive, derogatory, demeaning or unsupportive actions and/or statements about plaintiff.

Based on plaintiff's recollection that Conley's hard drive had been copied in 2005 (2005 Copy), her counsel inquired about the copy. It is not clear that defendants' counsel's response directly addressed plaintiff's counsel's inquiry about the 2005 Copy.

In support of her motion, plaintiff submits the affidavit of TIA's former employee and IT Manager, Lau. This affidavit is the first of two affidavits by Lau submitted on this motion, as defendants submit a second, later, affidavit by Lau in opposition to the motion. The differences between the two affidavits are notable.

In his first affidavit, Lau avers that he was the IT manager at TIA until June 2006, and that in 2005 an outside company copied the hard drive of a laptop Conley was then using at TIA (Laptop 1). Lau further avers that TIA allowed others to use Laptop 1 after Conley's departure from TIA, without attempting to preserve its hard drive, which may have been overwritten. Lau avers that before Conley left TIA, he received a new laptop (Laptop 2), which he took with him, and that to the best of Lau's knowledge, no mirror image was created of its hard drive. Lau also states that although he received the Preservation Notice, and a direction from a board member to preserve Conley's e-mails, he was not given specific instructions on how to do so, and took no steps to prevent TIA staff

from deleting their e-mails, or emptying the deleted items folder (DI Folder) on their computers. Lau maintains that Conley's e-mail box was always one of the smallest, and that Conley "most likely emptied his [DI Folder]" (Lau Aff., ¶ 10).

Lau avers that somewhere between every 7-14 days, TIA's server was set to automatically delete e-mails in DI Folders, a function that was not suspended. He further avers that back-up tapes at TIA were overwritten every two weeks, and that he is not sure that e-mails deleted during the day, before TIA's nightly server back-up process, would have been captured on those tapes. Lau also states that, presumably in order to prevent ESI loss, he disabled an automatic archiving function in "Outlook," and taught TIA staff how to archive their e-mails.

Lau states that Iron Mountain's services make data readily accessible and allow for instant access to it (*id.*, ¶13). He also avers that after Conley left TIA, a second e-mail box was established for him, with the e-mails captured on the TIA server, and backed up by Iron Mountain.

In the second Lau affidavit, submitted by defendants in opposition to plaintiff's motion and in support of their own, Lau swears that he told plaintiff's counsel that Conley had his own user profile on Laptop 1, and that other users of that laptop, who would have been logged in under their own profiles, could not generally access or overwrite Conley's data. Lau further swears that there is no reason to believe, and he knows of no instance in which, data from Conley's use of Laptop 1 has been compromised through use by others. Regarding TIA's "litigation hold," Lau avers that in response to receiving a preservation notice on March 24, 2005, he suspended an automatic notification system about reducing e-mails, and believes that he took all prudent steps available.

Concerning TIA's use of Iron Mountain's services, Lau avers that to the extent that relevant data was already being preserved by TIA and Conley, it would not have been destroyed by the loss of back-up data at Iron Mountain. Lau also states that the back-up data at Iron Mountain was in a form

that had to be restored for viewing, just like data on traditional back-up tapes, and that his reference to instant access in his initial affidavit concerned the ability to commence this process. Lau avers that he told plaintiff's counsel that deleted e-mails are preserved indefinitely in the DI Folder, and not, as he swore in his earlier affidavit, automatically deleted by the server.

Conley submits an affidavit in which he states that he understands his preservation obligations, has made every effort to comply with them, and knows of no instance in which there has been a failure on his part to preserve material evidence. He further swears that he knows of no instances in which he deleted a single e-mail relevant to plaintiff's claims.

Defendants submit the affidavit of the director of computer forensics at JMG, Adrian Wagner, who avers that JMG mirrored Conley's hard drive in November 2007 and analyzed it. After discussion about the analysis, Wagner concludes that Conley's hard drive files were not lost or destroyed at any time, including through the use of Laptop 1 by others, that all files have been preserved, and that there are no Off-Color Images on either laptop.

