

**Siras Partners LLC v Activity Kuafu Hudson Yards
LLC**

2018 NY Slip Op 32484(U)

September 28, 2018

Supreme Court, New York County

Docket Number: 650868/2015

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

plaintiff Siras Partners LLC (Siras), individual plaintiffs Saif Sumaida and Ashwin Verma, violated their duty to preserve evidence—including phone-based We-Chat messages—by upgrading their phones prior to the commencement of this action or the dissolution proceeding. According to Sumaida and Verma, both stopped using We-Chat before tensions arose between the parties, and both “upgraded [his] mobile phone in early 2015, in the ordinary course” (Sumaida aff, ¶ 3 [NYSCEF Doc. No. 607]; Verma aff, ¶ 3 [NYSCEF Doc. No. 606]).

Kuafu contends that plaintiffs’ duty to preserve evidence in anticipation of litigation arose in mid-2014, when, at a partners’ meeting to discuss the development project, Sumaida allegedly told defendant Shang Dai: “if [Dai] did not like the way he was handling the Project’s development, [Dai] had two choices: . . . deal with it, or . . . sue him” (Dai aff, ¶ 6; see *id.* ¶ 7 [“Although we tried many times to resolve the partnership disputes, the response we received was always the same: ‘so sue me.’”] [NYSCEF Doc. No. 591]). Plaintiffs deny that Sumaida told Dai or other principals of Kuafu “so sue me” (Sumaida aff, ¶ 4; see Verma aff, ¶ 4).

A party seeking spoliation sanctions must show that: (1) “the party having control over the evidence possess an obligation to preserve it at the time of its destruction”; (2) “the evidence was destroyed with a culpable state of mind”; and (3) “the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense” (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]). An obligation to preserve relevant evidence arises when a party “reasonably anticipates litigation”; that is, when a party “is on notice of a credible probability that it will become involved in litigation, seriously

contemplates initiating litigation, or when it takes specific actions to commence litigation" (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 43 [1st Dept 2012], citing *Zubulake v UBS Warburg LLC*, 220 FRD 212, 216 [SDNY 2003], The Sedona Conference, Commentary on Legal Holds: The Trigger and The Process, 11 Sedona Conf J 265 [Fall 2010], available at http://www.thesedonaconference.org/content/miscFiles/legal_holds_sept_2010.pdf).

In *Voom HD Holdings LLC*, a duty to preserve arose when the defendant threatened to terminate the contract in emails and the evidence also established that the defendant was aware that terminating the contract would cause the plaintiff to commence litigation (93 AD3d at 43-44). A duty to preserve has also been found to have been triggered when evidence established that a party notified an adversary that the party would consult legal counsel to consider commencing litigation (see e.g. *Ocwen Loan Servicing, LLC v Ohio Pub. Employees Retirement Sys.*, 49 Misc 3d 1219(A), *5-6 [Sup Ct, NY County 2015]).

The court declines to find as a matter of law that the alleged remark, "so sue me," triggered plaintiffs' duty to preserve relevant evidence under the circumstances presented here. In the absence of other evidence, the court is compelled to find that plaintiffs' duty to preserve relevant evidence arose on February 27, 2015 when the petition for dissolution was filed.

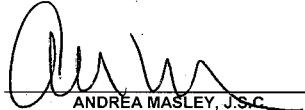
Though no adverse inference or sanctions are imposed as a matter of law, the issue whether plaintiffs' violated a duty to preserve relevant evidence when Sumaida and/or Verna "upgraded" their mobile phones in "early 2015" "in the ordinary course" may be submitted to the jury or the fact-finder to determine when a duty to preserve was

triggered and whether plaintiffs' acted with negligence or gross negligence in not maintaining or backing up their mobile phones at that time, and whether the information on those phones would be relevant to the parties' claims or defenses.

Accordingly, it is

ORDERED that the motion of defendants ACTIVITY KUAFU HUDSON YARDS LLC, 462-470 11TH AVENUE LLC, SHANG DAI, ZENGLIANG "DENIS" SHAN, QILING YUAN, DANIEL DWYER, and DAI & ASSOCIATES, P.C. for spoliation is denied.

9/28/2018
DATE


ANDREA MASLEY, J.S.C.

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	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE