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

REVISED DECISION AND ORDER ALLOWING PLAINTIFFS' MOTION FOR SPOLIATION SANCTIONS AFTER REMAND FROM A SINGLE JUSTICE OF THE APPEALS COURT

Plaintiffs have asked the Court to find that Stephen and Adam Weiner destroyed relevant evidence after they should have known that litigation with the Plaintiffs was possible, and to impose reasonable sanctions. Plaintiffs contend that the Weiners were on notice of possible 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 previously denied this motion because it found that (i) a reasonable person in the Weiners' position before October 1, 2019, would not have thought it very likely that they would be sued, and (ii) plaintiffs have not shown that they suffered any prejudice from spoliation of evidence between October 1 and October 23, 2019. Plaintiffs filed an interlocutory appeal of this decision under G.L. c. 231, § 118.

A single justice of the Appeals Court (Henry, J.) held that the Court applied the wrong legal standard with respect to alleged spoliation before October 1, 2019, and remanded with an order that the Court "determine if the defendants knew or reasonably should have known that evidence might have been relevant to a possible action," if so whether defendants spoliated evidence that prejudice the plaintiffs, and if so what sanction if any is appropriate.

The standard of "might have been relevant to a possible action" is very different than the standard that the Court applied. Applying this different standard, the Court finds that defendants spoliated evidence between

August 20, 2019, and October 1, 2019, that plaintiffs were prejudiced as a result, and that plaintiff will therefore be entitled to present evidence of the alleged spoliation at trial and to an instruction telling the jury that they may, but are not required, to draw an inference adverse to the defendants from the alleged spoliation.

1. **Further Legal and Procedural Background**. The Massachusetts appellate courts have used different words at different times to describe what constitutes sanctionable spoliation of evidence.

Courts have sometimes held that "[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); accord *Westover* v. *Leiserv, Inc.*, 64 Mass. App. Ct. 109, 113 (2005); *Kippenhan* v. *Chaulk Services, Inc.*, 428 Mass. 124, 127 (1998).

In other decisions, courts have held that a party to litigation may be subject to sanctions if they destroy or fail to preserve relevant evidence once they "are actually involved in litigation (or know [or reasonably should know] that they will likely be involved)" in litigation. *Fletcher* v. *Dorchester Mut. Ins. Co.*, 437 Mass. 544, 549 (2002); accord *Keene* v. *Brigham and Women's Hosp., Inc.*, 439 Mass. 223, 234 (2003) (holding that spoliation sanctions were appropriate because defendant failed to preserve evidence after it "should have been aware of a likely claim").

In its prior decision, the Court had understood "might be relevant to a possible action" standard and the "will likely be involved" in litigation to which the evidence may be relevant as meaning the same thing. As the Court previously noted, the Supreme Judicial Court has explained that, for spoliation sanctions to be appropriate, "[t]he threat of a lawsuit must be sufficiently apparent, … 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); accord *Zaleskas*, *supra*.

Indeed, though *Scott* cites the "might be relevant to a possible action" standard, it then holds that spoliation sanctions were reasonably imposed because the defendant "knew that he would likely be involved in litigation" when he discarded relevant evidence. See 454 Mass. at 798–799. The same is true in

Keene; the SJC cites the "might be relevant to a possible action" standard, and holds that spoliation sanctions were appropriate for the loss of relevant evidence when "the defendant should have been aware of a likely claim." See 439 Mass. at 234.

The Court therefore agreed with Judge Billings and Moore's Federal Practice that 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. Moore, 7 Moore's Federal Practice, § 37A.10[3][a] at 37A-41 (3d ed. 2013)).

On interlocutory review, the single justice held that the Court should not have applied this standard. She explained that, because the Court held that a reasonable person in the same position as the defendants before October 1, 2019, would "not think it very likely that they would be sued," she could not tell whether the Court applied the correct standard. The single justice remanded with an instruction that the Court "determine if the defendants knew or reasonably should have known that evidence might have been relevant to a possible action," without apply the test that the defendants should have known that they "will likely be involved" in litigation to which their text messages and emails would have been relevant.

The Court understands this remand order to require the Court to construe the phrase "possible action" to mean something materially different than "likely" litigation. A future lawsuit is "possible" if it is "within the limits of ability, capacity, or realization." Webster's Ninth New Collegiate Dictionary at 918 (1991). In contrast, litigation is "likely" only if it has "a high probability of occurring." *Id*. at 692. Under the remand order, therefore, defendants may be subject to spoliation sanctions if they destroyed relevant evidence at a time when they knew or reasonably should have known that litigation with the plaintiffs was "possible," even if a reasonable person would not have considered it to be "likely" or probable.

2. **Further Findings and Rulings**. The Court previously found, and still finds, that a reasonable person in the Weiners' position would not have expected that litigation with the Plaintiffs was likely until October 1, 2019.

In addition, however, the Court further finds that a reasonable person in the Weiners' position would have known—and thus the Weiners reasonably

should have known—that their text messages and emails about the project at issue here might be relevant to a possible civil action. It does so based on its prior findings that:

- 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; and
- 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.

Though later communications suggested that litigation was not yet likely, the Court finds that the Weiners should have known as of August 20, 2019, and therefore that litigation remained possible. In accord with the single justice's remand order, the Court therefore finds that the Weiners had a duty to preserve relevant evidence starting on August 20, 2019, and continuing thereafter.

The Court further finds that the Weiners breached that duty, and spoliated evidence either intentionally or negligently, by deleting and failing to preserve emails and text messages to each other or with others about their ongoing dispute with John Fish and the plaintiffs in this lawsuit.

In addition, the Court finds that plaintiffs were prejudiced by the Weiners' spoliation of evidence between August 20 and September 30, 2019, as the conduct and communications by the Weiners during that period is at the center of this lawsuit, and it is possible that unrecoverable emails or texts during that period would have helped bolster plaintiffs' proof of their claims.

"As a general rule, a judge should impose the least severe sanction necessary to remedy the prejudice to the nonspoliating party." *Westover* v. *Leiserv, Inc.*, 64 Mass. App. Ct. 109, 113 (2005), quoting *Keene* v. *Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 235 (2003).

The Court finds that the appropriate sanction is to permit plaintiffs to offer evidence at trial of the Weiners' alleged spoliation of emails and text messages, and to order that plaintiffs are entitled to a jury instruction that the jury may, but are not required to, infer from the Weiners' deletion of emails and texts that the message contents were unfavorable to the defendants. See, e.g., *Gath* v. *M/A Com, Inc.*, 440 Mass. 482, 488 (2003).

ORDER

Upon reconsideration after remand from an interlocutory appeal, and applying the standard ordered by a single justice of the Appeals Court, Plaintiffs' motion for spoliation sanctions against Defendants is **allowed**. Plaintiffs may offer evidence at trial of the Weiners' alleged spoliation of emails and text messages, and Plaintiffs are entitled at trial to a jury instruction that the jury may, but are not required to, infer from the Weiners' deletion of emails and texts that the message contents were unfavorable to the defendants.

Kenneth W. Salinger
Justice of the Superior Court

30 January 2023