SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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OSCAR BATISTA,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY and AARON JAMES

Defendants.

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INDEX NO. 156430/2017

MOTION DATE 05/10/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64

were read on this motion to/for DISCOVERY/IN LIMINE MOTION.

In this action to recover damages arising from a motor vehicle accident, the plaintiff moves pursuant to CPLR 3126 and in limine for the imposition of sanctions upon the defendants for spoliation of a video recording that allegedly depicted the subject accident. He seeks either to strike their answer, preclude them from adducing certain evidence at trial, or subject them to an adverse inference charge. The defendants oppose the motion, contending that the subject video never existed. The motion is granted to the extent that, upon considering the request for in limine relief, the court shall instruct the jury that, if it finds that the video did, in fact, exist, the jury may draw an adverse inference against the defendants that the events depicted in that video would have depicted images unfavorable to their defense.

Based upon the submissions of counsel, including the deposition transcripts and pertinent trial testimony, the court finds the following relevant facts for purposes of this ruling only:

On March 13, 2017, at approximately 4:00 p.m., the defendant Aaron James was operating a NYCTA-owned bus as part of a caravan of buses that were being transported from

NYCTA's Jamaica Bus Depot in Queens to its Kingsbridge Bus Depot, located at 4065 10th Avenue in Manhattan, at the intersection of 10th Avenue and 216th Street. The bus immediately behind the bus that James operated was being operated at the time by the nonparty Robert Flipping. The bus operated by James was traveling westbound on West 207th Street and attempted to make a right turn northbound onto 10th Avenue, when it came into contact with a vehicle operated by the plaintiff. Flipping witnessed this collision, and testified at his deposition that he pushed a button inside of his own bus to activate a time-stamp for any videos that might have been recording at that time by at least one of his bus's cameras. The plaintiff testified at his deposition, and at trial, that, immediately after the collision, James did not stop the bus that he was operating, but instead drove directly to the Kingsbridge Bus Depot, with the plaintiff following the James bus in his own vehicle. Both the plaintiff and Flipping testified at their depositions, and the plaintiff testified at trial, that, when the plaintiff exited his vehicle at the depot, the plaintiff and Flipping spoke to each other about Flipping's observation of the collision, Flipping's activation of the video time-stamp function, and whether a video of the collision had been captured by the cameras on the bus that Flipping had operated. Flipping further testified at his deposition that he had been told by his attorney that the video recorded by a camera on his bus existed. James testified at his deposition that he had been shown a video that had been recorded by the camera on Flipping's bus.

In response to the plaintiff's demand for the production of the video that was recorded by the cameras in Flipping's bus, the defendants served a *Jackson* affidavit (*Jackson v City of New York,* 185 AD2d 768 [1st Dept 1992]) executed by Jazmin Orea, an employee of NYCTA's contractor, SafeFleet, which was the company responsible for the installation, maintenance, and retention of onboard bus security video systems. Orea asserted in her affidavit that, on December 16, 2019, she received a request to locate video from Flipping's bus, designated as Bus #8071, that pertained to the March 13, 2017 accident between the plaintiff and the bus operated by James. She asserted that her search yielded no results. As she explained it,

> "[w]e are limited by storage capacity and video is deleted in FIFO (first in first out) order. Video taken on March 13, 2017 from the cameras onboard Bus #8071 was overwritten in normal operation."

Orea's affidavit however, did not address the issue of whether, in general, bus videos are automatically recorded when a bus is placed into operation, or describe how the recording device is engaged and the recording function is initiated.

Shortly prior to trial, counsel for the defendants informed the plaintiff and the court that Flipping's anticipated trial testimony would be that he was mistaken that a video had been recorded by the cameras on his bus, and that he had no control over whether to commence the recording of a video, but only over whether it would be time-stamped if, in fact, one were being recorded. In addition, counsel indicated that there would be proof that Flipping, as the bus operator, did not have the power or ability to commence the recording of videos, but that this function was within someone else's purview, and that no bus driver would have known whether the recording function had been activated on any particular bus prior to its departure from the Jamaica Bus Depot, even though it had been activated on James's bus. Flipping testified at trial that this was indeed the case, and that he in fact did not know whether the video cameras were in operation on his bus on March 13, 2017.

Consequently, based on the evidence admitted at the trial, it is clear that the bus driver does not control the operation of the video recording device, other than the time-stamping function, and that the most reasonable inference that may be drawn is that the initiation of the recording function is triggered automatically.

James testified at trial that, contrary to his deposition testimony, he did not actually view any video recorded by one of the cameras on Flipping's bus, but instead viewed a video recorded by a camera on his own bus that he mistakenly believed was recorded by a camera on Flipping's bus. In addition, the defendants now seek to exclude Orea's *Jackson* affidavit, suggesting that a video recording from Flipping bus existed at one point, from being admitted

into evidence on the ground that it is hearsay, and that any information that Orea might provide must be in form of her live testimony before the jury.

