SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** IAS MOTION 52EFM

Justice

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JANE DOE, JOHN DOE,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE CITY OF NEW YORK DEPARTMENT OF EDUCATION, TERRI RUYTER INDIVIDUALLY AND AS AGENT OF THE CITY OF NEW YORK DEPARTMENT OF EDUCATION, JOHN DOE 1-4

Defendant.

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INDEX NO. 151500/2019

MOTION DATE 01/22/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38

were read on this motion to/for SANCTIONS.

Plaintiffs move for sanctions on the grounds that defendants failed to preserve video surveillance in violation of its obligations. Defendants oppose the instant motion on various grounds. For the reasons set forth below plaintiffs' motion to strike the defendants' answer is denied, with other possible sanctions denied without prejudice to bring this motion again at the time of trial.

Facts

On December 7, 2017, plaintiff John Doe was allegedly sexually assaulted by another student in the playground in a public school under the jurisdiction of the Department of Education (DOE). That same day, an Occurrence Report was issued regarding the alleged assault and plaintiff Jane Doe verbally requested a copy of video surveillance footage from this playground area. Jane Doe followed up with additional requests. Jane Doe subsequently went to the school and along with defendant Ruyter, the principal of the school, viewed surveillance

footage from the day of the assault. This footage did not show the assault, but rather showed two school employees standing and talking to each other while plaintiff alleges the assault was taking place.

On December 15, 2017, a notice of claim was filed, which was amended on March 1, 2018. On February 26, 2018, a preservation of evidence notice was sent by plaintiffs' counsel via e-mail to both Ms. Ruyter's email address, as well as what plaintiffs claim but have not proven is the DOE general counsel's email address. On March 6, 2018, the notice was then sent via certified mail to the General Counsel of the DOE. On or about March 7, 2018, all video surveillance from the location on the date in question was erased pursuant to the DOE's 90 -day retention archive policies.

Discussion

In support of the portion of plaintiffs' motion that seeks to strike the defendants' answer, plaintiffs cite to an abundance of case law where defendants conduct was clearly outrageous as to warrant the striking of its answer. Based on the facts before this Court, plaintiff has not established that defendants intended to conceal or destroy evidence, thus failing to warrant such an extreme sanction, especially where here the mailed notice of preservation was sent at most one day before the evidence was to be destroyed. Accordingly, the portion of plaintiffs' motion that seeks to strike the City's answer is denied.

Strong v City of New York, cited by plaintiffs although distinguishable from the instant matter, is quite instructive. (112 AD3d 15 [1st Dept 2013]). The issue in *Strong* was the automatic destruction of police department radio run recordings. There the Court held that "the negligent erasure of audiotapes can certainly give rise to the imposition of spoliation sanctions under New York's common-law spoliation doctrine, if the alleged spoliator was on **notice** [that]

the [audiotapes] might be needed for future litigation"(*Id* at 22 [emphasis added, internal quotation marks and citation omitted]). The Court in *Strong* did not find that the City acted willfully and contumaciously, thus it rejected plaintiff's request to strike one of the City's affirmative defenses, a less severe sanction than striking defendants entire answer as requested here. Notably, in *Strong* there was a pre-action Order to Show Cause served on the agency maintaining the recordings, which was not done here.

Plaintiffs' reliance on *Strong* for its argument that the City's obligation to preserve the video surveillance was triggered with the filing of the Notice of Claim is misplaced. The Court in *Strong* held that the City was on notice within the 180-day retention period of the audio recording, by the notice of claim, the 50-h testimony and the City interposing its answer. The parties in *Strong* and plaintiffs are not in the same posture.

The Court therefore denies plaintiffs' motion without prejudice to bring as a *motion in limine* before the assigned trial justice. At that point in the litigation discovery will have been conducted and the extent of plaintiffs' prejudice, if any, will be apparent thus enabling the trial justice to decide this issue on a full record.

It is hereby

ORDERED that the plaintiffs' motion is to strike defendants answer is denied; and it is further

ORDERED that plaintiffs' motion for other spoliation sanctions is denied without prejudice as indicated above.

1/24/2020
DATE

LYLE E. FRANK, J.S.C.

HON. LYLE E. FRANK
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE