

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CHILDREN'S MAGICAL GARDEN, INC.,
Plaintiff,

INDEX NO. 654960/2019

- v -

MOTION DATE N/A

DAVID MAROM, individually, and DAVID MAROM, in his
capacity as President of The Horizon Group,

MOTION SEQ. NO. 006

Defendants.

**DECISION + ORDER ON
MOTION**

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DAVID MAROM, individually, and DAVID MAROM, in his
capacity as President of The Horizon Group,

Third-Party
Index No. 595905/2019

Plaintiffs,

-against-

KATHERINE TEMPLE-WEST, DAVID CURRENCE,
TIFFYNANY DE BRUYN, MORE GARDENS FUND, ARESH
JAVADI, and JANE DOE,

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 293, 294, 295, 296

were read on this motion to/for SANCTIONS.

In motion sequence number 006, plaintiff Children’s Magical Garden, Inc. moves for spoliation sanctions against defendant David Marom, individually, and in his capacity as President of The Horizon Group (collectively, Marom) including preclusion of defendants from contesting responsibility for their laborers’ actions on the property at issue, directing an adverse inference, and awarding Plaintiff attorneys’ fees and costs.

Background

Located on the Lower East Side of Manhattan, Children’s Magical Garden (collectively with plaintiff, Children’s Magical Garden, Inc., Garden) was founded in 1982 with the intention to create a space providing safe and educational afterschool and summer camp programs for children. (See NYSCEF Doc. No. [NYSCEF] 1, compl. ¶ 2.) The idea came to life after community activists cleaned out an abandoned corner lot— Lot 19 located at 157 Norfolk Street in New York City—and transformed the space into a community garden. (See *id.* ¶¶ 14-16.) The community garden is also situated on neighboring Lots 16 and 18; in July 2013, the Garden secured an agreement for the transfer of Lots 16 and 18 to the New York City (City) Department of Parks and Recordation for preservation under the City’s GreenThumb program. (*id.* ¶ 22.) Over the years, the Garden has hosted programs for children to encourage nature-based experiential learning, poetry readings, and music events, consistent with its mission to foster mentorship to local children. (See *id.* ¶¶ 18-20.)

Marom is in the business of real estate development. (NYSCEF 200, Marom depo tr at 43:2-9.) Marom is the sole owner of The Horizon Group (see *id.* at 44:6-11, *id.* at 48:10-16), the “umbrella organization” for several entities that Marom conducts his real estate development business through. (See *id.* at 48:17-23.) Marom is also the manager of nonparty 157, LLC (157 LLC) (*id.* at 50:6-8), which Marom asserts is the lawful owner of Lot 19. (NYSCEF 231, Marom aff ¶ 1 [Oct. 26, 2021].) 157 LLC and The Horizon Group share the same physical address, 53 Broadway, Brooklyn, New York 11249. (See NYSCEF 200, Marom depo tr at 49:10-25.) According to Marom, nonparty Britt Realty LLC (Britt Realty) does “services for 157 LLC” and is in

“communication with the subcontractors. Britt Realty is the agent for all my entities.”
(*Id.* at 36:24-37:6.) Marom owns and makes decision on behalf of Britt Realty. (*Id.* at 58:25-59:8.)

The dispute over Lot 19 traces back to as early as 2014. In 2014, the Garden filed a related action to settle title as owner of the land on Lot 19, captioned *Children’s Magical Garden, Inc. v. Norfolk Street Dev., LLC, et al.*, index No. 152094/2014 (Sup Ct, NY County 2014) (Norfolk Action). The ongoing Norfolk Action concerns Marom’s alleged trespass on Lot 19, to which the Garden alleges it is the lawful owner by adverse possession. (See NYSCEF 1, compl. ¶ 23 [in the Norfolk Action].)

The Garden alleges that in April 2019, “Marom and [his] agents broke into the premise where they used power tools to destroy and damage many of the Garden’s treasured plantings . . . on Lots 16 and 18. . . . [They] discarded dozens of large plastic containers filled with rotting garbage[,] . . . causing stench[] . . . and creating a breeding ground for mosquitos” (Incident). (NYSCEF 1, compl. ¶¶ 33-34.) In August 2019, the Garden filed this action against Marom and asserts seven causes of action sounding in tort and seeks equitable relief based on the Garden’s claim of possession over Lots 16 and 18. (See NYSCEF 1, compl. ¶¶ 45-99.) The Garden submitted photos as a part of its allegations showing the garden’s state of disarray: traffic barriers filled with garbage, garbage in the garden, and what seems to be fallen branches and/or tree trimmings. (See *e.g.*, NYSCEF 203, photo of traffic barriers in garden; NYSCEF 204, photo of garbage in garden; NYSCEF 205, photo of garbage in barrier.)

Discussion

The Garden moves for spoliation sanctions to preclude Marom from contesting liability for his laborer's actions in causing the damage to the community garden or being involved with the Incident. The Garden contends that preclusion is warranted because Marom never issued a litigation hold for this action and intentionally deleted documents, emails, and text messages concerning 157 Norfolk, including records identifying his workers who worked on Lot 19/157 Norfolk, who paid them, job site instructions, reports of their work, and all of Marom's correspondence with them. According to the Garden, based on Marom's conduct, to which he admits in his deposition, Marom should be precluded from contesting that his laborers, specifically nonparty Julio Morales, were employees and that Marom ordered his employees to carry out the Incident. Alternatively, Garden seeks an adverse inference that Marom destroyed evidence in this action. (See NYSCEF 296, tr at 17:25-18:1, 18:19-25 [mot. seq. no. 006].)

Marom's Statements and Admissions

Throughout this case, Marom has provided inconsistent testimony and statements as to his knowledge and his involvement with the Incident. For example, Marom insisted that he was not involved in littering the garden (*see, e.g.*, NYSCEF 120, Marom aff ¶ 5 [Mar. 25, 2021] ["I was not involved in, nor do I have any personal knowledge of, the alleged 'attack.'"]), but previously alleged that "[t]raffic barriers were placed on Lot 19 by lawful agents of 157 LLC—not 'intruders'—on its own property prior to April 2019 to prevent unauthorized trespass by the [Garden]." (See NYSCEF 8, answer, counterclaim, third-party compl. [answer with counterclaims]). Marom's

response to the Garden's second set of interrogatories identified Morales as the person who placed traffic barriers on Lot 19 and trimmed tree branches overhanging on Lot 19. (NYSCEF 125, Marom's February 26, 2021, response to second set of interrogatories ¶¶ 1-2 at 14-15.¹)

Marom's deposition was taken on April 26, 2021 and was concluded on the same day. Marom admitted during his deposition that he asked Morales, who he describes as his subcontractor, to place traffic barriers from one of Marom's job sites onto the community garden. (NYSCEF 200, Marom depo tr [Apr. 26, 2021] at 33:16-34:14.) Marom further testified, as to cutting the tree branches, that "it was [his] order to cut the branches growing over our property" and that he asked Morales to do so. (*Id.* at 151:4-16.) Marom provided more insight into Morales' job responsibilities and who Morales reports to:

Q.² Does Julio Morales work for Britt Realty LLC?

A. No, Britt Realty hires subcontractors and Julio Morales is one of them to this company.

Q. So Julio Morales is a subcontractor of Britt Realty LLC?

A. Yes.

Q. How did Britt Realty LLC come about retaining Mr. Morales as a subcontractor?

A. He is doing our -- he is supplying us with labor.

(NYSCEF 200, Marom depo tr at 37:7-18.)

¹ Pages refer to NYSCEF generated pagination.

² During Marom's deposition, questions were asked by Benjamin Burry, counsel to the Garden.

When asked how long Morales was a subcontractor for Britt Realty, Marom did not recall but volunteered to provide the information to the Garden's counsel in the future. (*See id.* at 37:19-22.)

Furthermore, Marom made a number of startling admissions, the first being that he has permanently deleted emails relating to 157 Norfolk after the initiation of the Norfolk Action and this action:

Q. Did you collect emails from Julio Morales' account in connection with this litigation?

A. I don't think I ever send him an email, but I don't remember corresponding with him on email.

Q. Did you collect emails from Mr. Morales' account or search for emails in his account in connection with this case?

MR. GOLDENBERG: Objection.

A. I went through my emails and I don't remember his emails, I don't think I ever emailed to Mr. Morales.

Q. You testified earlier that you do not know what Mr. Morales' email address is. Is that still true?

A. Yeah.

Q. So how can you search for emails with Mr. Morales if you don't know what his email address is?

MR. GOLDENBERG: Objection. You are not making any sense and you are mischaracterizing his testimony.

Q. Mr. Marom?

A. What is the question?

Q. Is there any way that you could have searched for emails with Mr. Morales if you did not know what his email address is?

MR. GOLDENBERG: Objection.

A. As I said, I searched for any emails for 157 [Norfolk] and I don't think I ever email to Mr. Morales for me to know his email address.

Q. If we go to tab 43, which was introduced as Exhibit 12, and you look at 3 that email. There is an email where you, David Marom, are copied. Did you locate this email in searching and collecting for emails for this litigation?

A. I don't remember.

Q. Are you aware that your counsel did not produce this email to us?

A. I delete many emails in my folders. I do not keep the emails because we have way too many emails in my company.

Q. What is your practice in terms of deleting emails?

A. When I'm looking at this email, there is no reason for me to maintain an email like that. Most of the time, I would not even read it.

Q. How often do you delete emails you receive?

A. Every day.

Q. Would you say you delete most of the emails you receive?

A. Yeah.

Q. And you mentioned that you don't read some of the emails. Do you delete some of the emails that you haven't read, as well?

A. Yeah, if I see the subject and it's not something that interests me, I delete it.

Q. Does a subject like the one in tab 43, Exhibit 12, a subject that would interest you?

A. I do not remember what I did at that date. When I'm looking today, I probably deleted it if it would come today.

Q. When you delete these emails, is there a way to retrieve them from a deleted folder or are they just permanently gone?

A. Usually, every two or three days, delete from the delete folders or all the junk mail in the delete folders, I empty them.

Q. During your deletion process, that permanently deletes them?

A. I believe so.

Q. This is a practice you continue to this day?

A. Yes.

Q. And is this something that you did in 2019, as well?

A. Yes.

Q. So you think that it's very possible that these emails we've been looking at that concern 157 Norfolk are emails that you deleted from your account?

A. As I said before, I don't know what I did at that time.

Q. What I'm trying to get a sense of we got these emails from a third party, but we did not receive them from your counsel and I was trying to understand why and it sounds like this might be the explanation. Do you think you may have deleted emails about 157 Norfolk in 2019 and 2020 and that's why we haven't been able to get them from your account?

MR. GOLDENBERG: Objection.

A. Very good possibility.

Q. What about Ms. Richards and Ms. Radu, other people that work in your office, do they do the same thing in terms of regularly deleting emails as they come in?

A. I'm not sure what they do, but I tell people to delete things because our server crashed a time ago.

Q. What did you mean, your server crashed?

A. It crashed because too many emails and as a matter of fact, we change from gmail to Microsoft, I think, because we had issues that the server couldn't support all the emails.

Q. When did you change from gmail to Microsoft?

A. I don't remember the date, but it was, I would say, in the last 12 months, 14 months.

Q. When you say, gmail to Microsoft, you are talking about the hosting of your email service?

A. Yes.

Q. No one actually changed their email addresses?

A. No, no change of email address.

(NYSCEF 200, Marom depo tr at 109:16-114:24.)

Marom testified that he searched his text messages “in connection to this litigation” with regard to “Julio Morales, Oren Ziv, and Arthur Jakoby.” (NYSCEF 200, Marom depo at 137:8-25.)

On May 11, 2021, the Garden moved, by Order to Show Cause, for contempt of court against Morales for failing to comply with the Subpoena Duces Tecum Ad Testificandum. (NYSCEF 141, OSC [mot. seq. no. 004].) This motion was later withdrawn when Morales appeared for a remote deposition and completed his document production. (NYSCEF 191, Notice of Withdrawal of Motion [mot. seq. no. 004].) However, and importantly, during June 10, 2021, argument on motion sequence number 004, the Garden represented to the court that it's counsel never received any documentation describing or showing Morales' employment/subcontractor relationship with Britt Realty following Marom's deposition even though Marom volunteered to

provide more documentary information about Marom and Morales' working relationship. (See NYSCEF 199, tr at 18:24-19:4 [mot. seq. no. 004].) The court then ordered Marom to produce a document showing payment for Morales' work from Britt Realty LLC (*id.* at 21:14-16). Then, during the January 18, 2022, argument on this motion (motion sequence number 006), the Garden contended that Marom did not produce any responsive records showing payment to Morales by Marom or any of his entities. (See NYSCEF 296, tr at 39:13-24 [mot. seq. no. 006].) Instead, Marom provided records of payments with respect other properties that Marom owns, but not concerning 157 Norfolk. (*id.* at 8:6-17.)

Morales' deposition was taken on July 16, 2021 and was concluded on the same day. Counsel for the Garden asked Morales to identify who gave him instructions with regard to the traffic barriers:

Q Did David Marom tell you to put the barricades –

A Who is David Marom?

Q Are you -- are you familiar with someone named David Marom?

A No. That's why I don't understand. Who is David Marom?

(NYSCEF 202, Morales depo tr at 27:4-10 [July 16, 2021].) Morales testified that nonparty Oren Ziv³ directed him to put the barricades onto the garden (*id.* at 27:25-28:2), Morales transported the barriers to the garden (*see id.* at 32:1-15), drained the water out of the barriers prior to bringing them to the garden (*id.* at 87:13-21), and, once in the garden, left them upside down to avoid water getting into them (*id.* at

³ Morales testified that he "used to work for Oren Ziv" until sometime in early 2020. (See, e.g., NYSCEF 202, Morales depo tr at 48:2-3.)

71:21-72:2). After placing the barriers onto the garden, Morales took photos of the barriers.⁴ (See *id.* at 101:25-102:13; NYSCEF 227, Morales' photo.) As to the cut trees and branches, Morales denied cutting any trees or trimming branches. (See NYSCEF 202, Morales depo tr at 64:23-66:1; see especially *id.* at 65:23-66:1.) The Garden queried about the uprooted plants, and Morales denied any part in that. (See *id.* at 76:25-77:8.)

The photo of the barriers placed neatly in the garden (NYSCEF 227) was taken by Morales and sent to Ziv. Morales explains that he took these photos to prove that the work he was asked to do was done; however, he did not recall the date of these photos and cannot recall having a conversation or receiving a reply from Ziv regarding the picture. (NYSCEF 202, Morales depo tr at 102:3-25 [testifying that the photo was taken, sent to Ziv, and not recalling the date of the photo], 103:4-104:3.)

Morales was also asked if he was ever notified of a litigation hold by Marom's prior counsel Herrick Feinstein LLP (NYSCEF 93, Consent to Change Attorney), current counsel Andrew Goldenberg, or by Ziv.

Q Did you ever receive a notice to preserve documents in connection with this case?

A Excuse me?

Q Did anyone ever tell you to preserve documents for this case?

A What do you mean by "preserve"? I don't understand the question.

Q To -- did anyone ever ask you to keep or retain e-mails or other documents that relate to this property?

⁴ There are no time stamps on the photos Morales took and no time stamps on the photos the Garden took.

A No.

Q Have you ever spoken with anyone from the law firm Herrick Feinstein?

A Who?

Q There's a law firm named Herrick -- Herrick Feinstein, LLP. My question is whether you've ever spoken with anyone from that law firm.

A No. What are you talking about? What are you talking about?

Q It's just a question.

A Oh.

Q Have you ever -- have you ever spoken with an attorney by the name of Andrew Goldenberg?

A No.

Q Did David Marom or Oren Ziv ever tell you that you need to keep documents because of this litigation?

A No.

Q Do you ever delete e-mails from the italianluv6@gmail.com⁵ account?

A No.

Q Does --

A Does what?

Q Does your wife ever delete e-mails from that account?

A I don't know. Maybe. Maybe she gets a lot from Victoria's Secrets and everything.

⁵ The e-mail address account "italianluv6@gmail.com" belongs to Morales' wife, nonparty Tina Perry; Morales testified that since he did not have an e-mail account, he used his wife's account. (NYSCEF 202, Morales depo tr at 21:18-23, 22:17-25, 23:5-9.)

Q But she wouldn't delete e-mails concerning your work as a laborer?

THE WITNESS: No, I don't know. Maybe the e-mail gets forwarded, and she trashes my e-mail. Then she trashes her e-mail. I can't -- I can't recall our e-mails.

(NYSCEF 202, Morales depo tr at 54:24-56:14, 56:24-57:2.)

Morales produced 39 pages of documents responsive to the Garden's requests and testified that these were the only documents he had. (See NYSCEF 202, Morales depo tr at 18:25-19:24.) Morales testified that no text messages were exchanged about 157 Norfolk and that "everything was verbal" despite evidence that there were emails sent regarding 157 Norfolk. (*Id.* at 79:3-10.) However, as mentioned above, Marom testified that he searched his text messages for messages with Morales, suggesting that there were possible text messages between him and Morales. Morales' search through his wife's email account for responsive documents was inartful to say the least.

Q Did you enter search terms in the Gmail account to locate these?

A Yes. And I -- I found those. That's all I had. That's the only thing I had pertaining to that -- to that page.

