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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS PART 58
Justice

QK HEALTHCARE, INC.,

Plaintiff,

-v-

FOREST LABORATORIES, INC.,

Defendant.

INDEX NO. 117407/09
MOTION DATE
MOTION SEQ. NO. 02
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits-- Exhibits....	1-3
Answering Affidavits– Exhibits	4-5
Replying Affidavits	6

CROSS-MOTION: ___ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 5/8/13

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ___ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

QK HEALTHCARE, INC.,

INDEX NO.
117407/09

Plaintiff,

- against -

FOREST LABORATORIES, INC.,

DECISION/ORDER

Defendant.

DONNA M. MILLS, J.:

In this breach of contract action, plaintiff QK Healthcare, Inc. ("QKH"), a wholesaler of prescription drugs, seeks to recover more than $70,000.00 from defendant Forest Laboratories, Inc. ("Forest"), a manufacturer and seller of pharmaceutical products, based on Forest's refusal to make payment to QKH upon its return of unsold Forest merchandise.

During discovery between the parties, it was learned that Mr. Salvatore LaDuca, former Vice President of Purchasing and current President of QKH, purportedly experienced a "computer crash" in April 2008. According to QKH, all of the electronic files created, sent, received and stored by Mr. LaDuca prior to April 2008 were lost. This deletion occurred after the present dispute between Forest and QKH arose, but before litigation commenced. Additionally, the discovery revealed that the computer containing all of the electronic files created, sent, received, and stored by Ms. Siobhan Conway, the former QKH employee responsible for handling all of the return goods at issue in this action was purportedly reformatted by QKH's MIS department on February 5, 2010, three months after QKH had commenced this lawsuit. According to QKH, this resulted in the complete destruction of all of Ms. Conway's electronic files. Forest now moves for sanctions based on the alleged spoliation of evidence by QKH pursuant to CPLR § 3126.

Under the traditional law of spoliation of evidence, "[w]hen a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation" [Squitieri v. City of New York, 248 A.D.2d 201, 202 [1st Dept 1998]). Until recently, New York state courts have grappled with the difficult issue of how to apply the traditional law of spoliation-e.g., the prohibition against destroying easily identifiable physical evidence related to, for example, some kind of accident-to the destruction of email and other electronic documents, as "[e]lectronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR," and "are not faced in traditional paper discovery" (Lipco Elec. Corp. v. ASG Consulting Corp., 4 Misc.3d 1019(A), 2004 N.Y. Slip Op 50967[U], [Sup Ct, Nassau County 2004]). However, in Ahroner v Israel Discount Bank of New York (79 AD3d 481 [1st Dept 2010]), the First Department has clarified the standard for imposing sanctions for the destruction of electronic evidence.

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 the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a "culpable state of mind"; and (3) the destroyed evidence was "relevant" to the moving party's claim or defense (id. at 482; 915 Broadway Associates LLC v Paul, Hastings, Janofsky & Walker, 34 Misc 3d 1229(A) [N.Y. Sup. 2012]).

Although QKH did not commence this action until December 2009, it is apparent that it reasonably anticipated litigation against Forest in late 2007. It was at that time when Forest communicated its rejection of QKH's request for credit for all of its returns submitted between March 2006 and October 2007. Another indicator of QKH's anticipation of litigation is the privilege log it provided in this action. QKH's privilege log lists a privileged communication noted as "Attorney Work Product" between QKH employees and its general counsel on November 15, 2007.

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents (see Voom HD Holdings LLC, v EchoStar Satellite L.L.C., 93 AD3d 33 [1st Dept. 2012]). As has been stated, "[I]n the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process" (Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 175–76 [S.D.N.Y.2004]). Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data Regardless of its nature, a hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee. The hold should, with as much specificity as possible, describe the ESI at issue, direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve electronically stored evidence (see Pension Comm. of the Univ. of Montreal Pension Plan v Banc of Am. Sec., L.L.C., 685 F.Supp.2d 456, 473 [S.D.N.Y. 2010]).

