

**1. A ruling from the U.S. District Court for the Southern District of New York denying spoliation sanctions based on the fact that Plaintiff had reset his employer-provided mobile phone before returning it to his employer.**

In *Goldman v. Sol Goldman Investments LLC*, 20-CV-06727 (MKV)(SN), 2022 WL 2118199 (S.D.N.Y. June 13, 2022), U.S. Magistrate Judge Sarah Netburn denied a motion for terminating and other sanctions based on the fact that Plaintiff had reset his employer-provided mobile phone before returning it to his employer, as well on as the non-production of certain emails.

In this case alleging wrongful termination of Plaintiff by Defendants, a dispute arose in discovery regarding certain electronically stored information (ESI): (1) the records from Plaintiff's work cell phone and (2) an email Plaintiff sent to his doctor on May 28, 2020. *Id.* at \*1. After Plaintiff was fired in June 2020, he returned his work phone and laptop to Defendants. Before returning the phone, Plaintiff reset the phone to the factory setting, deleting the phone's contents. Plaintiff claimed that he reset the phone because he "received this work phone on the factory setting and believed [he] was supposed to return the phone in the same condition in which [he] received it" and because he thought "it would be easier for the next employee to use the phone if it had been re-set to the factory setting." Plaintiff further claimed that he did not believe resetting the phone would lead to any loss of information because Defendants maintained the phone records, and all of his emails were saved on their server. The evidence included a July 3, 2020, email in which Plaintiff wrote to a friend: "I erased the Solil phone .... Long story short, they would not send me my stuff and they didn't send me FedEx labels for their computers."

During discovery, Plaintiff performed a search of his email account for responsive documents, including communications from his doctor, and provided the emails he found to his attorney, which did not include the May 28, 2020, email at issue. At the doctor's subsequent deposition, the doctor voluntarily provided Defendants the May 28, 2020, email from Plaintiff. *Id.* at \*2. After the doctor's deposition, Plaintiff's counsel helped him conduct a second search of his email, which led to the discovery of 75 new emails and documents. Plaintiff's email referencing his erasure of his work phone was apparently included in this production.

Defendants moved for sanctions pursuant to Federal Rule of Civil Procedure 37(e). They argued that Plaintiff engaged in the "intentional, bad-faith spoliation of evidence" and sought dismissal of Plaintiff's complaint with prejudice or, in the alternative, lesser sanctions.

Magistrate Judge Netburn began her analysis with a summary of the standards applicable to a claim of spoliation under Rule 37(e), noting that "[s]poliation is the

destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." After surveying the requirements of Rule 37(e), she noted that it authorizes courts to impose severe sanctions only where "the party that lost the information acted with the intent to deprive another party of the information's use in the litigation." *Id.* at \*3. In addition, the movant must show some prejudice, which may either be inferred from evidence that the spoliator "acted with the intent to deprive" or be proven circumstantially.

Quoting from the advisory committee notes to Rule 37(e)(1), Magistrate Judge Netburn explained that "an evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation ... which can either be interpreted as requiring merely that the spoliated evidence be probative, or alternately that it would affirmatively support the movant's claim." Again quoting from the advisory committee notes, she explained that "[t]he rule does not place a burden of proving or disproving prejudice on one party or the other" but rather "leaves judges with discretion to determine how best to assess prejudice in particular cases." Magistrate Judge Netburn further explained that the clear and convincing standard is the appropriate standard of proof to apply to a claim of spoliation where "the defendants seek terminating sanctions and the plaintiff's state of mind is at issue."

Applying these standards to the case, Magistrate Judge Netburn quickly disposed of Defendants' request for sanctions in connection with the May 28, 2020, email because that email had been produced. Rule 37(e) applies only where ESI has been "lost" and "cannot be restored or replaced through additional discovery." *Id.* (citing Fed.R.Civ.P. 37(e)). Because the email had been produced, spoliation sanctions may not be awarded and there was no need to inquire into Plaintiff's state of mind with respect to the email.

Defendants argued that Plaintiff's post-termination email to his friend that he "erased" his phone established intent to deprive Defendants of the ESI, but Magistrate Judge Netburn found that Defendants did not show that any information was "lost" or "cannot be restored." *Id.* at \*4. She noted that the requirement in Rule 37 that ESI be lost reflects that ESI "often exists in multiple locations" and so "loss from one source may often be harmless when substitute information can be found elsewhere." To the extent Defendants sought access to Plaintiff's work email or phone records from his work cell phone, they unquestionably had access to them as his former employer.

Magistrate Judge Netburn found that Defendants failed to show that Plaintiff acted with the intent to deprive them of the phone records. In particular, she concluded that Plaintiff saying "I erased the Solil phone" did not establish by clear and convincing

evidence that Plaintiff acted with the intent to deny Defendants access to this ESI. She also noted that Plaintiff's own litigation conduct demonstrated his belief that the information would be available to Defendants and favorable to him.

Finally, Magistrate Judge Netburn found that Defendants failed to make a showing of prejudice. Defendants asserted that the deleted phone records "must have been relevant because Plaintiff would not have destroyed it in his fit of anger if the data would not have benefited or been relevant." However, Magistrate Judge Netburn noted that "[c]ourts in this Circuit generally require some proof that the evidence would affirmatively support the movant's claim before sanctions will issue," and the mere fact that data has been lost or destroyed is not sufficient to support an inference that it would have been favorable to Defendants.

Ultimately, Magistrate Judge Netburn found that Defendants had not established the elements of a spoliation claim under Rule 37(e) and denied their request for sanctions. *Id.* at \*5.