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Recent Decision Concerning "Spoliation Sanctions"

By Barbara A. Hayes

The First Department recently issued a decision on a case involving the issuance of sanctions for spoliation of evidence. In *Malouf v Equinox Holdings, Inc., 113 AD3d 422 [1st Dept 2014]*, the plaintiff brought a personal injury action against a health club operator, alleging she was injured on a treadmill in the health club. The plaintiff immediately reported the accident and a claims defense form was prepared by the defendant's employee and forwarded to its legal department. The defendant was unable to provide the treadmill for inspection or any information as to how or when the treadmill was removed, other than an affidavit from a manager who believed that it was replaced as part of an equipment upgrade. All paperwork concerning the treadmill was also missing. The Supreme Court, New York County granted the plaintiff's motion for spoliation sanctions to the extent of precluding the health club operator from arguing at trial that the treadmill plaintiff was using at the time of her accident was operating properly or was free from defects, and granted the motion of third-party defendant treadmill manufacturer, Life Fitness, Inc., to strike the health club operator's third-party complaint against it.

According to the motion court, the plaintiff and third-party defendant established that the defendant's failure to take affirmative steps to preserve the treadmill constituted spoliation of evidence by demonstrating that the defendant was "on notice that the treadmill might be needed for future litigation". The health club operator appealed and the Appellate Division, First Department affirmed. The First Department determined that the motion court did not abuse its broad discretion in remedying the defendant's discovery failures by barring it from arguing at trial that the subject treadmill was operating properly or was free from defects. Moreover, it decided that the motion court's invocation of the harsh penalty of striking the third-party complaint seeking contribution and indemnification based on the design, manufacture, sale, maintenance, and servicing of the treadmill was warranted since the treadmill was the key piece of evidence and was not available for inspection.

The First Department's decision in *Malouf v Equinox Holdings, Inc., 113 AD3d 422 [1st Dept 2014]* is somewhat discouraging for business owners, as the takeaway from this decision is that when a claimant immediately reports an accident and a claims defense form is prepared by the defendant's employee and brought to the attention of its legal department, such circumstances are sufficient to trigger a party's obligation to preserve evidence. The action taken by the health club in *Malouf* is a common business practice. In the regular course of business a company might notify its legal department or its insurance broker directly upon receipt of a claim regardless of whether litigation has commenced. As a practical matter, *Malouf* could prove to be costly and burdensome for businesses alike, as it implies that whenever any incident report is

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completed, affirmative steps must be taken to preserve the evidence, or otherwise run the risk of facing spoliation sanctions in the event of litigation. Actual litigation or notification of a specific claim is not required; however, the existence of an incident report could be enough to constitute proof that a party was "on notice" that evidence might be relevant to litigation.

Certainly, *Malouf* signals a trend in the Appellate Division, First Department towards the federal standard regarding spoliation of discoverable electronically stored information (ESI) as set forth in *Zubulake v UBS Warburg LLC, 220 FRD 212 [SDNY 2003]*, where the "[o]bligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." The federal standard has been employed in cases involving the destruction of non–ESI evidence. See *Strong v City of New York, 112 AD3d 15 [1st Dept 2013]*. Whether this means that a health spa should take every single piece of equipment that could be relevant to a lawsuit and store it in a warehouse is yet to be seen.

THE LAW FIRM OF
HANNUM FERETIC PRENDERGAST & MERLINO, LLC
ONE EXCHANGE PLAZA
55 BROADWAY, SUITE 202
NEW YORK, NY 10006
(212) 530-3900
TELEFAX: (212) 530-3910