Q What search terms did you use?

A Oh, God. I went into the e-mail and I -- I -- I kept looking and looking and looking.

Q What was your process for looking for relevant e-mails?

A Excuse me?

Q What was the process you used? I mean, a lot of Gmail accounts have thousands, tens of thousands of

messages. How were you -- how is it you were able to locate these 39 pages?

A I was just looking through them. I was just looking through them, and then when I seen one, I pressed on that and it all came out. I pressed on the pest control.

Q Got it.

(NYSCEF 202, Morales depo at 23:24-24:13.)

Andra Radu was deposed on June 11, 2021. Radu worked at The Horizon Group from August 2018 to January 2020 (NYSCEF 201, depo tr at 16:19-20 [June 11, 2021]). Radu was responsible for putting documents in their place, “like in the specific folders, to prepare the invoices for the subcontractors, to prepare payments for the subcontractors, to respond to some e-mails, to put in contact people from the team, from the sites for some specific – I don’t know, things that were going on.” (*Id.* at 17:22-18:4.) For electronic files, Radu testified that they were “sav[ed] in specific folders on a common platform.” (*Id.* at 39:3-11.) Although Radu was unable to recall with certainty, she testified that documents, such as payments to subcontractors, were saved in specific folders organized by job site or by a more general category.

Q. Let's take a look at this Exhibit 11, for example. You can see that you're sending back a payment to an invoice from this -- these All State Pest Service providers, and you can see it's to 157 Norfolk. If you scroll down to the second and third page, you can see there's credit card information and then there's the amount here, which looks like it's \$200. Is this the kind of document you would save in the share drive?

A. Yes.

Q. And how would you know where in the share drive to save something like this?

A. I think I save it in a folder named Payments. I'm not sure. I don't remember exactly. But as far as I remember, in Payments. And probably in the folder named as the job site is named.

Q. So here on Exhibit 11, the job site says 157 Norfolk Street here at the top of this. So there would be a folder for 157 Norfolk Street job site and you'd save things there?

A. I'm not sure, but probably. Because I don't remember exactly.

(NYSCEF 201, Radu depo tr at 40:4-41:1.)

According to Radu, she also did not receive instructions to preserve evidence while she was still employed by Marom in relation to this action. (*Id.* at 96:19-97:1.)

Finally, during third-party discovery, the Garden received emails and other documents from nonparty All State Pest Management (ASPM) regarding “service[s] for 157 Norfolk” in February 2019. (See *generally* NYSCEF 216, Email Thread [Feb. 22, 2019].) Marom, Radu, Tina Perry, and nonparty Otistia Richards⁶ were listed on these emails but these emails were never produced by Marom. In fact, Marom submitted an affidavit of due diligence to this court stating that, inter alia, he used “Norfolk” as a search term in reviewing his electronic files but were unable to find responsive documents other than the ones previously provided. (NYSCEF 120, Marom aff ¶ 13 [Mar. 25, 2021].) The documents produced by ASPM included Marom’s email account and the terms “Norfolk.” (See, e.g., NYSCEF 216, Email Thread [Feb. 22, 2019] at 2.)

In sum, the Garden contends that Marom purged records identifying his workers who worked on Lot 19/157 Norfolk, who paid them, job site instructions, reports of their

⁶ The signature block for Richards states her title as “Administrative Assistant” to “Britt Realty LLC. / The Horizon Group” in these emails. (NYSCEF 216, Email Thread at 12.)

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work, and all of Marom's correspondence with them, as evidenced by the testimonies of Marom, Radu, and Morales', and the third-party discovery provided by ASPM, all detailed above.

Legal Standard

Spoliation is the intentional or negligent destruction of evidence. (*See Kirkland v New York City Housing Auth.*, 236 AD2d 170, 173 [1st Dept 1997] ["Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them."] [citation omitted].)

"On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a culpable state of mind, which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense. In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing."

(*Duluc v AC & L Food Corp.*, 119 AD3d 450, 451-452 [1st Dept 2014] [internal quotation marks and citations omitted].)

The Garden Sufficiently Establishes that Spoliation Sanctions are Warranted

The Garden has sufficiently established that spoliation sanctions are appropriate based on Marom's intentional deletion of emails after 2014, the initiation of the Norfolk Action.

The Garden bears the burden of showing that Marom had an obligation to preserve his communications and emails, employment or subcontractor files and

records, and other related business records. On the first element, the Garden contends, and the court agreed, that Marom had an obligation to preserve the evidence in 2014 as the related Norfolk Action is ongoing. (NYSCEF 296, tr at 14:8-15.) Nevertheless, the relevance of the Norfolk Action cannot be ignored in this action. The duty to preserve evidence is triggered when a party reasonably anticipates litigation. (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C*, 93 AD3d 33, 41 [1st Dept 2012] [citations omitted].) The Norfolk Action concerns who has title to Lot 19—and Lot 19 is situated on 157 Norfolk Street, a fact that is admitted by Marom. (See NYSCEF 8, answer with counterclaims ¶ 11 [“Marom, individually, is indirectly affiliated with non-party entity 157, LLC, which is and has been the lawful owner of real property located at 157 Norfolk Street, New York, New York (‘Lot 19’) since 2014 when it paid over \$3 million to purchase the property.”].) There cannot be any serious dispute as to whether Marom’s duty to preserve evidence, including all emails relating to 157 Norfolk, when the Norfolk Action was initiated in 2014. And, clearly, as the Norfolk Action is still ongoing, Marom’s duty to preserve evidence relating to 157 Norfolk is likewise ongoing. (NYSCEF 296, tr at 14:8-10 [“So the 2014 case is still ongoing. That’s the adverse possession case. It’s at the summary judgment stage right now”].) Therefore, Marom’s duty to preserve evidence attached at the time the Norfolk Action was initiated in 2014. Since the court finds that Marom’s duty to preserve evidence was triggered in 2014, the court need not address the Garden’s arguments in the alternative that Marom’s duty was triggered by events following the initiation Norfolk Action.

In opposition, Marom argues that he had no duty to preserve documents before the Garden filed the complaint in this action. He contends that neither he nor The

Horizon Group were on notice of a credible probability that he and The Horizon Group would be involved in litigation with the Garden concerning Lot 19 and thus his duty to preserve evidence was not triggered. Marom's argument is devoid of merit and conflicts with his own deposition testimony that he is the sole owner of The Horizon Group (see NYSCEF 200, Marom depo tr at 44:6-11, *id.* at 48:10-16), the "umbrella organization" for several entities that he conducts his real estate development business through, (see *id.* at 48:17-23), and that he is the manager of 157 LLC (*id.* at 50:6-8). Moreover, 157 LLC and The Horizon Group share the same physical address, 53 Broadway, Brooklyn, New York 11249. (See *id.* at 49:10-25.) Taking his admissions all together, it is more than reasonable to conclude that Marom is the at the epicenter of these entities and was well on notice of his duty to preserve evidence relating to 157 Norfolk, the subject of this action and of the Norfolk Action.

As to the second element, the Garden has met its burden to show that Marom destroyed the emails with a culpable state of mind. "A 'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence." (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012] [citations omitted].) "Failures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail." (*Id.* [citation omitted].) The Garden contends, and Marom essentially admits, that the lack of records showing the names, payments, hiring dates, and work reports of Marom's laborers in connection to 157 Norfolk is a result of Marom's spoliation of emails

and business records. Further, the Garden claims Marom never issued a litigation hold to preserve documents and actively destroyed evidence, for instance, deleting emails off his company's server in early 2020.

Here, Marom's conduct unequivocally rises, at least, to the level of gross negligence for failure to institute a litigation hold and to notify Morales and Radu of it. Radu and Morales testified that they were given no instruction from Marom, Marom's previous counsel, or Marom's current counsel to maintain evidence related to 157 Norfolk and to cease deletion of emails. (NYSCEF 201, Radu depo tr at 96:19-97:1; NYSCEF 202, Morales depo tr at 54:24-56:14, 56:24-57:2.) Morales produced 39 pages of documents and Morales admitted there could have been a possibility that his wife, Tina Perry, deleted more emails. (*Id.* at 56:9-12, 56:24-57:2.) The litigation hold could have prevented Perry from deleting emails that were on her email account that Morales used to communicate and receive emails relating to 157 Norfolk. (*See, e.g.*, NYSCEF 217, Email Thread [Dec. 19, 2019].) The litigation hold could have also assisted in determining what date Morales took his photo of the neatly placed traffic barriers. Giving Morales the benefit of every doubt imaginable that he had no conversation nor received a reply from Ziv after the photo was taken, the photo itself, either through metadata or through timestamping, could have revealed the date of when that photo was taken. Evidently, there are no further responsive documents showing Morales' payments from Marom or Ziv, no contemporaneous communications regarding placement of traffic barriers, and no documents or communications regarding document

retention and/or evidence preservation. (See NYSCEF 209, Burry Email to Brad Gross⁷ [July 23, 2021, Aug. 11, 2021].)

