Norton v Brodsky Org.
2026 NY Slip Op 31285(U)
March 31, 2026
Supreme Court, New York County
Docket Number: Index No. 156102/2020
Judge: Hasa A. Kingo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **65M**

Justice

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TESSA NORTON,

Plaintiff,

- v -

BRODSKY ORGANIZATION, OSCAR FUENTES

Defendant.

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INDEX NO. 156102/2020

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 122, 123, 124

were read on this motion for SANCTIONS.

Plaintiff Tessa Norton ("plaintiff") moves for spoliation sanctions based on the undisputed forensic finding that the work-issued iPhone assigned to Defendant Oscar Fuentes ("Fuentes") was subjected to a factory reset on May 31, 2020, resulting in the destruction of user data that plaintiff contends is central to her claims. Plaintiff seeks (i) a permissive adverse inference charge at trial; (ii) evidentiary preclusion to prevent defendants from offering proof or argument concerning the contents of the wiped device; and (iii) related relief, including costs and attorneys' fees incurred in connection with the forensic investigation and motion practice.

BACKGROUND AND PROCEDURAL HISTORY

This action arises from plaintiff's allegations that Fuentes, while employed by the corporate landlord/management defendant Brodsky Organization ("corporate defendant"), harassed plaintiff and engaged in retaliatory conduct, including communications transmitted through Fuentes's work-issued phone. Plaintiff contends that the corporate defendant is liable under theories that include, among others, vicarious liability and notice-based claims (NYSCEF Doc Nos. 92, 94, 122).

In prior motion practice, the court permitted forensic inspection of Fuentes's work-issued phone after defendants represented that the device had been located (NYSCEF Doc No. 92 ¶ 3). Plaintiff thereafter submitted an expert affidavit and report concluding that the device had been factory reset and that no recoverable user-generated data could be obtained from the forensic image (NYSCEF Doc No. 93). The forensic findings establish, and defendants do not dispute, that the reset occurred on May 31, 2020—after Fuentes's termination, which plaintiff asserts occurred May 4, 2020 (NYSCEF Doc Nos. 93, 94, 101, 122).

The present motion is therefore a renewed application for spoliation sanctions, made on a materially different record than existed when the court previously authorized forensic inspection.

ARGUMENTS

Plaintiff argues that defendants had a duty to preserve the phone and its contents once litigation was reasonably anticipated, at the latest by the time Fuentes was terminated in response to plaintiff's complaints; that defendants failed to implement meaningful preservation measures (including any effective litigation hold, custody controls, or timely forensic imaging); and that the May 31, 2020 factory reset destroyed relevant evidence and irreparably prejudiced plaintiff. Plaintiff further argues that it is not necessary to prove the identity of the individual who executed the reset for sanctions to lie, because the operative question is whether the party with control and an obligation to preserve failed to do so and thereby caused loss of relevant evidence. Plaintiff seeks, *inter alia*, an adverse inference and preclusion to restore balance to the litigation (NYSCEF Doc Nos. 92, 94, 122).

The corporate defendant opposes, principally arguing that plaintiff cannot satisfy the foundational elements for spoliation sanctions because plaintiff cannot establish that the corporate defendant performed the factory reset or that the phone was in the corporate defendant's custody or control at the time of the reset.[1] The corporate defendant contends that plaintiff's arguments rest on speculation; that Fuentes, in a contemporaneous text message, purportedly claimed he had already deleted content from the phone earlier (April 2020), which (the corporate defendant argues) undermines any showing that relevant evidence existed on May 31, 2020; that any purported missing evidence is available from alternate sources (including plaintiff's own device and email accounts, and third-party subpoenas); and that plaintiff cannot demonstrate prejudice sufficient to warrant sanctions. The corporate defendant further asserts that chain-of-custody documentation and the involvement of a third-party custodial vendor establish reasonable handling of the device after it was later secured (NYSCEF Doc No. 101).

DISCUSSION

A party seeking spoliation sanctions bears the burden to establish: (1) the party having control over the evidence possessed an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the moving party's claim or defense such that a trier of fact could find that the evidence would support the claim or defense (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-548 [2015]).

With respect to relevance, where evidence is determined to have been intentionally or willfully destroyed, relevance may be presumed; where the evidence is determined to have been negligently destroyed, relevance must be established by the movant (*Pegasus Aviation I*, 26 NY3d at 547-548).

