SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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CHOU MEI CHEN,

Plaintiff,

-- against --

J MART GROUP, INC., individually and d/b/a J-MART SUPERMARKET,

Defendants.

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DECISION AND ORDER

Index No. 711857/2015

Motion Sequence Number 2

Papers Numbered.....ECF docs. 25-44

SALVATORE J. MODICA, J.:

The three biggest scourges facing the truth-seeking process are perjury, intimidation of witnesses, and spoliation. In fact, they are often linked. If our courts fail to sanction spoliation effectively, a miscreant - - whether individual or big corporation - - will undoubtedly gamble at not being caught and destroy, wholly or partially, the smoking gun evidence. Without the dispositive evidence, a trial is reduced to testimonial accounts and competing claims of which witness is credible. Thus, by not dealing with spoliation in tough measures, the courts, both appellate and trial judges, are, in effect, giving an unintended perverse incentive to destroy the evidence. The spoliator then has free rein to commit perjury and to intimidate other witnesses. An aggrieved party's right to have a meaningful "day in court," culminating in the trial of the action, is thus reduced to an empty charade.

In the within action, this Court is forced to decide which measure of spoliation sanctions is best designed to (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.

Even if a sanction less than termination is proper, the Court has to grapple with an issue that many judges have avoided: judging the effectiveness of giving a sanction less than termination and whether the lesser sanction is actually a gift to the spoliator. In other words, just like a responsible and competent doctor should not treat the coughing up of blood simply with syrup, or give a Band-aid to a lacerating hemophiliac, courts should

twice before thinking that the mere giving of an adverse inference at trial will contain the contagion of spoliation.

Plaintiff was seriously injured on August 25, 2015, when she slipped on produce left on the floor at the defendant supermarket in Flushing, Queens County, New York. An ambulance crew took the plaintiff from the scene of the accident to the hospital, where she was diagnosed with a fracture of her kneecap, the patella, that required surgery.

Plaintiff's counsel promptly demanded the preservation of the video. The store had 15 cameras in operation. The plaintiff's attorneys sent letters to defendant and emails on September 11, 16, and 18, 2015., requesting the unedited videotaped surveillance footage. Despite a preliminary conference order of this Court, by the undersigned, dated March 22, 2016, and entered on April 4, 2016, and a compliance conference order by Justice Martin E. Ritholtz, dated September 15, 2016, and entered on Sept. 23, 2016, the defendant resisted producing the required evidence. Disclosure came piecemeal and only partially, requiring plaintiff's counsel to be taxed to the limit. Further facts are discussed below, concerning this Court's choosing an appropriate remedy that best fulfills the tri-fold objectives stated in this opinion's opening.

As an initial matter, the struggles of plaintiff's counsel to get a portion of the video is typical of the burdens and obstacles that spoliators intend. "Dishonest litigants have a distinct advantage over their honest adversaries, for the victimized opponent winds up . . . consuming substantial resources to respond to and 'undo' the victimizers' lies and distortions." *Tesar v Potter*, 2007 WL 2783386, slip op. at 8 [D.S.C. 2007] [internal quotation marks, and citation omitted], *quoted with approval in U.S. ex rel. Berglund v. Boeing Co.*, 2011 WL 6182109, slip op. at 29 [D. Or. 2011]. *Accord, Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 8, 954 P2d 511, 515, 74 Cal. Rptr. 2d 248, 252 (1998) ("[T]he intentional destruction of evidence should be condemned. Destroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action. Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both."]; *U.S. Fidelity & Guar. Co. v. American Re-Insurance Co.*, 93 AD3d 14 (1st Dept. 2012) (quoting approvingly a California trial court decision observing that insurer, concerned with a "litigation crisis," destroyed documents in order "to make it more difficult for insureds to establish coverage.").

The New York Court of Appeals, in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 (2015), emphasized that trial courts have discretion in fashioning appropriate ways to relieve an aggrieved party from the destruction of evidence and the

spoliator's state of mind, of whether acting intentionally or negligently, is important. The Court of Appeals stated:

> A party that seeks 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" *(VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 45, 939 N.Y.S.2d 321 [1st Dept.2012], *quoting Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 [S.D.N.Y.2003]). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed (*see Zubulake*, 220 F.R.D. at 220). On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation *548 sanctions must establish that the destroyed documents were relevant to the party's claim or defense (*see id.*).

Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d at 547–548.

The United States Supreme Court's decision in *Scott v. Harris,* 550 U.S. 372 (2007), made clear that a federal Court of Appeals must reject any version of evidence that is inconsistent with a videotape recording of the incident. The Supreme Court's ruling is a recognition of Napoleon's famous dictum that "a picture is worth a thousand words."

Pleadings will be struck where the intentional destruction severely hampers the other party from making his or her case. *See, e.g., Golan v. N. Shore Long Island Jewish Health Sys., Inc.,* 147 A.D.3d 1031 (2nd Dept. 2017) (a trial court may, under appropriate circumstances, impose a sanction based on the destruction of evidence even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation); *Ingoglia v. Barnes & Noble College Booksellers, Inc.*, 48 A.D.3d 636 (2nd Dept. 2009); *Baglio v. St. John's Queens Hosp.*, 303 A.D.2d 341 (2nd Dept. 2003); *New York Central Mut. Fire Ins. Co. v. Turnerson's Electric, Inc.*, 280 A.D.2d 652 (2nd Dept. 2001); *Di Domenico v. C & S Aeromatik Supplies*, 252 A.D.2d 41 (2nd Dept. 1998).

Without the imposition of terminating sanctions, witness preclusion, burden shifting, or other spoliation sanctions, the ruthless destruction of dispositive, critical video footage can cripple a plaintiff's case. *See, Metro Foundation Contractors, Inc. v. Arch Ins. Co.*, 551 Fed. Appx. 607 (2d Cir. 1994) (terminating sanctions imposed); *Gutman v. Klein*, 515 Fed. Appx. 8 (2d Cir. 2013) (default judgment granted); *Taylor v. City of New York*, 293 F.R.D. 601 (S.D.N.Y. 2013) (Patterson, J.) (precluding any testimony from the spoliator of the video, because otherwise it would reward and create a perverse incentive for spoliation); *United States v. Yevakpor*, 419 F. Supp. 242, 247 & 251 (N.D.N.Y. 2006) (finding bad faith where a government agency deliberately preserved only three segments of a video surveillance tape, destroying the remaining 87.5% of the tape, while knowing that the subject of the video was facing criminal proceedings); *Mangione v. Jacobs*, 37 Misc. 3d 711 (Sup. Ct. Queens County 2012) (Markey, J.) (dismissal was appropriate sanction for spoliation), *aff'd on other grounds*, 121 A.D.3d 953 (2nd Dept. 2014); *Savino v. Great Atl. & Pac. Tea Co.*, 22 Misc. 3d 792 (Sup. Ct. Queens County 2008) (Markey, J.) (customer who allegedly sustained injuries when she slipped and fell in store was entitled to production of video surveillance tape of incident and related notes and records before her examination before trial, even if customer misrepresented the cause of her injuries to her counsel; videotape showed the actual events and was the best evidence of whether the alleged negligence did or did not occur, and videotape would have readily unmasked any contrivance by the customer); *accord, CDR Creances S.A.S. v. Cohen,* 23 N.Y.3d 307 (2014) (default judgment granted for fraud upon the court).

The judiciary is not impotent to devise and deal with the infinite devious ways of miscreant litigants and unethical lawyers to deliberately and intentionally mislead a court. *See, e.g., Volcan Group, Inc. v. Omnipoint Communications, Inc.*, 552 Fed. Appx. 644 (9th Cir. 2014) (affirming termination sanctions for spoliation and fabrication of evidence since such misconduct have "'made it impossible . . . to be confident that the parties [would] ever have access to the true facts.'"), *aff'g* 940 F. Supp. 2d 1327, 1338 (W.D. Wash. 2012) ("[T]he misconduct that has come to the attention of the Court is not of the type that can be remedied through the imposition of lesser sanctions."); *Valley Engrs. Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1058 (9th Cir.1998) (imposing termination sanctions for spoliation of evidence, Ninth Circuit stated: "[w]here a party so damages the integrity of the discovery process that there can never be assurance of proceeding on the true facts, a case dispositive sanction may be appropriate."); *Laukus v. Rio Brands, Inc.*, 292 F.R.D. 485, 514 (N.D. Ohio 2013) ("The Court, too, has serious doubts that this case could still be decided on the merits, as the integrity of the fact-finding process has been so severely compromised.").

The Appellate Division, Second Department, however, does not rush headlong to terminating sanctions. The Second Department has asked trial judges, based upon the

circumstances presented, especially where behavior is not shown to be culpable, to consider sanctions less harsh than striking a pleading. *See, e.g., Lilavois v. JP Morgan Chase & Co.*, ___ A.D.3d _____, 2017 WL 2454242, at *2, 2017 N.Y. Slip Op. 04431 (2nd Dept. 2017) (trial court providently exercised its discretion in granting that branch of the plaintiffs' cross motion which was to strike Chase's answer on the ground of spoliation of evidence only to the extent of directing that an adverse inference charge be given against Chase at trial with respect to surveillance video of the underlying incident if the jury does not credit testimony of Chase's witness that no surveillance video existed for the subject location); *Rokach v. Taback*, 148 A.D.3d 1195 (2nd Dept. 2017) (trial court improvidently exercised its discretion in failing to impose any sanction for business's failure to preserve surveillance video recording of incident; appropriate sanction was to preclude business from offering any evidence regarding alleged contents of erased video).

Remedial measures that a trial court can use in combination to help rectify the prejudice sustained by a spoliation victim and to deter future spoliators include:

1. Denying all motions for summary judgment by the spoliating defendants. *See, Wood v. Pittsford Central School Dist.*, 2008 WL 5120494 (2nd Cir. 2008) (reversing lower court, Second Circuit held that intentional destruction of relevant evidence warranted that defense motion for summary judgment be denied); *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93 (2nd Cir. 2001) (defendants' spoliation of evidence was adequate grounds for denying their summary judgment motion based on qualified immunity); *Kronisch v. United States,* 150 F.3d 112, 125-128 (2nd Cir. 1998) (same; "(A)t the margin, where the innocent party has produced some (not insubstantial) evidence in support of his claim, the intentional destruction of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the line."; *id.* at 128), *overruled on other grounds by Rotella v. Wood*, 528 U.S. 549 (2000); *Aviva U.S.A. Corp. v. Vazirani*, 2012 WL 71020 (D. Ariz. 2012) (plaintiff would be entitled to all adverse inference in court's ruling on defense summary judgment motion); *Burgos v. Satiety, Inc.*, 2011 WL 6936348, slip op. at 3 (E.D.N.Y. 2011) (Gleeson, D.J.); *Volcan Group, Inc. v. T–Mobile USA, Inc.*, 2011 WL 6141000 (W.D. Wash. 2011) (striking all motions other than the spoliation motion and staying all proceedings, recognizing that the remedies for eviscerating a party's case takes precedence over any other motion); *Nicholson v. Board of Trustees for the Connecticut State Univ. Sys.*, 2011 WL 4072685 (D. Conn. 2011) (dispositive motion by defendants for dismissal or summary judgment would be denied as a sanction for spoliation).

2. Imposing terminating sanctions, including the striking of pleadings, striking defenses, and granting plaintiff a default judgment. *See, e.g., Byrd v. Alpha Alliance Ins. Corp.*, 2012 WL 360033, slip op. at 6-8 (M.D. Tenn. 2012) (dismissing

