

Simons v Petrarch LLC
2017 NY Slip Op 30457(U)
March 1, 2017
Supreme Court, New York County
Docket Number: 158843/2013
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 17

-----X
 KAREN SIMONS,

Plaintiff,

Index No.:
 158843/2013

-against-

PETRARCH LLC d/b/a/ ELECTRUM and HICHAM
 ABOUTAAM,

DECISION/ORDER

Defendants.
 -----X

HON. SHLOMO S. HAGLER, J.S.C.:

This action arises out of plaintiff Karen Simons's complaint alleging that she was subject to sexual harassment, retaliation and civil battery by her employer, defendant Petrarch LLC d/b/a Electrum ("Petrarch") and defendant Hicham Aboutaam ("Aboutaam"), who is the owner of Petrarch (together, "defendants").

Defendants now move, pursuant to CPLR 3126 and New York common law, for sanctions against plaintiff and her attorneys Mintz & Gold LLP, based on spoliation of evidence. Defendants request that the complaint be dismissed. In the alternative, defendants are seeking to preclude evidence or to obtain adverse mandatory inferences, as requested in defendants' revised proposed order, as set forth in motion sequence 008, with respect to the discarded computer, electronically stored log of harassment, ten additional claims of harassment not on the log, handwritten notes, audio recordings, text message screen shots and

plaintiff's cell phones. In addition, defendants are requesting to conduct a forensic examination of plaintiff's applicable email accounts, and are seeking monetary sanctions, punitive damages, as well as additional discovery with respect to the spoliation.

This decision is a consolidation of motion sequences 003 and 008. In motion sequence 003, defendants moved for the instant relief as well as for relief requesting preclusion of an undated audio tape between plaintiff and a co-worker. After a motion to compel was granted on June 15, 2015, defendants moved, in motion sequence 008, for the instant amended and revised relief, based on the new information they received. In light of this Court's determination in this decision, except for the proposed preclusion of the undated audio tape, the relief requested in motion sequence 003 is superceded and rendered moot by the relief granted in motion sequence 008.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff was employed by Petrarch, in its New York City art gallery, from August 2008 until she was terminated in February 2013. She worked as an assistant to Aboutaam. Defendants state that Aboutaam terminated plaintiff when he decided that he longer needed a personal assistant. In May 2013, plaintiff asked defendants if they were hiring again. See Klein affirmation dated Sept. 5, 2014, Exhibit "V," plaintiff's email dated May 6,

2013.¹

On August 7, 2013, plaintiff retained counsel to assist her in commencing an action against defendants. On September 27, 2013, plaintiff filed her complaint. Pursuant to the discovery process, among other things, defendants sought interrogatories and document requests from plaintiff, including any that were electronically stored, related to her claims. The requests also sought any other data compilations from which information could be obtained, including computer systems and files. *Id.*, Exhibit "D," defendants' first document demand at 3.

In response to defendants' requests, on April 11, 2014, plaintiff provided a type-written chronological log of the alleged harassment ("Log") she was subjected to while employed by defendants. The first incident was reported as taking place in March 2009, and the last incident was recorded in December 2012. During plaintiff's deposition on July 15, 2014, she testified that, after the alleged incident of sexual harassment occurred, she would write it down on a piece of paper and then put the entry into her own personal computer. *Id.*, Exhibit "A," plaintiff's tr at 51. Plaintiff indicated that this Log was compiled electronically by her shortly after the incident took

¹ "How are you? How's the family? Gallery? Remember if you or Dina need any help let me know!".

place, creating an on-going Log. After the hand-written notes were entered, plaintiff discarded them.

Plaintiff continued that she owned this personal computer throughout the time she worked for defendants and that she still had it after she was terminated in February 2013. However plaintiff testified that she no longer had the prior personal computer, as she "threw it out. It was ancient." *Id.* at 132. Plaintiff stated that after she was terminated she purchased the new iMac, the "really big one." *Id.* at 131.

Plaintiff could not remember when she purchased the new computer, only that she definitely still had the old computer at the time she was terminated. She did not remember the year that she got a new computer. Plaintiff testified that she neither made a copy of the hard drive nor did she make a copy of any of the contents in the computer before throwing it out. When questioned about the first three pages of the Log, which appear to be a summary of plaintiff's allegations, plaintiff testified that she wrote these pages after she was fired, from "memory." *Id.* at 162.

During plaintiff's July 2014 deposition, defendants requested that plaintiff provide the receipt for the new iMac. However, for months after the deposition occurred, plaintiff would not produce the receipt. On April 14, 2015, plaintiff submitted an affidavit where she stated that she did not remember

"where, when or how our current computer was obtained." *Id.*, Exhibit "C," plaintiff aff, ¶ 3. Plaintiff further stated that she "disposed of the previous computer prior to the time that I decided to initiate this lawsuit because that computer had become outdated." *Id.*, ¶ 4.

Counsel also advised defendants that plaintiff discarded her old computer and purchased a new computer, prior to the time that she was anticipating litigation. For example, on August 20, 2014, counsel stated to defendants that plaintiff "is not in possession of the receipt for the computer she purchased to replace her prior computer (but her new computer was purchased prior to litigation)." Klein reply affirmation dated October 9, 2015, Exhibit "E," Lawler letter at 2.

