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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MORIA ROGERS,

CASE NO. 1:10-cv-00589-SMS

Plaintiff,

ORDER DENYING PLAINTIFF’S MOTION
TO SANCTION DEFENDANT FOR
DESTRUCTION OF EVIDENCE

v.

SEIBERT FAMILY TRUST 1995, et al.,

(Docs. 41 and 42)

Defendants.

_____ /

Plaintiff Moria Rogers moves this Court for an order sanctioning Defendants for destroying copies of video surveillance of Rogers’ rented trailer in Defendants’ mobile home park. Defendants respond that, since indicating that the recordings were lost or destroyed, they were able to locate the recordings and have provided copies to Rogers. Rogers replies that Defendants have given her fewer than the number of recordings that she expected in light of Defendant Leslie Seibert’s deposition statement that he had retained copies of surveillance tapes that interested him. Because no evidence supports the conclusion that Defendants lost or destroyed any video surveillance recordings, the Court denies Rogers’ motion for sanctions.

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1 **I. Procedural and Factual Background**

2 In April 2005, Moria Rogers,¹ the plaintiff in this action, purchased a mobile home
3 parked on a leased lot in Sierra Hide-Away Mobile Home Park, which was managed by
4 Defendant Leslie Seibert, who is also a member of its owning partnership. Disagreements
5 between Rogers and Seibert developed almost immediately. Although many details of the
6 parties' relationship figure in the case as a whole, this motion only relates to Plaintiff's claim that
7 Defendants invaded her privacy by installing video surveillance system intended to observe
8 activities in Rogers' home.

9 On July 5, 2009, Seibert provided a letter to all tenants, indicating that park management
10 had observed a need for identification and documentation of activities in the park. Citing reports
11 of a possible theft and of an outsider who had entered the park and knocked on a tenant's door at
12 4:00 a.m., Seibert disclosed that management intended to install video surveillance equipment
13 and solicited the tenants' comments on the matter. In her response, Rogers declared that taping
14 her would be an invasion of her privacy and accused Seibert of "aggressive and obsessive
15 stalking behavior." Doc. 44-5.

16 On July 18, 2009, Seibert reported to the tenants, among other matters, that eighteen of
17 nineteen tenants who responded to his inquiry favored installation of video surveillance
18 equipment. Seibert stated:

19 We are going to do what we can to provide security and a feeling of safety. For
20 any others that do not want surveillance in this park I can only say with all the
21 kindness I can, that surveillance cameras are going to be installed as soon as
22 possible. And that is a fact. And surveillance is going to be time dated and
23 recorded 24/7. What we are doing is providing security and proof of events for
24 everyone who lives in this park. This is an adult park age 55 years and older, no
25 children and that is why a number of you selected this park. But a number of you
26 have also expressed to me that as your age has advanced you feel more vulnerable,
27 especially as we have observed our society become more angry and violent.
28 Surveillance does not necessarily stop crime, but often de[ter]s the crime because
of the surveillance. And de[ter]ing of crime is a good thing.

Doc. 44-3 at 2.

27 ¹ In the course of the events underlying this action, Rogers has used both her maiden name, Moria Rogers,
28 and the name Moria Isaksson. (Rogers apparently resumed use of her maiden name after filing a divorce complaint
in 2008.) To minimize confusion, the Court will consistently refer to the Rogers in this action using her current
name, Moria Rogers.

1 On July 27, 2009, Rogers, who was then pregnant, complained to Defendant Leslie
2 Seibert, the park manager, that, among other things, the privacy of her master bedroom had been
3 compromised by the installation of video surveillance cameras in the park and removal of
4 landscaping that screened her home from the street.

5 On or about August 27, 2009, Rogers gave birth. She continued to live in her mobile
6 home with her infant. On December 11, 2009, Sierra Hide-Away filed a declaratory judgment
7 action in California Superior Court, Madera County, seeking an order that Rogers could no longer
8 reside in a mobile home in Sierra Hide-Away with her infant.²

9 On April 5, 2010, Rogers filed the complaint in this case, alleging claims for violation of
10 the Fair Housing Act (42 U.S.C. § 3604(b)), the California Fair Employment and Housing Act
11 (California Government Code § 12955(b)), and the Unruh Civil Rights Act (California Civil
12 Code § 51 *et seq.*); unfair business practices (California Business & Professions Code § 17204);
13 negligence; negligent interference with prospective economic advantage; intentional interference
14 with prospective economic advantage; and invasion of privacy.

15 On April 6, 2010, Rogers's attorney deposed Seibert in the declaratory judgment action.
16 According to Rogers, Seibert stated that he had made permanent copies of some video
17 surveillance tapes, which he retained in his home. Immediately following the deposition,
18 Rogers's attorney served Seibert with the summons and complaint in this case.

19 The relevant portion of the deposition reads as follows:

20 Q. How many video surveillance cameras were installed?

21 A. Well, we had seven installed, but I really only have three now, and I'm
22 going to activate probably one other because four of them were attached to
23 my own unit where I could observe them through my screen in my own
24 home.

24 Q. Now, the video surveillance cameras, does it record or is it just looking at—

25 A. Um-hum, it does record and looks at live events.

26 ² Although the complaint refers to Exhibit A, which sets forth 27 conditions and rules of Sierra Hide-Away
27 in force when Rogers first leased her mobile home, and Exhibit D, which sets forth certain amendments to the rules,
28 implemented by a vote of the residents in 2007, Rogers did not include these appendices with the copy of the
complaint appended to her motion. According to the complaint, the 2007 amendment required that mobile homes in
the park be owner occupied.

1 Q. Let me ask you this: What type of media does it use to record? Is it CD,
2 DVD or what does it do?
3 A. It records, like, onto a DVD and you can make hard copies of these things.
4 Q. And how often do you have to change that DVD?
5 A. It rotates. It just keeps going. You'd have—you would have to— it wipes
6 out at the end of 30 days and starts over.
7 Q. So in other words, it will run for 30 days straight and if you wanted to you
8 could pull it out at that point and install a new one?
9 A. No.
10 Q. Does it start taping over itself after 30 days?
11 A. Yes, yes, yes, yes.
12 Q. Now, do you keep any of these tapes or you just let it –
13 A. No. What I do if there's things of interest to me that I want to record, I can
14 go in and record those and just stick them in a file for future reference. If
15 there's nothing happening—let's say the person in unit No. 7 says
16 somebody broke into my house. Well, when do you think that happened?
17 Well, I think it happened two nights ago, we were gone. I can go back and
18 I can check the cameras and see what shows up and I can give them a copy
19 to give to the sheriff.
20 Q. Now, you mentioned that you sometimes might have need of making a
21 hard copy. Have you made any hard copies since—
22 A. I've made a few.
23 Q. And where are those kept?
24 A. At my place, at my home.
25 Q. And what were those few of?
26 [Defendants' counsel]: Objection.
27 A. Nothing of any, you know—
28 By [Plaintiff's counsel]:
29 Q. You mention that there were seven cameras and now there were only four,
30 you say, or three?
31 A. There's only three now. The reason is we had—over in my office area we
32 had three of those installed. At my place, there was four installed. So
33 when I moved out of my place and had it all repainted and so forth, I took
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1 those all off and we've done nothing with them. So I am going to reinstall at
2 some point, yes, I probably will, at least one. Other than that, probably not.

3 Deposition of Leslie Seibert at 154:10-156:21 (April 6, 2010).³

4 Plaintiff's attorney asked no further questions regarding the content of the discs Seibert
5 had downloaded, what Seibert meant by "things of interest to me that I want to record," or how
6 many discs Seibert had downloaded from the surveillance system.