In the first instance, Orea's affidavit may be admitted into evidence. CPLR 4540-a provides, in relevant part, that

> "[m]aterial produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by a party shall be presumed authentic when offered into evidence by an adverse party."

Here, Orea's affidavit was produced by the defendants in response to the plaintiff's demand for production of the subject video, and it was created at the defendants' behest. Although the automatic authentication provision of CPLR 4540-a, by its terms, "shall not preclude any other objection to admissibility," the statement set forth in Orea's affidavit constitutes a party admission. A party admission is admissible in evidence notwithstanding the rule against the admissibility of hearsay (*see Passos v MTA Bus Co.*, 129 AD3d 481 [1st Dept 2015]; *Delgado v Martinez Family Auto*, 113 AD3d 426, 426 [1st Dept 2014]), even where the admission is made by the party's agent (*see K & K Enters. Inc. v Stemcor USA Inc.*, 100 AD3d 415, 416 [1st Dept 2012]; *see also Spett v President Monroe Bldg. & Mfg. Corp.*, 19 NY2d 203, 206 [1967]; *Rosasco v Cella*, 124 AD3d 447, 448 [1st Dept 2015]; *DeSimone v City of New York*, 121 AD3d 420, 422 [1st Dept 2014]; *Georges v American Export Lines, Inc.*, 77 AD2d 26, 33 [1st Dept 1980]). Orea and SafeFleet were deputized by the defendants in this action not only to oversee the management and location of videos recorded on NYCTA's buses, but also authorized by NYCTA to speak for it by providing the plaintiff with a response to his discovery demands in this litigation. Hence, SafeFleet and Ozea were the defendants' agents for the purpose of the rule allowing party admissions into evidence (*see Rosasco v Cella*, 124 AD3d at 448).

With respect to the plaintiff's request for in limine relief, "[g]enerally, the function of a motion in limine is to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. Its purpose is to prevent the introduction of such evidence to the trier of fact, in most instances a

jury" (*State of New York v Metz*, 241 AD2d 192, 198 [1st Dept 1998]). It thus serves a function quite different from that pertaining to other motions, such as a motion to impose sanctions for failure to make disclosure. Thus, while "a motion in limine is the appropriate vehicle to determine what evidence may be presented at trial regarding damages" (*Wey v New York Stock Exchange*, 15 Misc 3d 1127[A], 2007 NY Slip Op 50880[U], *11, 2007 NY Misc LEXIS 2965, *37 [Sup Ct, N.Y. County 2007, Apr. 10, 2007]), it may not be employed as a substitute for an untimely motion to impose sanctions for failure to make disclosure.

Under most circumstances, including the one in this case, a motion pursuant to CPLR 3126 to impose sanctions for the willful failure to make disclosure must be made prior to the filing of the note of issue and certificate of readiness since, by that filing, a party represents that all discovery has been completed and that there are no outstanding discovery requests (*see Flanagan v Wolff,* 136 AD3d 739, 741 [2d Dept 2016]). The failure to make a motion pursuant to CPLR 3126 prior to the filing of the note of issue and certificate of readiness is deemed a waiver of any contention that an adverse party has failed to meet his or her disclosure obligations (*see id.; K-F/X Rentals & Equip., LLC v FC Yonkers Assoc., LLC,* 131 AD3d 945, 946 [2d Dept 2015]; *Marte v City of New York*, 102 AD3d 557, 558 [1st Dept 2013]; *Rivera-Irby v City of New York*, 71 AD3d 482, 482 [1st Dept 2010]).

Although the court may not entertain this motion as one pursuant to CPLR 3126, it nonetheless may entertain it as an in limine motion for the imposition of spoliation sanctions, whether the sanction sought is the striking of a pleading (*see Soghanalian v Young*, 176 AD3d 1422, 1424 [3d Dept 2019]), the preclusion of testimony or evidence (*see Fuchs & Bergh, Inc. v Lance Enters., Inc.*, 66 AD3d 733, 734 [2d Dept 2009] [denying that sanction because loss of evidence there did not compromise plaintiffs' ability to prove their case]), or an adverse inference charge (*see Martinez v. Paddock Chevrolet, Inc.*, 85 AD3d 1691, 1693 [4th Dept 2011]). Indeed, even where the trial court denies a timely asserted CPLR 3126 motion based on spoliation of evidence, "whether dismissal is warranted on spoliation grounds is not the

'same question' as whether an adverse inference charge at trial is appropriate" (*id.* at 1623, quoting *Tillman v Women's Christian Assn. Hosp.*, 272 AD2d 979, 980 [4th Dept 2000]).

The Supreme Court is empowered with "'broad discretion in determining the appropriate sanction for spoliation of evidence'" (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2d Dept 2009], quoting *De Los Santos v Polanco*, 21 AD3d 397, 397 [2d Dept 2005]).

> "On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a 'culpable state of mind,' which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense"

(*Duluc v AC & L Food Corp*, 119 AD3d 450, 451 [1st Dept 2014]; *see VOOM HD Holdings LLC v EchoStar Satellite, LLC,* 93 AD3d 33, 45 [1st Dept 2012]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481 [1st Dept 2010]). 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 (see *Duluc v AC & L Food Corp*, 119 AD3d at 451-452; *Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218 [1st Dept 2004]). The burden is on the party requesting sanctions to make the requisite showing (*see Duluc v AC & L Food Corp*, 119 AD3d at 452; *Mohammed v Command Sec. Corp.*, 83 AD3d 605 [1st Dept 2011]).

In the context of a dispute over spoliation of evidence, a party acts with culpable conduct where it destroys or negligently fails to preserve physical or documentary evidence, despite being aware of pending or potential future litigation in which the evidence will be relevant, thus breaching its obligation to preserve that evidence (*see Zacharius v Kensington Publ. Corp.*, 154 AD3d 450, 451 [1st Dept 2017]; *Marotta v Hoy*, 55 AD3d 1194, 1197 [3d Dept 2008]; *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173-174 [1st Dept 1997]).

In the instant matter, the plaintiff has adduced evidence that a video recording was made by one of the cameras on Flipping's bus and that NYCTA lost, overwrote it, or destroyed it. He has further presented evidence permitting the jury to draw the inference that the video was

overwritten by NYCTA with a culpable state of mind, and that it was relevant to his claims. NYCTA was aware of the existence of a potential claim immediately after the accident and that any video would be relevant to that potential claim, even if that claim may only have appeared at the time to be related to property damage. In addition, inasmuch as the accident occurred on March 13, 2017, and the plaintiff commenced this action on July 17, 2017 and served NYCTA with process on July 20, 2017, NYCTA had knowledge only four months after the accident that it had an obligation to preserve any video recorded on March 13, 2017.

The sanctions of striking the defendants' answer or precluding them from adducing evidence in support of their defense are unwarranted here, however, as the absence of the video has not "fatally compromised" the plaintiff's ability to prosecute the action (*Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 629 [2d Dept 2005]), nor has the plaintiff has made a showing that "the defendants destroy[ed] essential physical evidence leaving the plaintiff without appropriate means to confront a claim with incisive evidence" (*Kerman v Friedman*, 21 AD3d 997, 999 [2d Dept 2005]). Rather, the appropriate sanction here is to permit the jury to determine, in the first instance, whether the video was indeed recorded, as suggested by the plaintiff's evidence, or whether it was never recorded, as the defendants now contend. Contrary to the plaintiff's concerns, the court concludes that Flipping's testimony concerning the existence of a so-called "blank disc" does not suggest the existence of two separate storage media that the defendants failed to produce. Rather, his testimony suggested that the recording referred to in the Orea affidavit did not contain video content that was thereafter overwritten, but that that recording medium was "blank." In any event, either the jury will believe that there was once a recording with viewable content in existence at some point that was lost, destroyed, or overwritten, or that there was never such a recording, and that any "blank disc" described by Flipping was the product either of the fact that the cameras were not activated, were nonfunctional, or produced a corrupted, unviewable storage medium such as a DVD-R or USB thumb drive when NYCTA's contractor attempted to retrieve it from the bus's equipment. For

that reason, if the jury finds that the video was indeed recorded and was at one time in existence, it shall be instructed that it may draw an adverse inference against the defendants that the events depicted on that video would not be favorable to their version of the happening of the accident (*see VOOM HD Holdings LLC v EchoStar Satellite, LLC,* 93 AD3d at 47).

Accordingly, it is

ORDERED that the plaintiff's application to admit the affidavit of Jazmin Orea into evidence is granted; and it is further,

ORDERED that the plaintiff's motion in limine for the imposition of spoliation sanctions upon the defendant for misplacing, losing, destroying, or overwriting a video of the March 13, 2017 accident that is the subject of this action, and that allegedly was recorded by cameras installed on a bus operated by Robert Flipping, is granted to the extent that the jury shall be instructed to make a finding as to whether the video ever existed or not and that, if it finds that it did exist, it shall be instructed that it may draw an adverse inference against the defendants that the events depicted on that video would not be favorable to the defendants or their version of the happening of the accident, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

5/10/2023
DATE

JOHN J. KELLEY, J.S.C.

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