[1] Fuentes filed no opposition to this motion and, to date, has failed to defend against the allegations asserted against him.

Trial courts possess broad discretion to craft proportionate relief to restore balance when evidence is lost or destroyed, including adverse inference instructions, preclusion of proof to prevent unfair tactical advantage, and the shifting of costs associated with the development of replacement evidence (*Ortega v City of New York*, 9 NY3d 69, 76 [2007]; *Pegasus Aviation I*, 26 NY3d at 551).

The sanction selected must be commensurate with the particular misconduct and should not go further than is necessary to remedy the prejudice and restore fundamental fairness (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc*., 22 NY3d 877, 880-881 [2013]). Finally, the Appellate Division, First Department, has repeatedly emphasized that, although striking a pleading is an available remedy, it is a drastic sanction that is generally reserved for situations in which the spoliated evidence is crucial and the spoliator's conduct reflects a higher degree of culpability, or where the moving party is left "prejudicially bereft" of the ability to prove a claim or defense (*Rossi v Doka USA, Ltd*., 181 AD3d 523, 525-526 [1st Dept 2020]; *Harry Winston, Inc. v Eclipse Jewelry, Corp*., 215 AD3d 421, 424-425 [1st Dept 2023]).

I. Duty to Preserve

The duty to preserve relevant evidence arises when a party reasonably anticipates litigation; at that point, the party must take affirmative steps to preserve evidence, including preventing routine destruction of electronic data (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 41 [1st Dept 2012]; *Ferrer v Go N.Y. Tours Inc*., 228 AD3d 457, 457-458 [1st Dept 2024]).

Here, defendants do not meaningfully dispute that (i) Fuentes's work-issued phone was a significant medium of communication relevant to the allegations; and (ii) the device was factory reset on May 31, 2020, after Fuentes's termination (NYSCEF Doc Nos. 93, 101, 122). The corporate defendant's attempt to cabin its preservation obligation by emphasizing uncertainty about who pressed the "reset" buttons is unavailing as a matter of governing spoliation doctrine.

The first prong is not "identity of the spoliator"; it is whether the party against whom sanctions are sought had control and an obligation to preserve at the time the evidence was destroyed (*Pegasus Aviation I*, 26 NY3d at 547-548).

On this record, the court finds that, at the time of the May 31, 2020 factory reset, the corporate defendant had sufficient "control" over the work-issued phone to trigger an obligation to preserve it. The phone was issued by the employer in the course of employment; it was employer property; and the corporate defendant's own submissions concede that, at some point after termination, the device was received by the corporate defendant (NYSCEF Doc No. 101 ¶¶ 40-44; NYSCEF Doc No. 94). In the spoliation context, "control" is not limited to a snapshot of physical possession at a particular minute; it includes practical and legal authority to secure and preserve evidence (*Pegasus Aviation I*, 26 NY3d at 547-548; *Coney Is. Auto Holdings, Corp. v Parts Auth., LLC*, 231 AD3d 470, 471 [1st Dept 2024]).

Moreover, even where a party later attempts to attribute destruction to an employee or agent, the corporate litigant cannot escape responsibility for preservation failures by pointing to

internal actors while conceding that it did not implement adequate preservation controls (*see VOOM*, 93 AD3d at 44-45 [discussing the duty to identify key players and to ensure their records are preserved and to stop automatic deletion]).

The corporate defendant's emphasis on post-December 2020 custodial documentation does not cure the earlier preservation lapse. Preservation obligations attach when litigation is reasonably anticipated, and the critical question is what was done (or not done) while relevant evidence remained susceptible to destruction (*Ferrer*, 228 AD3d at 457-458; *Maiorano v JPMorgan Chase & Co*., 124 AD3d 536, 536 [1st Dept 2015]).

II. Culpable State of Mind

A culpable state of mind for spoliation sanctions includes ordinary negligence (*VOOM*, 93 AD3d at 45; *Harry Winston*, 215 AD3d at 424).

The court does not, on this motion record, make a definitive finding that the corporate defendant intentionally or willfully executed the factory reset. The corporate defendant's expert analysis and arguments raise factual uncertainty as to the precise actor (NYSCEF Doc No. 101). Nor is the court persuaded that the record permits a finding, by the clearer evidentiary showings sometimes made after a dedicated hearing, that the corporate defendant deliberately "hard deleted" data in the manner addressed in *Coney Is. Auto Holdings*, where the Appellate Division, First Department, upheld findings of intentional deletions after a hearing (231 AD3d at 471-472).

