UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GENON MID-ATLANTIC, LLC and GENON CHALK POINT, LLC,	)	
Plaintiffs,	)	Case No. 11-Civ-1299 (HB/FM)
-against-	)	
STONE & WEBSTER, INC.,	)	
Defendant/Third-Party Plaintiff,	)	
-against-	)	
SIEMENS WATER TECHNOLOGIES CORP.,	)	
Third-Party Defendant	)	

DEFENDANT'S OBJECTIONS TO THE MAGISTRATE'S ORDER DENYING DEFENDANT'S MOTION FOR SPOLIATION SANCTIONS FOR PLAINTIFF'S SPOLIATION OF EVIDENCE

PRELIMINARY STATEMENT

On December 22, 2011, the true plaintiff in this matter, albeit, titled as defendant/counterclaimant Stone & Webster Inc. (hereinafter "Shaw") filed its Motion for Sanctions based on plaintiffs' spoliation of evidence. The Court referred the matter to Magistrate Judge Frank Maas for resolution pursuant to 28 USC §636(b)(1)(A), and on April 20, 2012, Magistrate Maas entered his Memorandum Decision and Order ("Order") denying Shaw's motion for sanctions. In his Order, Magistrate Maas found plaintiff ("GenOn") responsible for acts which constitute spoliation. That notwithstanding, the Magistrate denied sanctions only because he found that Shaw was not prejudiced by the spoliation of evidence. As set forth

hereafter, based upon Magistrate Maas' finding that acts constituting spoliation occurred, it was error to deny Shaw's motion for sanctions. As spoliation occurred, a sanction was required as a matter of law.

Therefore, pursuant to Federal Rule of Civil Procedure Rule 72, Shaw files its objections to the Order and asks this Court to modify the Order by granting the motion as spoliation has occurred as found by the Magistrate, and ordering the imposition of an appropriate sanction.

ARGUMENT

I

Based On Magistrate Maas' Rulings, Shaws's Motion for Sanctions Was Required to be Granted

The definition of "spoliation" is succinct. It is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999); *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010), *Zubulake v. USB Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); Kelley *v. Empire Roller Skating Rink, Inc.*, 11 Misc.3d 1059(A), 815 N.Y.S.2d 494 (Kings Co. 2006) ("Spoliation occurs when a party intentionally destroys evidence or negligently destroys evidence that the party has a duty to preserve."); *Krumwiede v. Brighton Associates, L.L.C.*, 2006 U.S. Dist. Lexis 31669 (N.D.Ill. 2006) ("Spoliation of evidence occurs when one party destroys evidence relevant to an issue in the case.").

In the instant matter, Magistrate Judge Maas found that evidence in the form of electronic mail prepared by GenOn's consultant FTI Consulting Inc. ("FTI") was spoliated; in fact, Magistrate Judge Maas found that FTI's managing director "double deleted" at least 46 e-mails.

Magistrate Judge Maas further found that GenOn was responsible for FTI's failure to preserve this evidence because GenOn had practical control over FTI's audit-related documents. Order, p. 21. And, Magistrate Judge Maas found that GenOn was at the least negligent in its failure to preserve this evidence. Order, p. 26. [1] Specifically, Magistrate Judge Maas concluded:

> Nevertheless, even if GenOn's actions or failures to act do not rise to the level [of] gross negligence, its conceded failure to take any steps beyond FTI's general backup procedures to ensure that Slavis' emails were preserved, even after litigation was anticipated, plainly constitutes negligence. [citation omitted]. Shaw therefore has established that GenOn acted with a degree of culpability sufficient to permit the imposition of sanctions by this Court.

Order, p. 26.

In short, Magistrate Judge Maas concluded that FTI had spoliated evidence and that GenOn was sufficiently culpable for this spoliation to permit the imposition of sanctions. However, Magistrate Judge Maas then concluded that Shaw was not prejudiced by the spoliation and denied Shaw's Motion.[2] It was legal error to do so.

II

Sanctions Were Required to be Assessed Against GenOn

If acts exist which constitute spoliation, sanctions are required. A failure to do so undercuts the "prophylactic, punitive and remedial rationales underlying the spoliation doctrine." *West v. Goodyear Tire and Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

> It has long been the rule that spoliators should not be able to benefit from their wrongdoing. This policy is captured in the maxim *omnia presumuntur contra spoliatorum*, which means, 'all

[1] GenOn failed to issue a litigation hold for nearly two years after it anticipated litigation with Shaw and GenOn also failed to identify all key players such as Joe Slavis who was retained to perform the contract audit to ensure that their electronic records were preserved. As a result, certain of Mr. Slavis' emails were not preserved.

[2] Shaw maintains that it was in fact prejudiced by the spoliation of the FTI emails. In particular, because numerous of the backup tapes could not be restored, the full scope of Mr. Slavis' double-deletion of emails will never be known and, therefore, the full scope of the lost evidence will never be known. Inasmuch as it was GenOn and FTI that caused this situation, Shaw should not bear responsibility for the unknown.

> things are presumed against a despoiler or wrongdoer.' *Black's Law Dictionary*, 1086 (6th ed. 1997)
>
> Recognizing acts of spoliation and punishing the spoliators is the result of judicial recognition that the 'spoliated physical evidence' is often the best evidence as to what has really occurred and that there is an inherent unfairness in allowing a party to destroy evidence and then to benefit from that conduct [citation omitted].

See Trigon Ins. Co. v. U.S., 204 F.R.D. 277, 284 (E.D.Va. 2001).

Sanctions are imposed for spoliation of evidence, pursuant to the Court's inherent power to control litigation. *See West v. Goodyear Tire & Rubber Co.*, 167 F.3d at 779. This inherent power is founded upon the "need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth…" *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d at 466.

Spoliation sanctions are founded upon the well-established, common law duty to preserve evidence. *Id.* When that duty is breached and spoliation of evidence occurs, sanctions are required to "ensure that the judicial process is not abused." *Id.* Determining an appropriate sanction for spoliation is a matter within the "sound discretion of the trial judge, and is assessed on a case-by-case basis." *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. at 215; *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d at 469.

In declining to assess sanctions against GenOn, Magistrate Judge Maas relied upon *Orbit One Commc'ns, Inc. v. Numerex, Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010) which held that prejudice to the innocent party was required in order for sanctions to be assessed. Order, pp. 15, 27. Shaw acknowledges the statements in the *Orbit* decision referenced by Magistrate Judge Maas. However, Magistrate Judge Maas does not address the body of law prevalent throughout the United State and specifically, the contrary decision by Judge Scheindlin in *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

Judge Scheindlin expressly concluded that the prejudice element is only controlling when determining whether to assess the most severe sanctions, such as dismissal or preclusion. Judge Scheindlin reasoned:

> *The burden of proof question differs depending on the severity of the sanction. For less severe sanctions -- such as fines and cost-shifting -- the inquiry focuses more on the conduct of the spoliating party than on whether documents were lost, and, if so, whether those documents were relevant and resulted in prejudice to the innocent party.* As explained more thoroughly below, for more severe sanctions -- such as dismissal, preclusion, or the imposition of an adverse inference -- the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence. [Emphasis supplied].

685 F. Supp. 2d 456, 467. Consequently, in determining whether attorneys' fees, costs, and/or other fines should be assessed against GenOn as a sanction, the focus is properly on the conduct of the spoliating party, not the prejudice to the innocent party, *i.e.*, Shaw.

In this case, GenOn's conduct more than warrants the assessment of monetary sanctions against GenOn in the form of Shaw's costs and fees in bringing this Motion. Magistrate Judge Maas expressly found that GenOn's failure to take any steps to preserve FTI's electronic mail "plainly constitutes negligence." Order, p. 26. Indeed, Magistrate Judge Maas also expressly found that GenOn's failures would constitute gross negligence under the standards set out by Judge Scheindlin in the *Pension* case. Order, p. 25. This distinction is significant because, if the GenOn's conduct was deemed grossly negligent, then there would be a presumption of relevance and prejudice. 685 F. Supp. 2d 456, 467-468. In that case, there would be no question that severe sanctions would be warranted.

Regardless of whether GenOn's conduct is characterized as being negligent, or grossly negligent, monetary sanctions in the form of fees, costs, and fines are also certainly warranted.

> 'Monetary sanctions are appropriate 'to punish the offending party for its actions [and] to deter the litigant's conduct, sending the message that egregious conduct will not be tolerated' Awarding monetary sanctions 'served the remedial purpose of compensating [the movant] for the reasonable costs it incurred in bringing [a motion for sanctions]'

See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d at 471 (*citing Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 291 (S.D.N.Y. 2009) (awarding monetary sanctions)).

Monetary sanctions should be assessed both to punish GenOn for its conduct, and also to compensate Shaw for the reasonable costs it incurred in bringing the Motion.[3] Although Shaw disagrees with the conclusion that it has not been prejudiced by FTI's spoliation of emails, these monetary sanctions are nevertheless appropriate for the reasons discussed by Judge Scheindlin.

Moreover, Shaw maintains that sanctions in the form of a spoliation charge, which Judge Scheindlin described as follows, is also appropriate:

> The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. [footnote omitted] This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party. [footnote omitted] Such a charge should be termed a "spoliation charge" to distinguish it from a charge where the a jury is *directed* to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is *directed* to deem certain facts admitted. (Emphasis in original).

[3] It is noteworthy that Magistrate Judge Maas also found that FTI produced over 500 emails in response to Shaw's Motion that FTI had not previously produced.

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d at 470-471. In view of GenOn's conduct, which was at least negligent if not grossly negligent, this "least harsh" instruction is more than warranted.

CONCLUSION

For the reasons stated above, Shaw objects to that portion of the Order which denied the motion without assessing sanctions, and respectfully requests that the Court grant the motion and assess sanctions against GenOn as described herein.

Dated: New York, New York
May 3, 2012

PECKAR & ABRAMSON, P.C.

/s/ Bruce D. Meller

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