Applying the legal standards discussed above, I find that the loss of Mr. LaDuca's files in April 2008, and the destruction of Ms. Conway's files in February 2010, both occurred well after QKH reasonably anticipated this litigation in late 2007, triggering QKH's duty to preserve evidence relating to this action.

Establishing that the electronic data was destroyed with a "culpable state of mind" does not require proof that the destruction was imminent or even reckless. "Spoliation sanctions ... are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other

party's ability to present a defense" ' (Standard Fire Ins. Co. v. Fed. Pac. Elec. Co., 14 AD3d 213, 218 [1st Dept 2004] [citation omitted]). Thus, "[a] culpable state of mind' ... includes ordinary negligence" (Ahroner v. Israel Discount Bank of New York, 79 AD3d at 482; see e.g. Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., 221 A.D.2d 243, 243 [1st Dept 1995] [dismissing plaintiff's claims due to its "negligent loss of a key piece of evidence which defendants never had the opportunity to examine"]). The facts clearly demonstrate that at a minimum, the deletion of Mr. LaDuca's files and the destruction of Ms. Conway's files consisted of negligence.

In addition, the party deprived of evidence as a result of its adversary's spoliation need not, in most cases, prove the relevance of the destroyed evidence. The relevance of the evidence will be inferred where it is "destroyed either intentionally or as the result of gross negligence" (Ahroner v. Israel Discount Bank of New York, 79 AD3d at 482, citing Sage Realty Corp. v. Proskauer Rose, 275 A.D.2d 11 [1st Dept 2000], lv dismissed 96 N.Y.2d 937 [2001]). Indeed, "it is the peculiarity of many spoliation cases that the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly" (Sage Realty Corp. v. Proskauer Rose, 275 A.D.2d at 17 [affirming dismissal of legal malpractice claims based on plaintiffs' spoliation of evidence]). Given the inherent unfairness of asking a party to prove that the destroyed evidence is relevant even though it no longer exists and cannot be specifically identified as a result of the spoliator's own misconduct, courts will usually reject an argument that the deprived party cannot establish the relevance of the evidence (see e.g. id. at 16 [acknowledging that the burden of proving relevance can be "rendered impossible to satisfy as a result of plaintiffs' own misconduct"]).

Under CPLR 3126 and New York case law, where a litigant destroys evidence, courts "possess broad discretion to provide proportionate relief to the party deprived of the lost evidence" (Ortega v. City of New York, 9 NY3d 69, 76 [2007]). Remedies for the spoliation of evidence include (1) dismissing the action or any part thereof; (2) deeming

resolved for the purposes of the action any issues as to which the destroyed evidence is relevant; (3) precluding proof favorable to the spoliation on the issues, claims, or defenses to which the destroyed evidence is relevant; or (4) employing an adverse-inference instruction (see id.).

While the striking of a pleading may be justified where a party destroys key physical evidence such that its opponents are " 'prejudicially bereft of appropriate means to [either present or] confront a claim with incisive evidence' " (DiDomenico v C & S Aeromatik Supplies, 252 AD2d 41, 53 [2nd Dept. 1998]), outright dismissal remains a drastic remedy and is appropriate only where less severe sanctions have been ruled out.

Here, the case turns on the language of two different return policies -- one in place when QKH bought the Forest products, and the other implemented by Forest a year and a half later in the same month when QKH started to return some of the Forest products it had purchased a year and a half before. Paul Reed, the Forest employee who authored both return policies was deposed by QK Healthcare in this case and can testify as to the meaning of the language of these policies and the intention of Forest in publishing these policies. Since the evidence destroyed or lost in the instant matter is not crucial to defendant's defense, a lesser sanction is warranted.

This court finds that the appropriate sanction for the spoliation of evidence in the instant action, shall be an adverse inference instruction at the time of trial against QKH with respect to its application to the returns at issue of the 2004 Forest Return Policy.

Accordingly it is

ORDERED that the motion of Defendant for spoliation sanctions is granted and an adverse inference instruction against QKH shall be given consistent with this decision; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 574, 111 Centre Street, on August 2 2013, at 10:00 AM.

Dated: 5/8/13

ENTER:

J.S.C.