Marom's indiscriminate deletion of emails—"Yeah, if I see the subject and it's not something that interests me, I delete it"—constitutes intentional spoliation of evidence. (NYSCEF 200, Marom depo tr at 112:6-7.) And Marom admitted in no uncertain terms that this practice of deleting emails that are uninteresting continues to this day and also occurred in 2019. (*Id.* at 112:21-113:5.) Curiously, Marom's deletion of emails, according to his policy of uninteresting emails, did not apply to all of his properties, just to 157 Norfolk. (NYSCEF 296, tr at 8:6-17, 10:6-11 [mot. seq. no. 006].)

Marom attempts to justify his intentional deletion of emails related to 157 Norfolk, including his instruction to Radu and "other employees" to delete emails" to prevent a server crash does not compel a finding less than gross negligence. However, as the Garden correctly points out, "a good faith explanation for the willful destruction of ESI when the duty to preserve has attached does not alter the finding of willfulness." (*Sekisui Am. Corp. v Hart*, 945 F Supp 2d 494, 507 [SD NY 2013].)

Finally, where evidence is negligently destroyed, "the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense." (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-548 [2015] [citation omitted].) However, where the spoliation is the result of gross negligence, the relevance of the evidence lost or destroyed is presumed. (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 [1st Dept 2016] [citations

⁷ Gross is Morales' attorney. (NYSCEF 202, Morales depo tr at 7:6-8.)

omitted].) The burden then shifts to the spoliating party to rebut this presumption. (*Id.*; see also *VOOM HD Holdings LLC*, 93 AD3d at 45 [citations omitted].)

Marom, in opposition, shifts the burden to the Garden to demonstrate that the emails were not relevant, argues that Marom and Morales did not exchange emails with each other, that the subcontractor documents have been produced, and in any event, Marom argues that the pest control emails have been produced so the Garden has not suffered any prejudice. Marom's first point is rejected for failure to cite any law that supports the Garden's burden to show relevancy; in fact, Marom cannot because it is not the standard. (*VOOM HD*, 93 AD3d at 46-47.) Marom cites to two portions of Morales' and Marom's testimony to demonstrate that they did not email each other—NYSCEF 202 at 22:3-23:9, 96:3-22, 102:6-103:3 and NYSCEF 225 at 110:2-8. Upon review, those portions of the citations do not support Marom's point whatsoever. For example, NYSCEF 225 at 110:2-8 defeats his point because Marom admits to not knowing Morales' email address. The court rejects Marom's third point, that the subcontractor documents have been produced, as misleading because documents were produced with respect to Marom's other properties, not 157 Norfolk. Marom's attorney represented this at argument on motion sequence number 006.

THE COURT: It's the employee records that are key here.

MR. GOLDENBERG: Right. So these employee records you hear about, we produced a list, a payroll list, of all employees, of all employees that were employed during the relevant time period. We gave that to Mr. Burry. He has it. So he has that list.

THE COURT: And what about a list of all independent contractors?

MR. GOLDENBERG: We gave him the two independent contractors that have done work on lot 19; that is Oren Ziv and that's Julio Morales. And we provided invoices of both that show proof of payment made by Mr. Marom's other company, Britt Realty, for work that those two individuals did. Now, we don't have any invoices for work done on lot 19 because there are none. Like, for example, when Mr. Morales removed the traffic barriers from one job site and sent them to lot 19, he may have put the job site for that other site on the invoice rather than the Norfolk site. Put simply, there wasn't much work done on this lot because there is no construction.

(NYSCEF 296, tr at 24:18-25:14 [emphasis added].) Again, Goldenberg says:

“There are two subcontractors that did work on lot 19, that is Oren Ziv and Morales. We produced all invoices relating to those individuals. We don't have any invoices that specifically say lot 19 with them or Norfolk Street on them.” (*Id.* at 40:2-5.)

The court rejects Goldenberg's speculation that the billing for work done for 157 Norfolk was listed as another job site. Importantly, Goldenberg represents to the court that there are no invoices for Lot 19/157 Norfolk. Lastly, Marom's point that the documents from ASPM were, in the end, fortuitously produced remedies the prejudice that the Garden faced misses the point of those documents entirely. Those documents show that there were emails that Marom did not produce in this action when he swore under oath that he had. (*See generally*, NYSCEF 120, Marom aff [Mar. 25, 2021].)

Finally, Marom argues that he would be prejudiced if the sanction was awarded against him as he argues he produced documents showing Morales was a subcontractor. For the reasons stated above, the subcontractor documents were not produced, despite Marom's argument to the contrary, and Marom's counsel represented that there are no responsive documents for 157 Norfolk. Furthermore, no documentary evidence has been submitted on this motion to demonstrate compliance with the court's

order to produce a document showing payment from Britt Realty to Morales as a subcontractor. On the other hand, the Garden has been prejudiced. For example, there is no contention that the evidence sought was cumulative or there are other methods of obtaining this evidence. (*VOOM HD*, 93 AD3d 33 at 47.) According to Marom, emails were permanently deleted, emails that could have contained communications about 157 Norfolk (as demonstrated by the ASPM emails).

Finally, the court notes that Morales' and Marom's deposition testimony conflicts as to what happened after Marom admittedly asked Morales to drop off the barriers in the garden. For example, Morales stated that there was no lock to 157 Norfolk when he delivered the barriers. (NYSCEF 202, Morales depo tr at 33:9-13.) However, Marom testified that when the traffic barriers were transported to 157 Norfolk, the "few laborers" used the key to open the gate, which they obtained from Morales. (NYSCEF 200, Marom depo tr at 145:2-13.) Even Ziv's testimony contradicts what Morales and Marom have repeatedly testified to (see *NYSCEF 202*, Morales depo tr at 27:25-28:2 [testifying that Ziv asked him to put the barricades on the property], 28:23-25 [testifying that he worked for Ziv]; *NYSCEF 200*, Marom depo tr at 40:12-23 [testifying that Ziv and Morales worked together].) Ziv submitted an affidavit attesting to under oath that he is "familiar with a laborer named Julio Morales, neither I nor my businesses have ever hired, retained, or paid Mr. Morales to perform work on the Property. Accordingly, I have no documentation for any payments to Mr. Morales for work on the Property." (*NYSCEF 210*, Ziv aff ¶ 6 [Aug. 27, 2021].) All of this contradicting testimony, e.g., how many workers were involved in the Incident, who directed/reported to whom, what exactly happened when the barriers were brought in, and the absence of documents,

communications, emails, or texts between Marom and Morales regarding 157 Norfolk to support their version of events warrants an adverse inference in addition to the preclusion sanction. And, as fully described above, there was no litigation hold issued, Marom admitted to intentionally spoliating evidence as it related to 157 Norfolk, and Morales performed an inartful search of responsive documents. Thus, the Garden is entitled to an adverse inference against Marom, specifically against his position that neither he nor his workers were principally involved in the Incident—i.e., throwing garbage in the traffic barriers (and the public’s contribution, if any, to the littering of the garden was de minimis) and cutting down trees and branches.

All other arguments have been considered and are without merit.

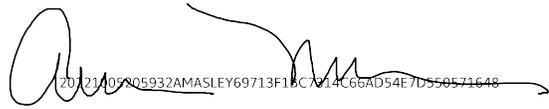
Accordingly, it is

ORDERED that the portion of plaintiff’s motion to preclude defendants from contesting that Morales is employed by defendants is granted; and it is further

ORDERED that plaintiff shall have an adverse inference for dispositive motions and, if appropriate, the jury shall be instructed with the following pursuant to Pattern Jury Instructions 1:77.2: “Before this trial began, the court decided that defendants willfully destroyed and failed to preserve documents showing payment of services to Morales and all communications, emails, and/or texts regarding 157 Norfolk, and that the evidence would have been important on the issue(s) of who was responsible for the causing the Incident. You should therefore presume that had the evidence been preserved the evidence would have been against defendants’ position that Marom and/or his workers did not cut down branches or trees or inserted rotting garbage in the traffic barriers on the property;” and it is further

ORDERED that plaintiff is awarded attorneys' fees and costs in bringing this motion and expenses involved in engaging in third-party discovery, and all other reasonable expenses in connection with this motion; and it is further

ORDERED that plaintiff shall submit, by electronically filing in NYSCEF and emailing SFC-Part48@nycourts.gov, an affirmation of services no later than 30 days after the date of this order, and defendants shall have 10 days thereafter to oppose the calculation, and failure to comply with these deadlines by either party will be deemed a waiver.



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10/5/2022

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE