A.D.E. Sys., Inc. v Gil-Bar Indus., Inc.
2019 NY Slip Op 34150(U)
September 25, 2019
Supreme Court, Nassau County
Docket Number: 601433-16
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,

Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

A.D.E. SYSTEMS, INC.,

Plaintiff,

-against-

GIL-BAR INDUSTRIES, INC.,

Defendant.

Decision and Order

MOTION SEQUENCE: 03
INDEX NO.:601433-16

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Support	2
Affirmation in Opposition	3
Affirmation in Reply	4

Plaintiff moves for an order:

i. Granting spoilation sanctions against Defendant Gil-Bar Industries, Inc. ("Gil-Bar") pursuant to CPLR 3126 and the inherent authority of this Court, in the form of striking Infinity's [sic] Answer and Counterclaim, or alternatively, in the form of an adverse inference instruction against Gil-Bar;

ii. If the Court, determines a hearing is necessary, that Gil-Bar's Principals Joe Sbarra and John Gill, and Gil-Bar's IT Manager be present for any such hearing;

iii. Allowing ADE to conduct a forensic examination of Gil-Bar's computer systems;

iv. Awarding ADE its attorneys' fees and costs incurred in the bringing of this spoliation motion.

Background

On April 1, 2015, Plaintiff, A.D.E. Systems, Inc., ("ADE") and nonparty Energy Labs, Inc. ("Energy Labs") entered into an agreement whereby ADE was to become a manufacturers' representative for Energy Labs' products. By letter dated May 21, 2015, Energy Labs terminated the agreement. According to ADE, the termination constituted a breach by Energy Labs and, hence, ADE commenced two related actions, namely *A.D.E. Systems, Inc. v Energy Labs, Inc.* (Index No. 604036/15) (the "*Energy Labs*" action) and the instant action.

The instant action, commenced in March 2016 and predicated upon the contention that Gil-Bar Industries, Inc. ("Gil-Bar") procured Energy Lab's breach of agreement with ADE, pleads three causes of action against Gil-Bar: tortious interference with contract, tortious interference with prospective economic relations, and unfair business practices.

The *Energy Labs* action was commenced on June 22, 2015. In that action, ADE asserted causes of action for breach of contract, anticipatory breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud in the inducement.

The following day, on June 23, 2015, ADE sent identical litigation hold notices ("Notices") to Gil-Bar's principals, Joe Sbarra and John Gill (Exhibits "I" and "J" to Motion). The Notices stated, in relevant part:

> [W]e are writing to place Gil-Bar on notice, not to destroy, conceal, or alter any paper or electronic files, or other data generated by, and/or received by, and/or stored on any of Gil-Bar's computers, email accounts, or storage media, (e.g., hard disks, floppy disks, backup tapes), or any other electronic data, such as voicemail, relating to Gil-Bar's business relationship with Energy Labs. Gil-Bar's failure to comply with his notice may result in severe sanctions being imposed by a court of law - and liability in tort - for spoliation of evidence or potential evidence. In order to avoid spoliation, Gil-Bar will need to retain and preserve the data which will be eventually requested and utilized for discovery purposes and evidentiary purposes in a court of law on the original media.
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> * * *
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> Additionally, Gil-Bar is on notice and must preserve all electronic storage data whether readily readable ("active") or "deleted" but recoverable. They are to

preserve all raw information in computer banks, as well as all computers, servers, hard drives, disk drives and other equipment or media on which such electronic information is stored.

* * *

Further, it is necessary that Gil-Bar preserves all of the following items: hard drives utilized on computers and all backup media, including backup tapes, cartridges, CDs or DVDs; all e-mails, both sent and received whether internally or externally; all word-processed files, including drafts and revisions; all spreadsheets, including drafts and revisions; all databases; all CAD (computer-aided design) files, including drafts and revisions; all presentation data or slide shows produced by presentation software (such as Microsoft PowerPoint or Mac Keynotes); all graphs, charts, and other data produced by project management software; all data generated by calendaring, task management, and personal information management (PIM) software (such as Microsoft Outlook); all data created with the use of personal data assistants (PDAs); all data created with the use of document management software; all data created with the use of paper and electronic mail logging and routing software; all Internet and Web-browser-generated history files, caches and "cookies" files generated at the workstation of each person, representative, agent or employee involved in any manner whatsoever with respect to matters involving Gil-Bar's business relationship with Energy Labs; and any and all other files generated by users through the use of computers and/or telecommunications, including but not limited to voicemail. Further, Gil-Bar is to preserve any log or logs of network used by employees, agents, representatives or otherwise, whether kept in paper or electronic form, and to preserve all copies of Gil-Bar's backup tapes and the software necessary to reconstruct the data on those tapes, so that there can be made a complete, bit-by-bit "mirror" evidentiary image copy of the storage media of each and every personal computer and/or workstation of each person, representative, agent or employee involved in any manner whatsoever with respect to matters involving Gil-Bar's business relationship with Energy Labs, and network server in Gil-Bar's control and custody, as well as image copies of all hard drives retained by Gil-Bar and no longer in service, but relate, directly or indirectly, to Gil-Bar's business relationship with Energy Labs (Exhibits "I" and "J" at pp 1-2).

In an email dated July 10, 2018, Gil-Bar's counsel indicated to ADE's counsel that Gil-Bar "does not have any preserved text messages from during the timeframe at issue in the subject litigation responsive to your demands" (Exhibit "L" to Motion). During a subsequent phone conference with the court on March 7, 2019, Gil-Bar's counsel confirmed that Gil-Bar no longer

possessed its cell phones and text messages during the relevant time period.[1]

ADE moves for spoliation sanctions based on Gil-Bar's failure to preserve text messages and cell phones while under a litigation hold.

For the reasons that follow, the motion is granted in part and denied in part.

The Court's Determination

A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a "culpable state of mind," and "that 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 [2015] quoting *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]; *DiDomenico v C & S Aeromatik Supplies,* 252 AD2d 41 [2d Dept 1998] [sanctions for the spoliation of evidence may be imposed where a litigant, intentionally or negligently, disposes of crucial items of evidence before the adversary has an opportunity to inspect it and even where the destruction takes place before the commencement of litigation, if the person who destroyed the evidence was on notice that the evidence might be needed for future litigation]; *Haviv v Bellovin,* 39 AD3d 708 [2d Dept 2007]).

When evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed while, on the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense (*Pegasus Aviation I., Inc. v Varig Logistica S.A.*, 26 NY3d at 547, *supra*).

The court has wide discretion in determining the appropriate sanctions for spoliation of evidence (*Molinari v Smith,* 39 AD3d 607 [2d Dept 2007]).

When 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 "by striking a party's pleading or instructing the jury that it may draw negative inferences from the missing evidence" (*Lawrence Insurance Group, Inc. v KPMG Peat Marwick LLP,* 5 AD3d 918 [3d Dept 2004]; *Baglio v St. John's Queens Hospital,* 303 AD2d 341 [2d Dept

[1] Gilbar was recently informed by Verizon that they could only provide "texted numbers to and from, dates, and times . . . for the last 6 months" (Exhibit "N" to Motion).

2003]; *Foncette v LA Express,* 295 AD2d 471 [2d Dept 2002]; *New York Central Mutual Fire Insurance Company v Turnerson's Electric,* 280 AD2d 652 [2d Dept 2001]).

The branch of ADE's motion seeking to strike Gil-bar's answer on the grounds of spoliation of evidence is denied. The drastic remedy of striking a pleading will not be imposed unless there is evidence that the spoliation was the result of willful and contumacious conduct resulting in the destruction of "key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence" (*De Los Santos v Polanco,* 21 AD3d 397 [2d Dept 2005]; *see also Dean v Campagna,* 44 AD3d 603 [2d Dept 2007]).

Nevertheless, an adverse inference charge has been found to be appropriate even in situations where the evidence has been found to have been negligently destroyed (*see, e.g., Pergasus Aviation I, Inc. v Varig Logistices S.A.*, 26 NY3d 543 [2015]; *Strong v City of New York*, 112 AD3d 15 [1st Dept 2013] [adverse inference charge at trial may be appropriate where evidence was negligently destroyed]; *Marotta v Hoy*, 55 AD3d 1194 [3d Dept 2008] [trial court did not abuse its discretion in determining that plaintiff was entitled to an adverse inference instruction as a sanction for negligent spoliation]; *Tomasello v 64 Franklin, Inc.*, 45 AD3d 1287 [4th Dept 2007] [adverse inference charge appropriate sanction for negligent spoliation]).

Here, ADE established that Gil-Bar had an obligation to preserve evidence at the time of its destruction. Even assuming that Gil-Bar did not intentionally destroy the text messages or cell phones, its failure to preserve them and take timely actions to recover damaged or destroyed phones and data constituted gross negligence, which raises the presumption of relevance (*see Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d at 547, *supra; Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, 171 AD3d 680 [2d Dept 2019][2];
Arbor Realty Funding, LLC v Herrick, Feinstein LLP, 140 AD3d 607 [1st Dept 2016]; *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33 [1st Dept 2012]).

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[2] In *Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, the plaintiffs issued a litigation hold and requested electronic data, neither of which specifically included cell phones or text messages. Nevertheless, the trial court found that the demand "could not have been broader and clearly included defendants electronic communications via WeChat [a social media application]" (*Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, 2018 WL 1363411 [Supreme Court New York County 2018]; *see also* 3 NY Prac Com Litig in New York State Courts § 27:28 [4th ed.] ["Given the volume of text messages and instant messages sent each day on cell phones, iPhones and other PDAs, it should come as no surprise that courts regard text messages as ESI that is subject to discovery, and that sanctions will be imposed when text messages are not preserved"]).

Notably, the "electronic data" defined in the litigation hold issued by ADE is broader than the "electronic data" set forth in *Siras Partners LLC v Activity Kuafu Hudson Yards LLC* which was found to include WeChat communications.

Conclusion

Based on the foregoing, it is hereby

Ordered that the branch of the Plaintiff's motion seeking an adverse inference instruction is granted; and it is further

Ordered that the branch of the Plaintiff's motion seeking attorneys' fees and costs incurred in making the instant motion is granted and it is further

Ordered that the motion is, in all other respects, denied.

Plaintiff shall submit an affirmation of counsel fees within 10 days of the date hereof; Defendant may submit a response within 10 days thereafter.

This constitutes the decision and order of the court.

Dated: September 25, 2019

Hon. Vito M. DeStefano, J.S.C.