SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. James E. d'Auguste **PART 55**

Justice

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A3 INVESTMENTS SA,

Plaintiff,

- v -

GRAEME LINNETT,

Defendant.

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INDEX NO. 157719/2018

MOTION DATE 05/31/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 76, 77, 78, 79, 80, 81

were read on this motion to/for STRIKE PLEADINGS.

In this residential landlord-tenant action, defendant landlord, Graeme Linnett ("Linnett"), moves pursuant to CPLR 3126(3) to strike the complaint of plaintiff tenant, A3 Investments SA ("A3"), and dismiss the action with prejudice based on A3's alleged spoliation of evidence. In the alternative, Linnett seeks to impose sanctions upon A3 pursuant to CPLR 3126(1) with an order that the issues to which the information is relevant shall be deemed resolved in Linnett's favor, or under CPLR 3126(2) precluding A3 from offering any evidence and testimony at trial relating to the conditions of the subject apartment and its monetary claims, including damages. Additionally, Linnett seeks to stay all further proceedings in the action, including discovery, until further order of the Court (NYSCEF Doc. No. 49). A3 opposes and cross-moves, pursuant to CPLR 3124, to compel Linnett to provide all text messages between Linnett and plaintiff-tenants in Linnett's possession responsive to A3's Demand for Discovery and Inspection at requests #2 and 3 (NYSCEF Doc. No. 68). For the reasons set forth below, the motion is granted in part, and denied in part, and the cross-motion is granted.

Tenant A3, a legal entity organized in Belgium, signed the subject one-year lease with Linnett to rent a fully furnished residential condominium unit, #4, at 60 Warren Street in Manhattan ("condo"), for

$26,000 per month for the purpose of providing housing for A3's sole shareholder, Sebastian Lombardo ("Lombardo"), his wife, Canel Frichet ("Frichet"), their two children, and a service dog. The term of the lease commenced on March 16, 2018, and expired on March 15, 2019; the first six months of rent was paid in advance totaling $150,000, as well as a $52,000 security deposit equaling two months' rent, plus a broker's commission of $41,600. Yet, Lombardo and his family vacated the condo on or about July 31, 2018, and moved back to France (NYSCEF Doc. Nos. 50, 62, 64).

Linnett asserts that during the course of discovery, repeated demands were made to plaintiffs for text messages on both Lombardo's and Frichet's mobile phones to discern facts about the conditions in the condo, as alleged by plaintiffs, including plaintiff's damages and the decision to vacate the condo early. Linnett claims that Lombardo admitted to failing to preserve the text messages after the obligation to do so attached, and also admitted to knowing how to preserve the evidence, but did not do so (NYSCEF Doc. Nos. 50, 51, 62). Thus, Linnett argues Lombardo admittedly spoliated evidence allegedly "going to the very heart of this case," and that striking A3's complaint and dismissing the action with prejudice, pursuant to CPLR 3126(3), is warranted for the willful spoliation of the text messages (NYSCEF Doc. Nos. 49, 62).

A3 seeks to recover all rent and amounts paid to Linnett, asserting eight causes of action, including breach of the warranty of habitability and constructive eviction, and seeking damages for alleged conditions in the condo, including inoperable appliances, leaks, extreme noise and heat, and cockroaches (NYSCEF Doc. Nos. 50, 62, 63, 64). Lombardo contends he and his family "suffered through conditions making it unbearable to continue to reside in the apartment" from the inception of the tenancy in March 2018, until the date of their vacatur four months later in July 2018 (NYSCEF Doc. No. 64). Lombardo asserts that Linnett was put on notice repeatedly of the conditions in order to rectify them, but failed to do so. Lombardo also argues the condo suffered a flood from above and a portion of the condo was unusable, noting while Linnett received compensation from his insurer, he refused to return any portion of Lombardo's pre-paid rent (NYSCEF Doc. No. 64). Lombardo further alleges that Linnett

requested that plaintiffs vacate the condo early in order to perform mold remediation, and upon vacatur, Linnett still failed to return any portion of the pre-paid rent, nor any of the security deposit (NYSCEF Doc. No. 64). Lombardo claims entitlement to rent abatement and damages "resulting from the diminished quality and interference of health, life and enjoyment" of the condo (NYSCEF Doc. Nos. 50, 62, 64). Linnett, in his reply affidavit, contests asking Lombardo and Frichet to vacate early, noting he merely requested access to repair damage caused by a water leak (NYSCEF Doc. No. 79).

Lombardo contends that "99.99% of communications were made by either email or face to face," noting "my wife, Canel and I never thought that a few text messages exchanged between Defendant, his wife and me and my wife could be so important that there would be a necessity to save a backup of an old phone" (NYSCEF Doc. No. 64). Lombardo claims that Linnett and his wife, Deborah Henry ("Henry"), already have the text messages Linnett claims were spoliated as they were part of the text message communications. As such, Lombardo argues that Linnett's assertions of prejudice "is ludicrous and is just a smoke screen to continue to delay Plaintiff from getting justice and pursuing this action" (NYSCEF Doc. No. 64).

However, both Linnett and Henry, in their reply affidavits, attest that Lombardo's claim that "99.99% of communications were made by either email or face to face" is patently false. Both Linnett and Henry assert that they met Lombardo and/or Frichet only a few times in person, and this "pale[s] in comparison to the amount of written communications by email and texts." Also, Linnett and Henry both state that the emails with Lombardo were limited as the communications were primarily between Henry and Frichet, and were mostly in writing – emails and texts (NYSCEF Doc. Nos. 79, 80).

Lombardo asserts as Linnett's attorney produced several text messages as an exhibit at Frichet's deposition on December 16, 2021, and that because Linnett already has the text messages between Linnett and Lombardo, he is not prejudiced by plaintiffs' inability to provide those same texts (NYSCEF Doc. Nos. 63, 64). Additionally, A3 has provided photographs and video during discovery, including of

"cascading water through bedrooms' ceilings and closet ceilings, … inoperable appliances … extreme noise most evident at night, large cockroaches…" (NYSCEF Doc. Nos. 63, 64).

"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. 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. The burden is on the party requesting sanctions to make the requisite showing." *Duluc v. AC & L Food Corp.*, 119 A.D. 3d 450 (1st Dep't, 2014).

Linnett contends that the duty to preserve evidence attaches at the time that litigation is "reasonably anticipated" by a party. *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D. 3d 33 (1st Dep't 2012). Linnett asserts that A3's duty to preserve evidence, specifically, the text messages in question, attached in March 2018 when it knew it would be suing Linnett, or at the very latest when it retained counsel in connection with the subject matter before June 11, 2018 (NYSCEF Doc. Nos. 50, 58). Linnett claims it served a demand requesting documents, both hard copy and electronic, concerning the primary issue in the case—the condo's condition—in August 2019. Linnett notes that "correspondence" was defined in the demand as "correspondence, emails, …text messages…and other Documents Relating to the communications between or among individuals or entities" (emphasis supplied) (NYSCEF Doc. Nos. 50, 59). Linnett contends that text messages were not only sought for those between the parties and their wives, but any other relevant text messages, including those between or among Frichet, Lombardo and their nannies and assistants. Linnett argues that despite repeated requests for text messages, A3 never produced any communications (NYSCEF Doc. No. 50).

Linnett argues that Frichet admitted at her deposition on October 22, 2021, and subsequently continued on December 16, 2021, that no text messages were produced in response to the document

demand "because I changed my phone, so I didn't have it anymore. But it was sad not to be able to send it because it does explain very well the situation" (emphasis supplied) (NYSCEF Doc. Nos. 50, 54). Additionally, Linnett notes Frichet also admitted at the deposition that she obtained the new phone "after I had to produce the documents" (emphasis supplied) (*Id.*). Linnett contends Frichet, at her deposition, admitted the text messages are crucial to the issues in this matter, yet she failed to preserve them after the obligation to do so attached (NYSCEF Doc. No. 50).

On that point, A3 argues that while Linnett's counsel used portions of Lombardo's and Frichet's deposition transcripts in defendant's motion, the transcripts were not provided to plaintiffs for review by either Lombardo or Frichet until after the filing of Linnett's motion, and only upon demand made by A3's counsel (NYSCEF Doc. Nos. 63, 64). In his affidavit, Lombardo notes that no opportunity was given to him or his wife to preview and correct their transcripts before Linnett utilized them in the instant motion (NYSCEF Doc. No. 64). CPLR 3116(a) provides that a transcript must be submitted to the witness to read and make any necessary changes, then sign the transcript under oath. If such procedure is followed, then the transcript may be used. Also, where the deposition witness is a party, and the transcript has been certified, pursuant to CPLR 3116(b), by the officer before whom the deposition was taken, then the deposition may be usable as an admission. *Palumbo v. Innovative Communs. Concepts*, 251 A.D. 2d 246 (1st Dep't 1998); *Tsai Chung Chao v. Chao*, 161 A.D. 3d 564 (1st Dep't 2018). Yet, A3 argues that in order to use a transcript unsigned by a witness that is a party, nor certified, it is defendant's burden to show the transcript was sent to the witness to be reviewed for any corrections, and with sufficient time to do so (*see*, Siegel, 1993 Supp Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C3116:1, 1997-1998 Pocket Part, at 94). A3 asserts, and Lombardo's affidavit corroborates, the transcripts were not submitted by Linnett to Lombardo or Frichet, for review and to make any desired changes within a reasonable time, before Linnett made this motion (NYSCEF Doc. Nos. 63, 64). In light of these circumstances, A3 argues Linnett should not be allowed to use any portion of the transcripts in its motion (NYSCEF Doc. No. 63).

Linnett counters A3's argument, contending that the Appellate Division in *Chao v. Chao*, *supra*, held that the "deposition transcript, which defendant submitted with his initial motion papers, is admissible because, although it is unsigned, it is certified by the reporter," as is the case herein (NYSCEF Doc. Nos. 50, 64, 76, 81). Linnett further asserts that A3, by using the depositions in support of its motion, "adopted it as accurate by submitting it" to the Court (NYSCEF Doc. No. 81). *Ying Choy Chong v. 457 W. 22nd St. Tenants Corp.*, 144 A.D. 3d 591 (1st Dep't 2016); *Franklin v. Chalov*, 209 A.D. 3d 524 (1st Dep't 2022). Finally, Linnett adds that the deposition transcripts were not previously provided as depositions were not yet closed (NYSCEF Doc. Nos. 50, 76).

The Court notes, as Linnett is the party wishing to use plaintiffs' deposition transcripts, it is his burden to show the transcripts were sent to the witnesses to be reviewed for corrections, and sufficient time to do has passed. Yet, Linnett failed to do so, and no evidence was presented establishing plaintiffs received their transcripts within a reasonable time to review and make any necessary corrections. In fact, Lombardo's affidavit asserts to the contrary, and plaintiff's counsel's affirmation in opposition also notes transcripts were not submitted to plaintiffs until after Linnett filed this motion, and only after counsel made a demand for the transcripts (NYSCEF Doc. Nos. 63, 64). Additionally, Linnett's motion for sanctions was made May 31, 2023, and returnable on June 29, 2023, and both Lombardo's and Frichet's depositions, despite numerous delays and non-compliance of the Court's orders, were finished. Also, arguably it is defendant's delays in complying with the Court's orders why the depositions are not yet closed as neither Linnett nor Henry have been deposed (NYSCEF Doc. Nos. 63, 69). Thus, Linnett is prohibited from using the transcripts on the instant motion; however, as the transcripts have now been formally provided to plaintiffs, with CPLR 3116(a) notice, denial of the use of the transcripts is without prejudice and with leave to renew.

Linnett further asserts that Lombard, with an alleged technical expertise, also failed to preserve any text messages when he, like his wife, Frichet, also obtained a new mobile phone. Moreover, Linnett argues that Lombardo allowed the text messages to be destroyed despite having the ability to preserve

them after the obligation to preserve attached. Linnett asserts that at his deposition, Lombardo testified he was aware that text messages were automatically erased every 24 months; and when questioned whether Lombardo had the ability to save the text messages, he replied, "Technically, I had the ability," but he failed to do so (NYSCEF Doc. Nos. 50, 51, 62). Linnett argues such failure to preserve, when Lombardo had the ability to do so, amounts to a willful state of mind, but at the very least, the failure to preserve was grossly negligent. *Douglas Elliman LLC v. Tal*, 156 A.D. 3d 583 (1st Dep't 2017) ("the record demonstrates that plaintiff acted with gross negligence in destroying ESI..after commencement of the action triggered a duty to preserve…").

"Spoliation sanctions such as dismissal and preclusion are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense. 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. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to preserve evidence." *Strong v. City of New York*, 112 A.D. 3d 15 (1st Dep't 2013). New York's common-law doctrine of spoliation, rather than CPLR 3126, may be considered, since CPLR 3126 covers refusal to comply with a discovery order or a willful failure to disclose, neither of which appears applicable here. Despite some New York cases stating that only "willful, deliberate, or contumacious" destruction of evidence warrants the imposition of spoliation sanctions (*see e.g. Kerman v Martin Friedman, C.P.A., P.C.*, 21 A.D. 3d 997 [2d Dep't 2005]), the Appellate Division has, on numerous occasions, authorized imposing sanctions where the destruction of evidence was negligent rather than willful (*see Adrian v Good Neighbor Apt. Assoc.*, 277 A.D. 2d 146 [1st Dep't 2000]; *Sage Realty Corp. v Proskauer Rose*, 275 A.D. 2d 11 [1st Dep't 2000]; *Squitieri v City of New York*, 248 A.D. 2d 201 [1st Dep't 1998]). However, "striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct," and, thus, the courts must "consider the prejudice that resulted from the

spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness." *Iannucci v. Rose*, 8 A.D. 3d 437 (2d Dep't, 2004). When the moving party is still able to establish or defend a case, a less severe sanction is appropriate. *De Los Santos v. Polanco*, 21 A.D. 3d 397 (2d Dep't 2005). *Sage Realty, supra,* concerned the plaintiff's destruction of audiotape recordings of discussions that were at the heart of the plaintiff's claims against their former attorneys. The First Department affirmed the dismissal of the complaint for spoliation, citing *Squitieri, supra,* for the proposition that "willfulness or bad faith may not be necessary predicates" for spoliation sanctions under the common-law rule (*id.* at 16). Therefore, the negligent erasure of audiotapes may assuredly 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" (*Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 A.D. 3d 213 (1st Dep't 2004).

Linnett argues that A3's duty to preserve evidence attached in March 2018 when it knew it would be suing Linnett, or at the latest when A3 retained counsel regarding the instant matter before June 11, 2018 (NYSCEF Doc. Nos. 50, 58). However, Lombardo notes the loss of the evidence was not willful, averring "my wife...and I never thought that a few text messages exchanges between Defendant, his wife and me and my wife could be so important that there would be a necessity to save a backup of an old phone" (NYSCEF Doc. No. 64). The Supreme Court has "broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation…or employing an adverse inference instruction at the trial of the action." *Ortega v. City of New York*, 9 N.Y. 3d 69 (2007); *see* CPLR 3126; *Voom, supra.* The party requesting sanctions for spoilation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and "fatally compromised its ability to defend [the] action." *Lawson v. Aspen Ford, Inc.*, 15 A.D. 3d 628 (2d Dep't, 2005).

As the foregoing establishes, plaintiffs' spoliation claim can be fully addressed under New York's common-law spoliation doctrine. The elements of a spoliation claim under New York common law

having been demonstrated, the Court considers the appropriate sanction. The Court concludes that a less severe sanction would be appropriate. Nothing in the record supports an inference that the erasure of the text messages sought here was willful or in bad faith such as would justify the striking of a pleading (*see DiDomenico v. C&S Aeromatik Supplies, Inc.*, 252 A.D. 2d 41). Preclusion, also a relatively severe sanction, is appropriate where "the defendants destroy[ed] essential physical evidence leaving the plaintiff without appropriate means to confront a claim with incisive evidence" (*see Kerman v. Friedman*, 21 A.D. 3d 997). Here, an adverse inference charge at trial is arguably the appropriate sanction (*see Suazo*, 102 A.D. 3d 571 [1st Dep't 2013]; *Gogos v Modell's Sporting Goods, Inc.*, 87 A.D. 3d 248 [1st Dep't 2011]).

The First Department in *Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 A.D. 3d 607, (1st Dep't 2016) noted that the motion court properly determined an appropriate sanction should be imposed on plaintiff. However, the sanction must reflect "an appropriate balancing under the circumstances." *Voom, supra.* Generally, dismissal of the complaint is warranted only where the spoliated evidence constitutes "the sole means" by which the defendant can establish its defense (*Alleva v. United Parcel Serv., Inc.*, 112 A.D. 3d 543 [1st Dep't 2013]), or where the defense was otherwise "fatally compromised" (*Jackson v Whitson's Food Corp.*, 130 A.D. 3d 461 [1st Dep't 2015]) or defendant is rendered "prejudicially bereft" of its ability to defend as a result of the spoliation (*Suazo, supra)* [internal quotation marks omitted]). The record does not support such a finding given the document production of emails and text messages, as well as the availability of key witnesses to testify. *Arbor Realty Funding, supra.* Also, the record does not support a finding that plaintiff refused to produce key witnesses or prevented defendants from deposing them. *China Dev. Indus. Bank v. Morgan Stanley & Co. Inc.*, 183 A.D. 3d 504 (1st Dep't 2020). In fact, it has been defendant's failure to abide by the Court's prior orders in producing Linnett and Henry for depositions (NYSCEF Doc. Nos. 63, 69). While sanctions may be imposed for the negligent loss of evidence (see *Strong, supra,*) such is not the case herein. Linnett is not "prejudicially bereft of appropriate means" to present his claims. (*Kirkland v New York City Hous. Auth.*, 236 A.D. 2d 170, [1st Dep't 1997]). Therefore, under the circumstances presented, an adverse inference

charge is an appropriate sanction (*see Suazo, supra; VOOM, supra*; *Ahroner v. Israel Discount Bank of N.Y.*, 79 A.D. 3d 481 [1st Dep't 2010]). The Court finds such sanction is adequately tailored to restore balance to the matter.

Linnett cites this Court's prior ruling in *Abildgaard v. Brulle*, 999 NYS2d 796 (Civ. Ct., NY Cnty, J. d'Auguste 2014, *affirmed* 2015 NY Misc. LEXIS 4525 (AT, 1st Dep't 2015), in which the Court found the "failure to produce the original document would constitute spoliation of evidence regardless of whether the original document was lost negligently or in bad faith." However, unlike the matter herein, *Abildgaard* concerned the production of secondary evidence—a photocopy of a document—thus, the failure to produce the original, and a failure to explain the unavailability of the document. Yet, the Court there, as here, concluded while such failure constituted spoliation of evidence, in lieu of striking plaintiff's pleadings, noting "striking a party's pleading is a drastic remedy," (*Almas v. Loza*, No. 112379/07, 2011 N.Y. Misc. LEXIS 5008, 2011 WL 5118136 (Sup. Ct., NY Cnty, 2011), it sanctioned plaintiff by precluding the admission of the photocopied document into evidence.

Considering the totality of the circumstances involved in the plaintiffs' failure to preserve the subject text messages, the Court finds that Linnett is entitled to an adverse inference charge at trial. The Court concludes that striking of A3's pleading is unwarranted as the lost evidence does not create an insurmountable burden in proving Linnett's case. As the spoliated items are not unavailable in light of deposition testimony revealing that Linnett and his wife, Henry, have the text messages requested from plaintiffs—sent between the parties—as well as photographs and videos provided during discovery of the alleged conditions, there is no prejudice.

Therefore, the Court concludes as Linnett did not demonstrate the plaintiffs willfully deleted the text messages with a culpable state of mind, and Linnett may obtain the contents of the discoverable text messages from other sources, including his and Henry's own mobile phones, imposition of the sanction of striking A3's pleading and dismissing the complaint based on spoliation of evidence is unwarranted. *Arbor Realty Funding, supra.* (striking pleading for spoliation unwarranted because, "while the spoliation

was the result of…intentional destruction or gross negligence, there was a massive document production…and the key witnesses were available to testify").

The Court has considered the parties remaining arguments and found them to be unavailing.

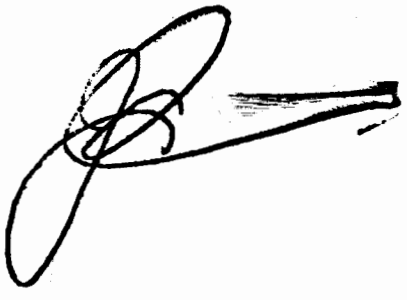
Accordingly, it is

ORDERED that Linnett's motion, pursuant to CPLR 3126 to strike A3's complaint and dismissing the action with prejudice, or alternatively to deem relevant issues be resolved in Linnett's favor, or preclude A3 from offering any evidence and testimony at trial relating to the conditions of the subject apartment and its monetary claims, including damages, based on A3's spoliation of evidence is granted to the extent Linnett is entitled to an adverse inference charge at trial, but otherwise denied; and

ORDERED that a stay of all further proceedings is denied, and the parties are directed to proceed, and complete the depositions of Linnett and Henry within 30 days of this order; and

ORDERED that A3's cross-motion pursuant to CPLR 3124 compelling Linnett to provide text messages between defendant and plaintiff in defendant's possession responsive to plaintiff's Demand for Discovery and Inspection at requests number 2 and 3 is granted.

This constitutes the decision and order of this Court.



10/11/2023
DATE

James d'Auguste, 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