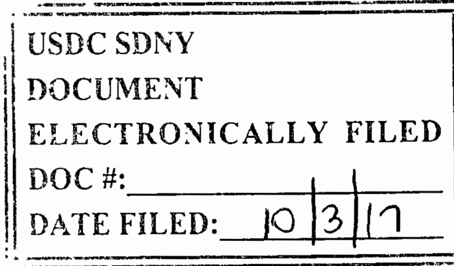


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HILARY RHODA, *et al.*,

Plaintiffs-Counterclaim Defendants,

-against-

No. 14 Civ. 6740 (CM)

MARIANNE K. RHODA,

Defendant-Counterclaim Plaintiff.

DECISION AND ORDER DENYING DEFENDANT-COUNTERCLAIM PLAINTIFF M. RHODA'S MOTIONS IN LIMINE

McMahon, C.J.:

Before the Court are two motions *in limine* from Defendant-Counterclaim Plaintiff M. Rhoda (Dkt. Nos. 168, 170).[1]

Defendant's First Motion in Limine

Defendant moves *in limine* (Dkt. No. 168) seeking an adverse inference instruction against Plaintiffs for destruction of email evidence in Defendant's HRH Group, Inc. ("HRH") email account. For the reasons set forth below, the motion is DENIED.

I. Legal Standard

Spoliation is defined as "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." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (citing *Black's Law Dictionary* 1401 (6th ed. 1990)). Under Federal Rule of Civil Procedure 37(e), a court may sanction a party for failing to take reasonable steps to preserve electronically stored information that cannot be restored or replaced through additional discovery upon a finding that "the party acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2). Additionally, a "court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002), *superseded by statute on other grounds* as *recognized in CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 495 (S.D.N.Y. 2016); *see Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 267 (2d Cir. 1999),

[1] "Plaintiffs-Counterclaim Defendants" are hereinafter referred to as "Plaintiffs," and "Defendant-Counterclaim Plaintiff" is hereinafter referred to as "Defendant."

superseded by statute on other grounds as recognized in Hernandez v. Jrpac Inc., No. 14 CIV. 4176 (PAE), 2016 WL 3248493, at *35 (S.D.N.Y. June 9, 2016).

"The choice of an appropriate remedy for spoliation 'is confined to the sound discretion of the trial judge and is assessed on a case-by-case basis.'" *Ottoson v. SMBC Leasing & Fin., Inc.*, No. 13 CIV. 1521, 2017 WL 2992726, at *8 (S.D.N.Y. July 13, 2017) (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)). Among the established sanctions for spoliation is "an inference that the evidence would have been unfavorable to the party responsible for its destruction.'" *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

A party seeking an adverse inference instruction must establish: "(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 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. *Stern v. City of New York*, 665 F. App'x 27, 29 (2d Cir. 2016) (citing *Residential Funding Corp.*, 306 F.3d at 107). "A party seeking spoliation sanctions has the burden of establishing the elements of a spoliation claim by a preponderance of the evidence." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 107 (2d Cir. 2001), *superseded in part by statute on other grounds as recognized by Mazzei v. Money Store*, 656 F. App'x 558, 560 (2d Cir. 2016). The adverse inference instruction is an "extreme sanction and should not be given lightly." *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 219-20 (S.D.N.Y. 2003).

Between the filing of the complaint in this case and the instant motion, a new Rule 37 went into effect, impacting the obligations of parties to preserve electronically stored information.

> The Advisory Committee Notes on section (e)(2) of the new Rule . . . make clear that the new Rule 37 rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of [mere] negligence or gross negligence. In other words, the new Rule 37(e) overrules Second Circuit precedent on the question of what state of mind is sufficiently culpable to warrant an adverse inference instruction when electronically stored evidence is missing.

Thomas v. Butkiewicus, No. 3:13-CV-747 (JCH), 2016 WL 1718368, at *7 (D. Conn. Apr. 29, 2016) (internal quotation marks and citations omitted). Thus, litigants in the Second Circuit seeking an adverse inference now have the burden of proving "intent to deprive," rather than ordinary or gross negligence. Fed. R. Civ. P. 37(e)(2).

Upon transmitting the new Rule 37 to Congress, Chief Justice Roberts included an order providing, in pertinent part, that "the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2015, and shall govern in all proceedings in civil cases thereafter commenced and, *insofar as just and practicable*, all proceedings then pending." 13 2015 U.S. Order 0017 (emphasis added). "Chief Justice Roberts' order is consistent with 28

U.S.C. § 2074(a), which permits the Supreme Court to apply new rules to pending proceedings, 'except . . . to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.'" *Best Payphones, Inc. v. City of New York*, No. 1-CV-3924, 2016 WL 792396, at *3 (E.D.N.Y. Feb. 26, 2016) (citing 28 U.S.C. § 2074(a)).