action for spoliation of evidence; "While it is conceivable that an appropriate instruction to the jury could level the evidentiary playing field between the parties, the court believes that a harsher sanction is warranted in light of the plaintiff's egregious conduct. Indeed, a less severe sanction may not effectively deter would-be spoliators from engaging in similar conduct in the future."); *Gutman v. Klein*, 515 Fed. Appx. 8, *aff'g* 2010 WL 4916722 (E.D.N.Y. 2010) & 2011 WL 4916722 (2011) (Cogan, J.) (ordering a default judgment for the plaintiff based upon defendant's spoliation of computer evidence), *aff'g* 2010 WL 5851125 (E.D.N.Y. 2010) (Levy, M.J.); *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772 (N.D. Tex. 2011) (striking of defense pleadings and defenses); *Veolia Transp. Servs., Inc. v. Evanson*, 2011 WL 5909917 (D. Ariz. 2011) (default judgment); *Ameriwood Industries, Inc v. Liberman*, 2011 WL 5110313 (E.D. Mo. 2007) (court granted plaintiff partial default judgment because defendant destroyed evidence by installing a scrubbing software on its computer).

3. Precluding the spoliator from offering evidence or the principal of the spoliator from testifying. *E.g.*, *John v. City of New York,* Docket # 1:11-cv-05610-RPP (March 28, 2012) (Patterson, D.J.) rejecting City's claim that video recording was destroyed in accordance with a "record retention schedule," where City received notice of the assault on the plaintiff inmate], discussed in Benjamin Weiser, "Video That City Destroyed Is Cited in Inmate's Lawsuit," *N.Y. Times*, April 10, 2012 ; *FatPipe Networks India Ltd. v. X Roads Networks, Inc.*, 2012 WL 192792 (D. Utah 2012) (precluding spoliating party from introducing evidence); *Multiservice Jt. Venture, LLC v. United States*, 85 Fed. Cl. 106 (Fed. Cl. 2008) (principal of spoliator prevented from testifying in addition to other spoliation sanctions for significant alteration to exhibit), *aff'd*, 374 Fed. Appx. 363 (Fed. Cir. 2011) (per curiam; unpublished opinion); *Commonwealth v Vlastos,* 26 Mass. L. Rptr. 518, 2010 WL 986507 (Mass. Super. Ct. 2010).

4. Precluding the Spoliator from Introducing Any Expert Testimony or Report to Explain the Destruction of Evidence. *E.g.*, *VOOM HD Holdings LLC v. EchoStar Satellite, L.L.C.*, 93 AD3d 33, *supra.*

5. Barring cross-examination at trial. *E.g.*, *McCargo v Texas Roadhouse, Inc.*, 2011 WL 1638992, slip op. at 9 & 11 (D. Colo. 2011) (defendant found "highly culpable" in destruction of critical portions of videotape; court bars defendant, as a spoliation sanction, from cross-examining plaintiff's witnesses at trial regarding certain events, in addition to attorneys fees and costs).

6. Burden-shifting at trial . *E.g.*, *Farella v. City of New York*, 323 Fed. Appx. 13, 15 (2nd Cir. 2009) (burden-shifting might be a spoliation sanction in an appropriate case); *accord, Williams v. Russ,* 167 Cal. App. 4th 1215, 1226-1227, 84 Cal. Rptr. 3d

813, 822-823 (2008), *review denied* (Jan. 21, 2009) (court, in shifting the burden based on the intentional spoliation of evidence, stated: "[B]urden shifting is proper when one's party wrongdoing makes it practically impossible for the plaintiff to prove its case.").

7. Reimbursement of forensic computer experts. *E.g., Nacco Materials Handling Group, Inc. v. Lilly Co.*, 278 F.R.D. 395, 406-407 (W.D. Tenn. 2011) (recoupment of sums already expended on forensic computer expert and for fees that may have to be paid in the future to the expert and related investigatory costs and expenses); *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 124 (S.D.N.Y. 2008); *Doe v. Norwalk Community College*, 248 F.R.D. 372 (D. Conn. 2007); *Lentz v. Nic's Gym, Inc.*, 90 A.D.3d 618 (2nd Dept. 2011).

8. Awarding full attorneys' fees on the motion for spoliation sanctions and in conducting any and all depositions necessitated by the destruction of the evidence. *E.g., Simons v. Petrarch LLC,* 2017 WL 914631, 2017 N.Y. Slip Op. 30457(U) (Sup. Ct. New York County 2017) (recovery of attorneys fees and adverse inference); *accord, FatPipe Networks India Ltd. v. X Roads Networks, Inc.*, 2012 WL 192792, *supra* (awarding attorneys fees and entire costs of motion for spoliation sanctions]; *Kosher Sports, Inc. v. Queens Ballpark Co., LLC,* 2011 WL 3471508 (E.D.N.Y. 2011) (Mann, M.J.) (ordering attorneys' fees and other sanctions for spoliation); *Yu Chen v. LW Restaurant, Inc.,* 2011 WL 3420433 (E.D.N.Y. 2011) (Pollak, M.J.); *Casale v. Kelly,* 710 F. Supp. 2d 347, 367 (S.D.N.Y. 2010) ("Monetary sanctions in the form of attorneys' fees are also appropriate.") (Scheindlin, D.J.); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 222 (S.D.N.Y. 2003) (Scheindlin, D.J.) ("[spoliating defendant] UBS must bear (plaintiff) Zubulake's costs for re-deposing certain witnesses"]; *accord, Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 [D. Md. 2010], and, 2011 WL 2552472, slip op. at 1 & 10 (awarding attorneys fees, costs, and expenses of over $1,000,000 for the enormous scope of the spoliation and for misleading statements concerning the destruction); *Surowiec v. Capital Title Agency, Inc.,* 790 F. Supp. 2d 997 (D. Ariz. 2011).,

9. Crafting appropriate adverse inferences and instructions to the jury at trial. *E.g., Lilavois v. JP Morgan Chase & Co.,* ___ A.D.3d _____, 2017 WL 2454242, at *2, 2017 N.Y. Slip Op. 04431 (2nd Dept.), *supra; E.W. Howell Co. v. S.A.F. La Sala Corp.,* 36 A.D.3d 653, 655 (2nd Dept. 2007); *accord, Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494 (S.D.N.Y. 2013) (Scheindlin, D.J.) (corporation willfully destroyed ESI, as required for adverse inference instruction); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 496 (S.D.N.Y. 2010); *Matlock Place Apts., L.P. v. Druce*, 369 S.W.3d 355 (Tex. App. 2012), *citing Brookshire Bros., Ltd. v. Aldridge*, 2010 WL 2982902, slip op. at 7-8 (Tex. App. 2010) (spoliation prejudiced the plaintiff because remaining portion of video showed only part of events

relevant to plaintiff's accident).

This Court respectfully suggests that the Second Department consider whether a strong message - - and one with reverberating effect - - that spoliation of evidence, tampering with evidence, destruction of photographs, and intimidation of witnesses cannot be tolerated.

As the court, in *Philips Electronics North America Corp. v. BC Technical*, 773 F. Supp. 2d 1149, 1213 (D. Utah 2011), stated:

> [C]ourts have recognized that if parties are willing to take the risk and balance destroying evidence against turning over the proverbial smoking gun, knowing that the destruction will not result in the ultimate judgment, destruction of important evidence will occur. The court must not inherently reward the misbehavior of companies and individuals who want to destroy incriminating evidence rather than produce it and have a judgment entered against them; litigants must be strongly discouraged, rather than encouraged in any way, to become more and more clever about how to delete and hide the destruction of [pertinent evidence].

The court, in *Micron Tech., Inc. v. Rambus Inc.*, 917 F. Supp. 2d 300, 325–28 (D. Del. 2013), preferred strong sanctions, understanding that lesser sanctions would not have a deterrence effect, according to spoliators calculating the gamble and odds of getting caught. The court stated:

> . . . .The risk of having to pay an opponent's fees and costs, or even punitive damages, is likely to pale in comparison to the potential windfall that would-be spoliators could otherwise receive. The court is not prepared to create such a perverse incentive.
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> . . . . Adverse jury instructions, however, do not adequately serve as punishment or deterrence in cases involving spoliation as extensive as Rambus'. *See Samsung*, 348 F.Supp. 2d at 338 n.10 (noting that the rationales of punishment and deterrence "play a secondary role with respect to the spoliation inference" of a jury instruction). Where, as here, Rambus' spoliation was not only extensive, but there is no record of exactly what documents were destroyed, Micron

> would be "helpless to rebut" anything that Rambus might use to try to overcome the adverse presumption. *See id.* at 337. Therefore, a sanction of adverse jury instructions would be ineffective as a remedy, punishment, or deterrent.
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> A dispositive sanction promotes the trifold aims of remedying the prejudice that Micron suffered as a result of Rambus' actions, protecting Micron's interests, and deterring future spoliation of evidence. Though drastic, the nature and degree of Rambus' wrongdoing merits such a sanction.

