Forget Something? No Litigation Hold Means Big Sanctions

Chan v. Triple 8 Palace, Inc., 2005 WL 1925579 (S.D.N.Y. 2005)

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1. Facts

Destroying discoverable documents when litigation has commenced puts the destroying party in a sanctionable position. This case demonstrates what a court may do when those sanctions are necessary. It comes about through the Fair Labor Standards Act, where the wait staff sued for unpaid overtime, tips and other abuses. The plaintiffs requested documents concerning the wages, tips, and the restaurant's earnings and expenditures. The restaurant responded with payroll registers, time cards, W-2 and W-4 forms, check stubs and corporate tax returns[2]. During depositions, however, it became apparent that several other discoverable documents were destroyed.[3]

First, an owner testified that the restaurant threw away all banquet receipts after one year. He was never told to cease destruction of litigation-related documents, and no document retention policy existed.[4] Next, a "money received book," a record of the amounts received each day, often had pages ripped out. The bookkeeper testified that she was never told that it might be requested for production, nor that she should retain that document.[5] Finally, tip distribution sheets were partially produced during the litigation, missing several pages. The sheets were kept for a week and then destroyed because they were not seen as necessary.[6]

2. Law and Analysis

The court finds two sources for the sanction of the destruction of evidence: Rule 37(b) of the Federal Rules of Civil Procedure, and the court's "inherent power to manage its own affairs." For the moving party to show the necessity of sanctions, it must prove:

> "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
>
> (2) that the records were destroyed 'with a culpable state of mind'; and

> (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."[7]

The duty to preserve has two questions: "[w]hen does the duty to preserve attach, and what evidence must it preserve?"[8] The time element was met because documents were destroyed after the issuance of a discovery order.[9] To the second question, the court responded to the claim that the documents were not permanent records by noting that there is a difference between the creation and preservation of evidence. If the restaurant so chose, it could cease to create those records, but it did not, so it had to preserve them.[10]

In addressing culpability, the court first recognizes that counsel and managers have the duty to place a litigation hold on document destruction when litigation is anticipated. Counsel here never directed managers or employees to retain records and they continued to be destroyed.[11] For culpability, it is not necessary to destroy with the intent to affect litigation; gross negligence is all that is required. The court holds that, by not establishing any sort of litigation hold, the company has been grossly negligent.[12]

There are two ways to establish relevance: it may be inferred from a culpable state of mind or extrinsic evidence may demonstrate that the missing evidence would be favorable to the moving party.[13] The court addressed the second method by noting that additional charges on banquet receipts were employee tips because they were not included on gross receipts or wages. Also, because the contention that management took an improper share of tips was corroborated, the tip distribution sheets are presumed to demonstrate such a claim.[14]

For sanctions, factors like bad faith, prejudice suffered by the moving party, and the available sanctions must be considered. In considering the above factors, "[t]he most appropriate sanction is to allow the finder-of-fact to consider the gravity of the defendant's conduct, the materiality of the evidence that was lost … and to draw an adverse inference against the defendants."[15]

1. Benjamin Miller is a business lawyer and Member of Sponsel Miller Greenberg PLLC in Houston, Texas. He can be reached at miller@smglawgroup.com. Nothing contained herein should be construed as legal advice or the basis of an attorney/client relationship. Special thanks to Rebecca Miller.

2. *Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579, *1-2 (S.D.N.Y. 2005).

3. *Id*. at *2-4.

4. *Id.* at *2.

5. *Id*. at *2-3.

6. *Id.*

7. *Id.* at *4.

8. *Id* (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y.2003)("Zubulake IV")).

9. *Id*. at *5.

10. *Id*.

11. *Id*. at *6.

12. *Id*. at *6-7.

13. *Id.* at *8.

14. *Id.* at *8-9.

15. *Id.* at *10.

SPONSEL MILLER GREENBERG