

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

TIM CANOVA

Plaintiff,

CASE NO.: CACE-17-010904

Division: 21

IMMEDIATE HEARING
REQUESTED PURSUANT TO Fla.
Stat. § 119.11

v.

BRENDA SNIPES, IN HER OFFICIAL
CAPACITY AS SUPERVISOR OF ELECTIONS,
BROWARD COUNTY, FLORIDA

Defendant,
_____ /

**MOTION TO STRIKE AFFIRMATIVE DEFENSES AND
FOR SANCTIONS FOR THE SPOILIATION OF EVIDENCE**

Plaintiff, TIM CANOVA, moves to strike the Defendant's Affirmative Defenses, and for sanctions, including the award of reasonable costs and fees for Defendant's common law spoliation of evidence and violations of Fla.R.Civ.P. 1.380 (b)(2)(C) and in support thereof states as follows:

INTRODUCTION

This action concerns the Defendant Supervisor of Elections refusal to produce public records pursuant to Article I, Section 24 of the Florida Constitution and Chapter 119, Florida Statutes, (herein collectively the "Public Records Act"). In particular, Canova was seeking to copy the original paper ballots cast in the election. Upon becoming frustrated with the unreasonable conditions that the Supervisor was placing on such inspection and copying, Plaintiff filed this public records request action seeking reasonable production and conditions of copying/scanning the original paper record ballots.

Once this lawsuit was filed, Requests for Production were served and Request for Production # 1 sought to inspect and copy the following:

All ballots cast (including early voting, election day voting, mail-in voting handicapped voting, provisional or affidavit ballots, military or overseas ballots, void ballots, blank ballots, write-in ballots and other form of ballot not mentioned) during the August 30, 2016 primary election for Broward County precincts of Florida's 23rd congressional district.

Defendant did not timely file a response to such Request to Production. So, on August 28, 2017, Mr. Canova moved to compel production. Two days after the Motion to Compel was filed, the Supervisor of Elections, Dr. Brenda Snipes, personally signed an authorization to destroy the public records. The public records were destroyed between September 1 and September 19, 2017. In signing the records destruction form, Dr. Snipes certified that there was no on-going litigation concerning the ballots. The Defendant's destroyed records were the subject of discovery requests in this case. It is also important to note that the Supervisor of Elections did not respond to these discovery requests at all prior to the destruction of the records¹.

The destruction of the records sought in discovery, during this on-going litigation, serves to invoke sanctions for spoliation of evidence and Fla.R.Civ.P. 1.380 (b)(2)(C). In addition, the destruction of the original ballots violates the "litigation hold" provisions of section 119.11(4) of the Public Records Act.

MEMORANDUM OF LAW

I. THE PURPOSEFUL DESTRUCTION OF RECORDS SOUGHT BY REQUESTS FOR PRODUCTION IN ON GOING LITIGATION IS A MAJOR DISCOVERY VIOLATION

Defendant, Supervisor of Elections, admits that she destroyed the records that were the

¹ The Supervisor of Elections served responses to Requests for Production on November 13, 2017. After she announced in open court (on November 6, 2017) that the Supervisor of Elections destroyed the ballots cast in the August 30, 2016 primary election, during a hearing on the Motion to Compel the inspection of the original cast ballots.

subject of Requests for Production after the requests for production were served and after a Motion to Compel was filed. Rule 1.380, Fla. R. Civ. Proc. sanctions for destruction of evidence while a lawsuit is pending are readily imposed by courts, and usually are one of the more onerous options selected. Florida law recognizes a heightened duty to preserve evidence. “[A] party does have an affirmative responsibility to preserve any items or documents that are the subject of a duly served discovery request.” *Strasser v. Yalamanchi*, 783 So.2d 1087, 1093 (Fla. 4th DCA 2001). The Fourth District recognizes that striking of defenses is an appropriate sanction for failure to preserve evidence after a lawsuit is filed, even if the destruction of the evidence may have resulted from negligence. *Nationwide Lift Trucks, Inc. v. Smith*, 832 So.2d 824, 826 (Fla. 4th DCA., 2002); *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1311 (N.D.Fla., 2002).

There are two different types of spoliation of evidence claims. *See* Bard D. Rockenbach, *Spoliation of Evidence: A Double-Edged Sword*, 75 Fla. B.J. 34 (2001). The first type occurs when a party, during litigation, destroys or loses evidence that is vital to the opposing party. *See id.* Such loss is then treated by the court as a discovery violation, which is subject to a variety of discretionary sanctions. *See id.* The second type is an independent cause of action. *See id.* at 36.

Under Florida law, spoliation is established when the party seeking sanctions proves: “(1) the evidence existed at one time, (2) the alleged spoliator had a duty to preserve the evidence, and (3) the evidence was crucial to the movant's prima facie case or defense.” *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 781 (Fla. 4th DCA 2006). Where a party loses crucial evidence and the loss of that evidence prejudices the opposing party’s ability to prosecute or defend the claim, appropriate sanctions should be imposed. *Depuy, Inc. v. Eckes*, 427 So. 2d 306 (Fla. 3d DCA 1983) (holding that loss of crucial evidence should have resulted in striking of defendants’ answer). “What sanctions are appropriate when a party fails to preserve evidence in its custody depends on

the willfulness or bad faith, if any, of the party responsible for the loss of the evidence, the extent of prejudice suffered by the other party or parties, and what is required to cure the prejudice.” *Sponco Manufacturing, Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995). “Drastic sanctions, including default, are appropriate when a defendant alters or destroys physical evidence, and when the Plaintiff has demonstrated an inability to proceed without such evidence.” *Id.* at 630. When evidence is intentionally lost, misplaced or destroyed by one party, a trial court can rely upon sanctions found in Florida Rules of Civil Procedure 1.380(b)(2). *See Martino v. Walmart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005).

Here, the evidence was intentionally destroyed. The Supervisor of Elections who was served with the Complaint and was aware of this litigation executed a document authorizing the destruction of all ballots cast in the August 30, 2016 primary election involving Plaintiff, Tim Canova. The Supervisor destroyed those records despite having an obligation pursuant to section 119.11(4), Fla. Stat. to preserve them during the pendency of this action.

1. The Supervisor of Elections had a duty to Preserve the Evidence; She Destroyed The Evidence; and Its Destruction Severely Prejudices Plaintiff

It is undisputed that ballots cast in the August 30, 2016 primary election existed at the time this lawsuit was filed. Defendant, Supervisor of Elections Snipes, had a duty, and in fact was required under Federal and Florida Law to preserve the records. See, 52 U.S.C. § 20701 and §§101.545, 119.021, and 257.36(6), Fla. Stat., and Rule 1B-24.003, F.A.C. In addition, the Supervisor had an independent duty to preserve the original paper ballots pursuant to the provisions of the Public Records Act, which is the basis for this lawsuit. Sections 119.11(4) and 119.07(1)(h), Florida Statutes directly creates liability for the Supervisor to be responsible for preserving the original paper ballots pending the resolution of this lawsuit or further order of this court. Lastly, the Supervisor has another independent basis for preserving such originals pursuant

to her obligations under this lawsuit. The original paper ballots are the subject of pending discovery requests in this action. As part of the subject matter of this lawsuit, there is a duty to preserve. *Strasser v. Yalamanchi*, 783 So.2d 1087, 1093 (Fla. 4th DCA 2001). The Ballot Destruction Record, (Doc. 5 Notice of Filing Supporting Affidavits and Documents), establishes that the records were ordered to be destroyed on September 1, 2017.

Furthermore, there is no doubt that, as a direct result of the Supervisor of Elections failure to preserve evidence, Plaintiff is permanently prevented from reviewing the original cast ballots in the August 30, 2017 primary. *Rockwell Int'l Corp. v. Menzies*, 561 So. 2d 677, 680 (Fla. 3d DCA 1990) (defendant/manufacturer's alteration of saw by removal of bolts left Plaintiffs with no way of challenging the conclusion of defendant's experts, made its defense to plaintiff's prima facie case unassailable, and justified striking defendant's pleadings and entering default on liability).

Where there has been a "substantial and complete nature of the destruction of evidence by the spoliator" a finding of prejudice is justified. *Id.*; see also *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F. 3d 99, 109 (2d Cir. 2002); *E*Trade Sec., LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 592 (D.Minn.2005); see also *In re Krause*, 367 B.R. 740, 749 (Bankr. D.Kan. 2007) (spoliation found where debtor used security program to permanently wipe or purge files on hard drive after court ordered him to turn over computer).

For example, in *Public Health Trust of Dade County y. Valcin*, 507 So. 2d. 596, 600 (Fla. 1987), the Florida Supreme Court dismissed the notion that a "vanishing presumption" would be the appropriate sanction for the spoliation of evidence, and noted the irony that the selective destruction of evidence by a defendant deprives plaintiffs of the tools with which to rebut "the self-serving testimony of the defendant."

In another similar case, involving the blatant deletion of data, the District Court for the Middle District of Florida found that sanctions were required to keep the spoliator from benefitting from its intentional conduct and to deter others from similar conduct in the future. *Pacific Coast Marine Windshields Ltd. v. Malibu Boats, LLC*, 2012 WL 10817204, *10 (M.D.Fla. November 30, 2012); *see also Collazo–Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 29 (1st Cir.1998) (the spoliation doctrine is concerned not only with rectifying prejudice, but with deterring similar misconduct in the future).

When there is a basis for imposing spoliation sanctions, “the appropriate sanction varies according to 1.) the willfulness or bad faith, if any, of the party who lost the evidence, 2.) the extent of the prejudice suffered by the other party, and 3.) what is required to cure the prejudice.” *Fleury v. Biomet, Inc.*, 865 So. 2d 537, 539 (Fla. 2nd DCA); *see also, Harrell v. Mayberry*, 754 So. 2d 742 (Fla. 2nd DCA 2000); *Sponco Mfg. Inc., v. Alcover*, 656 So. 2d 629 (Fla. 3rd DCA 1995).

II. STRIKING DEFENDANT’S PLEADINGS IS THE APPROPRIATE REMEDY.

Where a party willfully destroys evidence after having a clear duty to maintain the information, Courts do not hesitate to strike its pleadings. *See Taylor v. Mitre*, 2012 WL 5473715 (E.D. Va. Sept. 10, 2012) (granting motion for dismissal with prejudice for plaintiff’s destruction of his hard drive and ruining of evidence by eliminator and cleaner programs); *Gutman v. Klien*, 2008 WL 4682298, *12 (E.D.N.Y. Oct. 15, 2008) (finding that use of a hard drive wiping program “irretrievably deleted computer files that likely contained important discovery information” and may have deprived the aggrieved party of “crucial evidence” sufficient to warrant a default judgment and attorney’s fees and costs); *Ameriwood Indus., Inc. v. Liberman*, 2007 WL 5110313 (E.D. Mo. July 3, 2007) (entering default judgment and awarding fees and costs because defendant’s intentional use of “Window Washer” scrubbing software “evidence a serious disregard

for the judicial process and prejudice plaintiff”); *Arista Records, LLC v. Tschirhart*, 241 F.R.D. 462, 466 (W.D. Tex. 2006) (awarding fees and costs and proposing an order of default judgment against defendant who willfully destroyed evidence by installing data-wiping software); *Communications Center, Inc. v. Hewitt*, 2005 WL 3277983, *2 (E.D. Cal. April 5, 2005) (recommending entry of default against defendant for use of Evidence Eliminator software while under a court order to undergo computer imaging finding it showed a “stark affront to the judicial process”). In matter of fact, the Fourth District recognizes that striking of defenses is an appropriate sanction for failure to preserve evidence after a lawsuit is filed, even if the destruction of the evidence may have resulted from negligence. *Nationwide Lift Trucks, Inc. v. Smith*, 832 So.2d 824, 826 (Fla. 4th DCA, 2002).

Plaintiff Canova is severely prejudiced by Defendant Supervisor of Election’s deliberate and willful destruction of original paper ballots cast in his August 30, 2016 Congressional Election. More importantly, Defendant compromised the integrity of the judicial process in not seeking a court order and destroying evidence subject to discovery. (See, § 119.11(4) and 119.07(1)(h), Fla. Stat.). Parties who destroy material evidence in the presence of a state statute requiring it to preserve, must be sanctioned; otherwise, the public will have no confidence in the system and future violations will grow exponentially.

Consequently, the Supervisor of Elections should be sanctioned for spoliation of evidence. Because the evidence destroyed was material, and the destruction was complete and prejudicial. Plaintiff requests that Defendants’ pleadings be stricken with prejudice pursuant to Rule 1.380 (b)(2)(C). Plaintiff incurred fees and costs that should be recoverable, as a consequence of the destruction of the public records in question, without notice to the Plaintiff, or to the Court, and

accordingly, the Plaintiff should be entitled to recover costs associated with a lawsuit seeking inspection and copying of records that were destroyed.

III. JUDGMENT FOR PLAINTIFF IN LAWSUIT SEEKING PRODUCTION OF PUBLIC RECORDS UNDER CHAPTER 119

Plaintiff Canova has moved for Summary Judgement. The Motion for Summary Judgment discusses how all of the Defendant's affirmative defenses fail as a matter of law. Regardless, given the Defendant's admitted destruction of records sought by Requests for Production after a Motion to Compel was filed in this lawsuit, this Court has the authority under Rule 1.380 (b)(2)(C), and the cases discussed above, to sanction Defendant for her conduct. Further, such destruction is directly in violation of Sections 119.11(4) and 119.07(1)(b), Florida Statutes. As additional discovery sanction, Mr. Canova seeks a refund of \$5,586.00 that he paid to the supervisor of elections on October 26, 2017 to conduct an inspection of the public records. Prior to conducting such inspection, Mr. Canova was not informed that the records were destroyed until after he spent \$5,586.00 in order to inspect purported electronic images of such ballots.

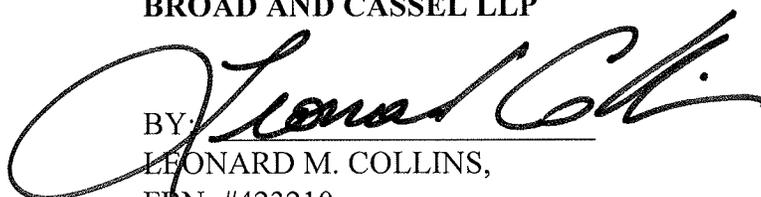
WHEREFORE, Plaintiff, Tim Canova, requests that this Court GRANT Plaintiff's Motion to Strike the Defendant's Affirmative Defenses and for sanction:

- a. Enter a finding of fact that the destruction of the ballots cast in the August 30, 2017 election, after requests for production were served and a motion to compel was filed, constitutes spoliation of evidence and a discovery violation subject to penalty under the inherent authority of this Court and under Fla.R. Civ. P 1.380(b)(2)(C);
- b. Enter a finding that the destruction of the original paper ballots was in violation of law under Sections 119.11(4) and 119.07(1)(h), Florida Statutes, and subject to attorneys' as under Section 119.12 (2016), Florida Statutes;

- c. Strike all the Defendant's Affirmative Defenses as a result of Defendant's Spoliation of Evidence;
- d. Make a determination that the Plaintiff is entitled to costs associated with the inspection of records that were destroyed, and require a return to Plaintiff of the \$5,586.00 spent on the inspection conducted on October 26, 2017;
- e. Determine that Plaintiff is entitled to an award of reasonable costs and fees for Defendant's Spoliation of Evidence and violations of Fla.R.Civ.P. 1.380 (b)(2)(C), and under section 119.11(4) and 119.07(1)(h), see, §119.12, Fla. Stat, (2016);
- f. The court reserve jurisdiction and hold a separate hearing to determine the amount of attorney's fees to award.
- g. Such other relief as the court determines is needed.

Respectfully submitted this 19th day of January, 2018.

BROAD AND CASSEL LLP

BY 

LEONARD M. COLLINS,

FBN: #423210

lcollins@broadandcassel.com

sbaxter@broadandcassel.com

FRANK P. RAINER,

FBN: #436518

frainer@broadandcassel.com

kdilworth@broadandcassel.com

215 S. Monroe Street, Suite 400

Tallahassee, FL 32301

(850) 681-6810

Attorneys for Tim Canova

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 19th day of January, 2018 by Electronic Mail to: Burnadette Norris Weeks, Burnadette Norris-Weeks P.A., 401 North Avenue of the Arts, Fort Lauderdale, Florida 33311.


Attorney