That said, the absence of a finding of willfulness does not end the analysis. The court finds, at minimum, that defendants' preservation failures rise to the level of negligence sufficient to support sanctions.

A factory reset is not a passive technological event; it is a destructive act that, once performed, irreversibly eliminates user data in modern encrypted mobile devices, materially impairing forensic recovery (NYSCEF Doc No. 93). Defendants concede the reset occurred (NYSCEF Doc No. 101; NYSCEF Doc No. 122). When a work-issued device central to disputed communications is wiped after the duty to preserve has attached, and where the party with control cannot establish timely, concrete preservation measures (such as immediate securing of the device, a custody log, or prompt forensic imaging), the resulting loss constitutes at least negligent spoliation (*see Ferrer*, 228 AD3d at 457-458 [negligence sufficient; duty to preserve required affirmative steps]; *Ellis v JPMorgan Chase Bank*, 190 AD3d 413, 413-414 [1st Dept 2021]).

The corporate defendant's reliance on juristic uncertainty—created in substantial part by the lack of contemporaneous custody controls—is not a defense; it is evidence of deficient preservation practice. *VOOM* underscores that failures such as not taking effective steps to preserve key players' electronic records and allowing destruction to continue are factors supporting culpability (93 AD3d at 45).

III. Relevance and Prejudice

Because the court finds negligence (and does not, on this motion, make a definitive finding of intentional spoliation by the corporate defendant) plaintiff must demonstrate relevance (*Pegasus Aviation I*, 26 NY3d at 547-548).

Plaintiff satisfies that burden. The phone at issue is not peripheral discovery. It is the work-issued device used by the alleged harasser/actor during the relevant period, and plaintiff's theory of liability includes communications, notice, and the nature and extent of the conduct. In analogous contexts, the Appellate Division, First Department, has found that deleted or overwritten electronic recordings are "potentially relevant" where they may shed light on disputed conduct, conditions, or credibility, even when other evidence exists (*Ferrer*, 228 AD3d at 458 [deleted bus camera footage "potentially relevant" to claims]; *Cabrera-Perez v Promesa Hous. Dev. Fund Corp*., 225 AD3d 464, 464-465 [1st Dept 2024] [negative inference warranted where lost footage could bear on disputed incident]).

The corporate defendant argues that plaintiff already possesses many communications through her own phone and email, and that certain allegedly harassing messages have been produced from other sources (NYSCEF Doc No. 101). That argument goes to degree of prejudice and calibration of sanction—not to irrelevance.

First, partial survival or partial production does not negate spoliation. Even when some evidence remains, the destruction of a key repository may compromise fairness by depriving the non-spoliating party of additional communications, context, and metadata bearing on authenticity, timing, and scope (*see Lev v Eataly USA LLC*, 231 AD3d 482, 483 [1st Dept 2024] [even absent definitive culpability proof, loss of video "compromised the fairness of the litigation" warranting adverse inference]; *Harry Winston*, 215 AD3d at 424-425 [prejudice analysis informs whether drastic sanctions are warranted]).

Second, the "alternate source" argument is overbroad in the mobile-ESI[2] context. While some communications may be duplicated on plaintiff's device, the spoliated phone could contain additional relevant categories of information: deleted messages not mirrored on the recipient's phone; communications with third parties bearing on notice, motive, or contemporaneous reactions; internal contacts and call history; and device-level metadata and artifacts relevant to authentication and chronology. *Ferrer* recognizes that a litigant may not unilaterally determine what footage (or, by extension, data) is relevant and delete the remainder (228 AD3d at 458).

Third, reliance on Fuentes's alleged April 2020 statement that he deleted content from the phone does not defeat relevance. Even if Fuentes deleted some content at an earlier time, that does not establish that no relevant evidence existed thereafter, nor does it excuse the later May 31, 2020 reset that indisputably wiped the device. The Court of Appeals' framework focuses on whether the evidence destroyed at the relevant time was subject to preservation obligations and whether its loss undermines the fairness of adjudication (*Pegasus Aviation I*, 26 NY3d at 547-548; *Ortega*, 9 NY3d at 76).