The facts of this case show amply that this is not even a close case or a gray area. In *Scott v. Harris*, 550 U.S. 372, 380-38, *supra*, a videotape capturing the events belied the respondent's version of the events. The United States Supreme Court stated: "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Id.* at 380-381. The Supreme Court's statement proves the point made by this Court's opening paragraph of the within opinion: failure to combat spoliation effectively will lead to perjury.

Under the present record, the defendant should have placed a litigation hold on the video. *See, VOOM HD Holdings LLC v. EchoStar Satellite, L.L.C.*, 93 A.D.3d 33, 44 (1st Dept. 2012) (adopting federal standard and holding that failure to preserve evidence was, at a minimum, grossly negligent), *aff'g* 2010 WL 8400073, 2010 NY Slip Op 33759(U) & 2010 WL 8435623, 2010 NY Slip Op. 33764(U) (Sup. Ct. New York County 2010) (Lowe, J.) ("EchoStar's spoliation in this action, and the fact that it has been sanctioned for spoliation in previous actions, is precisely the type of offensive conduct that cannot be tolerated by the court. . . . [defendant] EchoStar has been hoist with its own petard."). The defendant here, instead, entertained other destructive thoughts and cemented them by acts of spoliation, compounded by active concealment.

This is not a case of an incident unknown to the defendant. The knowledge was contemporaneous. Defendant was aware of plaintiff's fall, store employees spoke to the injured plaintiff at length and made sure to grab from plaintiff's possession the piece of produce on which she slipped, they themselves took photographs, and they were aware of the situation as the ambulance crew came inside the store to get the plaintiff.

Defendant fails to contest that the video segment it first provided was only six seconds in length and was generated by defendant videotaping an excerpt of the actual surveillance footage and that they viewed as they filmed the episode. Defendant offers no explanation why it first contended falsely that the six second episode was the only video that existed.

The excuse offered by defense counsel that defendant was making a good faith search is unacceptable. Defense counsel stated that when plaintiff served its demand to preserve the video on or about September 11, 2015, the video machine had already recorded over the events and that it no longer existed. Thus, defense counsel explains that it was impossible to get the video that would show how long the unswept produce that caused the fall was laying on the floor. That excuse does not fully exonerate the defendant. Even with the portion of the video that was not recorded over, the defendant did not readily produce the demanded footage that existed. The six-second video was filmed off a playing video. It was not from the undeited recording, but recorded over. The defendant decided to play fast-and-loose with the Court and the truth. Eventually, the defendant produced a 10-second excerpt, only after this Court's two orders, described above. This Court is not obligated to practice delusional thinking and, therefore, rejects the notion that it took many attempts and two court orders to secure partial compliance.

At some point, in fashioning effective methods to combat spoliation and the numerous temptations that still provide incentives for potential spoliators to risk evidence destruction rather than proof production, courts must wake up to the realities. The failure of courts to be aware that mere slips on the wrist not only do not fully right the victim's wrong, but serve actually for wrongdoers to keep pushing the envelope of their transgressions.

Consider this analogy: at trial, it is well-settled that a proponent of an expert's credentials need not accept a stipulation that such a witness is so qualified. The proponent may, understandably, want the jury to hear the credentials of the expert witness for the full force and effect of a well-credentialed expert. In stark contrast, especially in cases of videotape surveillance footage, there is no word count, no matter how voluble and well-crafted the jury instruction of an adverse inference, that can ever compensate for a missing and destroyed video. If a picture speaks a thousand words, a videotape would speak a million words. The videotape footage is unassailable. It allows the opponent little room to maneuver, concoct, or finagle. Absence of a video permits a jury to actually consider the credibility of a contrived story, hoping that the trier of fact will buy it.

In the final analysis, courts have a choice. Wisen up to the intentional gamble made by spoliators in destroying smoking gun evidence and provide effective deterrence

against tactics that make a mockery of the truth-seeking function or play the role of a ventiloquist dummy and blindly repeat the excuse given by a spoliator as a means to justify a tepid, unsuitable, and unsatisfactory choice of a sanction.

Defendant's bad faith and wilful, contumacious conduct, in the case at bar, is exhibited by: defendant's immediate and contemporaneous knowledge of the accident, its conduct in furnishing a six-second segment rather than exchanging the unedited original surveillance footage, its repeated and false assertions, until July 2016, that the six-second segment was the only video in existence, and the purposefully worded and tailored affidavit of the store employee discussing defendant's attempts at compliance. *See, Dzidowska v. Related Companies, L.P.*, 148 A.D.3d 480 (1st Dept. 2017) (building owner had culpable state of mind in destroying videotape evidence relevant to plaintiff's action against owner to recover damages for injuries she sustained when she tripped and fell in building's elevator, and thus imposition of sanctions against owner for spoliation of evidence was proper, where plaintiff's counsel gave owner notice to preserve surveillance tapes within days of accident, but owners only preserved copies of limited portions of tape from one camera and destroyed footage for the entire relevant period from another camera located in elevator, and plaintiff showed that portions of tape that were recorded over were relevant to whether owner had notice of elevator malfunctions prior to accident).

Also troubling is the defendant's failure to preserve the video showing how long the produce was lying on the floor. Plaintiff should not be forced to rely on defendant's self-serving statements regarding its maintenance, cleaning, and inspection of the supermarket. Videotape of the store prior to the plaintiff's fall, had it been preserved, would have shown what efforts were made by defendant to clean and sweep where the fall occurred and to keep it dry.

Defendant, by the spoliation and stonewalling, devised the strategy of reducing plaintiff's case to a "Rashomon effect" swearing contest by their spoliation of the dispositive pictorial proof.[1] That is why giving an adverse inference charge cannot adequately cure the harm sustained by plaintiff, especially on the vital issue of whether the defendant had knowledge of the unsafe floor and for how long was the floor left uncleaned. The trial will boil down to a swearing contest, where the video would have

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[1] A "Rashomon effect" is where the same event is given contradictory interpretations by different individuals and named after renown director Akira Kurosawa's masterpiece, classic film "Rashomon" (1950), in which a murder is described in four mutually plausible, but highly contradictory ways by its four witnesses.

been the determinative proof. See the cogent and articulate reply affirmation of Jennifer K. Matthew, Esq.

The desired remedy must (1) deter parties and future miscreants from engaging in or even attempting spoliation; (2) place the risk on the spoliator, and (3) restore the prejudiced party to the same position had the spoliation not occurred. In the present case, terminating sanctions by striking the answer is warranted and proper.

Where the courts and proceedings of this Court, entrusted to be the pillar of the true of administration, are threatened by spoliation, this Court will find and apply the proper cure for the threatening malady and to deter a contagion by tempted copycat miscreants. "[A] court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice." *CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307, 318 (2014). Such is the case, especially here, where the integrity of court processes, and respect for its own orders, are at stake. *See, e.g., Mangione v. Jacobs*, 121 A.D.3d 953 (2nd Dept. 2014). This case is not one of negligent destruction that would justify giving only an adverse inference charge. *See, Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d at 554, *supra.*

The plaintiff's motion is granted. The defendant's answer is stricken. The parties shall complete discovery on damages. Upon plaintiff filing a note of issue, the Clerk of the Court will schedule a trial on damages.

The foregoing constitutes the decision, order, and opinion of the Court.

Dated: Jamaica, New York
July 10, 2017

Honorable Salvatore J. Modica
J.S.C.

Appearances of Counsel:

For Plaintiff: Gregory J. Cannata & Associates, LLP, by Jennifer K. Mathew, Esq., 60 East 42nd Street, New York, New York 10165

For Defendant: Gordon & Silber, P.C., by Andrew Kaufman, Esq., 355 Lexington Avenue, New York, New York 10017