7 On June 2, 2010, Rogers requested that Seibert produce various documents, including
8 "[a]ll permanent copies of any video surveillance of the Subject Rental Premises from April 1,
9 2005, to the present." Although Seibert indicated that he would produce copies of the video
10 recordings, he did not do so. Rogers and Defendants' counsel met and conferred multiple times,
11 but the video copies had not been produced by January 19, 2011, when Defendants moved to
12 substitute Andrew W. Sorenson for their prior counsel. On January 27, 2011, the Court granted
13 Defendants' motion to substitute counsel and vacated the discovery end date of March 17, 2011.

14 On May 9, 2011, Seibert responded to Rogers's request for production of the surveillance
15 video tapes, stating "[R]esponding party is unable to comply, because videotapes meeting the
16 above request have been destroyed, ha[ve] been lost or replaced and are no longer in the
17 possession, custody, or control of the responding party." On August 5, 2011, the parties' counsel
18 met and conferred regarding discovery requests but were unable to resolve the dispute concerning
19 Rogers's request for the surveillance video recordings. Thereafter, Defendants' attorney again
20 contacted Seibert and asked him to search again for any copies of video surveillance. Seibert
21 located three discs in the park office. Of these, two had readable content. On September 14,
22 2011, Seibert provided copies of these two computer discs to Rogers.

23 In a declaration prepared for this motion, Seibert stated that he initially had difficulty
24 understanding the technology of the surveillance cameras, which retained images for several days
25 before recording over them. Surveillance images could be retained by making copies of portions

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27 ³ In his deposition, the surveillance camera installer, Gary Milner, explained that the cameras had to be
28 monitored from two different location because the cable could not cross the driveway. Deposition of Gary Milner at
25-26 (September 12, 2011). As a result, the monitor for some of the cameras was installed in the office, which was
on one side of the driveway, and a monitor for the rest of the cameras was installed in Seibert's mobile home, which
was on the other side of the driveway.

1 of the tapes revealing activity of possible relevance. Seibert tested the recording process and sent
2 a disc copying a portion of the surveillance to his son Mark, who lived in Maryland. Mark
3 reported that the disc was not readable. Seibert tried again. The second disc revealed that the
4 cameras were aimed too high and failed to show pedestrians' faces or the occupants or license
5 plates of vehicles. Thereafter, Seibert had the cameras' aims adjusted. Mark discarded the discs.

6 Rogers contends that Seibert aimed two video cameras at her mobile home. She
7 maintains that because Sierra Tel, which initially installed the cameras, would not aim them to
8 record activities within her home, Seibert had a resident, Pete Jarra, reposition the cameras to
9 reveal her activities within her home. In his September 12, 2011 deposition, Jarra denied that he
10 positioned the security cameras to record activity at Plaintiff's home.

11 **II. Spoliation of Evidence**

12 "Parties may obtain discovery regarding nonprivileged matter that is relevant to any
13 party's claim or defense—including the existence, description, nature, custody, condition and
14 location of any documents or other tangible things." F.R.Civ.P. 26(b)(1). This includes
15 electronically stored information, including photographs, from which information can be
16 obtained either directly or through translation. F.R.Civ.P. 34(a)(1)(A). If a party has failed to
17 comply with discovery, a party may move for an order compelling discovery after it has made a
18 good faith effort to confer or attempt to confer with the party from whom the discovery is sought.
19 F.R.Civ.P. 37(a)(1). If the party from whom discovery is sought does not fully comply with the
20 court's order compelling disclosure, the party may move for sanctions pursuant to F.R.Civ.P.
21 37(b). *See West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). When an
22 order compelling discovery has not been entered, a party may still apply for sanctions against
23 another party for spoliation of evidence, that is, for destroying, altering, or failing to preserve
24 property for another's use as evidence in pending or reasonably foreseeable litigation. *Id.* When
25 spoliation occurs in the absence of a discovery order, a court may impose sanctions pursuant to
26 its inherent power. *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Plaintiff
27 contends that, because Seibert destroyed or discarded discs composed of downloaded periods of
28 electronic surveillance, sanctions are against defendants appropriate here.