[2] In a legal context, ESI stands for "Electronically Stored Information." It refers to any data created, manipulated, stored, or transmitted in digital form that may be relevant to legal proceedings, such as lawsuits or investigations, and is subject to discovery.

On prejudice, the court finds that the destruction of the phone's user data meaningfully prejudices plaintiff. Plaintiff's claims and defendants' defenses will be litigated in a credibility-laden, communication-driven factual setting. The loss of a principal communication device compromises plaintiff's ability to test defendants' narrative through contemporaneous digital evidence and deprives the factfinder of the best evidence of the disputed communications (*see Gogos v Modell's Sporting Goods, Inc*., 87 AD3d 248, 251 [1st Dept 2011][party should not be compelled to accept self-serving statements about destroyed recordings; adverse inference appropriate where destruction deprived opportunity to view material evidence]).

IV. Appropriate Sanction

The court must craft relief that is proportionate and necessary as a matter of fundamental fairness, without going further than is required to remedy the prejudice (*Merrill Lynch*, 22 NY3d at 880-881; *Duluc v AC & L Food Corp*., 119 AD3d 450, 452 [1st Dept 2014]).

Striking an answer is not warranted on this record. The Appellate Division, First Department, has repeatedly held that striking is generally inappropriate where the missing evidence is not the sole means by which the moving party can prove its case, and where other testimonial or documentary proof remains available (*Acosta-Romero v Suiyeng Hung Fong*, 231 AD3d 591 [1st Dept 2024]; *Harry Winston*, 215 AD3d at 424-425).

Here, plaintiff retains some communications and may develop proof through depositions, building records, and other discovery. The court therefore declines to impose a terminating sanction. However, the court finds that measured, trial-focused sanctions are necessary to restore balance given the negligent spoliation of a key ESI source.

a. *Permissive Adverse Inference*

A permissive adverse inference charge is appropriate (*see Ferrer*, 228 AD3d at 457-458; *Lev*, 231 AD3d at 483).

The court emphasizes that any adverse inference must be permissive, not mandatory (*Temiz v TJX Cos., Inc*., 178 AD3d 620, 621 [1st Dept 2019] [an instruction that effectively requires an inference is tantamount to a liability determination and is improper; the instruction must allow, not compel, the inference]).

Accordingly, the court will deliver, at trial, a PJI 1:77-style permissive charge, tailored to this case, permitting (but not requiring) the jury to infer that destroyed user data from Fuentes's work-issued phone would have been unfavorable to defendants on relevant disputed issues, including (as applicable on the trial record) Fuentes's communications and conduct and the corporate defendant's notice and response.

b. *Preclusion Regarding Contents of the Wiped Device*

Preclusion is also warranted, but narrowly tailored to prevent defendants from obtaining an unfair tactical advantage by testifying about or introducing proof concerning the contents of evidence that was lost while under defendants' preservation obligations.

The Appellate Division, First Department, has specifically endorsed coupling an adverse inference with preclusion where allowing testimony about the contents of missing electronic recordings would advantage the spoliation (*Tittel v City of New York*, 237 AD3d 416, 417 [1st Dept 2025][modified to add preclusion from introducing evidence concerning contents of missing tape because otherwise spoliator would gain tactical advantage]; *Strong v City of New York*, 112 AD3d 15, 24 [1st Dept 2013][preclusion appropriate to prevent defendants from confronting a claim or defense with "incisive evidence" where essential evidence destroyed; in negligent erasure context, lesser sanctions may be appropriate depending on materiality]).

Here, the court precludes defendants, at trial, from offering testimony, proof, or argument purporting to describe, characterize, or summarize the contents of Fuentes's work-issued phone as they existed prior to the May 31, 2020 factory reset, including any assertion that the phone contained no additional relevant communications beyond those otherwise produced. This preclusion does not bar defendants from introducing independent records obtained from third parties (e.g., carrier business records) that are otherwise admissible, nor does it bar appropriate cross-examination of plaintiff with materials properly in evidence. The objective is to prevent defendants from filling the evidentiary void of their own making with self-serving content testimony (*see Tittel*, 237 AD3d at 417; *Gogos*, 87 AD3d at 251).

c. *Costs and Attorneys' Fees*

Finally, the court finds that cost-shifting is an appropriate component of a proportionate sanction here.

The Court of Appeals has recognized that sanctions may include requiring the spoliator to pay costs associated with the development of replacement evidence (*Ortega*, 9 NY3d at 76; *Pegasus Aviation I*, 26 NY3d at 551).

The Appellate Division, First Department, has affirmed spoliation sanctions directing payment of attorneys' fees and costs incurred in reviewing evidence and preparing the spoliation motion (*Zacharius v Kensington Publ. Corp.*, 154 AD3d 450, 451 [1st Dept 2017]).

Here, plaintiff incurred forensic expenses precisely because the device was not preserved in a forensically sound manner when the duty to preserve attached, and plaintiff was required to litigate the issue after the destructive reset was confirmed. Under these circumstances, and to restore balance, the court awards plaintiff the reasonable costs and attorneys' fees incurred (i) in connection with the forensic work necessary to determine the condition of the phone and (ii) in making the present motion.

The amount of such fees and costs shall be determined as follows: within 30 days of entry of this order, plaintiff shall serve and e-file an affirmation of services (with invoices and proof of payment/redaction as appropriate consistent with privilege) limited to the above categories; the

corporate defendant shall serve and e-file any opposition within 30 days thereafter; and plaintiff may file a reply within 14 days. If the parties cannot stipulate to an amount on that schedule, the court will refer the matter to a Special Referee to hear and report, or hear and determine, as appropriate.

Finally, the court finds that the spoliation at issue cannot be viewed in artificial isolation as to one defendant alone. The duty to preserve relevant evidence attached to the employment relationship and the litigation reasonably anticipated by both defendants, and the failure to safeguard the subject device and its electronically stored information reflects a breakdown in preservation obligations that operated to the detriment of the truth-seeking function of the court and the fairness of the adversarial process. Where, as here, the record demonstrates that the device was irreversibly wiped after defendants were on notice of potential litigation, thereby rendering critical evidence permanently unavailable, a sanction tailored to restore evidentiary balance must apply to all parties whose conduct and shared litigation posture contributed to the loss of that evidence, irrespective of the precise identity of the individual who executed the reset.

At the same time, principles of proportionality and fairness require that the financial consequences of the discovery failure be borne by the party with primary institutional responsibility for the management, custody, and preservation of the work-issued device. The corporate defendant, as the entity that owned the device, controlled the relevant information systems, and was best positioned to implement preservation protocols once litigation was reasonably anticipated, shall therefore bear the costs and attorneys' fees associated with the forensic examination and motion practice. This allocation appropriately reflects the relative responsibility of the parties while ensuring that the remedial sanction imposed by the court is both equitable and consistent with the governing standards articulated by the Court of Appeals and the Appellate Division, First Department.

Accordingly, it is hereby

ORDERED that plaintiff's motion (Motion Seq. 004) is granted to the extent that, at trial, the court will deliver a permissive adverse inference charge consistent with *Temiz v TJX Cos., Inc*., 178 AD3d 620 [1st Dept 2019], permitting (but not requiring) the jury to infer that the user data destroyed from defendant Fuentes's work-issued phone by the May 31, 2020 factory reset would have been unfavorable to defendants on relevant disputed issues; and it is further

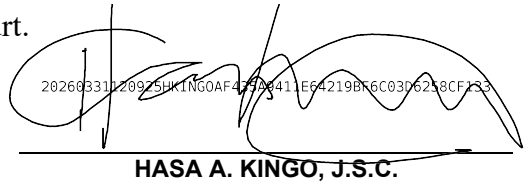
ORDERED that defendants are precluded, at trial, from offering testimony, documentary proof, or argument purporting to describe, characterize, or summarize the contents of Fuentes's work-issued phone as they existed prior to the May 31, 2020 reset, including any assertion that the device contained no additional relevant communications beyond those otherwise produced, except that defendants are not precluded from offering admissible third-party business records or other independent evidence properly obtained and disclosed; and it is further

ORDERED that plaintiff is awarded the reasonable costs and attorneys' fees incurred in connection with (i) the forensic work necessary to determine the condition of the phone and (ii) the present motion practice, in an amount to be fixed upon submissions as set forth above; and it is further

ORDERED that the parties are directed to appear for a discovery conference before the court in Room 308 of the courthouse located at 80 Centre Street, New York, New York, on Tuesday June 2, 2026, at 2:15 PM; and it is further

ORDERED that plaintiff's remaining requests for relief are otherwise denied.

This constitutes the decision and order of the court.



3/31/2026
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE