

In *Man Zhang v. City of New York*, 2019 WL 3936767 (S.D.N.Y. Aug. 20, 2019), Magistrate Judge Ona T. Wang awarded plaintiffs attorneys’ fees but denied plaintiffs’ request for entry of a default judgment or an adverse inference instruction because plaintiffs failed to establish that defendants’ failure to preserve certain electronically stored evidence was anything more than negligent.

Plaintiffs, administrators of Zhiquan Zhang’s estate, brought suit against a group of defendants, including the City of New York and the New York City Department of Correction (collectively, “defendants”), following Zhang’s death while in pretrial detention at Rikers Island jail. *Id.* at *1. According to plaintiffs, despite Zhang complaining to corrections officers about his chest pains and seeking treatment, defendants failed to provide him with adequate medical care. Following closure of discovery, plaintiffs filed a motion seeking sanctions for defendants’ alleged failure to preserve inmate location information, video surveillance footage and telephone recordings. Plaintiffs also sought sanctions because a corrections officer failed to appear for her deposition. As recourse for defendants’ alleged conduct, plaintiffs requested either (1) “an adverse influence,” which, to Magistrate Judge Wang, “appear[ed] to be a request for the Court to strike Defendants’ pleadings and to enter a default judgment,” or (2) “an adverse inference instruction.” Plaintiffs also sought attorneys’ fees and costs.

Before considering the merits of plaintiffs’ spoliation motion, Magistrate Judge Wang set forth the applicable legal standards with respect to ESI and non-ESI evidence. As she explained, “Rule 37(e) of the Federal Rules of Civil Procedure ... governs sanctions for failure to preserve ESI,” and “before the sanctions listed in subsection 2 of Rule 37(e) — i.e., adverse inference, dismissal, or default judgment — are available[.]” “Plaintiffs must show that Defendants acted with the intent to deprive [them] of the information’s use in the litigation.” *Id.* at *4 (internal quotation marks omitted). Alternatively, under subsection 1, “[u]pon finding prejudice to another party from loss of the information, [the court] may order measures no greater than necessary to cure the prejudice.” Additionally, for ESI evidence, plaintiffs must “demonstrate that the spoliating party had an obligation to preserve the evidence at the time it was destroyed.” *Id.* (internal quotation marks, brackets and citation omitted).

For non-ESI evidence, Magistrate Judge Wang explained, the spoliation standards found in *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002) apply. Under *Residential Funding*, “a party seeking an adverse inference instruction is required only to demonstrate (1) that the party having 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 the mind and (3) that the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Id.* (internal quotation marks omitted). Magistrate Judge Wang specified that Rule 37(e)’s standard applied to the video surveillance footage and telephone recordings in dispute, while the standards found in *Residential Funding* applied to the inmate location information. *Id.* at *5.

As an initial matter, the magistrate judge noted that “the parties agree that Defendants failed to impose a litigation hold relating to any of the[] categories of documents” at issue: “Where the parties disagree is whether Defendants were required to do so, and whether Plaintiffs have sufficiently established the relevance of each set of documents such that spoliation sanctions are warranted.” *Id.* at *5.

Ultimately, with respect to non-ESI evidence, Magistrate Judge Wang concluded that there was insufficient evidence to conclude that the information sought pertaining to bed numbers or bed charts ever existed. In addition, defendants' duty to preserve did not extend to defendants' housing area log books, as plaintiffs contended, and sanctions were not warranted for the loss of documents concerning inmate location information. *Id.* at *5-*7.

With respect to the video surveillance footage and telephone records, however, Magistrate Judge Wang concluded that sanctions were warranted because (1) defendants destroyed relevant evidence after their duty to preserve attached (no later than April 26, 2016), and (2) plaintiffs were prejudiced by the loss of such evidence. *Id.* at *5. But plaintiffs managed to demonstrate only that defendants' failure to preserve the ESI was "at worst negligent," and Magistrate Judge Wang therefore concluded that plaintiffs were entitled to sanctions under Rule 37(e)(1) and awarded attorneys' fees and costs. *Id.* at *7-*10. Finally, as to plaintiffs' contention that a corrections officer missed her deposition, Magistrate Judge Wang ruled that sanctions were not warranted because regardless of whether the officer was a Rule 30(b)(6) designee or a nonparty, there was no subpoena or order that specifically identified the officer, and, in any case, the officer had good cause for her failure to appear at the deposition as she was "out on medical leave due to illness." *Id.* at *10.