1 A court may only levy sanctions for spoliation of evidence when the party knew or
2 reasonably should have known that the destroyed evidence was potentially relevant to the claim.
3 *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). Thus to sanction Defendants, the Court
4 must find that the discs that Seibert lost or destroyed discs at some time after Plaintiff served him
5 with the summons and complaint at the close of his deposition on April 6, 2010.

6 In her original motion, Plaintiff argues that Seibert must have done so because, “[d]uring
7 his deposition, Mr. Seibert openly admitted that he had made permanent copies of some of the
8 video surveillance tapes and kept them in his home.” Doc. 43 at 5. Her contention was correct
9 as far as it went. But analyzing the propriety of sanctions is complicated because, in his response
10 to Plaintiff’s motion for sanctions, Seibert accounted for five discs: two had been reviewed and
11 destroyed by his son Mark well before the deposition and service of process in this matter, and
12 three (two of which were readable) had been located in the on-site office. Defendants’ attorney
13 copied the two readable discs and provided those to Plaintiff’s counsel.

14 Despite Plaintiff’s optimistic belief that the “few” discs that Seibert downloaded from the
15 surveillance system must have totaled more than the five discs of which Seibert finally provided
16 account, no evidence indicates that any additional discs were downloaded or destroyed.
17 Spoliation of evidence necessarily requires the existence of the evidence to lose or destroy. “To
18 find that spoliation has occurred, a court must first find that the evidence previously existed.”
19 *United States v. Universal Health Services, Inc.*, 2011 WL 2559552 (W.D. Va. June 28, 2011)
20 (No. 1:07CV000054). Nothing in the record establishes the existence of any discs in addition to
21 those for which Seibert has accounted.

22 In her reply brief, Plaintiff argues that Seibert’s production of discs found in the Sierra
23 Hide-Away office does not address Seibert’s deposition testimony that he had made copies of
24 “things of interest to [him]” and kept them in his home. Eager to document her belief that
25 Seibert was spying on her activities in and about her home, Plaintiff would have this Court
26 believe, as she apparently does, that the things of interest to Seibert must have been Plaintiff
27 herself. Nothing in the deposition supports such a conclusion. In fact, Seibert’s testimony that
28 he recorded things that interested him is separate from his testimony that he had made and kept

1 discs containing footage downloaded from the surveillance system. In describing the operation
2 of the surveillance system, Seibert testified to his ability to record things of interest to him,
3 immediately offering the example of his ability to go back a day or so to find footage relating to a
4 hypothetical resident's complaint of a burglary. Later, after indicating that he made and retained
5 some discs, Seibert described their content as "nothing of any . . .," but Plaintiff's attorney cut off
6 any further response and did not further question Seibert about the discs' content. That the disc's
7 content was nothing of importance or relevance would be consistent with Seibert's declaration
8 that he randomly copied video to be used to confirm that the system was working properly and
9 that the cameras were aimed as desired.

10 The apparent disparity of Seibert's testimony that he kept the discs in his home and the
11 fact that he eventually located them in the Sierra Hide-Away office to raise a red flag, despite
12 Plaintiff's insistence to the contrary. Seibert testified that he kept the discs at home, but he could
13 not find them at home when he received the discovery request. Later, he located the discs in the
14 park office. He then provided Plaintiff with copies. Nothing about this sequence of events is
15 inherently suspicious.

16 Plaintiff has simply failed to carry the burden of demonstrating that Seibert destroyed any
17 evidence following the April 2010 deposition for which he must be sanctioned. "Plaintiff's
18 speculation that additional relevant [evidence] once may have existed and was deleted, without
19 any proof, is insufficient to establish that any relevant information was destroyed." *Hare v.*
20 *Opryland Hospitality, LLC*, 2010 WL 3719915 at *18 (D. Maryland September 17, 2010) (No.
21 DKC 09-0599).

22 Plaintiff's motion to sanction Defendants for spoliation of evidence is HEREBY
23 DENIED.

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27 IT IS SO ORDERED.

28 **Dated: October 11, 2011**

/s/ Sandra M. Snyder

UNITED STATES MAGISTRATE JUDGE

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