

1. A ruling from the Supreme Court of New York requiring a defendant to produce its document hold notices and related material based on the plaintiff's showing that the defendant had spoliated responsive materials.

In *Radiation Oncology Servs. of Cent. New York, P.C. v. Our Lady of Lourdes Mem'l Hosp., Inc.*, 69 Misc. 3d 209 (N.Y. Sup. Ct. Cortland Co. June 9, 2020), New York Supreme Court Justice Mark G. Masler ordered the Defendants to produce their litigation document hold notices and related information because the Plaintiffs made a preliminary showing of spoliation as to certain documents, which Defendants failed to rebut as a matter of law, but held in abeyance Plaintiffs' request for spoliation sanctions until after production of the document hold materials.

In this breach-of-contract litigation, Plaintiffs moved to compel production of Defendants' litigation hold and all related ESI as well as for sanctions based on alleged spoliation. *Id.* at 210. Plaintiffs claimed seven instances of spoliation, but Justice Masler addressed only two, both of which involved instances in which Defendants produced a printed copy of a document but failed to produce electronic copies or any associated ESI. *Id.* at 211-12.

Justice Masler explained that "[l]itigation holds are generally protected from disclosure by the attorney-client privilege or as attorney work product unless a preliminary showing of spoliation is made." *Id.* at 210. Where a preliminary showing of spoliation has been made, production of a litigation hold may be ordered "because its scope and effect bear directly on the state of mind of the party with control of the destroyed evidence, which is a critical element in determining whether spoliation sanctions are warranted, and, if so, in assessing an appropriate sanction." A party seeking "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.'" *Id.* at 211 (quoting *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45 (1st Dept 2012)).

Justice Masler found that Plaintiff established a preliminary showing of spoliation. With respect to the two emails at issue, he noted that Defendants produced printed hard copies of the emails but no electronic versions or ESI associated with them. *Id.* at 211-12. Justice Masler then found that Defendants failed to rebut Plaintiffs' preliminary showing of spoliation by arguing that the hardcopy versions of the documents contained their content. Justice Masler concluded that this did not resolve the spoliation issue as "printing paper copies of the emails and permanently deleting the associated ESI potentially deprived the emails of significant evidentiary value." Nor did Defendants establish, "as a matter of law ... (1) that they had no obligation to preserve the evidence at the time of its destruction; (2) that the evidence was destroyed through no fault or wrongdoing whatsoever, even negligence; or (3) that the missing evidence was not relevant to Plaintiffs' claims." *Id.* at 212-13.

Because Defendants failed to rebut Plaintiffs' preliminary showing of spoliation, Justice Masler ordered Defendants to produce all litigation hold notices and associated ESI. *Id.* at 213. But Justice Masler held Plaintiffs' motion for sanctions in abeyance until the parties had a "full and fair opportunity to litigate the issue of spoliation" using the litigation hold materials.