MondayMonday

ESI Destroyed? Who Cares?

December 28, 2015

The days dwindle down to a precious few; the melancholy in the air is so thick you can barely breath; and while the civilian world is both at rest and on the precipice of a new year, lawyers remain on the job, ever vigilant. We'd love to say it's because justice never sleeps (though with that blindfold on, heaven knows why not,) but we'd be lying. While lying is certainly an ethical violation in some circumstances, you would find us out in a heartbeat if we did.

The truth is always in the hackneyed; the tiresome proverb. There is no rest for the weary, though there was, at one time, to be sure. The last two weeks of December were when lawyers went to Sun Valley, to ski, or Miami, to sun. It was a time for cruising and drinking foolish beverages with umbrellas, while sitting on deck chairs and reading tawdry novels. Perhaps a week or so at the cabin in the country? The spouse, the kids, snow, chestnuts roasting on the open fire and the unspoiled landscape that looked nothing like the lobby of Supreme Kings. What happened?

We hate to break this to you, but while the law is a marvelous pastime for the mentally awkward, for most of us, it's what we do to earn a living. That means that we have given up the luxuries of the idle rich to which we were born and substituted them for the cruel realities of the marketplace. So here we are, in the last week of the old year, working in much the same manner as we will in the opening week of

the new one. Why? Because that's what we have to do to make a living.

Warner Baxter, as Broadway producer Julian Marsh in the movie "42nd Street" put it this way: "You're gonna' work and sweat, and work some more. You're gonna' work days, and you're gonna' work nights, and you're gonna' work BETWEEN time when I think you need it. You're gonna' dance until your feet fall off, till you're not able to stand up any longer, BUT five weeks from now, we're going to have a show."

So keep dancing, brother and sisters, right into the show that will be 2016, and God love us, one and all.

Judge Pigott's opinion in *Pegasus Aviation I, Inc. v. Varig Logistics S.A.*, 2015 NY Slip Op 09187 (12/15/15) is part of the growing problem of destruction of ESI evidence by defendants. While you might argue that even a broken umbrella in a rainstorm is better than no umbrella at all, you would be wrong. You get used to the broken umbrella and stay wet forever.

A party who destroys evidence while under an obligation to preserve it, will be sanctioned for that conduct if the evidence was relevant to its adversary's claim and the destruction was done with a culpable state of mind. Where the destruction is willful or intentional, relevance is presumed. However, if only negligently destroyed, the sanction-seeking party must show that the destroyed evidence was relevant. *Voom* (93 A.D.3d 33 [AD1 2012]) out of *Zublake* (220 FRD 212 [SDNY 2003]) is the pertinent pedigree.

AD1 reversed an order of SupNY that sanctioned defendants for spoliation. The majority affirms AD1's finding of negligent spoliation, but sends the matter back to SupNY for a determination as to whether the destroyed evidence was relevant to plaintiff's claims and, if so, what the appropriate sanction might be. We've seen courts do this before when a defendant destroys evidence. It's called punting the ball and it stinks.

Judge Stein dissents though, joined by Judge Rivera, and calls the bluff. Defendants were not merely negligent in failing to preserve evidence; they "acted with gross negligence," which means, under *VOOM/ Zublake,* that the evidence destroyed is *presumed* to have been relevant. All AD1 need do, then, is to consider whether a sanction is warranted. SupNY had it right and Defendants' actions should have warranted an adverse inference at trial. Those actions included not only mysterious computer crashes which destroyed data after receipt of Plaintiff's discovery requests, but the destruction of storage media from which the data could have been restored. Finally, while the gross negligence of Defendants sets up the rebuttable presumption of relevancy, it is the burden of Defendants to rebut that presumption, not Plaintiff to prove it.

With Judges Lippman and Pigott gone by this time next year, this dissent by the new kids on the block might be the shape of things to come, and none too soon. The destruction of ESI evidence has become the norm, with little or nothing to lose.