Accordingly, this Court must apply the new version of Rule 37(e) unless, as a preliminary matter, it concludes that it would be unjust or impracticable to do so.

II. Discussion

The Court finds that it would be unjust to utilize the new Rule 37(e) to decide the instant motion. In deciding which rule to apply in similar circumstances, courts within this Circuit have considered whether the motion was briefed before or after the new Rule 37(e) came into effect, *see McIntosh v. United States*, No. 14-CV-7889 (KMK), 2016 WL 1274585, at *32 (S.D.N.Y. Mar. 31, 2016); *Citibank, N.A. v. Super Sayin' Publ'g, LLC*, No. 14-CV-5841, 2017 WL 946348, at *2 (S.D.N.Y. Mar. 1, 2017); *Learning Care Grp., Inc. v. Armetta*, 315 F.R.D. 433, 440 (D. Conn. 2016), whether either party has advocated for the application of the old or new rule, *see Thurmond v. Bowman*, No. 14-CV-6465W, 2016 WL 1295957, at *8 n. 6 (W.D.N.Y. Mar. 31, 2016), *report and recommendation adopted*, 199 F. Supp. 3d 686 (W.D.N.Y. 2016), and whether the party seeking sanctions is *pro se* and thereby entitled to a presumption that the case would have proceeded more quickly and under the old rule had the party been represented. *See Thomas*, 2016 WL 1718368, at *8. Courts have also considered whether the alleged spoliation transpired before or after the revisions to Rule 37(e) went into effect. *See id.*; *see also Distefano,* 2017 WL 1968278, at *4.

Here, the alleged spoliation occurred in March 2014 and the case was commenced in August 2014, over a year before the amendment to Rule 37(e) took effect on December 1, 2015. Although Defendant filed the instant motion in September 2017 – after the amendment to Rule 37(e) – the parties first raised this issue in early 2015 before Magistrate Judge Ellis prior to the application of the new rule. (*See* Giger Decl., Ex. G, Dkt. No. 176.) Thus, the Court will apply the old, more permissive standard. *See Learning Care Grp.*, 315 F.R.D. at 440. As detailed below, even under the old version of Rule 37(e), the Court finds that an adverse inference instruction is not warranted.

A. Obligation to Preserve

The Court first examines whether "the party having control over the evidence had an obligation to preserve it at the time it was destroyed." *Residential Funding Corp.*, 306 F.3d at 107. A party has a duty to preserve evidence when "the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Fujitsu Ltd.*, 247 F.3d at 436. The duty to preserve arises when litigation is "reasonably foreseeable." *Byrnie*, 243 F.3d at 107.

Here, Plaintiff H. Rhoda fired Defendant on February 4, 2014, for her alleged refusal to provide documentation about personal and business finances. (*See* Dkt. No. 163 at 19.) On or

about February 5, 2014, Defendant served Plaintiff H. Rhoda with a formal Notice of Default pursuant to her 2010 Manager Agreement. (*See id.*) In the Notice, Defendant stated that Plaintiff H. Rhoda breached the 2010 Manager Agreement by firing Defendant, making disparaging statements about her to third parties, disclosing the financial terms of the 2010 Manager Agreement, and by allowing a third party to interfere with and negotiate contracts without Defendant's written permission. (*See id.*) In the Notice, Defendant also alleged that her termination was an attempt by Plaintiff H. Rhoda to convert commission to which she was entitled. (*See id.*) Defendant's termination, the Notice of Default, and the surrounding circumstances should have caused Plaintiff H. Rhoda to reasonably anticipate litigation.

Therefore, Plaintiff H. Rhoda had an obligation to preserve Defendant's HRH emails by February 5, 2017, at the latest.

B. Culpability

The Court must next determine whether "the records were destroyed with a culpable state of mind," *Thomas*, 2016 WL 1718368, at *7, sufficient to warrant the imposition of sanctions. The evidence on this point demonstrates that Plaintiff H. Rhoda acted with ordinary negligence, and nothing more.

Plaintiff H. Rhoda asserts that she deactivated the account after she became aware that Defendant – even after her termination – was still purporting to act on behalf of Plaintiffs. (*See* H. Rhoda Decl., Dkt. No. 175 ¶ 4.) In order to prevent Defendant from continuing to mislead third parties by communicating with those third parties through the HRH email account, Plaintiff H. Rhoda attempted to render the HRH email account inactive. (*See id.* ¶ 5.) Six months later, in October 2014, in connection with discovery in this case, Plaintiffs became aware that GoDaddy.com, its web hosting servicer at the time, deleted the emails associated with the deactivated account from its server pursuant to its policy of doing so fourteen days after deactivation. (*See id.* ¶ 5-7.)

The Court finds that, at the time she deactivated Defendant's email account, Plaintiff H. Rhoda was not aware that GoDaddy.com would eventually delete its contents from its server. And Defendant's submissions do not prove otherwise.

Defendant points to an August 2017 printout of a Help Page from GoDaddy.com, which explains the steps necessary to delete an email account. (*See* Ex. 2, Dkt. No. 169.) Defendant points to a warning box on the Help Page that reads: "When you delete an email address, you also delete all of the messages remaining on the server for that address." The printout is dated August 2017. First, it is not clear that this warning box was posted on the page in March 2014 when Plaintiff H. Rhoda deleted the email account. More importantly, without proof, it is not clear that Plaintiff H. Rhoda even accessed the GoDaddy.com Help Page and read the warning message, before she deactivated the account. It is also plausible that Plaintiff H. Rhoda deactivated the account using her intuition of how websites work.

C. Relevance

"Where a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." *Residential Funding Corp.*, 306 F.3d at 109.

Absent bad faith, however, "it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him." *Zubulake*, 220 F.R.D. at 221 (internal quotation mark and citation omitted). When the destruction is negligent, "the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that 'the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.'" *Residential Funding Corp.*, 306 F.3d at 109. In other words, the party seeking sanctions must demonstrate that a reasonable trier of fact could find that "the missing records would have been unfavorable to the spoliator." *De Espana v. Am. Bureau of Shipping*, No. 3-cv-3573 (LTS) RLE, 2007 WL 1686327, at *7 (S.D.N.Y. June 6, 2007), *objections overruled sub nom. Reino de Espana v. Am. Bureau of Shipping, Inc.*, No. 3-cv-3573(LTS)RLE, 2008 WL 3851957 (S.D.N.Y. Aug. 18, 2008).

Such a showing can be made on the basis of extrinsic evidence. "Typically, the evidence used to establish relevance of missing documents is deposition testimony." *De Espana*, 2007 WL 1686327, at *8. However, there is no deposition testimony here to support such a finding. Here, Defendant's counsel, for whatever reason, failed to ask Plaintiff H. Rhoda any questions concerning the deleted emails during her deposition. Moreover, when the parties raised the issue before Magistrate Judge Ellis, on October 7, 2015, he invited Defendant's counsel to move for an additional deposition on the topic if needed. (*See* Giger Decl., Ex. G, Dkt. No. 176 at 7:19-25.) Defendant's counsel, however, failed to do so and has otherwise presented no evidence tending to prove that the substance of the missing emails would have been favorable to her and thus unfavorable to Plaintiffs.

Additionally, Plaintiffs have already produced over 30,000 pages of emails in connection with this case, thousands of which are to, from, or copying M. Rhoda's HRH and/or personal email accounts used for business communications, making the likelihood of prejudice to Defendant a nullity. "No matter what level of culpability is found . . . [t]he absence of prejudice can be shown by demonstrating . . . that the other [party was] able to obtain the same evidence from another source." *Best Payphones, Inc.*, 2016 WL 792396, at *6 (internal quotation marks and citations omitted). Because Defendant has "not met its burden of demonstrating with sufficient evidence that the missing emails would have contained relevant information *unfavorable* to [Plaintiffs], or that [Defendant] is now prejudiced without those records, no adverse inference sanction is appropriate." *De Espana*, 2007 WL 1686327, at *8 (emphasis added).

Defendant's Second Motion in Limine

Defendant's motion *in limine* (Dkt. No. 170) for leave to take a trial deposition of Shaundri St. Louis, a former accountant for Plaintiffs is DENIED.

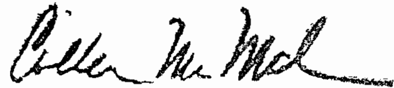
St. Louis is a citizen and resident of Maryland, beyond the scope of the Court's subpoena power. The parties already deposed St. Louis on May 28, 2015, and again on June 23, 2015, and the deposition lasted almost the two full days. Defendant proffers no compelling circumstances that motivate the Court to reopen discovery; she simply requests to "take another deposition that is specifically tailored to be used as trial testimony." (Def.'s Memo of Law in Supp. of Mot. to Take Trial Dep. of Shaundri St. Louis at 2.) Defendant does not suggest that St. Louis' deposition testimony is inadmissible, outdated, or incomplete. Neither does she suggest that any facts or circumstances relevant to St. Louis' testimony occurred after her deposition was already taken or after discovery ended in this case over a year ago.

Defendant has approximately 660 pages of St. Louis' deposition transcript to utilize in trying this case. I see no reason to add to that. Its motion is, accordingly, DENIED.

Conclusion

For the foregoing reasons, Defendant's motions *in limine* (Dkt. Nos. 168, 170) are DENIED.

Dated: October 3, 2017



Chief Judge

BY ECF TO ALL COUNSEL