Regarding the 2005 Copy, defendants submit the affidavit of JMG partner, Edward Frost, who states that JMG was retained by defendants' law firm to search a forensic copy of Conley's hard drive. Frost avers that JMG retained another company to make and deliver copies to it, and subsequently learned that a copy made of Conley's hard drive in 2005 was missing, which has not been located despite a thorough search. Frost further avers that JMG advised defendants' law firm of the loss after March 2007. Defendants' counsel avers that it was not until then that JMG told his firm that the 2005 Copy was missing, and that he never made misrepresentations about it.

Finally, in a supplemental affidavit, plaintiff submits four e-mail messages, one of which is from Conley, and was sent to, among others, Drew Kugler, a consultant to TIA, and Arnold Rubin dated June 2, 2005 (E-mail A). In E-mail A, Conley describes plaintiff, and the two females

executives who also filed EEOC charges, as a “cancer at TIA” and states that “[w]e must create an exit strategy for all three of these employees” (Pl. Sup. Aff., Exh A, at 1). Plaintiff also submits an e-mail dated March 31, 2005 [E-mail B], which appears to have been sent to Kugler by a TIA employee. Conley is listed as a recipient on the e-mail, which contains an attachment that states, in reference to plaintiff: “[b]y the time of the workshop, hope to have her out of the office” (Pl. Sup. Aff., Exh. B).<sup>5</sup> These e-mails were not initially exchanged with plaintiff, but later were turned over by defendants’ counsel in connection with Kugler’s deposition.

#### *Analysis*

In New York, “[o]ne traditional method of dealing with spoliation of evidence . . . has been CPLR 3126 where sanctions, including dismissal, have been imposed for a party’s failure to disclose relevant evidence” (*MetLife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478, 482-483 [NY 2004]). CPLR 3126 permits the court to strike pleadings when a party “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed.” “Sanctions for spoliation should be imposed when a party disposes of key evidence before the other party has an opportunity to examine it, whether the loss of evidence is wilful or negligent, ‘since a party’s negligent loss of evidence can be just as fatal to the other party’s ability to present a defense’” (*Brown v Parfums Jacques Bogart S.A.*, 12 Misc 3d 1187 [A], NY Slip Op 51481[U], \*4 [Sup Ct, NY County 2006], quoting *Squitieri v City of New York*, 248 AD2d 201, 202-203 [1st Dept 1998]; see also *Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213 [1st Dept 2004]).

Sanctions for discarding items in good faith and pursuant to a company’s normal business practices are inappropriate in the absence of pending litigation or notice of a specific claim

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<sup>5</sup>The author of the attachment to E-mail B is not specified in the document.

(*Conderman v Rochester Gas & Elec. Corp.*, 262 AD2d 1068, 1070 [4th Dept 1999]). Conversely, where a party has notice of a specific claim, appropriate sanctions may be called for if a party destroys evidence prior to becoming a party or receiving a notice or order to produce, if the party is on notice that the evidence might be needed (*MetLife Auto & Home*, 1 NY3d at 483).

Only where destroyed or lost evidence is key to support a claim or defense is the drastic remedy of the striking of a pleading appropriate, and a less drastic sanction, appropriate to the circumstances, may be imposed where prejudice is less severe (*Marro v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 294 AD2d 341, 342 [2d Dept 2002]; *see also Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]), or where there is independent evidence that permits a party to adequately prepare its case (*see e.g. Melendez v City of New York*, 2 AD3d 170, 171 [1st Dept 2003]). “[C]ourts have ‘broad discretion’ that must not be disturbed absent ‘clear abuse’ 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” (*Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 17 [1st Dept 2000]).

i. Overwritten Data, the 2005 Copy, and Images from Conley’s Hard Drive

Plaintiff claims key evidence was spoiled, or not preserved, when, after Conley’s departure, data from Laptop 1 was likely overwritten by others at TIA, and that defendants have destroyed or are unwilling to search the 2005 Copy. As a result of this, and defendants’ failure to preserve e-mails, discussed below, plaintiff argues that she cannot establish that Conley’s conduct created a hostile environment at TIA. Plaintiff also contends that her ability to challenge defendants’ defenses, to prove that the reason given by defendants for plaintiff’s termination was a pretext, and to engage in meaningful cross-examination is impaired or lost because of defendants’ conduct concerning ESI.

Defendants were not required to maintain duplicate copies of ESI, and provide evidence here (A) that Laptop 1 files were not overwritten, and (B) that both laptops hard drives have been preserved. Plaintiff provides no evidence that anything on Laptop 1 was overwritten, or that defendants permitted destruction of Off-Color Images from Conley's hard drives, or from which may be drawn the inference that there existed requested images on the 2005 Copy, that would not also be on the laptop hard drives.

Plaintiff voices concerns, in her reply, that Wagner did not investigate the possible use of scrubbing or wiping programs to erase information beyond recovery, but as she points to no evidence of the use of such programs, or of Off-Color Images that were erased, her assertion is speculative. Plaintiff may make an application to arrange for her own forensic expert to conduct the tests that she maintains were not performed, if she desires. Plaintiff argues that she still does not know which copy of the hard drive was allegedly searched pursuant to the January 2, 2007 Order. While not grounds for sanctions, this issue may be addressed at the parties' next discovery conference, if necessary.

ii. Defendants' Preservation of Evidence and Conley's E-mails

Plaintiff contends that defendants have failed to engage in appropriate ESI preservation practices, and that there is no evidence that they, or their counsel, did anything to ensure that materials relevant to plaintiff's claim would be preserved. Plaintiff argues that defendants should be faulted for permitting Conley to delete e-mail messages, not suspending automatic deletion of e-mail messages from the TIA server, and terminating TIA's contract with Iron Mountain. She further argues that defendants should have reasonably anticipated the possibility of litigation, and recognized the need to preserve evidence, as early as November 2004, when plaintiff complained to Kugler about Conley's lewd gestures, sexual innuendos, jokes and e-mails, or December 2004, when TIA contacted defendants' counsel concerning plaintiff. Plaintiff also argues that defendants'

preservation obligations arose no later than February 19, 2005, when, following Conley's letter about terminating plaintiff's employment, TIA's board members entertained discussions about the three female executives' EEOC filings.

Plaintiff states that out of 28,000 documents provided, only about 182 are from Conley's e-mail box for the two-year period ending February 2006, and that Lau's affidavit demonstrates that Conley continued to delete e-mails. Plaintiff also states that when TIA terminated its contract with Iron Mountain, the e-mails stored there were no longer available, despite defendants' counsel's assurances, at the time, that all relevant documents were being preserved. Plaintiff maintains that she should not be subject to Conley's determination as to relevance, and that as a result of defendants' acts, and failure to act, some of Conley's e-mails could not be retrieved, with no way of knowing how much evidence he destroyed.

In opposition, defendants maintain that in February 2005, their counsel instructed Conley and the Executive Committee to preserve all relevant documents, following up with written directives on March 9, 2005. Defendants' counsel affirms that copies of the e-mail boxes of Conley, plaintiff, and others were made, and that on March 24, 2005, TIA sent a Preservation Notice to all persons identified as potentially having documents relating to plaintiff's claim. Thereafter, counsel avers that he had numerous follow-up communications regarding preservation obligations with various TIA employees, including Conley, Lau, and members of TIA's board and Executive Committee.

Defendants state that all relevant e-mails from Conley's e-mail box have been preserved and argue that, because Conley was timely instructed to preserve documents relevant to plaintiff's claims and "understood and adhered to such instructions, it is beyond dispute that defendants have complied with their preservation obligations" concerning Conley's e-mails (Def. Memo. of Law, at 2, 11). Defendants maintain that plaintiff is not entitled to sanctions because she has not alleged or

established the identity of a relevant e-mail or category of relevant e-mails intentionally destroyed by anyone, or key or crucial evidence negligently destroyed due to Conley's alleged practice of deleting e-mails, or TIA's termination of Iron Mountain's services.

In reply, plaintiff calls Conley's assurances that he did not delete relevant e-mails unverifiable, and argues that, because he did not allow counsel to review e-mails before deleting them, the customary safeguard of counsel review is not present. Plaintiff further argues that evidence loss occurred before she filed her EEOC complaint,<sup>6</sup> and months before she filed this action, leaving no way to determine what Conley's measure of relevance was.

In her supplemental affidavit, plaintiff contends that E-mail A demonstrates retaliatory animus, is relevant to plaintiff's claim of retaliation, and that defendants' failure to produce it, and the other e-mails she submits with the affidavit (the Subject E-mails), prove that defendants' opposition is without merit, and that defendants failed to preserve and produce relevant documents. Plaintiff argues that she has suffered prejudice in that she already conducted the deposition of Conley, and another witness, without the benefit of this evidence.

Responding, defendants argue that the Subject E-mails, including E-mail A, do not support plaintiff's retaliation claim, and that plaintiff has not suffered prejudice because she has copies of them now. Defendants further argue that plaintiff merely speculates that their failure to produce E-mail A was due to either their deletion of the document, or willful failure to produce it, and that the uncontradicted evidence on this motion shows that neither defendants nor their counsel willfully withheld or destroyed relevant evidence. In support, they refer to Conley's sworn statements in his affidavit, previously discussed, in which he swears that he knows of no instance in which there has been a failure on his part to preserve material evidence, or any instances in which he deleted a single

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<sup>6</sup>It is not clear whether plaintiff is discussing the March 2005 EEOC complaint, which was based on hostile work environment and age discrimination, or her second, September 2005, EEOC complaint based on retaliation.

e-mail relevant to plaintiff's claims. Defendants also refer to defendants' counsel's sworn statement that he is aware of no instance in which defendants did not follow protocol, or withheld electronic documents and e-mails responsive to plaintiff's discovery demands, as modified by the January 2, 2006 Order. Defendants state that they electronically searched Conley's e-mail boxes using the parties' agreed upon search terms, reviewed and produced all e-mails and documents identified as being responsive to plaintiff's discovery demands, and that plaintiff's insinuation of willful withholding is belied by the fact that their counsel produced the e-mails.

Defendants also contend that E-mail A is not a crucial piece of evidence, but Conley's response to a long stream of e-mails relating to the perception that another TIA executive was refusing to perform a job function. Defendants maintain that there is no evidence that an exit strategy for the three female executives was adopted, as one was retained and the other left of her own accord, and that Conley was merely repeating a description of plaintiff previously made by a female employee.

Defendants also argue that they had no duty to preserve E-mail A and E-mail B because when they were created the only potential litigation of which defendants could have been on notice was plaintiff's sexual harassment complaint against Conley. Defendants argue that they were under no obligation to preserve e-mails based on speculation that a future claim might be brought, or before they had reasonable notice of it, and that E-mail A was sent months before plaintiff was terminated, and complained of retaliation therefrom. Defendants' counsel states that he has confirmed with TIA technical staff that, as of July 2005, E-mail A and E-mail B were no longer in Conley's mailbox, and E-mail B was no longer in the mailbox of Tee Valentin, who sent it. However, counsel's affidavit conspicuously fails to address why E-mail A and E-mail B were no longer in Conley's mailbox as of July, 2005. Conley also does not provide an explanation.

Finally, defendants characterize plaintiff's entire motion as an act of desperation in response to a failing case. Defendants assert that plaintiff was fired by the Executive Committee, and can produce no evidence to refute their good faith judgment as to what they believed was in TIA's best interests. Defendants maintain that testimony to date demonstrates that the Executive Committee based its decision to terminate plaintiff on an August 2005 outside consultant's report, their own observations, and complaints from employees, including those other than Conley. Defendants also submit the testimony of an Executive Committee member who states that conversations about terminating Fitzpatrick took place as early as the third quarter of 2004, before defendants contend that plaintiff first complained of sexual harassment.

Despite defendants' contention that they had no notice of a retaliation claim before plaintiff filed a second claim with the EEOC, E-mail A appears to be a document that TIA itself sought to preserve, specifically with the instruction in the Preservation Notice, dated March 24, 2005. That notice provided that recipients of the notice were to preserve "documents relating to . . . the work performance and evaluations of [Fitzpatrick]" (Pl. Mov. Aff., Exh. H). Indeed, where TIA contacted counsel, and defendants maintain that Conley wanted to fire plaintiff, their contention that they were unaware of the possibility of a potential retaliation claim rings hollow. While facts revealed hereafter may demonstrate that an earlier date is called for, TIA's preservation duty concerning documents about plaintiff's "work performance," and everything else in the Preservation notice, arose no later than March 24, 2005. In fact, in arguing the E-mail A is not a crucial piece of evidence, Defendants themselves characterize it as Conley's response to a long stream of e-mails relating to the perception that a TIA executive was refusing to perform a job function. Accordingly, E-mail A should have been preserved. While defendants contend that E-mail A does not support

plaintiff's retaliation claim, this is not the only reasonable inference to be drawn from that message, and inferences about that evidence should be drawn by a jury, not by defendants, or their counsel.

As to the efficacy of TIA's "litigation hold" methods, however, the evidence on this record is that defendants' counsel instructed TIA management of its preservation obligations, and that TIA instructed involved employees to preserve evidence after plaintiff filed the first EEOC complaint, notwithstanding the company's document retention/destruction policy. Defendants also made copies of Conley's mailbox, mirrored his hard drive, and, at some point, obtained his laptops. Lau avers that he taught staff how to archive e-mails. Although E-mail A should have been, but was not, turned over, on this record alone, the sanctions plaintiff seeks are not warranted based on TIA's preservation methods alone.

Plaintiff relies on *Sage Realty Corp.* (275 AD2d 11, *supra*), in which, during a deposition, the plaintiff admitted destroying tape recordings once disclosure of them became imminent, and the evidence established that hundreds of tapes existed and were in the plaintiffs' control when the litigation was commenced, but no longer existed during the time period of the discovery dispute. In *Sage*, there was evidence that the plaintiff directed that all phone calls in connection with an underlying business transaction be recorded. The plaintiff's principal was also observed discussing the transaction over the phone with the defendant attorneys, who were being sued for the advice they allegedly failed to provide concerning it. The court determined that the defendant was prejudiced, substantially, in interposing a defense without the relevant, intentionally destroyed evidence.

Plaintiff also relies on *Zubulake v UBS Warburg LLC* (229 FRD 422 [SD NY 2004]), to support her request for sanctions. The plaintiff in *Zubalake* presented extensive proof that employees were deleting relevant e-mails and the court, upon an extensive and well-developed record, was able to determine that some e-mails were irretrievably lost because there was "strong evidence that they

once existed” (*Zubulake*, 229 FRD at 426). Here, plaintiff has not demonstrated the likelihood of the existence of relevant documents or e-mails, other than E-mail A and E-mail B, that were not turned over to her that should have been, and whether these e-mails were, willfully, not preserved or turned over, involves a credibility determination inappropriate on these papers. Plaintiff correctly states that *Sage* advises that destruction of evidence “diminishes the ability of the deprived party to prove relevance directly” (275 AD2d at 17). But, unlike here, the record before the court in *Sage* contained evidence from which the Court could infer that the plaintiff destroyed relevant evidence, that was never recovered or turned over, about the occurrence that formed the basis of the claim against the defendants.<sup>7</sup>

Furthermore, the lynchpin for spoliation sanctions under New York law, is prejudice. Plaintiff has moved for harsh sanctions, including to strike the answer, based on many alleged wrongs by defendants, but has not demonstrated a factual basis here for several of her assertions of defendants’ wrongful conduct, or, on this record, that the sanctions she seeks are appropriate due to prejudice where the Subject E-mails were, eventually, turned over by defendants’ counsel, and at this point, the evidence is insufficient to prove that the discovery was intentionally withheld. Plaintiff states that the prejudice she has endured consists of already having taken a deposition, without having the benefit of certain discovery. However, if another deposition is warranted, the court may order one.

Still, the court is concerned about how disclosure has been conducted here. Conley’s sworn statement and defendants’ assertions about having preserved e-mails relevant to plaintiff’s claim, may raise questions about their judgment as to relevance given that E-mail A was not originally

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<sup>7</sup>Plaintiff asserts that the evidence allegedly destroyed consisted of off-color images and e-mails. Conley undoubtedly had to show or send the images to someone else at the office in order to create a hostile work environment, and e-mails are generally sent to another person. Yet, other than E-mail A, and possibly E-mail B, plaintiff, in her brief, does not discuss indirect evidence that Conley deleted relevant e-mails or had Off-Color Images on his hard drive at work.

turned over to plaintiff and was not in Conley's box as of July 2005. E-mail A is derogatory and derisive, and contains the search words contained in this court's July 12, 2007 order.<sup>8</sup> That a member of defendants' law firm was on E-mail A's distribution list, and thus, presumably, had a copy of it, does not increase the court's confidence in this regard.<sup>9</sup> Most troubling, however, is that defendants avoid directly addressing how E-mail A and E-mail B went missing from Conley's e-mail box, or why it was not initially turned over. While defendants argue that plaintiff merely speculates that their failure to produce E-mail A was due to either their deletion of the document, or willful failure to produce it, it is defendants or their counsel who should have explained the reason why that e-mail was not turned over. Defendants perhaps attempt to leave the court to infer from Conley's initial moving affidavit that Conley inadvertently deleted the email, but as Conley did not submit an affidavit in response to plaintiff's submission of the E-mail A, the court will not draw this inference on this record.

As to the Iron Mountain data, while defendants offer Lau's sworn statement that to the extent that relevant data was already being preserved by TIA and Conley, it would not have been destroyed by the loss of back-up data at Iron Mountain, the phrase "to the extent" only begs the question *of the extent* of preservation. In addition, according to defendants' counsel, Iron Mountain was hired on March 2005 and Conley deleted E-mail A prior to July 2005, which was prior to TIA's termination of Iron Mountain's services. Thus, had TIA continued its contract with Iron Mountain, presumably E-

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<sup>8</sup>From this record, the court cannot determine that the attachment to E-mail B was written "by Conley about plaintiff," thus it is not clear that it was strictly responsive to paragraph F of the January 2, 2007 Order (Pl. Mov. Aff., Exh. E, at 12). In addition, it appears that the two other e-mails plaintiff submitted with her supplemental affidavit would not have been in Conley's e-mail box. Additional, broader, disclosure requests may reveal whether other relevant documents exist, or provide information as to any ESI that may not have been produced. To the extent that relevant documents may not have been exchanged because they are slipping through the cracks based on the parties' discovery stipulations, it is plaintiff's counsel that must review those stipulations for comprehensiveness.

<sup>9</sup>Plaintiff's counsel's conduct has also not been exemplary in that she had not completed a review of certain documentary evidence exchanged before making her motion, and it appears that certain arguments that plaintiff advanced were based on mere suspicion. In addition, Lau's sworn statement that e-mails in DL Folders were automatically deleted by the TIA server was apparently incorrect.

mail A would have been preserved. These concerns notwithstanding, on this record, the evidence does not demonstrate that relevant or crucial documents have been destroyed, or not preserved, to plaintiff's prejudice. And the issue plaintiff raises about the accessibility of the Iron Mountain data is not susceptible to disposal on this record.

Accordingly, although the evidence produced at this time is insufficient to establish that sanctions are warranted,<sup>10</sup> in light of the court's concerns, plaintiff's motion is denied, without prejudice to renew at trial based on newly discovered evidence should that arise. Depositions of TIA board members remain outstanding, and defendants' counsel's affidavit demonstrates that TIA's technical staff may be an additional source of information concerning Conley's e-mails.

*Defendants' Cross Motion for Sanctions Pursuant to Rule 130-1.1*

Defendants contend, among other things, that plaintiff's counsel knew that her statement that data from Laptop 1 was most likely overwritten by TIA employees was false. Defendants also argue that this motion could have been avoided had plaintiff's counsel conferred with defendants in good faith, or plaintiff conducted meaningful investigation or discovery. In opposition, plaintiff's counsel states that defendants' counsel refused to answer her questions about the whereabouts of the 2005 Copy, leaving her to conclude that defendants did not have it, or were refusing to search it. Plaintiff maintains that, as she did not have access to Conley's hard drives, she did not have the opportunity to make determinations about data thereon.

Defendants' contention that had plaintiff merely asked or investigated she would have discovered the disposition of the 2005 Copy is unpersuasive (*see* Pl. Mov. Aff., Exh. K, M, *see also* Pl. Reply Aff., Exh. Q, R). It was within defendants' power to straighten out confusion concerning the loss of the 2005 Copy, but they appear not to have done so except in response to this motion.

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<sup>10</sup>From the papers here, the court can ascertain only that Email A was either deleted or not initially turned over in response to the January 2, 2007 Order, and that plaintiff has not suffered extensive prejudice from the late production of that document.

While plaintiff's counsel does not state that she attempted to confer in good faith with defendants about all of the issues here before moving, it appears that defendants' cooperation might have avoided some of this, and defendants' motion is denied.

*Plaintiff's Motion for Leave to Reargue*

Plaintiff seeks leave to reargue a so-ordered stipulation, dated October 4, 2007, and for an order compelling defendants to produce Rubin in New York. Plaintiff's counsel states that plaintiff's agreement to conduct the deposition was based on a mis-communication between her and a partner at her law firm, but that it is inequitable to make plaintiff pay to go to California with her counsel to depose Rubin when she has been out of work for two years. Plaintiff cites *Broyles & Broyles v Rainbow Sq.* (125 AD2d 933, 934 [4th Dept 1986]), for support, and argues that the relief she seeks should be granted in the interest of justice, and that Rubin's deposition should be conducted in New York because he is a TIA director over whom they have control (*see* CPLR 3110). Rubin avers that he works and resides in California, has not been a director of TIA since 2006, is not paid for his position as an ex officio member of the TIA board, and that he is not counted among the 17 directors expressly provided for by TIA's bylaws.

The court is sympathetic to the substantial costs of litigation borne by many litigants. Rubin's employer is not TIA, however, but a company that is not a party here. Plaintiff, herself formerly a high-ranking executive of TIA, does not dispute that Rubin is not counted among the 17 directors expressly provided for in TIA's bylaws, and does not make clear the basis for her assertion that TIA exercises control over him. Finally, Rubin agreed to be deposed while he was in New York, but plaintiff's counsel was unavailable, and plaintiff is not without the more cost-effective option of conducting the deposition through video conferencing. Plaintiff argues that she considers video conferencing a poor substitute for her right to confront defendants, and speculates as to potential misconduct by defendants and their counsel. Despite these reservations, however, she agreed to this

method for another deposition and, presumably, would not have done so had her concerns about misconduct been exceedingly great. That Rubin was included in the confidentiality agreement for purposes of reviewing documents is not dispositive.

*Conclusion*

Accordingly its is,

ORDERED that plaintiff's motion pursuant to CPLR 3126 is denied, without prejudice to renewal for spoliation sanctions at trial based on newly discovered evidence should that arise, and the motion for reargument is denied; and it is further

ORDERED that defendants' cross motion is denied.

**This Constitutes the Decision and Order of the Court.**

Dated: January 5, 2009

ENTER:

  
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J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
JAN 16 2009  
COUNTY CLERK'S OFFICE  
NEW YORK