Ocwen Loan Servicing, LLC v Ohio Public Empls. Retirement Sys.
2015 NY Slip Op 32356(U)
December 7, 2015
Supreme Court, New York County
Docket Number: 654586/2012
Judge: Eileen Bransten
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

OCWEN LOAN SERVICING, LLC,

Plaintiff,

-against-

OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Defendant.

----------X

Index No. 654586/2012
Motion Date: 9/24/2015
Motion Seq. No. 011

BRANSTEN, J.

In this action, Plaintiff Ocwen Loan Servicing, LLC ("Ocwen"), a trust servicer, seeks to recover approximately $5 million on behalf of ABFS Mortgage Trust (the "ABFS Trust") from Defendant Ohio Public Employees Retirement System ("OPERS") on the grounds that OPERS mistakenly received principal distributions to which it was not entitled. Plaintiff now seeks spoliation sanctions, claiming that OPERS failed to preserve relevant electronically stored information ("ESI") in connection with this litigation. Specifically, Plaintiff asks the Court to strike OPERS' sixth affirmative defense asserting detrimental reliance or, alternatively, to issue a preclusion sanction or adverse inference against OPERS. Plaintiff also requests attorneys' fees and costs.

For the reasons that follow, Plaintiff's motion for sanctions is granted, and the matter is referred to a Special Referee for a determination of the amount of attorneys' fees and costs due to Plaintiff for the filing of the instant motion.

I. Background

A. *The Amended Complaint*

Ocwen Loan Servicing, LLC ("Ocwen") is a certificateholder of the ABFS 2002-03 Mortgage Loan Trust ("ABFS Trust"), as well as the servicer of the trust. (Am. Compl. ¶ 1.)

The ABFS Trust consists primarily of a pool of mortgage loans. (Am. Compl. ¶ 8.) Pursuant to its Pooling and Service Agreement ("PSA"), the ABFS Trust issued approximately $370,000,000 in aggregate of mortgage certificates. *Id.* The ABFS Trust consists of five classes of certificateholders that receive monthly distributions from the interest and principal payments on the underlying mortgages.[1] *Id.* at ¶¶ 8-9. Ocwen owned certificates in the M-1 class, which had the second-highest priority. *Id.*

The PSA provided, in part, that by the tenth of each month, the servicer would provide a report to the trustee so that the trustee could make distributions to certificateholders based on their priority. *Id.* at ¶ 11. The PSA further provided that by the fifteenth of each month, the trustee would make the distributions accordingly. *Id.*

On May 1, 2005, Ocwen became the servicer and calculating agent for the mortgage loans owned by the ABFS Trust. *Id.* at ¶ 12. As servicer, Ocwen was responsible for collecting mortgage payments and foreclosing on delinquent mortgages.

---

[1] Payments were made to the senior class first, followed by each subordinate class in order of priority. (Am. Compl. ¶ 10.)

Id. at ¶ 13. As calculating agent, Ocwen administered monthly distributions to certificateholders based on the amount of interest and principal owed to each class. *Id.* at ¶ 14. Ocwen reported those amounts to JPMorgan, ABFS' trustee, who then instructed the depository trust company to make the distributions. *Id.* at ¶ 15. The distributions to each class were published on Ocwen's investor website. *Id.* at ¶ 16.

Between January 2007 and August 2009, Ocwen miscalculated the order of priority set forth in the Amended PSA, which resulted in overpayments of monthly principal distributions to the M-1 class totaling $10 million and corresponding underpayments to the lower classes.[2] *Id.* at ¶ 18. In May 2009, an investor brought the error to Ocwen's attention and in September 2009, Ocwen verified the error and corrected the monthly distributions in accordance with the PSA. *Id.* at ¶¶ 19-20.

In October 2009, JPMorgan posted a letter from Ocwen to the investor website, explaining the error in distributions from January 2007 to August 2009. *Id.* at ¶ 21. Ocwen then asked the M-1 class to return the $10 million in principal that was distributed in error. *Id.* at ¶¶ 22-23. In response, multiple certificateholders in the M-1 class returned funds amounting to approximately $5 million. *Id.* at ¶ 24.

[2] The error also lowered the face value of the certificates in the M-1 class. (Am. Compl. ¶ 18.)

OPERS was among the certificateholders of the M-1 class who mistakenly received principal distributions.[3] *Id.* at ¶ 25. OPERS owned approximately 45.95% of the ABFS Trust's M-1 class, valued at approximately $10.2 million. *Id.* at ¶ 25. On or about June 16, 2010, Ocwen informed JPMorgan, as record owner of OPERS' certificate, that it was overpaid $4,782,739.27 and requested the return of the funds. *Id.* at ¶ 26. On July 26, 2010, Ocwen sent JPMorgan a second request for the funds. *Id.* at ¶ 27. Thereafter, Ocwen learned that OPERS was the beneficiary of the certificates held by JPMorgan, so, in early 2011, Ocwen requested the return of the funds directly from OPERS. *Id.* at ¶ 28. OPERS rejected the demand and has not returned any portion of the $4,782,739.27.[4] *Id.* at ¶ 29.

Ocwen filed the complaint on December 21, 2012, asserting, among other things, a claim of unjust enrichment against OPERS. On March 6, 2015, Ocwen filed the amended complaint. In its answer, OPERS asserts the affirmative defense of detrimental reliance.[5] Specifically, OPERS argues that Ocwen's claims are barred because OPERS

---

[3] OPERS bought into the ABFS Trust in 2005. The deal was negotiated by Eric France, one of OPERS' senior portfolio managers, who had complete discretion to purchase and sell securities without approval. (Affirmation of John Siegal ("Siegal Affirm.") Ex. C at 25; Siegal Affirm. Ex. B at 21.)

[4] OPERS asserts that in the summer of 2009, France negotiated the sale of OPERS' position in the ABFS Trust and sold the bond to Gleacher, a brokerage firm, on August 17, 2009, with no knowledge of Ocwen's mistaken payment. (Def. Mem. at 5.)

[5] Though OPERS' asserts sixteen affirmative defenses in its answer, only detrimental reliance, the sixth defense, is relevant to this decision.

"reasonably relied" on Ocwen's representation as to the value of the bond and because of that representation, OPERS, through France, sold the bond for less than it was worth. (Answer to Am. Compl. ¶55.)

B. *Discovery*

On January 28, 2013, OPERS, at the direction of in-house counsel, distributed a written litigation hold notice to certain employees who were deemed likely to possess documents relevant to the dispute with Ocwen.[6] (Siegal Affirm. Ex. J ¶ 4.) The notice directed employees to preserve hard copies of any documents that might be relevant, as well as electronically-stored information ("ESI"). *Id.* OPERS also instructed employees to save relevant emails in their Microsoft Outlook accounts. *Id.* Though these accounts were not subject to automatic purging, they had a size limit of one gigabyte per account—when employees reached the limit they were instructed to manually delete old emails. (Siegal Affirm. Ex. K at 137-38.) In addition, OPERS' IT department took steps to preserve non-email ESI that employees saved in OPERS' "home directories," which operated as shared system folders. (Siegal Affirm. Ex. J ¶¶ 5-8.)

Further, OPERS' IT saved emails that were stored in the Symantec Enterprise Vault Archive, which functioned as a central repository for employees' incoming and

[6] This included Paul Greff, Senior Portfolio Manager, Erik Cagnina, Portfolio Manager Lead and Walter Knox, Enterprise Chief Risk Officer, but not Eric France because he retired in June 2011. (Siegal Affirm. Ex. J ¶ 4.)

outgoing email.[7] (Siegal Affirm. Ex. K at 21.) Although emails stored in this location, called the "journal" mailbox, were automatically purged after two years, Symantec could isolate and preserve them upon request. (Siegal Affirm. Ex. J ¶ 6.) On March 13, 2013, OPERS' IT instructed Symantec to isolate and preserve the emails of Greff, Cagnina, Knox, France, as well as OPERS' in-house counsel Mark Gleaves and Anthony Lange.[8] *Id.* at ¶ 7.

Pursuant to the above directives, OPERS' employees searched for relevant documents and turned it over to Gleaves and Lange for review and production. (Siegal Affirm. Ex. J ¶ 15.) In addition, the IT department ran forty-two unique search terms across the preserved ESI from the "journal" mailbox and the "home directories" in search of relevant documents.[9] *Id.* at ¶ 10. The search collected 10,000 documents, which were reviewed for responsiveness and produced in accordance with Ocwen's written discovery requests.[10] *Id.* at ¶ 16.

Notwithstanding the litigation hold, OPERS' objected to Ocwen's February 2013 discovery request, arguing that its motion for summary judgment, filed March 19, 2013,

---

[7] Symantec was OPERS' outside vendor responsible for maintaining the incoming and outgoing message archive. (Siegal Affirm. Ex. J ¶ 13.)

[8] OPERS concedes that by virtue of the automatic purge, any emails from the period surrounding the August 2009 sale were long since deleted. (Def. Mem. at 8.)

[9] The search terms included, among other things, "Ocwen," "ABFS" and "Gleacher." (Siegal Affirm. Ex. J ¶ 10.)

[10] Ocwen's first document request was served on OPERS on February 6, 2013. (Reply Affirmation of Joel M. Miller ("Miller Reply Affirm.") Ex. 1.)

was dispositive and that discovery should be stayed. (Dkt. No. 24; Miller Affirm. Ex. 1.) The Court heard the motion for summary judgment on September 12, 2013 and addressed OPERS' failure to produce any discovery. (Dkt. No. 24.) The Court instructed the parties, "Until I make a decision, I want document discovery to go forward. I don't want any further delays. And I want it started immediately…start it on Monday [September 16, 2013]." *Id.* at 57-58. Despite the Court's instruction, Ocwen claimed that OPERS failed to produce any documents until October 2013. (Dkt. No. 71.) At the parties' next appearance, on November 13, 2013, OPERS denied Ocwen's representation, asserting that it had turned over approximately 85,000 documents since the Court ordered discovery to proceed. (Miller Affirm. Ex. 12 (9/12/2013 Transcript) at 12.)

Thereafter, in January and February 2014, the parties exchanged numerous letters with each other and the Court, trying to resolve the discovery dispute. (Dkt. Nos. 90-101.) OPERS maintained that discovery was stayed while the Court decided the motion for summary judgment, dated March 19, 2013, and Ocwen argued there was no basis for a stay. *Id.* On February 14, 2014, the Court denied OPERS' motion. (Dkt. No. 112.)

On or about March 24, 2014, OPERS added Joann Yocum, an Investment Administration Technician, to the litigation hold. (Siegal Affirm. Ex. M.) Yocum was instructed to preserve and collect potentially relevant documents and OPERS' IT ran the same forty-two search terms across her ESI. (Siegal Affirm. Ex. J ¶¶ 17-18.) The relevant documents were produced on June 9, 2014. *Id.* at ¶ 19.

In response to Ocwen's motion to compel filed in August 2014, OPERS' revealed that due to a "synchronization error," emails that were preserved by Symantec in the "journal" mailbox and subject to the ligation hold were accidentally purged.[11] (Siegal Affirm. Ex. J ¶ 23.) Because of this error, OPERS lost the content of 101 emails that contained one of the forty-two search terms, but was able to recover and produce metadata from the lost emails. *Id.* Thirty of the lost emails were produced in discovery by either hard copy or from a third-party. *Id.* at ¶ 24.

On September 30, 2014, after a phone conference with the Court, OPERS provided Ocwen with a sworn affidavit stating that no additional documents responsive to Ocwen's discovery request were being withheld. *Id.* at ¶ 25. Ocwen nonetheless requested a forensic analysis to confirm that France's computer was wiped clean when he retired. (Siegal Affirm. Ex. P.) Ocwen further requested a search of the relevant employees' inboxes to determine whether they had received any "one-gigabyte email notifications." *Id.* Only one of the requested employees, OPERS' in-house counsel Gleaves, had received such a notification.[12] *Id.*

---

[11] Specifically, on August 13, 2014, Symantec informed OPERS that it made an error in indexing the emails in the "journal" mailbox that were dated January 2011 to July 2011. (Siegal Affirm. Ex. J ¶ 23.)

[12] The employees deemed relevant by the parties are Greff, Cagnina, France, Gleaves, Knox, Lange and Yocum. (Siegal Affirm. Ex. P.)

Additionally, Ocwen served a subpoena on Gleacher, the brokerage firm that purchased OPERS' position in the ABFS Trust. (Miller Affirm. Ex. 9.) Among the 5,000 documents produced by Gleacher was a message sent via Bloomberg messaging, dated May 13, 2009, from an employee at Gleacher to France, asking "Why is the M1 stepping down but the M2 hasn't gotten any principal? Looks like the trustee might be paying wrong?"[13] *Id.* However, during his earlier deposition, France testified that he did not speak with anyone at Gleacher before selling the bond and further denied that anyone at Gleacher informed him of Ocwen's payment. (Miller Reply Affirm. Exs. 2-3.)

II. Discussion

Based on OPERS' alleged spoliation of documentary evidence, Ocwen filed the instant motion for sanctions pursuant to CPLR § 3126, arguing that OPERS' failed to preserve the following: (1) documents saved on Eric France's computer; (2) France's emails; (3) France's Bloomberg messages; and (4) OPERS' employee ESI, including emails sent through Outlook and saved in the "journal" mailbox. Ocwen asks the Court to strike OPERS' affirmative defense of detrimental reliance, or, in the alternative, order a preclusion sanction or adverse inference. In response, OPERS argues that it preserved,

---

[13] The Bloomberg message service provided a traders with a forum for secure communication and was included as part of OPERS' Bloomberg subscription. This particular message was sent from djones99@bloomberg.net to efrance@bloomberg.net. (Siegal Affirm. Ex. Q.)

collected and produced documents in accordance with its obligations under New York law and, therefore, Ocwen's motion should be denied.

A. *Plaintiff's Motion for Discovery Sanctions*

Plaintiff seeks spoliation sanctions against Defendant pursuant to CPLR § 3216, which provides that "[i]f any party … refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: … 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses… 3. an order striking out pleadings or parts thereof … or dismissing the action or any part thereof…" Here, Plaintiff contends that Defendant has failed to preserve relevant documents and because of this failure, Plaintiff lacks the relevant evidence necessary to disprove Defendant's affirmative defense of detrimental reliance—*i.e.*, that OPERS accepted an underpayment for its position in the ABFS Trust based on Ocwen's representation of the bond's value.

In New York, sanctions for spoliation may be available where a litigant "intentionally or negligently, disposes of crucial items of evidence…before the adversary has an opportunity to inspect them." *Kirkland v. N.Y. City Hous. Auth.*, 236 A.D.2d 170, 173 (1st Dep't 1997). "A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with 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 finally, (3) 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." *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45 (1st Dep't 2012) (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)).

1. Obligation to Preserve

The obligation to preserve relevant evidence is trigged when a party "reasonably anticipates litigation." *VOOM*, 93 A.D.3d at 36 (citing *Zubulake*, 220 F.R.D. at 218). Thereafter, the party "must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents." *Id.* (internal citation omitted). In the context of electronic discovery, the obligation to preserve goes beyond putting an end to affirmative acts of destruction and includes taking "active steps" to halt any automatic purging or deletion of ESI, such as emails, that a party may have in place. *Id.* at 41.

Contrary to OPERS' assertion that it had no obligation to preserve documents before Ocwen filed the complaint, the obligation arises once a party is "on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." *Id.* at 43;

see also Hameroff v. Plank, 2012 WL 3516870 at *3 (Sup. Ct. Albany Cnty. 2012) (finding the obligation to preserve evidence arose after settlement failed and litigation was threatened).

Here, the record demonstrates that litigation was contemplated between the parties as early as April 2011 and no later than May 2011. First, emails sent between Samuel Nieves, a senior analyst at Ocwen, and France show that by the end of March 2011, OPERS was aware of Ocwen's claim against it for $4.8 million due Ocwen's distribution error. (Miller Affirm. Ex. 15.) France responded Nieves' email about the claim by asserting that due to Ocwen's error, he sold OPERS' position in the ABFS Trust for less than it was worth. *Id.* In response to another email from Nieves, asking whether OPERS would pay, France wrote, on April 14, "I have requested a meeting with our legal counsel. It appears that only legal action will rectify the issue." *Id.* At his deposition, France explained that the mention of "legal action" in his April 14th email referred to the possibility that OPERS would sue Ocwen or that Ocwen would sue OPERS. (Miller Affirm. Ex. 3 at 127.) France also testified that Ocwen had already threatened to sue OPERS by that point. *Id.* at 129.

Further, on May 10, 2011, France sent Nieves an email, which stated, in part,

> Because we have determined $677,486.08 may be an unwarranted gain, OPERS is willing to settle the matter by paying a total of $677,486.08 in

> return for a release as to all claims… If you are in agreement, please provide a proposed release for review by our counsel so that we may resolve this matter with JPMorgan and Ocwen.

