STATE OF NEW YORK
SUPREME COURT SENECA COUNTY

JEFFREY CULBREATH
DIN # 95-B-1028

Plaintiff

DECISION

-against

46760

BRIAN FISCHER, JOHN B. LEMPKE, JOHN C. COLVIN, T. JENKINS, JOE DOE #1 AND JOHN DOE #2,

Defendants

APPEARANCES: Jeffrey Culbreath, Pro se

Assistant Attorney General Timothy P. Mulvey, Esq.
On behalf of the Defendants

BENDER, Acting J.

The Court has cross motions before it in this 42 USC 1983 action. The underlying action involves allegations by the plaintiff that while he was incarcerated at Five Points Correctional Facility, he was sexually molested by a corrections officer named "John Doe #1" and that the assault was in the presence of two other corrections officers. One corrections officer is identified as "John Doe #2" and the other corrections officer is identified named defendant T. Jenkins.

The incident was alleged to have occurred on June 10, 2011. The plaintiff alleges, and there has been no denial by the defendants, that the day of the incident, he wrote the superintendent of security and asked the defendants to preserve camera footage relating to it. The plaintiff also filed a grievance concerning the purported incident. (Plaintiff's Ex. C) The grievance was acknowledged by Defendant John C. Colvin, Deputy Superintendent of Security,

per memorandum dated June 14, 2011. (Ex. B, Plaintiff's Complaint) The plaintiff alleges that despite his prompt request that the video footage not be destroyed, that the defendants indeed destroyed the footage. This, too, has not been specifically denied by the defendants.[1]

The plaintiff now moves for an order striking and precluding the defendants' Answer herein pursuant to CPLR 3126(3), or alternatively dismissing the defenses of the defendant herein pursuant to CPLR 3211(b).

The statute has been interpreted to apply to pre-litigation spoliation of evidence. *Conderman v. Rochester Gas & Electric Corp., 262 AD 2d 1068 (4th Dept., 1999); Hulett ex rel. Hulett v. Niagara Mohawk Power Co., 1 AD 3d 999 (4th Dept., 2003).* Under the statute, the court has broad discretion to determine the appropriate remedy for spoliation of evidence. This Court finds, with regard to the plaintiff's unrebutted allegations that the defendants did unjustifiably destroy the video evidence despite a prompt request that that not be done, that a sanction of some sort is appropriate. See, *Barnes v. State, 89 AD 3d 1382 (4th Dept., 2011).* The appropriate sanction, however, cannot be determined at this early stage of litigation. Therefore, the plaintiff's request for sanctions relating to the defendants' unrebutted spoliation of evidence is reserved to a later time in the proceeding.

The defendants cross move for a dismissal of the Complaint as against Defendants

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[1]In response to the plaintiff's Complaint alleging that the video footage was destroyed, the defendants simply entered a general denial.

Fischer, Lempke and Colvin and for summary judgment in favor of Defendant Jenkins. At the time of the alleged incident, Defendant Fischer was Commissioner of DOCCS; Defendant Lempke was Superintendent of Five Points Correctional Facility and Defendant Colvin was the Deputy Superintendent of Five Points. Defendant Jenkins is the officer that allegedly stood by while the assault took place by Officer John Doe #1 and made disparaging remarks. The defendants allege there are no accusations or references to any physical injuries suffered by the plaintiff when he initially filed his Complaint. The defendants also argue that the charges against Defendants Fischer, Lempke and Colvin are based on an argument of supervisory liability and that prison supervisors are not liable for civil rights violations simply by virtue of the actions of subordinates. They submit that the defendants cannot be held liable as a matter of law under the doctrine of *respondent superior*.

The defendants also submit the plaintiff cannot show physical and emotional injury. There are no reports of him requesting health services at the prison on the day of the incident or thereafter. There are no Five Points Correctional Facility records showing complaints were made to its medical staff nor did he seek medical attention for alleged injuries.

In response to the plaintiff's motion, the plaintiff points out counsel for the defendants and Nurse Linda Bannister have no personal knowledge concerning the events in question. He alleges he chose not to seek medical attention because he was humiliated and too embarrassed and because he already felt violated.

With regard to the motion to dismiss against Defendants Fischer, Lempke and Colvin, the plaintiff now alleges there were numerous complaints filed against the same individuals concerning acts of sexual harassment and sexual misconduct by the very same group of corrections officers. He alleges Defendants Lempke and Colvin deliberately ignored complaints of sexual misconduct against this group of officers and that Defendant Fischer deliberately ignored complaints as well that were brought to his attention through CDRC decisions and Inspector General reports. He also alleges he sought access to other complaints of a similar nature against these officers to ascertain all their names and just how long these kinds of attacks have been occurring but that the civil inmate grievance supervisor informed him that while the materials existed, they were confidential and he could not have access to them. (¶ 10, Plaintiff's Affidavit). He also alleges he has sought to identify Defendants John Doe #1 and #2 but to date, their identities have not been disclosed.

The defendants' motions to dismiss are denied as premature. With regard to the allegations that some of the named defendants cannot be held liable for sexual assault under a theory of *respondent's superior,* the plaintiff in his Complaint does allege that said defendants were either aware of similar patterns of misconduct and did nothing and/or permitted the video tape evidence capturing the sexual assault to be destroyed knowing in advance its contents. The Court assumes *arguendo* that the allegations Defendants Fischer, Lempke and Colvin deliberately allowed the destruction of the video tape would not support responsibility for the alleged assault because it occurred after the fact. Notwithstanding the allegation they were aware of similar patterns of misconduct by these officer is significant and further buttressed by the

plaintiff's allegations in his responding affidavit that he was informed that prior allegations and misconduct against the officers existed. As noted in the case cited by defendants in *Colon v. Coughlin, 58 F.3d 865, 873 (2nd Cir., 1995),* the superiors can be held liable if "... 2. The defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong...". Discovery should be conducted to see if in fact this is just supposition on the part of the plaintiff or if there are specific acts of sexual misconduct that had been alleged against these particular defendants, and that this was made known to the named superiors and they did nothing to monitor their conduct.

With regard to the allegation the plaintiff has failed to establish a physical injury, the plaintiff has provided sworn statements as to specific physical injuries he alleges he received. In his Complaint at paragraph 5, he alleges that he suffered excruciating pain, that his testicles were painfully swollen for nearly two weeks, that he suffered rectal bleeding, that it was painful to use the bathroom, and sitting was uncomfortable. He further alleges psychological trauma, of nightmares, being in a secluded area within the facility, etc. *Liner v. Goord, 196 F.3d 132 (2nd Cir., 1999).* Discovery should be conducted to flesh out the allegations without prejudice to renewal.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the plaintiff's motion for sanctions due to the spoliation of video tape in question is granted to the extent that the Court will consider the

imposition of some appropriate sanction, but is denied to the extent of the specific sanctions requested by the plaintiff at this time, without prejudice. The Court will determine the appropriate penalty at a later date. The cross motion by the defendants seeking a dismissal of the Complaint as against Defendants Fischer, Lempke and Colvin and for summary judgment in favor of Defendant Jenkins is denied as premature.

The Court further directs that discovery in this matter should be completed no later than July 31, 2013. If the parties wish to take depositions, notice should be sent out to the other party within 30 days of this Decision and Order.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

DATED: 8/29/13

HON. DENNIS F. BENDER
Acting J.S.C.