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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
1984CV03317-BLS2

JFF CECILIA LLC, IN BOTH ITS INDIVIDUAL CAPACITY AND DERIVATIVELY ON BEHALF OF ADG SCOTIA HOLDINGS, LLC, AND SUFFOLK CONSTRUCTION COMPANY, INC.

v.

WEINER VENTURES, LLC, STEPHEN R. WEINER, AND ADAM J. WEINER, DEFENDANTS

AND

ADG SCOTIA HOLDINGS, LLC, NOMINAL DEFENDANT

emailed notice 1/9/23 BW

DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR SPOLIATION SANCTIONS AGAINST DEFENDANTS

Plaintiffs ask the Court to find that Stephen and Adam Weiner destroyed relevant evidence after they knew or should have known that litigation with the Plaintiffs was likely, and to impose reasonable sanctions. Plaintiffs contend that the Weiners were on notice of likely litigation starting August 20, 2019, but that they failed to preserve and actively destroyed relevant electronic communications from then until October 23, 2019, when this lawsuit was filed.

The Court will **deny** this motion because it finds that: (i) someone in the Weiner's position would not reasonably have expected to be sued until October 1, 2019, and (ii) Plaintiffs have not shown that they suffered any prejudice from spoliation of evidence between October 1 and October 23, 2019.

1. **Legal Background.** Parties that "are actually involved in litigation (or know [or reasonably should know] that they will likely be involved) have a duty to preserve evidence for use by others who will also be involved in that litigation." *Fletcher* v. *Dorchester Mut. Ins. Co.*, 437 Mass. 544, 549 (2002). The "will likely be involved" standard, *supra*, means that for a duty to preserve evidence to arise "[t]he potential litigation must be probable ... and not merely possible." *Diamondrock Boston Owner LLC* v. *Suffolk Constr. Co.*, Suffolk Sup. Ct. No. 1284CV00307-BLS1, slip op. at 12 (Feb. 10, 2014) (Billings, J.) (quoting J.W. More, 7 Moore's Federal Practice, § 37A.10[3][a] at 37A-41 (3d ed. 2013)).

"A judge may impose sanctions for the spoliation of evidence if a party 'negligently or intentionally loses or destroys evidence that the [party] knows or reasonably should know might be relevant to a possible action.' " *Zaleskas* v.

Brigham and Women's Hospital, 97 Mass. App. Ct. 55, 75 (2020), quoting *Scott* v. *Garfield*, 454 Mass. 790, 798 (2009). "The threat of a lawsuit must be sufficiently apparent, however, that a reasonable person in the spoliator's position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute." *Scott, supra,* quoting *Kippenhan* v. *Chaulk Services, Inc.*, 428 Mass. 124, 127 (1998).

"The doctrine of spoliation 'is based on the premise that a party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results.' " *Westover* v. *Leiserv, Inc.*, 64 Mass. App. Ct. 109, 112–13 (2005), quoting *Keene* v. *Brigham and Women's Hosp., Inc.*, 439 Mass. 223, 234 (2003). "As a general rule, a judge should impose the least severe sanction necessary to remedy the prejudice to the nonspoliating party." *Keene, supra,* at 235.

2. **No Reasonable Expectation of Litigation Before October 1, 2019**. The Court finds that, under the circumstances of this case, a reasonable person in the Weiners' position would not have expected that litigation with the Plaintiffs was likely until October 1, 2019. It therefore finds that the Plaintiffs did not have a duty to preserve relevant evidence before that time.

On August 20, 2019, counsel for plaintiff JFF Cecilia LLC sent a letter to the Weiners that provided Weiner Ventures LLC with written notice of a Major Decision Impasse, as that term is defined Third Amended and Restated Operating Agreement of ADG Scotia Holdings LLC.

Standing alone, the August 20 notice would have made anyone in the Weiners' position fear that they were likely to be sued by the Plaintiffs. And, indeed, the Weiners drew that inference from the August 20 notice. Two days later Adam Weiner sent an email to his father Stephen Weiner sketching out rough terms of a possible settlement, including the need for a "mutual release" between the Fish parties and the Weiner parties. And an email to Stephen Weiner from an attorney working on the parties' real estate development project makes clear that Stephen also understood the prior notice to convey a "threat of litigation."

But two days later, on August 22, the Weiners learned two things that would make any reasonable person believe that litigation was not yet likely. First, one of the project's lawyers at Goulston & Storrs told them that he had spoken with the Fish parties' lawyer, who said that he did not view the prior notice "as a

precursor to litigation and regrets that it gave that impression."[1] Second, the Weiners' current litigation counsel at Goodwin & Proctor later told the Weiners that this clarification made sense because, in his view, the ADG Operating Agreement barred the Fish parties from bringing any lawsuit against the Weiners or Weiner Ventures LLC.

A reasonable person in the same position would, at that point, not think it very likely that they would be sued. As a result, the Weiners did not yet have any obligation to preserve evidence.

3. **No Prejudice from Subsequent Spoliation.** That changed on October 1, 2019, when Plaintiffs' counsel sent a letter conveying a settlement offer to the Weiners' litigation counsel. At the end of the letter, Plaintiffs' counsel said that John Fish and JFF Cecilia "would be compelled to recover [their losses] through other mechanisms" if the parties could not reach an agreement before the morning of October 5. Any reasonable person would have understood that time-limited ultimatum to be a clear threat that litigation was likely in the absence of an immediate settlement.

The Court therefore finds that as of October 1, 2019, the Defendants had an affirmative duty to preserve any evidence that could be relevant to this dispute. Rather than do so, however, Stephen and Adam Weiner continued their regular practice of deleting most emails and texts, including those concerning this dispute. And on October 5, 2019, Adam Weiner bought a new cell phone and performed a factory reset of his old phone, which was not backed up to the cloud; by doing so, Adam permanently destroyed any electronic evidence that might otherwise have been recoverable from his cell phone. The Weiners continued to delete new emails and texts until October 23, 2019, when the Plaintiffs filed this lawsuit.

The Court finds, however, that Plaintiffs have not shown they have been prejudiced by the Weiners' failure to preserve emails or texts between October 1 and October 23, 2019. It does so because it finds that:

- All email or text communications that the Weiners had with their lawyers or others involved in relevant events have been recovered

[1] Plaintiffs' objection that this email constitutes inadmissible hearsay is without merit. Defendants do not offer the email to establish that the report of what the Fish parties' lawyer said is true; they only seek to establish what the Weiners had been told and thus reasonably understood.

and produced by those other parties. That the Weiners did not keep their own copies of those communications has not materially prejudiced the Plaintiffs.

- The key events at issue in this lawsuit occurred before October 1, 2019, and thus occurred before the duty to preserve evidence first arose. If the Weiners had private electronic communications with each other between October 1 and October 23, that have not been and cannot be recovered from other sources, it is unlikely that those communications would have been very probative.

Though it is possible that the Weiners destroyed highly probative private electronic communications between themselves that took place in August or September 2019, consistent with their general practice of deleting emails and text messages after reading them, that would not be prejudice from spoliation because the Weiners had no duty to preserve those communications, as discussed above.

The Court will therefore deny the motion for spoliation sanctions because Plaintiffs "did not demonstrate how the spoliation" between October 1 and October 23, 2019, "allegedly prejudiced them." Cf. *Zaleskas*, 97 Mass. App. Ct. at 75.

ORDER

Plaintiffs' motion for spoliation sanctions against Defendants is **denied**.

Kenneth W. Salinger
Justice of the Superior Court

6 January 2023