| Λ    | ٨  | ore | ш  | / F | 26 | f 3 | 11/1         | h ( | 2+  |
|------|----|-----|----|-----|----|-----|--------------|-----|-----|
| - 11 | 11 | ule | 11 | v c | as |     | <b>14</b> LI |     | JL. |

2018 NY Slip Op 31907(U)

August 9, 2018

Supreme Court, New York County

Docket Number: 160209/15

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

RECEIVED NYSCEF: 08/09/2018

## SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

| PRESENT: Hon. I  | Paul A. Goetz, JSC  |  | PA   | RT 47  |
|--|---|--|--|--|
| Morell   |   |  | INDEX No. 1/a/   | 77.09/15   |
| 10001011   | •   |  | INDEX No   |  |
|  | - <b>V-</b>   |  | MOTION DATE  | 002  |
| East 34  | rhst  |  | MOTION SEQ. No   | 003  |
| The following papers, r  | umbered 1 to, were  | read on this motion to/fo  | or   |  |
| Notice of Motion/Order   | to Show Cause - Affidavits -<br>Exhibits  | Exhibits   |  | No(s)  |
| Answering Affidavits -   | Exhibits  |  |  | No(s). 2   |
| Replying Affidavits  |   | ·  |  | No(s). <u>3</u>  |
| 34th Street LLC,<br>management con   | other injuries. In this motion, p<br>the owner of the building, and<br>pany, based on their spoliatio   | defendant Citi-Urban Ma  | anagement Corp., the   |  |
| and (3) document<br>This is plaintiff's plaintiff's first manager of the radical valve the day after renew its motion. Finally, the court incident or proviso, the court held.   | 1) the radiator valve for the sure its related to the maintenance at third motion for sanctions. By otion, holding that defendants jator valve because the superinger the incident. With respect to for sanctions after conducting ordered defendants to produce a compliant affidavit of non that plaintiff would be entitled. Mr. Borkowski's deposition,   | were precluded from offer<br>the emails and texts, the<br>a deposition of Eric Borle<br>e all records for the boile<br>n-existence by February 1<br>d to an adverse inference  | and texts concerning to the in the building.  22, 2017, this court gradering any evidence at the concerning the court authorized plain knowski, the property may for two years prior to 5, 2018. If defendants regarding these records on for discovery sanctices.   | nted in part rial d of the tiff to lanager. the failed to do s. ions. On                     |
| and (3) document This is plaintiff's plaintiff's first manager of the regarding the radical valve the day after enew its motion Finally, the court incident or proviso, the court held After conducting July 12, 2018, the court denied plain additional boiler                            | third motion for sanctions. By otion, holding that defendants lator valve because the superirer the incident. With respect to for sanctions after conducting ordered defendants to produce a compliant affidavit of non that plaintiff would be entitled. Mr. Borkowski's deposition, a parties appeared for a court contiff's second motion without records after submission of the  | were precluded from offer<br>the emails and texts, the<br>a deposition of Eric Borle<br>e all records for the boiler<br>e-existence by February 1<br>d to an adverse inference<br>plaintiff renewed its moti-<br>conference to discuss the<br>prejudice based in part or                                   | and texts concerning to r in the building.  22, 2017, this court gradering any evidence at the property of the | nted in part rial d of the tiff to tanager. the failed to do s. tions. On nce, the on of     |
| and (3) document This is plaintiff's plaintiff's first manager of the radical valve the day after renew its motion Finally, the court incident or proviso, the court held After conducting July 12, 2018, the court denied plaintiff is plaintiff.   | third motion for sanctions. By otion, holding that defendants lator valve because the superirer the incident. With respect to for sanctions after conducting ordered defendants to produce a compliant affidavit of non that plaintiff would be entitled. Mr. Borkowski's deposition, a parties appeared for a court contiff's second motion without records after submission of the  | were precluded from offer<br>the emails and texts, the<br>a deposition of Eric Borle<br>e all records for the boiler<br>e-existence by February 1<br>d to an adverse inference<br>plaintiff renewed its moti-<br>conference to discuss the<br>prejudice based in part or                                   | and texts concerning to r in the building.  22, 2017, this court gradering any evidence at the property of the | nted in part rial d of the tiff to nanager. the failed to do is. ions. On nce, the on of the |
| and (3) document This is plaintiff's plaintiff's first manager of the regarding the radical valve the day after enew its motion Finally, the court incident or proviso, the court held After conducting July 12, 2018, the court denied plain additional boiler present motion for         | third motion for sanctions. By otion, holding that defendants iator valve because the superiner the incident. With respect to for sanctions after conducting ordered defendants to produce de a compliant affidavit of non that plaintiff would be entitled. Mr. Borkowski's deposition, a parties appeared for a court of the cords after submission of the present of the cords after submission of the present of the cords after submission of the cords. | were precluded from offer<br>the emails and texts, the<br>a deposition of Eric Borle<br>e all records for the boiler<br>e-existence by February 1<br>d to an adverse inference<br>plaintiff renewed its moti-<br>conference to discuss the<br>prejudice based in part or                                   | and texts concerning to the in the building.  22, 2017, this court gradering any evidence at the notion, negligently disposed court authorized plain knowski, the property many for two years prior to 5, 2018. If defendants regarding these record on for discovery sanctimotion. At the conferent defendants' production is producted plaintiff to make the conferent defendants on the conferent defendants.   | nted in part rial d of the tiff to nanager. the failed to do is. ions. On nce, the on of the |
| and (3) document This is plaintiff's plaintiff's first manager of the regarding the radical valve the day after enew its motion. Finally, the court incident or proviso, the court held. After conducting July 12, 2018, the court denied plai additional boiler present motion for Dated: | third motion for sanctions. By otion, holding that defendants lator valve because the supering the incident. With respect to for sanctions after conducting ordered defendants to produce a compliant affidavit of non that plaintiff would be entitled. Mr. Borkowski's deposition, a parties appeared for a court of the parties appeared for a court of the parties.   | worder dated December 2 were precluded from offentendent, Jonathan Deborathe emails and texts, the a deposition of Eric Borle all records for the boiled existence by February 1 d to an adverse inference plaintiff renewed its motivation of the prejudice based in part or emotion. The court author    | and texts concerning to the in the building.  22, 2017, this court gradering any evidence at the notion, negligently disposed court authorized plain knowski, the property many for two years prior to 5, 2018. If defendants regarding these record on for discovery sanctimotion. At the conferent defendants' production is producted plaintiff to make the conferent defendants on the conferent defendants.   | nted in part rial d of the tiff to lanager. the failed to do ls. ions. On nce, the on of the |
| and (3) document This is plaintiff's plaintiff's first manager of the regarding the radical valve the day after enew its motion. Finally, the court incident or proviso, the court held. After conducting July 12, 2018, the court denied plai additional boiler present motion for Dated: | third motion for sanctions. By otion, holding that defendants lator valve because the superirer the incident. With respect to for sanctions after conducting ordered defendants to product de a compliant affidavit of non that plaintiff would be entitled. Mr. Borkowski's deposition, the parties appeared for a court of the production of the parties. The production of the parties after submission of the productions.                                | were precluded from offentendent, Jonathan Deborathe emails and texts, the a deposition of Eric Borle all records for the boiler existence by February 1 d to an adverse inference plaintiff renewed its motivonference to discuss the prejudice based in part or e motion. The court authors as EDISPOSED | and texts concerning to the in the building.  22, 2017, this court gradering any evidence at the io, negligently disposed court authorized plain knowski, the property mer for two years prior to 5, 2018. If defendants regarding these record on for discovery sanctimotion. At the conferent defendants' production is defendants' production in the interpretation of the interpretation of the interpretation of the interpretation of the interpretation. At the conferent defendants' production is defendants' production in the interpretation. Paul Goeta  | nted in part rial d of the tiff to lanager. the failed to do ls. ions. On nce, the on of the |

