UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JOSHUA AHAMED,

Plaintiff,

-against-

563 MANHATTAN INC., *d/b/a* COTTER BARBER, *et al.*,

Defendants.
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AMENDED MEMORANDUM AND ORDER
19 CV 6388 (EK) (CLP)

POLLAK, United States Magistrate Judge:

On November 12, 2019, plaintiff Joshua Ahamed ("plaintiff") commenced this action against defendants 563 Manhattan Inc., d/b/a Cotter Barber, 321 Graham Inc., d/b/a Cotter Barber, and Brian Burnam ("Burnam") (collectively, "defendants"), bringing claims of discrimination pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 28 U.S.C. §§ 2000, et seq., and the New York City Human Rights Law ("NYCHRL"), NYC Admin. Code §§ 8-101, et seq., as well as a claim of common law battery based on defendant Burnam's alleged non-consensual touching of plaintiff. (ECF No. 1). On February 6, 2020, plaintiff filed an Amended Complaint, adding a Fourth Cause of Action, alleging that defendants filed a retaliatory counterclaim seeking punitive damages in violation of the NYCHRL. (First Amended Complaint ("FAC") (ECF No. 11) ¶¶ 56–68).[1]

On March 3, 2023, plaintiff filed a motion seeking spoliation sanctions against defendant Burnam in the form of an adverse inference, as well as attorney's fees and costs. (Spoliation Motion ("Spoliation Mot.") (ECF No. 110)). Plaintiff asserted that Burnam had deliberately destroyed security camera recordings which captured Burnam sexually touching plaintiff while

[1] The Court assumes familiarity with the facts alleged in this case, which are set forth in detail elsewhere and are not central to this Order.

at work. (Plaintiff's Memorandum of Law in Support of Sanctions ("Pl.'s Mem.") (ECF No. 110-1) at 1). On March 29, 2024, this Court granted plaintiff's Spoliation Motion in an Order holding, in pertinent part, that Burnam had intentionally spoliated the security camera footage, and that an adverse inference instruction was an appropriate remedy for that conduct. (Spoliation Order (ECF No. 149) at 19).[2] In doing so, the Court found:

> (1) that the security camera recordings at issue existed and likely contained relevant evidence concerning Burnam's alleged sexual misconduct; (2) that Burnam failed to preserve or outright destroyed said recordings and that they cannot be recovered; (3) that Burnam was obligated to preserve the recordings at the time they were destroyed; and (4) that Burnam destroyed or failed to preserve the recordings with a culpable state of mind.

(Id. at 16–17 (internal citations omitted)). The Court also concluded that an adverse inference instruction would likely "deter[] Burnam and other parties from destroying or failing to preserve evidence, appropriately assign[] the risk connected with said conduct to Burnam, and put[] plaintiff in the same position he would have been in had Burnam appropriately preserved the evidence." (Id. at 17).

On April 8, 2024, plaintiff filed a motion pursuant to Rule 72(a) of the Federal Rules of Civil Procedure seeking to "modify or set aside" a portion of the Spoliation Order as "contrary to law." (Motion for Reconsideration ("Mot. Recon.") (ECF No. 150) at 1). Specifically, plaintiff argued that in finding Burnam had acted with a "culpable state of mind" (Spoliation Order at 17), this Court assessed the mental state factor of the adverse inference test under an old standard that has been replaced with the more stringent "intent to deprive" standard since 2015 (Mot. Recon. at 1–2).[3] Plaintiff therefore asked the district court to "modify the [Spoliation Order], make

[2] The Court also held that "plaintiff may make an application for reasonable attorney's fees and costs related to the spoliation." (Id.)

[3] Defendants did not make any filing in support of or opposition to plaintiff's Motion for Reconsideration, nor did they challenge the Court's Spoliation Order directly.

findings under the correct legal standard, and otherwise affirm the [Spoliation Order]," including the sanctions that this Court issued. (Id. at 1).

For the reasons set forth below, the Court (1) construes plaintiff's Rule 72 motion as a motion for reconsideration pursuant to Local Civil Rule 6.3; (2) grants reconsideration; and (3) concludes, based on a review of the record under the applicable legal standard, that Burnam destroyed or failed to preserve the recordings with the intent to deprive plaintiff of the contents thereof. The Court therefore reaffirms all other findings and holdings of the Spoliation Order, including the imposition of spoliation sanctions against Burnam in the form of an adverse inference.

DISCUSSION

I. Reconsideration

Plaintiff brings the instant motion pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, which provides that when a magistrate judge issues an order or a nondispositive matter, "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." For purposes of said rule, "[a]n order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." Fashion Exch. LLC v. Hybrid Promotions, LLC, No. 14 CV 1254, 2021 WL 1172265, at *1 (S.D.N.Y. Mar. 29, 2021). However, civil procedure also provides a mechanism by which a court can modify its own prior order to correct similar mistakes. See Local Civil Rule 6.3 (providing for a "motion for reconsideration or reargument of a court order determining a motion"). Reconsideration is regularly granted where the moving party identifies "controlling decisions . . . that the court overlooked." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). The Court therefore construes plaintiff's instant motion as a motion for reconsideration pursuant to Local Civil Rule 6.3.

Plaintiff is correct that the 2015 amendments to Rule 37(e), which governs motions for spoliation sanctions, replaced the "culpable state of mind" standard with the "intent to deprive" standard, and that the latter is more stringent. See Ungar v. City of New York, 329 F.R.D. 8, 12–13 (E.D.N.Y. 2018), aff'd, 2022 WL 10219749 (2d Cir. Oct. 18, 2022). This Court therefore agrees with plaintiff that the Spoliation Order's assessment of Burnam's mental state was clear error and "contrary to law" in light of the more recent standard. See Fashion Exch. LLC v. Hybrid Promotions, LLC, 2021 WL 1172265, at *1; Shrader v. CSX Transp., Inc., 70 F.3d at 257. In light of that conclusion, the Court has reconsidered the record that was before the Court when deciding the Spoliation Motion to determine whether plaintiff satisfied the "intent to deprive" standard and thus whether the Court's order imposing spoliation sanctions may stand.[4]

II. Burnam's Mental State

A. Legal Standard

When a party fails to preserve electronically stored information ("ESI"), an instruction permitting or requiring the jury to "presume the information was unfavorable to the [destroying] party" is appropriate "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2). The "intent to deprive" standard turns not on whether "the spoliator affirmatively destroys the data, or passively allows it to be lost," but rather on the "spoliator's state of mind." Ungar v. City of New York, 329 F.R.D. at 13 (citing Moody v. CSX Transp., Inc., 271 F. Supp. 3d 410, 431 (W.D.N.Y. 2017)). "A court may infer that a party acted with an intent to deprive on the basis of circumstantial evidence." Hice v. Lemon, No. 19 CV 4666, 2021 WL 6053812, at *5 (E.D.N.Y. Nov. 17, 2021) (quoting Mule v. 3-D Bldg. & Constr. Mgmt. Corp., No. 18 CV 1997, 2021 WL 2788432, at *12

[4] The Court does not reconsider any of its other findings in the Spoliation Order, as they are not challenged by plaintiff's Motion for Reconsideration.

(E.D.N.Y. July 2, 2021)), report and recommendation adopted, 2021 WL 6052440 (E.D.N.Y. Dec. 21, 2021); see also CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 500 (S.D.N.Y. 2016) (noting that even "standing alone," circumstantial evidence alone may support a finding of an intent to deprive).

B. Analysis

In concluding that Burnam had acted with a culpable state of mind, this Court relied on a robust record that equally supports the conclusion that in failing to preserve or outright destroying the security camera recordings, Burnam acted with the intent to deprive plaintiff of the contents thereof.

First, the record demonstrates that Burnam consciously chose to disregard his obligation to preserve relevant evidence. Burnam admitted to having received and read the Notice to Preserve on July 3, 2019. (Pl.'s Mem. at 10). The Notice directed Burnam to "preserve and not destroy all documents or other evidence that pertain to these claims, including, but not limited to, all video surveillance of 563 Manhattan Ave. and 321 Graham Ave. between May 2019 and July 3, 2019," and warned Burnam of the potential consequences of failing to preserve or destroying evidence. (ECF No. 110-9). Burnam conceded that he took no steps to preserve the recordings until approximately 120 days later when plaintiff instituted this litigation, and he claims that only then did he realize that the recordings had been erased. (Pl.'s Mem. at 14 (citing ECF No. 33-2)). Burnam attempted to explain his conduct by testifying that after receiving the Notice, he did not believe he had any obligation to take affirmative steps to preserve the recordings because he thought it was a "prank." (Id. at 10, 12 (citing Ex. 1, Burnam Tr.[5] at 99–102)).

[5] Citations to "Ex. 1, Burnam Tr." refer to the transcript of defendant Brian Burnam's deposition testimony taken June 6, 2022, and attached to plaintiff's Memorandum as Exhibit 1. (ECF No. 110-3).

Burnam's excuse is facially implausible and is made even more so by the fact that on the same day that he sent the Notice, plaintiff's counsel also emailed a copy of plaintiff's NYCCHR complaint to Burnam. (FAC ¶¶ 30–31). Various developments after July 3rd undoubtedly provided Burnam with sufficient indication of the sincerity of the Notice. Among other things, plaintiff quit his job on July 6, 2019, and the Associate Director of the New York City Commission on Human Rights served a Notice on Burnam's business addresses relating to plaintiff's pursuit of his claims in court. (Pl.'s Mem. at 13). What's more, Burnam's story as a whole is belied by the fact that Burnam spoke to plaintiff about the Notice to Preserve and NYCCHR complaint on July 4, 2019, and apologized for making plaintiff feel uncomfortable during that conversation. (Id. at 12).

The Court does not credit Burnam's claimed ignorance of his discovery obligations given the wealth of evidence to the contrary. Thus, the Court finds that Burnam was made aware of his obligation to preserve evidence, including the security camera recordings, when he received the Notice to Preserve or very shortly thereafter. The Court also finds that notwithstanding those obligations, Burnam consciously chose not to take any action to preserve the security footage until several months after he was put on notice, and thus that his inaction is highly indicative of his intent to deprive plaintiff of the benefit of that footage. See Ungar v. City of New York, 329 F.R.D. at 13 (holding that "a party's conscious dereliction of a known duty to preserve electronic data is both necessary and sufficient to find that the party 'acted with the intent to deprive another party of the information's use' under Rule 37(e)(2)"); Moody v. CSX Transp., Inc., 271 F. Supp. 3d at 431 (noting that improbabilities and inconsistencies in the spoliating party's story of what took place could support a finding of intent to deprive).

Second, the record demonstrates that Burnam's inaction continued even after he was informed that the footage would be automatically deleted. Burnam testified that he was under the impression that the recordings were preserved and that he could "always get things out of them. No matter what." (Defs.' Mem. at 9 (quoting Ex. 1, Burnam Tr. at 120)). That assertion is directly contradicted by other facts in the record. For example, defendants' expert, William Essling, Jr., testified that on August 2, 2019, he informed Mr. Burnam that "given the capacity of the system, video would only be saved for 60 to 90 days." (Pl.'s Mem. at 14–15 (citing Ex. 11, Essling Tr.[6] at 100:3–9, 113:13–22, 114:19–25, 116:9–25, 117:2–3, 120:14–25, 121:2–10)). Mr. Essling further testified that he told Burnam that if he took no action, the recordings would be erased in 60 to 90 days. (Id. at 15 (citing Ex. 11, Essling Tr. at 22:22–24)). Finally, Mr. Essling testified that he explained to Burnam how a customer could preserve a recording using a flash drive, and that if Burnam needed assistance with the security cameras, he should call Essling; Burnam never did so. (Id. (citing Ex. 11, Essling Tr. at 45, 46, 48–51, 58–59, 63–64, 67–68))

Relatedly, Burnam cannot rest on his claim that he had no working knowledge of the camera system. (See id. at 14 (citing ECF No. 110-12)). That assertion is undermined not only by Burnam's own testimony that he was in control of the cameras in his stores (Ex. 1, Burnam Tr. at 159–60), but also by the testimony of Ployyipa "Dee" Usaha, the manager of Burnam's store, who stated that "Burnam used the security cameras for 'training purposes' by playing back the video of his employees performing their jobs." (Plaintiff's Reply Memorandum ("Pl.'s Reply") (ECF No. 114) at 15 (quoting Ex. 2, Usaha Tr.[7] at 76:10–25, 77:2–14)).

[6] Citations to "Ex. 11, Essling Tr." refer to the transcript of William Essling, Jr.'s deposition testimony, taken on July 25, 2022, and attached to plaintiff's Memorandum as Exhibit 11. (ECF No. 110-13).

[7] Citations to "Ex. 2, Usaha Tr." refer to the transcript of Ployvipa Usaha's deposition testimony, taken June 16, 2022, and attached to plaintiff's Memorandum as Exhibit 2. (ECF No. 110-4).

Thus, the record indicates that Burnam knew of the risk that the recordings would be deleted and knew how to preserve them but took no action to do so, further supporting a finding that Burnam spoliated the recordings with an intent to deprive. See Moody v. CSX Transp., Inc., 271 F. Supp. 3d at 431 (stating that defendants' "failure to make any effort . . . to confirm that the data was properly preserved in the Vault undercuts the reasonableness and credibility of their asserted belief that the material was still accessible"); Ottoson v. SMBC Leasing and Finance, Inc., 268 F. Supp. 3d 570, 582 (S.D.N.Y. 2017) (stating that failing to "intentionally take any steps to preserve [ESI] . . . satisfies the requisite level of intent required by [Rule 37(e)]").

Third, even if the Court credited Burnam's testimony that he thought the recordings were preserved and lacked adequate information about the camera system to know otherwise, Burnam's failure to confirm said beliefs, given that supposed lack of knowledge, would be tantamount to a failure to "take any reasonable steps to preserve" relevant ESI. Ottoson v. SMBC Leasing and Finance, Inc., 268 F. Supp. 3d at 582; see also Moody v. CSX Transp., Inc., 271 F. Supp. 3d at 431 (finding intent to deprive where defendants were aware of duty to preserve spoliated data but "allowed the original data . . . to be overwritten" without ever confirming whether it had been preserved).

Fourth, throughout the course of this litigation, the Court has observed Burnam and his counsel repeatedly change their explanations of why copies of the videos could not be made. (See Spoliation Order at 8–10). Indeed, it was not until he was forced by Court Order that Burnam notified the Court that the recordings were taped over 60-90 days after the litigation had commenced, thus "ma[king] it impossible for plaintiff to [obtain the DVR units]." (ECF No. 38). Burnam's inconsistencies, coupled with his counsel's belated disclosure of the fact that the tapes were no longer accessible, further support the conclusion that Burnam acted with the intent

to deprive plaintiff of the video evidence. See Hice v. Lemon, 2021 WL 6053812, at *6 (noting that inconsistencies in a party's "proffered excuse[s]" can "tend[] to show [that party's] intent to deprive"); StoneX Grp., Inc. v. Shipman, No. 23 CV 613, 2024 WL 1509346, at *13 (S.D.N.Y. Feb. 5, 2024) (noting that the spoliating party's false and inconsistent statements about what transpired "further support[ed]" a finding of intent to deprive); Brown Jordan Int'l, Inc. v. Carmicle, No. 14 CV 60629, 2016 WL 815827, at *33–37 (S.D. Fla. Mar. 2, 2016) (finding intent to deprive where spoliating party did not credibly explain failure to preserve), aff'd, 846 F.3d 1167 (11th Cir. 2017).

In sum, the Court finds that at every juncture, Burnam consciously acted with complete and utter disregard for his obligation to preserve relevant evidence, and specifically the security camera recordings that plaintiff highlighted in his Notice to Preserve. Moreover, the Court finds that despite numerous opportunities to do so, Burnam took no measures to ensure that the recordings were saved, even after being told that they would be automatically deleted if he failed to act. Therefore, the Court finds that in failing to preserve or outright destroying the security camera recordings, defendant Burnam acted not simply with a culpable state of mind, but with the intent to deprive plaintiff of the use of the information contained in said recordings. See, e.g., Ungar v. City of New York, 329 F.R.D. at 13; Ottoson v. SMBC Leasing and Finance, Inc., 268 F.Supp.3d at 582–83.

CONCLUSION

For the reasons noted above, this Court's Spoliation Order is modified to incorporate the findings herein. Since those findings support the core holdings of the Spoliation Order, those holdings stand: (1) defendant Brian Burnam intentionally spoliated evidence in the form of security camera footage; (2) as an appropriate sanction for that conduct under Rule 37(e)(2) of the Federal Rules of Civil Procedure, the jury should be instructed that they may infer the

spoliated evidence was unfavorable to Burnam; and (3) plaintiff may make an application for reasonable attorney's fees and costs related to the spoliation.

The Clerk is directed to send copies of this Order to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

SO ORDERED.

Dated: Brooklyn, New York
June 17, 2024

Cheryl L. Pollak

Cheryl L. Pollak
United States Magistrate Judge
Eastern District of New York