In another instance, on April 15, 2015, plaintiff's counsel maintained, "[p]laintiff replaced her computer because it was 'ancient' and before she retained counsel and decide to file the instant lawsuit." *Id.*, Exhibit "B," Friedland affirmation, ¶ 3. Counsel further argued that, at no time, did defendants request production of this computer during discovery.

Among other motion practice, defendants brought a motion to compel the production of the purchase date of the iMac. On June 15, 2015, this Court granted defendants' motion to compel plaintiff to produce documents indicating when she purchased the iMac. This Court noted that plaintiff was required to perform

due diligence as to when the computer was purchased, including searching bank records or contacting the Apple store.

On July 15, 2015, plaintiff produced a receipt from the Apple store, dated March 29, 2014. The receipt set forth that plaintiff's husband purchased an iMac on that date, at the Apple Store in Short Hills, for a total purchase price of \$2,052.21. Plaintiff submitted an affidavit that, pursuant to this Court's order, she examined her husband's credit card statements and was able to determine that he purchased their iMac on March 29, 2014.

Discarded computer, electronic log and duty to preserve:

Defendants now move for spoliation sanctions as a result of plaintiff's alleged destruction of her former home computer. Plaintiff claims that she contemporaneously documented the alleged harassment on the discarded computer from March 2009 until she was terminated in February 2013. However, defendants believe that plaintiff created her Log of alleged harassment after she was terminated. They maintain that plaintiff only contemplated this lawsuit after they did not re-hire her again in May 2013, as a way to "extort money from" defendants. Mot seq 003, Memorandum of Law ("MOL") at 2.

Now, without this discarded computer, defendants state that they are unable to determine if plaintiff actually documented the allegations when she said she did. Defendants state, "[t]here can be no doubt that Plaintiff's spoliation of the computer and

the highly relevant ESI and metadata that it contained was deliberate and intentional and, together with her perjured testimony, warrants dismissal of this action." Motion sequence 008, MOL at 2.

According to defendants, plaintiff had control over the computer and the electronic log, had a duty to preserve them, yet she intentionally destroyed them. Plaintiff testified that she threw out this home computer and purchased a new iMac prior to litigation. Counsel also represented several times that plaintiff replaced her old computer and purchased the iMac prior to initiating litigation. However, the purchase receipt from the iMac indicates that plaintiff bought the iMac on March 29, 2014. This date is at least six months after she retained counsel and filed the instant complaint.

In any event, defendants contend that plaintiff's duty to preserve evidence was triggered far earlier than when her complaint was filed. They argue it should be as early March 2009, as this was allegedly when she began documenting the alleged harassment in anticipation of litigation. Defendants point to a secretly recorded conversation that took place as early as May 2010, in which plaintiff is recorded as saying, "[i]f he fires me, I will slap him with a lawsuit." Klein affirmation dated Sept. 5, 2014, Exhibit "B."

Defendants further point to text messages in the record as early as November 2011, where plaintiff texted co-worker Emily Davis (Davis) about suing defendants. She advised Davis to tell her mother that they want to sue defendants. Evidently, when Davis responded, plaintiff texted the following, "Ummm hard to sue? R u whacked? My brother n law and my husband said it will b easy. I found a lawyer who won't take a penny until we get paid." Klein affirmation dated Sept. 5, 2014, Exhibit "K" at 3.

Defendants believe plaintiff's willful destruction of irreplaceable evidence in combination with her conduct warrants dismissal of this action. In the alternative, defendants argue that the Log should be precluded or that the court should issue a mandatory adverse inference that the electronic Log was fabricated in contemplation of litigation and not created contemporaneously with the alleged harassing conduct.

Plaintiff argues that the motion should be denied because the disposal of the computer was, at most, negligent. Counsel states that plaintiff "merely replaced their home computer, as thousands of Americans do every single day. Thus, at worst the loss of the computer was negligent." Pollack affirmation dated Sept. 18, 2015, ¶ 10. In addition, counsel argues that plaintiff, who is not a college graduate, should be held to a lower standard than a corporate party.

As the failure to preserve was negligent, plaintiff argues that the motion should be denied because defendants cannot establish that the discarded computer was relevant. Plaintiff further argues that defendants are merely speculating what was on plaintiff's computer.

In addition, plaintiff claims that, as defendants never requested production of the computer where the Log was typed, it cannot be relevant. "The fact that defendants never demand production of the computer shows it was not relevant." *Id.*, ¶ 35. Plaintiff contends that, as defendants will still be able to challenge plaintiff's Log without examining the computer, neither preclusion of evidence or an imposition of an adverse inference is warranted.

Plaintiff argues that she did not anticipate litigation until 2013. Plaintiff testified that she "felt the need" to create the Log due to the many incidents of harassment starting in 2009, but that it was not in anticipation of litigation. Plaintiff's tr at 174. Plaintiff does not dispute sending text messages to Davis where she discusses litigation. However, plaintiff claims that, although she may have searched on the internet for a lawyer, she did not consider suing at the time. During her deposition she testified that she did not know what made her go on the internet and start researching lawyers in 2011. Plaintiff's tr at 779. According to plaintiff, as she did

not anticipate litigation until at least August 2013, her duty to preserve was not triggered until that date.²

Counsel claims that they fulfilled their professional responsibilities because they informed plaintiff, from the start of their representation, of her obligation to preserve evidence. Counsel writes, "[o]ur firm's, and my personal, practice is to advise clients of their preservation obligations both orally and in writing at the commencement of our representation." Pollack affirmation, ¶ 57. Counsel reiterates that it is ultimately the client's responsibility to preserve the evidence.

Ten additional allegations of harassment:

Pursuant to subsequent discovery, plaintiff includes approximately ten additional allegations of harassment. Some of these are dated as early as 2010, with quoted texts provided. These allegations were neither in the complaint nor were they in the plaintiff's alleged Log of harassment. Plaintiff testified to this effect and claimed that, although she did not write the incidents down or enter them into her Log, she was able to remember them by memory and include them. Defendants now argue that the approximately ten additional allegations of harassment

² The initial privilege Log produced by plaintiff indicates that she spoke to current counsel as early as February 2013. During an in-camera review of certain documents related to the privilege Log, this Court noted that the emails between plaintiff and counsel in February 2013 are irrelevant to the present action as they discuss issues related to payments and employment benefits. June 14, 2016 oral argument, tr at 15.

that were not included in the Log or in the complaint should also be dismissed, precluded or given a mandatory adverse inference.

Spoliation of additional items:

Defendants further request that either adverse inferences or preclusion be issued with respect to the November 2011 recordings, cell phones and screen shots, hand-written notes and undated audio recording.

November 2011 recordings:

In plaintiff's Log of harassment, she listed two attempts in November 2011 to record Aboutaam. In one of the purported recordings, dated November 14, 2011, Aboutaam reportedly sexually harassed plaintiff. Plaintiff deleted any recordings that she allegedly made of Aboutaam. During her deposition, plaintiff testified that she deleted the November 14, 2011 recording because there was nothing worth saving from that conversation. According to defendants, this testimony contradicts the Log, which indicated that an alleged act of harassment occurred.

In her testimony, plaintiff claimed that this November 14, 2011 Log entry may not have been actually recorded on that date and time. According to defendants, this further contradicts plaintiff's claims that the Log was created contemporaneously with the alleged harassment. Defendants are now seeking that the court issue a mandatory adverse inference with respect to these two attempted audio recordings that are reflected on the Log.

They argue that, had plaintiff not destroyed the recordings, "they would have supported Defendants' claim that Plaintiff attempted to bait Mr. Aboutaam into saying something flattering or sexual to her and Mr. Aboutaam rebuffed her advances." Motion sequence 003, MOL at 24.

Plaintiff contends that she does not intend to rely on the recordings to support her claims of harassment and concedes that the recordings do not contain any supporting evidence. As a result, plaintiff argues that there is no basis for an adverse inference, as the recordings have no effect on defendants' ability to defend themselves.

Cell phone and screen shots of text messages:

During testimony, plaintiff explained that, some of the documents produced were screen shots of text messages that she had saved. Plaintiff's tr at 57. She testified that, if she had a text conversation with someone and she thought it was inappropriate, she would take a screen shot of the text conversation. The screen shot would only capture what was on the screen of the phone at the time. However, plaintiff then discarded the original phones and deleted the text messages. So, although plaintiff still had the screen shot of the portion of the text message, she did not have the full text on her phone.

Plaintiff further testified that she had at least two iphones while working for defendants, as well as a Galaxy S4.

During testimony, plaintiff stated that she believed she switched from the iPhone to the Galaxy S4 in early 2013, and lost all of the text messages when she switched. She no longer has any of the phones, including the Galaxy S4 and she cannot remember when she discarded them.

Defendants claim that the screen shots do not always contain a time and date and allege that some of the texts have been altered or deleted. According to defendants, the full context of the conversation cannot be gleaned from the captured portion of the screen shots. In support of their contentions, defendants produced testimony from Alexander Gherardi ("Gherardi"), manager at Petrarch. Gherardi claims that some of the screen shots of the text messages shown to him that were between him and plaintiff had been "doctored," meaning, that a text message or several, were deleted. He testified as to one screen shot in which it appears that he sent plaintiff a picture with a text message, but it was a picture with a caption, not something that was written by Gherardi. Klein affirmation dated Sept. 5, 2014, Exhibit "Q," tr of Gherardi at 277.

Defendants contend that they are prejudiced by this spoliation and have been deprived of the ability to, "[e]xamine the full texts of the snapshots printed and produced by Plaintiff to determine context and whether the snapshots represent in any way the actual texts." Motion sequence 003, MOL at 14.

Defendants argue that, as the screen shots have been altered or are incomplete, they should be precluded from being introduced into evidence. They are further seeking that the court issue an adverse inference with respect to plaintiff's phones that, had plaintiff not discarded her cell phones, the information on the cell phones would have been favorable to defendants and refuted the claims of harassment.

Plaintiff argues that defendants' motion should be denied as she replaced her phones prior to anticipation of litigation. She continues that she replaced her old phone, like millions of other Americans do every year. Even if plaintiff had a duty to preserve the phone, she claims the disposal was negligent.

Plaintiff further argues that her phone was not relevant as defendants only speculate as to what was on the phone. According to plaintiff, defendants do not offer any evidence as to what was on the unprovided portions of the text messages.

Handwritten notes:

Defendants are seeking to preclude plaintiff from testifying about the hand-written notes that she allegedly took and threw away after inputting the information regarding alleged harassment into her computer. Defendants argue that plaintiff had an obligation to preserve these hand-written notes as they were taken in anticipation of litigation. Defendants argue that, as a result the destruction of the notes, they are unable to, among

other things, compare the log to the handwritten notes or determine if the notes actually existed.

Plaintiff maintains that she discarded the hand-written notes prior to her duty preserve evidence.

Undated audio recording:

In motion sequence 003 only, there is a request to preclude an undated unidentifiable recording between plaintiff and Davis. Plaintiff testified that she secretly recorded herself and Davis discussing the alleged harassment. Plaintiff did not remember where or when the conversation took place, but that the conversation may have taken place at any time between 2010 and 2012. Plaintiff continued that she "believe[s]" she recorded the conversation on her iPhone that she no longer has and then transferred it onto her now-discarded computer. Tr at 809.

When asked how she could have retained the tape recording if she got rid of the computer prior to hiring a lawyer, plaintiff stated that she did not know exactly. *Id.* at 814. "I got rid of my home computer prior to suing, meaning I didn't have a lawyer, I wasn't suing. I got rid of my computer a long time ago." *Id.* at 814. However, then she testified that the conversation "could have also been on the tape recorder . . ." *Id.* at 820.

Defendants argue that, as plaintiff could not remember when, where and how she recorded the conversation, it should not be allowed to be entered into evidence as defendants have no way to

examine the original recording to see if anything has been altered.

Plaintiff argues that the recording should not be precluded simply because plaintiff cannot remember when or how she recorded it.

Forensic analysis of emails:

In addition to the spoliation sanctions, defendants are seeking to conduct a forensic examination of plaintiff's email accounts. Defendants believe that emails produced may refute plaintiff's allegations that she was subject to harassment over four years. During plaintiff's deposition, she testified that she would correspond with her supervisors and co-workers on her personal gmail account and as well as her work email. During the course of her employment, plaintiff had two personal gmail accounts; one with her maiden name and one with her married name.

Plaintiff testified that she produced all of the emails or documents she received from co-workers on her personal gmail account. On July 15, 2014, plaintiff testified that she "looked for emails concerning anyone that worked with me during my duration at Phoenix Ancient Art." Defendant's Exhibit "G." Plaintiff's tr at 99. The following day, when questioned about her gmail account, plaintiff testified that she did not remember if she reviewed her own emails in her gmail account.

Defendants claim that they are missing documents as they only received one email chain and some job searches. They maintain that plaintiff's own unsupervised collection of these documents does not satisfy her discovery obligations. In addition, as a result of plaintiff's failure to comply with discovery requests and her destruction of evidence, defendants argue that they are entitled to a forensic review of plaintiff's gmail account to ensure that they have been provided with all of the relevant data.

Defendants are requesting that the court permit a forensic review of this account with searches limited to key terms in this action as agreed upon by the parties. During oral argument, defendants noted that they would agree to key terms with plaintiff's counsel and pay for the forensic company to run the searches. If the searches reveal documents that are relevant to litigation that have been withheld, defendants can make an application for cost shifting. April 7, 2016 oral argument, tr at 41.

Plaintiff argues that this Court should deny the forensic analysis because plaintiff testified that she produced all relevant emails.

Costs and attorneys' fees:

Moreover, defendants argue that plaintiff's counsel should be sanctioned for failing to instruct plaintiff to preserve

evidence and for failing to provide information without court intervention. Defendants are requesting that, as a result of plaintiff and counsel's actions, plaintiff and/or counsel be required to pay all costs, including attorneys' fees, in connection with having to make these motions and the motion to compel production of the purchase date of the iMac. Defendants are also requesting additional monetary sanctions as a result of the misconduct.

DISCUSSION

Spoliation Sanctions:

Both CPLR 3126 and New York's common law-doctrine of spoliation may authorize the imposition of sanctions for either willful or negligent destruction of evidence. "Under CPLR 3126 if a court finds that a party destroyed evidence that ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just [internal quotation marks omitted]." *Ortega v City of New York*, 9 NY3d 69, 76 (2007).

Under the common-law doctrine of spoliation, "[w]hen a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned [internal quotation marks and citation omitted]. . . ." *Denoyelles v Gallagher*, 40 AD3d 1027, 1027 (2d Dept 2007); see

also *Squitieri v City of New York*, 248 AD2d 201, 202-203 (1st Dept. 1998) (Spoliation occurs “[w]hen a party alters, loses or destroys key evidence before it can be examined by the other party's expert” and 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”).

On their motion for spoliation sanctions for the destruction of electronic evidence, defendants must establish:

“(1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a ‘culpable state of mind,’; and finally, (3) the destroyed evidence was relevant to the moving party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense.”

VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d 33, 45 (1st Dept 2012).

“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 [internal quotation marks and citation omitted].” *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d at 41. The Court explained that a reasonable anticipation of litigation can arise, in pertinent part, when a party “seriously contemplates initiating litigation, or when it takes specific actions to commence litigation [internal quotation marks and citation

omitted].” *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d at 43; see also *Barsoum v New York City Hous. Auth.*, 202 FRD 396, 400 (SD NY 2001) (“A party has a duty to retain evidence that it knows or reasonably should know may be relevant to pending or future litigation”).

According to plaintiff, although she took down a Log, made secret recordings, captured incriminating text messages and discussed potential litigation with a co-worker, none of this was done in anticipation of litigation. Plaintiff argues that her duty to preserve evidence was not triggered until she commenced litigation. However, this argument is unavailing. Simply because plaintiff did not actually retain counsel until August 2013 does not mean that she did not reasonably anticipate litigation prior to this date.

According to plaintiff, she started a Log of harassing incidents in 2009, but not in anticipation of litigation. Then, in 2010, plaintiff is recorded saying that, if Aboutaam fires her, she will sue him. Even if plaintiff had not been reasonably anticipating litigation in 2010, she was clearly anticipating litigation in November 2011 as she took “specific actions to commence litigation.” *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d at 43.

In November 2011, plaintiff attempted to secretly record Aboutaam, hoping to record the alleged harassing conduct.

Shortly after the attempted recordings, plaintiff's text messages indicate that she and Davis both wanted to sue for harassment. Evidently when Davis asked about suing, plaintiff texted that she spoke to her family who told her it will be easy to sue and that she found a lawyer that would not take a penny until she and Davis got paid. As a result, by November 2011, plaintiff had been reasonably anticipating litigation because she had discussed the possibility of litigation with her family and Davis, done some research and presumably found a lawyer.

Defendants have satisfied the first element of the spoliation analysis as plaintiff had control over her computer and had an obligation to preserve it at the time it was destroyed. Here, the litigation was commenced in 2013, several months before the iMac was purchased. Even if, according to plaintiff, the duty to preserve arose after litigation commenced, there is no question that plaintiff had an obligation to preserve the work-product on her computer's hard drive, including the alleged Log of harassment, prior to discarding it in 2014.

Plaintiff claims that defendants never specifically asked for her personal computer during discovery. However, the record indicates that defendants asked for any documents or things, including electronically stored information, related to her claims, that was generated after she started working for defendants. This would potentially include the discarded

computer and the electronic Log. In any event, regardless of whether or not defendants specifically asked for the computer and the Log on a date certain, plaintiff still had a duty to preserve them in anticipation of litigation, given the relevance of these items to plaintiff's claims.

It is dubious that plaintiff is an ignorant party as to the preservation of the evidence, as she claims to have recorded the harassment in various ways. The record indicates that plaintiff evidently tried to document things that were favorable to her, while destroying the rest of the evidence. She saved certain screen shots for years, that she thought could possibly be helpful for a potential lawsuit. In any event, plaintiff is not held to a lower standard simply because she is an individual and not a corporate actor. Courts have held that "anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary." *Zubulake v UBS Warburg LLC*, 220 FRD 212, 217 (SD NY 2003).

In *Neverson-Young v Blackrock, Inc.* (2011 WL 3585961, 2011 US Dist LEXIS 89380, *8 [SD NY 2011]), the case cited by plaintiff, although the Magistrate Judge noted that plaintiff was unsophisticated, it found that the donation of her computer after she contemplated litigation was negligent, rather than grossly negligent or willful. The Magistrate Judge noted that there was

no evidence that plaintiff was aware of her duty to preserve her laptop, she did not intentionally dispose of the computer and that there was no more than speculation that documents on the hard drive were relevant.

However, *Neverson-Young v Blackrock, Inc., supra*, is distinguishable from the present situation. Here, counsel claims that it issued a written litigation hold to plaintiff, which would have been in effect prior to when she discarded her computer. In addition, even if plaintiff's misconduct was negligent, there is no question that the information on the computer was relevant.

As set forth below, defendants have demonstrated the second prong in the spoliation analysis that the computer was destroyed with a "culpable state of mind." For purposes of spoliation sanctions a "culpable state of mind . . . includes ordinary negligence [internal quotation marks and citation omitted]." *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d at 45.

Although the exact date of disposal is unknown, the record indicates that, despite misrepresentations from plaintiff to the contrary, plaintiff clearly disposed of her computer at least six months after the litigation commenced. Counsel does not dispute that plaintiff failed to preserve the computer, but argues that plaintiff did not act in bad faith or with gross negligence.

Counsel refers to the disposal as negligent, as thousands of Americans dispose of their computers every day and replace them. However, plaintiff's arguments are unavailing. Prior to the destruction of the computer, plaintiff was given notice of her obligation to preserve all records, including electronic ones. In any event, regardless of whether or not the disposal was willful or intentional, in the very least, the disposal constituted gross negligence.

Defendants are not obligated to come forward with evidence of the relevancy of the computer or the electronic Log because plaintiff's spoliation by discarding the computer was either intentional or grossly negligent. See e.g. *Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 AD3d 607, 609 (1st Dept 2016) ("Where, as here, the spoliation is the result of the plaintiff's intentional destruction or gross negligence, the relevance of the evidence lost or destroyed is presumed"). Regardless, the computer is relevant. There is no speculation as to what may have been on the computer, as plaintiff testified that it was this computer where she allegedly contemporaneously inputted her Log of harassment.³

³ The presumption of relevance is rebuttable in certain circumstances, not applicable here. For example, courts have found the spoliating party can rebut the presumption of relevance "by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses [internal quotation marks and citation omitted]." *VOOM HD*

Courts have broad discretion when considering the appropriate sanction, "such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action." *Ortega v City of New York*, 9 NY3d at 76. Defendants have established a prima facie case for entitlement to sanctions. Had plaintiff preserved the computer where she allegedly inputted her Log of harassment, defendants would have been able to review the metadata to determine whether the Log of harassment was inputted when plaintiff stated it was, or whether, as defendants allege, it was fabricated after plaintiff's termination. See e.g. *Harry Weiss, Inc. v Moskowitz*, 106 AD3d 668, 670 (1st Dept 2013) (Court granted spoliation sanctions by precluding plaintiff from offering certain testimony or evidence and held that, "by discarding the computer after its duty to preserve had attached without giving notice to defendants, plaintiff deprived defendants of the opportunity to have their own expert examine the computer to determine if the deleted files could be restored").

The inability to investigate the computer places defendants at a disadvantage because they are prevented from looking at the critical time period when the allegations were supposedly

Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d at 45.

transcribed. Nonetheless, plaintiff's allegations may still be challenged through testimony and other evidence such as text and email messages. As a result, dismissal is too drastic in this circumstance, given that the loss of this computer does not irrevocably strip defendants of "useful defenses." *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 175 (1st Dept 1997).

"Rather, an adverse inference is sufficient to prevent [plaintiff] from using the absence of the [computer] to its own advantage." *Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402, 403 (1st Dept 2009); see also *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 (1st Dept 2010) (When the destruction of a computer hard drive was either intentional or grossly negligent, the Court affirmed that the lower court "properly drew an inference as to the relevance of the e-mails stored on the drive. The court also properly exercised its discretion in limiting its sanction against defendants to an adverse inference charge [internal citation omitted]").

In the present situation, defendants are entitled to an adverse inference charge as to the computer and the corresponding typewritten Log and all disputed issues related to the Log of harassment shall be resolved in defendants' favor. The adverse inference can be "appropriately tailored by the trial court." *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 554 (2015).

Audio-recordings from November 2011:

As set forth in the facts, plaintiff's Log indicates that she attempted to record Aboutaam on two occasions. Plaintiff claims that she subsequently deleted these recordings because they did not contain any evidence to support her claim. As a result, plaintiff argues that there is no basis for an adverse inference charge.

Defendants are now entitled to an adverse inference charge with respect to the Log of harassment. As the two allegedly attempted audio recordings are included in this Log, they too will be included in this adverse inference charge. See e.g. *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 255 (1st Dept 2011) ("[plaintiff] will not be able to use the absence of the videotape to its advantage"). Defendants are entitled to the presumption that the recordings would have been favorable to them, regardless of whether or not plaintiff intends to use them or claims that they contained nothing to support her claim.

Plaintiff's phones and text-messages:

As addressed above, plaintiff had a duty to preserve the evidence in anticipation of litigation as of November 2011. Plaintiff testified that she had at least two iPhones while she worked for defendants, and then, in early 2013, switched to a Galaxy S4. Plaintiff has provided screen shots, or pictures, of selective portions of text messages that she saved. All of the

screen shots were taken with an iPhone. When plaintiff switched phones from an iPhone to a Galaxy, she lost all of the data stored on her iPhones.

The analysis of plaintiff's phones parallels that of the discarded computer and electronically stored Log of harassment. Similar to the above, plaintiff had a duty to preserve her phones and complete text messages which were in her control. Even if she negligently discarded them, text messages on the phones and the screen shots are undisputedly relevant to her claims, as plaintiff reiterates that these text messages were contemporaneous with the alleged harassment.

Plaintiff concedes that she selectively saved screen shots of text messages that she believed would support her claims. She then deleted the text messages and threw away the phones. As a result, there is no way for defendants to analyze the phones to retrieve the complete text messages from the screen shots and determine the context or whether it had been altered.

Under the circumstances, dismissal of the complaint is not warranted as "the loss of the subject records will not fatally compromise the appellants' defense to the claims or leave them without the means of establishing their defense." *E.W. Howell Co., Inc., v S.A.F. La Sala Corp.*, 36 AD3d 653, 655 (2d Dept 2007). However, spoliation sanctions are necessary, as it is "uncontested" that plaintiff saved selective screen shots and it

would be "unfair" to allow plaintiff to "use the inculpatory images without defendants having an opportunity to see all of the camera views." *New York City Hous. Auth. v Pro Quest Sec., Inc.*, 108 AD3d 471, 474 (1st Dept 2013). By throwing away her phones, plaintiff has deprived defendants from viewing the complete and original text messages from where the screen shots were taken. As defendants were deprived of this opportunity, plaintiff "should be precluded from entering the [screen shots] into evidence or having a witness testify to [their] contents." *Id.*

In addition, an adverse inference is warranted for the information allegedly on plaintiff's discarded phones that is otherwise unretrievable from other sources.⁴ Defendants have been prejudiced by the spoliated evidence and "were entitled to inspect the [phones] to determine for themselves" the accuracy of the content provided. *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 251 (1st Dept 2011); see also *Peters v Hernandez*, 142 AD3d 980, 981 (2d Dept 2016) (Court issued adverse inference charge with respect to the unavailable and negligently disposed of video recording).

Handwritten notes:

Plaintiff testified she would take notes and then discard them after entering them into the computer. Plaintiff claims

⁴ Defendants state that they have been able to obtain certain text messages from some parties but not others.

that, as soon as she entered the incident into the computer, she threw the paper away. This incident would become part of an on-going Word document. As the hand-written notes no longer exist, they cannot be precluded. However, defendants are seeking to preclude plaintiff from testifying about her process of taking notes after an incident occurred and then inputting it into her computer.

Courts have found that "[w]hile a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. [internal quotation marks and citation omitted]." *Zubulake v UBS Warburg LLC*, 229 FRD at 217. Further, "a party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter." *Zubulake v UBS Warburg LLC*, 229 FRD at 218. As a result, it would be conceivable for plaintiff to believe that she did not have to preserve the notes because they were being saved on her computer.

"A party can only be sanctioned for destroying evidence if it had a duty to preserve it." *Zubulake v UBS Warburg LLC*, 229

FRD at 216. Here, as there was no obligation for plaintiff to save her handwritten notes, there can be no sanction imposed.

Even if plaintiff did have a duty to preserve the hand-written notes after November 2011, no sanction will be imposed for the failure to produce the notes. While it can be concluded that plaintiff purposely threw away the computer after litigation commenced, defendants cannot attribute more than negligence with respect to the notes. In addition, as neither party had the opportunity to inspect the hand-written notes, they are both equally prejudiced by their destruction. See *e.g. Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 479 (1st Dept 2011) (Plaintiff and [defendant] are equally affected by the loss of the saw; neither party has reaped an unfair advantage in the litigation as neither party can inspect the saw").

Undated audio recording:

Plaintiff secretly recorded Davis between 2010-2012. Plaintiff does not remember when, where and how she recorded the conversation, but believed that she recorded it onto her iPhone and then transferred it onto her computer. As set forth above, plaintiff had an obligation to preserve both the computer and the iPhone in anticipation of litigation.

Preclusion is appropriate where "the defendants destroy[ed] essential physical evidence leaving the plaintiff without appropriate means to confront a claim with incisive evidence

[internal quotation marks and citation omitted].” *Strong v City of N.Y.*, 112 AD3d 15, 24 (1st Dept 2013). Here, plaintiff should be precluded from introducing the undated audio recording into evidence. Since both the computer and iPhone have been discarded, defendants have no way to identify when or how the recording was made and whether it had been altered.

Additional ten claims of harassment:

Defendants are also seeking to dismiss an additional ten claims of harassment that were not part of plaintiff’s complaint or Log of harassment. Plaintiff provided these new allegations in her supplemental response to interrogatories. Plaintiff testified that she did not write down these incidents in her Log, but that she remembered the exact quoted dialogue from previous years. Defendants maintain that the only way to prove that these additional allegations are fabricated is to show that they were not included in the Log.

Although plaintiff does not address these additional allegations, the spoliation of the computer does not prejudice defendants in their ability to prove that the additional allegations were purportedly fabricated. As defendants maintain, these new allegations were not included in the Log or in the complaint. As a result, even if spoliation of the computer did not occur, an investigation of the computer would not provide any information about the additional allegations. Defendants can

still elicit testimony with respect to these additional allegations, and why they were not included in an allegedly contemporaneous log of incidents. Accordingly, defendants request to dismiss the additional allegations is denied.

Forensic examination of plaintiff's gmail account:

Plaintiff testified that she communicated with co-workers by means of her personal gmail account while employed by defendants. She believes that defendants should not be entitled to a forensic analysis of her gmail account because she testified that she produced all emails to and from co-workers. Defendants argue that a forensic examination of plaintiff's gmail account is warranted given plaintiff's conduct during discovery and her testimony that she was permitted to review her own emails to decide if they were relevant. They believe that the emails produced may contradict plaintiff's claims that she was subject to harassment for four years.

The request to compel inspection of a hard-drive may be granted "when there is reason to believe that a litigant has tampered with the computer or hidden relevant materials despite demand for them in the course of the lawsuit or when the possession or use of the computer is an element of the parties' claims or defenses." *Lifeng Chen v New Trend Apparel, Inc.*, 2012 WL 4784855, *1, 2012 US Dist LEXIS 144919, *4 (SD NY 2012).

Although forensic examinations are only granted "under limited circumstances," a forensic examination of plaintiff's gmail account is warranted in this situation. *Id.* Plaintiff worked for defendants for at least four years and testified that she communicated with supervisors and other co-workers by means of her personal gmail account. Yet, according to defendants, after their discovery requests, they only received one email chain between plaintiff and Aboutaam. Here, as a result of plaintiff's testimony and her alleged conduct of tampering with evidence, there is reason to believe that she failed to produce all responsive documents included in electronic form from her gmail account. Further, these emails may contradict plaintiff's claims that she was subject to harassment for four years.

Moreover, counsel alleges that it fulfilled its professional responsibility by informing plaintiff both at the commencement of its representation of plaintiff and also throughout this action, of her obligation to preserve evidence. However, counsel has been unable to produce a written litigation hold letter and evidently was unable to affirmatively take steps to monitor plaintiff's compliance with preserving evidence. See e.g. *Zubulake v UBS Warburg LLC*, 229 FRD 422, 432 (SD NY 2004) ("A party's discovery obligations do not end with the implementation of a 'litigation hold' -- to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation

hold, monitoring the party's efforts to retain and produce the relevant documents").

Accordingly, defendants are permitted to conduct a limited and narrowly tailored forensic search of plaintiff's gmail account(s), based on agreed upon search terms. See e.g. *Treppel v. Biovail Corp.*, 249 FRD 111, 124 (SD NY 2008) ("plaintiff shall be permitted to undertake, at the defendants' expense, a thorough forensic examination . . . in an effort to recover additional relevant e-mails that were deleted"). Here, defendants will pay for the search, but are seeking to be reimbursed for the costs of the examination if relevant information is found.

Attorneys' fees and costs:

Defendants seek attorneys fees and costs in connection with motion sequences 003 and 008 and defendants' motion to compel. Courts have routinely granted attorneys fees, costs and other monetary sanctions when there has been a finding of spoliation through gross negligence. See e.g. *Ahroner v Israel Discount Bank of N.Y.* (79 AD3d at 481) (Among other things, Court affirmed adverse inference charge and also request for attorneys' fees in connection with motion for spoliation sanctions based on the destruction of electronic evidence); see also *Dean v. Usine Campagna*, 44 AD3d 603, 605 (2d Dept 2007) (Monetary sanction was warranted under CPLR 3126 after plaintiff delayed 10 months in informing the court of negligent spoliation); see also *Arbor*

Realty Funding, LLC v Herrick, Feinstein LLP 140 AD3d at 610 (In addition to granting an adverse inference charge, plaintiff required to pay discovery sanctions to defendant "for its failure to produce . . . until after the motion court had decided the initial spoliation motion").

In the present situation, attorneys' fees and costs are warranted as a result of plaintiff's conduct during discovery. As set forth in the facts, plaintiff misrepresented the timing of the spoliation of the computer and the purchase of the new iMac. Moreover, plaintiff (and counsel as per plaintiff's direction) insisted that plaintiff did not have the iMac receipt and plaintiff did not make any attempt to locate the receipt. It is undisputed that plaintiff could have taken simple steps such as contacting an Apple Store or looking through a credit card statement, to retrieve the receipt. Defendants were forced to bring a motion to compel and wait almost a year before plaintiff provided the receipt. Accordingly, plaintiff is ordered to pay defendants' attorneys' fees, costs and expenses in connection with motion sequences 003, 008 and the motion to compel.

The remaining requests for relief, including punitive damages, monetary sanctions against counsel and additional discovery concerning spoliation of evidence, are denied.

CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion, brought pursuant to New York common law and CPLR 3126 is granted to the extent that defendants are entitled to an adverse inference charge, appropriately tailored by the trial court, resolving all disputed issues in defendants' favor, as to plaintiff's computer, plaintiff's log of harassment, plaintiff's cell-phones and the November 2011 recordings; and it is further

ORDERED that plaintiff is precluded from introducing the screen shots of the text messages and the undated audio recording (motion sequence number 003) into evidence; and it is further

ORDERED that defendants are permitted to conduct a limited and narrowly-tailored forensic search of plaintiff's gmail account(s), based on agreed upon search terms; and it is further

ORDERED that plaintiff is to pay defendants', attorneys' fees, costs, and expenses incurred in connection with the motion for spoliation sanctions (seq. no. 003), the supplemental motion for spoliation sanctions (seq. no. 008) and the motion to compel (seq. no. 005); and it is further

ORDERED that the amount of attorneys' fees and costs due to defendants, is referred to a Special Referee to hear and determine, as permitted by CPLR 4317 (b); and it is further

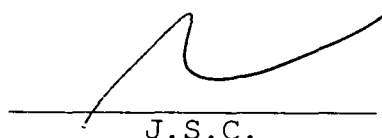
ORDERED that counsel for the defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the additional requested relief is denied; and it is further

ORDERED that a conference will be held in Room 335, on May 3, 2017, at 2:15 p.m.

Dated: March 1, 2017

ENTER:



J.S.C.

SHLOMO S. HAGLER, J.S.C.