

4.18.1 Spoliation

(1) In a civil proceeding, “spoliation” refers to the loss, alteration, or destruction of evidence.

(2) A party claiming to be adversely affected by the spoliation of evidence and seeks a remedy must show:

(a) that the party who had control over the evidence has an obligation to preserve it at the time of its spoliation;

(b) that the spoliation of evidence was done with a “culpable mental state”; and

(c) that the evidence was relevant to the claim or defense of the party claiming to be adversely affected adversely affected by its spoliation such that the trier of fact could find that the evidence would support that claim or defense.

(3) A “culpable mental state” includes acting intentionally, wilfully, or negligently. The relevance of the spoliation to a claim or defense is presumed when the spoliation is done intentionally or wilfully.

(4) Upon a finding of “spoliation,” a court has broad discretion in determining what, if any, sanction is warranted.

Note

This rule states New York’s common-law spoliation rule as it is derived from *Pegasus Aviation I, Inc. v Varig Logistica S.A.* (26 NY3d 543, 547-548 [2015]) where the Court held:

“A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a ‘culpable state of mind,’ and ‘that the

destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense’ (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012], quoting *Zubulake v UBS Warburg LLC*, 220 FRD 212, 220 [SD NY 2003]). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed (*see Zubulake*, 220 FRD at 220). On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party’s claim or defense (*see id.*)”

On the facts of the case, the Court found that the spoliation was the result of “simple negligence” and remanded the case for a determination of the relevance of the evidence to plaintiff’s case. (*Id.* at 553-554; *see Bruno v Peak Resorts, Inc.*, 190 AD3d 1132, 1135 [3d Dept 2021] [“Supreme Court found that plaintiff acted negligently in deleting the blog comment; thus, defendants were required to demonstrate its relevance”].)

Two Judges dissented in *Pegasus* on the grounds that the spoliation was not the result of “simple negligence,” but rather the result of “gross negligence” and that on a finding of “gross negligence,” relevancy should be presumed. (*Pegasus* at 555.) The dissent defined “gross negligence” as the failure to exercise even “ ‘slight care’ ” (*Pegasus* at 559 [citation omitted]). (*See Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, 171 AD3d 680, 680 [1st Dept 2019] [a finding of spoliation by “gross negligence” “raises the presumption of relevance”]; *accord Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 [1st Dept 2016].)

CPLR 3126 authorizes a trial court to impose a remedy or sanction on a party who refused to obey an order for disclosure or willfully failed to disclose information that the court finds should have been disclosed.

Pegasus noted that a trial court “possess[es] broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action.” (*Id.* at 551; *see Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 299 [2017] [an appropriately tailored adverse inference is permissible]; *Payne v Sole Di Mare, Inc.*, 216 AD3d

1339, 1342 [3d Dept 2023] [“the court has the discretion to give (an adverse inference) charge appropriately tailored to the facts of the case”]; *RCSUS Inc. v SGM Socher, Inc.*, 214 AD3d 488, 488 [1st Dept 2023] [“The adverse inference was a provident exercise of the motion court’s discretion ‘to provide proportionate relief to a party deprived of lost or destroyed evidence’ ” (quoting *Pegasus*)]; *Parkis v City of Schenectady*, 211 AD3d 1444, 1447 [3d Dept 2022] [“adverse inference charges have been found to be appropriate even in situations where the evidence has been found to have been negligently destroyed”].)

Courts also have recognized that striking a pleading is a potential sanction. The remedy for spoliation, however, must be proportional to the harm caused. Striking a pleading is a drastic sanction in the absence of willful or contumacious conduct. A court must consider the prejudice that the spoliation caused to determine whether such drastic relief is necessary to assure fairness. When the moving party has not been deprived of the ability to establish a claim or defense, a less severe penalty is appropriate. (See *Harry Winston, Inc. v Eclipse Jewelry, Corp.*, 215 AD3d 421, 422 [1st Dept 2023] [“striking a pleading is a drastic sanction (for spoliation) in the absence of willful or contumacious conduct . . . Where the moving party has not been deprived of the ability to establish its case or defense, a less severe sanction is appropriate”]; *Harry Spring Consulting LLC v Esterson*, 199 AD3d 567, 568 [1st Dept 2021] [“The motion court providently exercised its discretion not to sanction (a party) by striking the counterclaim on grounds of spoliation” of evidence].)

On the other hand, while the “striking of a pleading is generally limited to ‘instances of willful or contumacious conduct,’ it may also be warranted where the [grossly] negligent destruction of relevant evidence leaves a party prejudicially bereft ‘of the means of proving [its] claim or defense’ ” (*Buffalo Biodiesel, Inc. v Blue Bridge Fin., LLC*, 228 AD3d 1274, 1275 [4th Dept 2024] [citations omitted]).