

UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION

CASE NO.: 16-cv-20924-
MARTINEZ/GOODMAN

DONNA INCARDONE, *et al.*,

Plaintiffs,

vs.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant.

**PLAINTIFFS' REPLY IN SUPPORT OF AMENDED MOTION FOR
SPOILIATION**

COME NOW, the Plaintiffs hereby file a Reply Memorandum in support of their Amended Motion for Spoliation regarding Defendant's failure to produce all CCTV and VDR recordings to Plaintiffs, and state as follows:

The Defendant has submitted that it turned over a sufficient amount of evidence concerning the CCTV and VDR and it was not required to preserve all such evidence. [DE 392] The Defendant did not dispute that the majority of the CCTV was unproduced or that the VDR was corrupted. Rather, it claimed the missing evidence was "irrelevant" and not "crucial" to Plaintiffs case. [DE 392 p.4-6] The Defendant further raised the issue of whether the Plaintiffs can demonstrate that the Defendant acted in "bad faith" concerning the CCTV and VDR. [DE 392 p. 4-5]

It has been Defendant's practice in this case to pick and choose which evidence it deems relevant, without producing everything in its possession as required by Fed.R.Civ.P. 26. Defendant's contention that the additional CCTV footage was "irrelevant" begs the question of whether Defendant reviewed this footage and made such a determination without producing it to the Plaintiffs. Otherwise, how would the Defendant know of its relevance?

The Defendant's brief continued to argue Eleventh Circuit and Southern District law concerning spoliation remedies. [DE 392 p.1-9] But this Court was clear in its position that Rule 37(e) is the controlling law on spoliation matters. [DE 378] (citing Sosa v. Carnival Corp., No. 18- 20957-CIV, 2018 WL 6335178, at *10 (S.D. Fla. Dec. 4, 2018), reconsideration denied, No. 18- 20957-CIV, 2019 WL 330865 (S.D. Fla. Jan. 25, 2019) (citing Fed. R. Civ. P. 37 advisory committee's note to 2006 amendment) and Williford v. Carnival Corp., 17-cv-21992 (S.D. Fla. May 28, 2019)).

The Defendant did offer a Rule 37(e) argument in which it admitted to the existence of the sought-after ESI footage and acknowledged it did not produce most of the CCTV or a working VDR. Yet, the Defendant claimed it had no duty to preserve the ESI nor did it fail in its duty to preserve the ESI. [DE 392, p. 10-18].

The Defendant analyzed Sosa and Wilford, arguing: "Sosa and Williford both involve situations where evidence existed, should have been preserved, and went inexplicably missing altogether. Royal Caribbean took reasonable steps to preserve the CCTV because it did, in fact, preserve CCTV. This is not a case where an entire category of evidence went missing. Royal Caribbean produced thirty minutes of video footage to Plaintiffs depicting the ship's bow and exterior being struck by waves and high winds, and portions of the exterior of the ship sustaining damage during the storm." [DE 392 p.14]. Despite Defendant's contentions, the CCTV and

VDR in this action also should have been preserved but went inexplicably missing. The Defendant has not attempted to explain the whereabouts of the remaining CCTV or why the VDR was “corrupted.” While no two cases are identical, Sosa and Wilford offer distinct and instructive similarities to the instant action.

(1) The Defendant admits the missing footage is ESI. [DE 392 p.10]

(2) The Defendant had an obligation to preserve the CCTV and VDR.

Defendant’s employees, Captain Claus Andersen, Captain Wendy Williams, and First Officer Spahis all testified that the recordings made during the voyage should have been preserved. [DE 276, p. 3] And the Captain ordered them to be preserved. [DE 160-1, pgs. 44-57] The Defendant argued “destruction of evidence under routine procedures does not indicate bad faith.” [DE 392 p. 5] But the Defendant failed to cite testimony or explain RCCL’s routine of destroying evidence, who selects “relevant” evidence to preserve or any standard used to select what evidence is indeed “relevant.” The Defendant further argued “litigants do not have a duty to preserve any and all evidence, but only that which is potentially relevant.’ *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, 2011 WL 1456029, *12 (S.D. Fla. Apr. 5, 2011).” [DE 392 p. 11] However, it is not up to the Defendant to parse through relevant evidence and make one sided determination as to which of that evidence is suitable for production. If any of the CCTV footage was relevant for production, it stands to reason that most of the CCTV footage would be relevant for production considering the nature of the incident in question.

Despite admitting the CCTV was recorded 24 hours a day for the entire cruise, the Defendant elected to produce a mere 28 minutes of footage. [DE 392] The Defendant offered the Plaintiffs and the Court no explanation as to where the remaining footage is. Rather, the Defendant claimed the footage to be “irrelevant.” [DE 392 p.6] The Defendant asserted the few

snippets of waves it produced was sufficient. [DE 392 p.2] Again, that decision was not up to the Defendant. The Plaintiffs were subject to unrelenting hurricane force winds and waves for 12 hours. The Plaintiffs need the CCTV footage to show the total picture and the ferocity of the winds and waves, which caused the Plaintiffs to fear for their lives.

The Defendant argued it had no duty to preserve the VDR because it is “not a discovery or investigative tool” but rather, it is “intended to provide some information if it can be found in case of the total loss or sinking of the cruise ship.” [DE 392 p.12]. The Defendant cited no legal authority or testimony to support their contentions. More importantly, there is absolutely no question Defendant was supposed to preserve this evidence as its own Captain Andersen testified he ordered the VDR recordings be preserved when the ship was en route back to Bayonne. [DE 276-3 p.44-57] He agreed in his testimony, on at least three occasions, that this was a serious incident for which the VDR needed to be captured. [Id. at pp. 48, 56 & 57].

(3) The Defendant did not take reasonable steps to preserve the footage.

The Defendant claimed it took reasonable steps to preserve the footage because it produced 30 minutes out of thousands of hours of footage that existed. [DE 392 p.14] The Defendant distinguished the case of Sosa where no explanation was given for the missing footage. [Id. p.13] Despite its argument, the Defendant here has also failed to give explanation for the whereabouts of the missing footage. The Defendant simply stated “Plaintiffs received the CCTV they were supposed to get.” [Id.]. It was not the Defendants obligation or right to determine what the Plaintiffs “were supposed to get”. Interestingly, the Defendant argued it has the same VDR information that the Plaintiffs were provided but made no such argument with regard to the CCTV footage. [Id.] At some point the Defendant possessed CCTV footage that it

chose not to produce. It admitted as much. The Defendant has failed to take reasonable steps to preserve and produce the CCTV footage.

Defendant cites Mitchell v. v. Royal Caribbean Cruises, Ltd., 2013 WL 12066018 (S.D. Fla. May 7, 2013), arguing it had no duty to preserve the entire CCTV because the Court found the isolated incident at issue had been recorded and no further irrelevant recordings needed to have been preserved. [DE 392 p.12]. Yet, Mitchell is quite distinct from the instant action. First, Mitchell involved an isolated incident where a passenger slipped exiting a ship. See Mitchell at *1. The incident was captured on the CCTV. See Id. No further CCTV would have depicted the incident. See Id. Second, in Mitchell the Defendant actually gave an explanation as to where the remaining CCTV went. The Defendant explained the CCTV taped over itself after two weeks. See Id. The Court in Mitchell agreed Defendant “had a greater duty to preserve any and all possible CCTV footage that could possibly be used in the event of a lawsuit, even for impeachment purposes...” Id. at *2. In the instant action, only a small fraction of the hurricane was captured on the CCTV that was produced. The Defendant here has not argued the remaining CCTV failed to capture the hurricane. In addition, the Defendant here gave no explanation of the whereabouts of the remaining CCTV. The Defendant failed to meet its burden of preservation under Rule 37(e).

The Defendant also failed to explain why or how the VDR became corrupted. It admitted, however, that the VDR was inaccessible. The Defendant’s employee, Gerry Ellis, reviewed the VDR in making his “Heavy Weather Incident, Preliminary Analysis, February 7 and 8, 2016”. He stated a pre-departure briefing was held on February 6th, during which the bridge team discussed the passage plan including weather forecasting and the intention to increase speed. Ellis used the VDR to listen to voice recordings from the bridge. [DE 179-6,

pgs. 30-31] He admitted he was able to extract voice recordings from the VDR and hear what was going on. [DE 179-6, p.31] Further, VDR transcripts were somehow made from recordings of the Captains announcements evidencing that the VDR was intelligible to some extent. [DE 192]. But no VDR transcripts of bridge conversations were produced and no comprehensible voice recordings were produced. The Plaintiffs have therefore been unable to review evidence of the conversations on the bridge that surrounded the Captain's decision to sail into the storm. The Defendant admitted the VDR data was unintelligible but failed to explain why. [DE 392] It is without question the Defendant failed to preserve the VDR data.

(4) The footage cannot be restored or replaced through additional discovery

The Defendant argued the missing footage was replicated through discovery. Yet, it only offered an explanation as to discovery it believed to be a substitution for the VDR data. Defendant offered no argument as to discovery which had or could replicated the missing CCTV footage, as no such discovery exists.

As for the VDR, the produced discovery is not a replication or replacement. Defendant listed Bon Voyage weather maps, NOAA weather forecasts, deck logs, weather logs, pre-departure checklist, heavy weather checklist, hand over notes, the voyage plan and testimony as discovery which replicates VDR audio recordings from the deck. While all of that discovery was seminal to Plaintiffs' case, none of it replaces the exact audio recordings of all decisions and discussions had on the bridge by the Captain, Staff Captain Williams (who is unavailable) First Officer Spahis (who is unavailable) and other crew.

(5) Sanctions are appropriate

The evidence was central to Plaintiffs' proof of liability and damages. The Plaintiffs are unable, without this evidence, to fully demonstrate the total severity of the storm, it's impact on

Anthem and the Plaintiffs, the decision making of the crew, any course corrections made or information overlooked by the crew. The CCTV and VDR collectively recorded the conversations on the bridge, the claimed navigational course changes, navigational instrumentation on the bridge, the situation on the ship during the storm, and the full effect of hurricane force winds and gusts up to 160 knots with 60-foot seas. [DE 276, p. 5-7] Again, in arguing Plaintiffs have not been prejudiced, the Defendant conveniently left out mention of the missing CCTV footage. [DE 392 p.15] The Defendant solely argued no prejudice exists with regard to the also missing VDR evidence. [Id.] The Plaintiffs have suffered a prejudice as it relates to both the missing CCTV and VDR, for which there are no replacements.

As determined in Sosa, sanctions under Rule 37(e) do not require a finding of bad faith. Although it bears noting that Defendant's conduct amounts to bad faith as discussed in Plaintiffs Spoliation Motion and Motion for Sanctions. [DE 339]¹

In analyzing the type of sanction available under Rule 37(e) Defendant argues there is no need for a jury to decide the issue as it did in Sosa, stating: "This Court could not decide the issue where it was unclear how the CCTV went missing after the cruise line admitted it had a

¹In its Sanctions motion Plaintiffs argue that Defendant has engaged in a course of conduct to hide crucial evidence from Plaintiffs, including vital testimony from Captain Williams and First Officer Spahis and documentary evidence as well as CCTV and VDR data, amounts to bad faith conduct. [DE 339] In the Eleventh Circuit, bad faith for spoliation purposes, may exist in a case of reckless disregard of the consequences. See Amlong & Amlong, P.A. v. Denny's, Inc., 457 F.3d 1180, 1190 (11th Cir. 2006); Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1544 (11th Cir. 1993); Peer v. Lewis, 606 F.3d 1306, 1314 (11th Cir. 2010). A "finding of bad faith is warranted where an attorney [or party] knowingly or recklessly raises a frivolous argument ... or hampering enforcement of a court order." Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1320 (11th Cir. 2002) (quoting Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998)). "[O]bjectively reckless conduct is enough to warrant sanctions even if the attorney does not act knowingly and malevolently" because conduct is "tantamount to bad faith when he 'either carelessly or deliberately' covered up evidence." Amlong, 457 F.3d at 1191 (quoting Malautea, 987 F.2d at 1544). If bad faith is found by the Court, Plaintiffs request the Court use its inherent authority to issue sanctions under Rule 37.

duty to preserve it, its employee reviewed it, and there was no explanation for the disappearance.” [DE 392 p.16] Yet, the Defendant here has failed to overcome these same exact concerns. The Defendant has not clarified the location of the remaining CCTV footage. The Defendant has just vaguely argued it produced what was “relevant” or what Plaintiffs were “supposed” to receive. The instant action is not so distinct from Sosa.

The Defendant’s conduct falls within the Rule 37(e) requirements. Since Defendant failed to preserve significant ESI evidence, Plaintiffs are entitled to the following choice of sanctions, as described in Sosa: 1) All evidence about the CCTV video, VDR and any other ESI in this case and its unavailability shall be presented to the jury and Plaintiffs are entitled to argue that Defendant had the intent to deprive Plaintiffs of it (and then, if the jury finds the intent, argue that the jury may find a presumption against Defendant to be appropriate), or (2) Defendant’s witnesses shall be precluded from testifying about the contents of CCTV footage, VDR and any other ESI in this case (and their efforts to preserve it) and simply have the Court advise the jury that Defendant had CCTV video footage and the VDR at one time, but it is no longer available. Under the second approach, a jury instruction about a potential adverse inference would not be given.

Wherefore, Plaintiffs respectfully request the Court grant Plaintiffs’ Amended Motion for Spoliation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this 26th day of June, 2019 on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Morgan P. Theodore
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