(Siegal Affirm. Ex. F.) On May 19, 2011, Nieves responded to France's email,

> After careful consideration, Ocwen has decided to decline your settlement offer… we maintain that OPERS was the party that was unjustly enriched… As such, we expect OPERS to honor the outstanding claim of $4,782,739.27.

(Siegal Affirm. Ex. G.) In light of the above, there is no doubt that prior to Ocwen filing the complaint and by no later than May 2011, OPERS was "on notice of a credible probability that it [would] become involved in litigation." *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 43 (1st Dep't 2012).

In addition, the record demonstrates that OPERS' had control of—and access to—the lost or destroyed ESI in May 2011. First, OPERS had, by virtue of its "journal" mailbox, access to incoming and outgoing employee email, including France's. (Siegal Affirm. Ex. K at 21.) OPERS had access to non-email ESI through the "home directories." (Siegal Affirm. Ex. J ¶¶ 5-8.) As for Bloomberg messages, despite OPERS' assertion that it did not have access to the messages sent through the third-party provider, OPERS' admission that it ordered Bloomberg to delete France's account in June 2011, after his retirement, proves otherwise. (Siegal Affirm. Ex. R (Affidavit of Samantha Freeman) ¶¶ 5-6.) Thus, Ocwen has satisfied the first spoliation element.

2. Culpable State of Mind

With respect to the second element, Ocwen met its burden in demonstrating that OPERS destroyed the evidence with a culpable state of mind. As explained above, once a party reasonably anticipates litigation, "it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of [ESI]." *VOOM,* 93 A.D.3d at 41. The litigation hold "must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee." *Id.* As part of the litigation hold, it is "well-settled that a party must suspend its automatic deletion function." *Id.* at 44.

OPERS admits that when France retired in June 2011, it wiped France's computer as per company policy and instructed Bloomberg to terminate access to his account. (Miller Affirm Ex. 3; Siegal Affirm. Ex. J (Affidavit of Roger Steller) ¶ 9.) OPERS also concedes that it did not institute a litigation hold or take any steps to prevent the automatic purge of emails saved in the "journal" mailbox until January 2013. (Siegal Affirm. Ex. J ¶ 4.) And finally, despite OPERS' assertion that Symantec, a third-party vendor, lost 101 potentially relevant emails through a "synchronization error," OPERS was affirmatively required to preserve ESI in the first place. (Siegal Affirm. Ex. J ¶ 23.)

In light of these facts, a finding of gross negligence on the part of OPERS is appropriate. *See VOOM,* 93 A.D.3d at 45 (noting that a failure to issue a litigation hold when appropriate and a failure to prevent automatic purging of email lead to a finding of gross negligence).

However, it is important to note that the finding of gross negligence is not wholly premised on OPERS' failure to institute a litigation hold. *See L & L Painting Co., Inc. v. Odyssey Contracting Corp,* 2014 WL 4829629 at *5 (N.Y. Sup. 2014) (noting that a party's failure to institute a litigation hold as soon as it reasonably anticipated litigation is not gross negligence *per se*) (citing *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 118 A.D.3d 428, 432 (1st Dep't 2014)). As explained above, OPERS also failed to stop the automatic purging of emails in the "journal" mailbox. (Siegal Affirm. Ex. J ¶ 4.) Moreover, OPERS intentionally wiped France's computer just one month after Ocwen declined OPERS' settlement offer and directed Bloomberg to terminate his account. (Siegal Affirm. Ex. B at 21.)

3. Relevance

The third element of the spoliation analysis requires a showing that the destroyed evidence was relevant to the parties' claim or defense. Where the destruction of ESI is a result of gross negligence, there is a presumption of relevance. *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45 (1st Dep't 2012) (internal citation omitted). However, a presumption of relevance is rebuttable:

> When the spoliating party's conduct is sufficiently egregious to justify a court's imposition of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants permitting the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

Id.; *see also AJ Holdings Grp., LLC v. IP Holdings, LLC*, 129 A.D.3d 504, 505 (1st Dep't 2015) (discussing the rebuttable presumption of relevance and deeming that spoliating party successfully rebutted the presumption by demonstrating that the deleted emails were not relevant to the contract claim at issue).