NYSCEF DOC. NO. 193

RECEIVED NYSCEF: 08/09/2018

## SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

| PRESENT: Hon. Paul A. Goetz, JSC  | PART 47  |
|---|--|
| Morell  | INDEX No. 160 209/1  |
| - <b>v</b> -  |  |
| East-34th St  | MOTION DATE  |
| The following papers, numbered 1 to, were read on this motio  | n to/for   |
| Notice of Motion/Order to Show Cause - Affidavits - Exhibits  | No(s)1_  |
| Answering Affidavits – ExhibitsReplying Affidavits  | No(s). <u>2</u>  |
| Replying Affidavits   | No(s). <u>3</u>  |
| the spoliator was "on notice that the [evidence] might be needed for relevant to such litigation. <i>Id.</i> at 22. With respect to the destruction and texts, New York courts follow the federal standard articulated F.R.D. 212 (S.D.N.Y. 2003). Under this standard, "[a] party seeking the seeking of the seeking o | on of ESI evidence, such as the emails in <i>Zubulake v. UBS Warburg LLC</i> , 220 ing sanctions based on the spoliation of  |
| relevant to such litigation. <i>Id.</i> at 22. With respect to the destruction and texts, New York courts follow the federal standard articulated   | on of ESI evidence, such as the emails of in Zubulake v. UBS Warburg LLC, 220 ing sanctions based on the spoliation of the evidence had an obligation to preserve with a "culpable state of mind"; and claim or defense such that the trier of the ense." Voom HD Holdings LLC v. (2) Zubulake). The intentional destruction that is the result of gross negligence. Id. (2) the failure to the other records are preserved; and (3) authorizes sanctions based on a party's and of attorneys' fees and costs. Jackson   |
| relevant to such litigation. <i>Id.</i> at 22. With respect to the destruction and texts, New York courts follow the federal standard articulated F.R.D. 212 (S.D.N.Y. 2003). Under this standard, "[a] party seeking evidence must demonstrate: (1) that the party with control over the it at the time it was destroyed; (2) that the records were destroyed finally, (3) that the destroyed evidence was relevant to the party's fact could find that the evidence would support that claim or defere <i>EchoStar Satellite LLC</i> , 93 A.D.3d 33, 45 (1st Dep't 2012) (citing of evidence is sufficient to presume relevance, as is destruction the "Failures which support a finding of gross negligence, when the detriggered, include: (1) the failure to issue a written litigation hold, identify all of the key players and to ensure that their electronic are the failure to cease the deletion of e-mail. <i>Id.</i> Finally, CPLR 3126 failure to comply with court-ordered discovery, including the away  | on of ESI evidence, such as the emails of in Zubulake v. UBS Warburg LLC, 220 ing sanctions based on the spoliation of the evidence had an obligation to preserve with a "culpable state of mind"; and claim or defense such that the trier of the ense." Voom HD Holdings LLC v. (2) Zubulake). The intentional destruction that is the result of gross negligence. Id. (2) the failure to the other records are preserved; and (3) authorizes sanctions based on a party's and of attorneys' fees and costs. Jackson   |
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RECEIVED NYSCEF: 08/09/2018

## SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

|   | PART 47   |
|---|---|
| Morell  | INDEX NO. 160209/15   |
|   | MOTION DATE   |
| Morell<br>East 34th St  | INDEX NO. 160209/15  MOTION DATE  |
|   |   |
| The following papers, numbered 1 to, were read on this moti   | ion to/for  |
| Notice of Motion/Order to Show Cause – Affidavits – Exhibits  | No(s).  |
| Answering Affidavits - ExhibitsReplying Affidavits  | No(s). 2  |
| Replying Amidavits  | No(s)   |
| depositions. Affirmation of Gregory M. Dexter dated July 19, 20   |   |
|   | 218, Exh. A (Debono Tr. 32:13-35:19, 12-96:16). Indeed, Jonathan Debono, where the incident occurred, testified that counsel until his deposition. Exh. A ne relevance of these documents is Realty Funding, LLC v. Herrick, as destruction of evidence was at a non hold). With respect to the boiler purt's orders. Although defendants did not have any additional records.  |
| depositions. Affirmation of Gregory M. Dexter dated July 19, 20 38:4-21) and Exh. B (Borkowski Tr. 44:2-46:3, 52:20-54:22, 95: defendants' key witness and the superintendent for the building he had never even seen the litigation hold letter from plaintiff's of (Debono Tr. 29:6-32:4). This constitutes gross negligence and the therefore presumed. Voom HD, 93 A.D.3d at 45; see also Arbor Feinstein LLP, 140 A.D.3d 607, 608 (1st Dep't 2016) (plaintiff's minimum grossly negligent given its failure to institute a litigation records, defendants repeatedly failed to fully comply with the couproduce some documents in accordance with the court's December clearly incomplete despite defendants' representation that they definded, after plaintiff highlighted this deficiency in her motion precords in June 2018. Yet defendants have still failed to produce to maintain by law, if such records ever existed.          | 218, Exh. A (Debono Tr. 32:13-35:19, 12-96:16). Indeed, Jonathan Debono, where the incident occurred, testified that counsel until his deposition. Exh. A ne relevance of these documents is Realty Funding, LLC v. Herrick, as destruction of evidence was at a con hold). With respect to the boiler ourt's orders. Although defendants did over 22, 2017 order, such production was lid not have any additional records. Supports, defendants produced additional the boiler log records they are required |
| depositions. Affirmation of Gregory M. Dexter dated July 19, 20 38:4-21) and Exh. B (Borkowski Tr. 44:2-46:3, 52:20-54:22, 95: defendants' key witness and the superintendent for the building he had never even seen the litigation hold letter from plaintiff's (Debono Tr. 29:6-32:4). This constitutes gross negligence and the therefore presumed. Voom HD, 93 A.D.3d at 45; see also Arbor Feinstein LLP, 140 A.D.3d 607, 608 (1st Dep't 2016) (plaintiff's minimum grossly negligent given its failure to institute a litigation records, defendants repeatedly failed to fully comply with the comproduce some documents in accordance with the court's December clearly incomplete despite defendants' representation that they defended, after plaintiff highlighted this deficiency in her motion percords in June 2018. Yet defendants have still failed to produce to maintain by law, if such records ever existed.  CHECK ONE: | 218, Exh. A (Debono Tr. 32:13-35:19, 12-96:16). Indeed, Jonathan Debono, where the incident occurred, testified that counsel until his deposition. Exh. A he relevance of these documents is Realty Funding, LLC v. Herrick, as destruction of evidence was at a con hold). With respect to the boiler purt's orders. Although defendants did her 22, 2017 order, such production was hid not have any additional records. Supports, defendants produced additional the boiler log records they are required  |

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S)

RECEIVED NYSCEF: 08/09/2018

## SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

| PRESENT: Hon. Paul A. Goetz, J  | SC   | PART 47   |
|---|--|---|
|   |  |   |
| Morell  |  | INDEX No. 1602 09/10  |
| -v-   |  | MOTION DATE   |
| East 34 m 81  |  | INDEX No  |
| The following papers, numbered 1 to   | , were read on this motion to/fo   | or  |
| Notice of Motion/Order to Show Cause - A  | Affidavits - Exhibits  | No(s) <b>(</b>  |
| Answering Affidavits – Exhibits   |  | No(s)   |
| Replying Affidavits   |  | No(s)   |
| under the circumstances." Arbor Re striking defendants' answer is unwar spoliated evidence does not constitut Accordingly, an adverse inference cl defendants shall be required to pay d incurred in making the three spoliation Accordingly, it is ORDERED that the motion is grante | rranted as there are key witnesses the the "sole means" by which plainting arge is an appropriate sanction und discovery sanctions to plaintiff for the on motions in the amount of \$1,000 and; and it is further | at are available to testify and the iff can prove her case. <i>Id.</i> er the circumstances. In addition, he attorneys' fees and costs. |
| oradiator valve, the e-mails and texts of ORDERED that defendants shall rein \$1,000, with payment made to plaint   | mburse plaintiff for the costs incurre   | ed in this matter in the amount of  |
| Clerk of Part 47 within 30 days after   |  | • •   |
| ORDERED that, in the event that time order with notice of entry and an affirm of plaintiff and against defendants in A status conference is s   | rmation or affidavit of non-paymen the aforesaid sum.  | t, shall enter a judgment in favor  |
| =101.   |  | 19 11   |
| Dated: 3/1/18   |  | 1 Wells   |
|   |  | Hon. Paul A. Goet SC  |
| CHECK ONE:  | CASE DISPOSED  | NON-FINAL DISPOSITION   |
| CHECK IS APPROPRIATE:MOTION   |  | GRANTED IN PART OTHER   |
| CHECK IF APPROPRIATE:   | SETTLE ORDER  DO NOT POST FIDUCIA  | SUBMIT ORDER  ARY APPOINTMENT REFERENCE   |
|   | - U -  |   |
|   | Page $\frac{9}{2}$ of $\frac{4}{2}$  |   |