In rebuttal, OPERS argues that it did not destroy any relevant ESI and that Ocwen cannot point to any destroyed evidence that would support its claims. *See L & L Painting Co., Inc. v. Odyssey Contracting Corp*, 2014 WL 4829629 at *5 (N.Y. Sup. 2014) ("Moreover, a finding of gross negligence does not, in all cases, obviate the need to demonstrate the relevance of the evidence sought.") (internal citation omitted). In response, Ocwen points to the Bloomberg message produced by Gleacher from August 2009, suggesting that France, who negotiated the OPERS' sale, had notice that Ocwen overpaid OPERS before he sold OPERS' position in the ABFS Trust. (Miller Affirm. Ex. 9.) Ocwen argues that the message is relevant because France's knowledge of the overpayment undermines OPERS' assertion that it relied on Ocwen's representation and,

further, that similarly relevant ESI was likely destroyed, as well. Considering France was the sole negotiator of the August 2009 sale, the Court agrees that his ESI would be particularly relevant on this point.

Since the remaining ESI that was lost or destroyed due to OPERS' failures, it is difficult to see, and Ocwen fails to show, how such ESI would be relevant to a transaction that occurred in August 2009 that was orchestrated by one individual. For example, with respect to the 101 employee emails OPERS lost, dated January 2011 to June 2011, Ocwen does not explain how any of these emails, thirty of which were later obtained in their entirety, are relevant to its claims or defenses. (Siegal Affirm. Ex. J ¶ 23.) Thus, despite the finding of gross negligence, the Court will not presume the relevance of OPERS' employee ESI, aside from France. *See L & L Painting*, 2014 WL 4829629 at *6 (despite a finding of gross negligence, the party did not make "an adequate showing of the relevance of the missing emails to its remaining counterclaims or how they would support its defenses").

4. Spoliation Sanctions

"The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the court and is assessed on a case-by-case basis." *See L & L Painting Co., Inc. v. Odyssey Contracting Corp*, 2014 WL 4829629 at *6 (N.Y. Sup. 2014) (Bransten, J.) (citing *Cuevas v. 1738 Assoc., LLC*, 96 A.D.3d 637, 638 (1st Dep't 2012)). "In deciding whether to impose sanctions, courts look to the extent that the

spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness." *Id.* (citing *Duluc v. AC & L Food Corp.*, 119 A.D.3d 451-52 (1st Dep't 2014)).

Here, Ocwen has demonstrated prejudice as a result of OPERS' failure to preserve France's ESI and Bloomberg messages. However, the "extreme sanction" of striking OPERS' affirmative defense is not appropriate in this case because Ocwen was able to obtain *some* evidence to disprove detrimental reliance, namely the August 2009 message sent from Gleacher to France. *See VOOM,* 93 A.D.3d at 45; *see also Melcher v. Apollo Medical Fund Mgmt. L.L.C.*, 105 A.D.3d 15, 24 (1st Dep't 2013) ("Striking a party's pleading would be too drastic a remedy where [the opposing party is] not entirely bereft of evidence tending to establish [its] position."); *Iannucci v. Rose*, 8 A.D.3d 437, 438 (2d Dep't 2004) (denying request to strike pleading as a sanction for spoliation as "[a] less severe sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case"). Since the loss of potentially relevant ESI is not fatal to Ocwen's rebuttal of OPERS' sixth affirmative defense, the imposition of an adverse inference as to that charge is appropriate and "reflects an appropriate balancing under the circumstances."[14] *VOOM*, 93 A.D.3d at 47.

[14] The appropriate jury charge should be briefed by the parties with their jury requests submitted before trial.

III. Conclusion

For the foregoing reasons, it is

ORDERED that Plaintiff's motion for spoliation sanctions is granted insofar as Plaintiff requests an adverse inference instruction to be read at trial in connection with Defendant's sixth affirmative defense; and it is further

ORDERED that Defendant shall pay the attorneys' fees and costs incurred by Plaintiff in preparing the instant motion for sanctions; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose:

(1) The amount of costs expenses, and attorneys' fees incurred in making the instant motion for sanctions; and it is further

ORDERED that the powers of the JHO/Special Referee to hear and report shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646–386–3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at

www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212–401–9186) or email an Information Sheet (which can be accessed at http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a pre-hearing memorandum within 24 days from the date of this order and the defendants shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

ORDERED that counsel are to appear for a status conference in Room 442, 60 Centre Street, on February 9, 2016, at 10 a.m.

Dated: New York, New York
December 7, 2015

ENTER

Hon. Eileen Bransten, J.S.C.