UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EDMUNDO CALTENCO,

Plaintiff,

-against-

G.H. FOOD, INC. d/b/a Natural Garden, GURDIP SINGH,

Defendants.

MEMORANDUM & ORDER

16 Civ. 1705 (LDH) (VMS)

Vera M. Scanlon, United States Magistrate Judge:

Before this court is Plaintiff Edmundo Caltenco's motion for sanctions against Defendants G.H. Food, Inc. and Gurdip Singh for spoliation of evidence. For the reasons discussed herein, Plaintiff's motion is denied.

I. BACKGROUND

Plaintiff brings this action against Defendants seeking monetary damages and equitable relief for wage-and-hour violations that Plaintiff allegedly suffered when he worked as a stock clerk at a grocery store known as Natural Garden in Brooklyn, New York. See generally Compl, ECF No. 1. Plaintiff alleges that Defendants violated the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL") by failing to pay him overtime and the minimum wage, and to furnish proper wage statements as required by the NYLL. Id. ¶¶ 1-59. Plaintiff alleges that Defendants failed to pay him minimum wage and failed to pay him any wages for hours that he worked in excess of forty hours per week. Id. ¶¶ 13-18. He also alleges that Defendants failed to pay him "spread-of-hours" premiums for shifts that exceeded ten hours per day. Id. ¶¶ 48-52.

The Parties dispute the hours Plaintiff worked during his employment at Natural Garden. Plaintiff alleges that he worked six days per week in twelve-hour shifts per day without any breaks, totaling seventy-two hours per week. Id. ¶ 15. Defendants maintain Plaintiff generally worked only sixty-two hours per week. See Singh Dep. Transcript, ECF No. 41-2.

The Parties agree that Plaintiff was paid in cash each week, and that each time he was paid, he signed a notebook confirming the date on which he was paid and the amount he was paid in cash on that date. See ECF No. 41 at 2; ECF No. 42 at 3-4. On December 6, 2016, Defendants produced to Plaintiff's counsel photocopies of those notebook pages in response to Plaintiff's October 3, 2016 discovery request. See ECF No. 42 at 4; ECF No. 41-3, 41-4, 41-5 (Bates No. D00001-D00303). The photocopies reflect the wages Plaintiff was paid in cash each week and the dates on which Plaintiff was paid. ECF No. 41-3, 41-4, 41-5 (Bates No. D00001-D00303). Each entry is signed by Plaintiff. Id. In addition, each week's entry (or each page) indicates the time Plaintiff began and ended work each day of that week, and the total number of hours Plaintiff worked that week. Id. At Plaintiff's deposition on March 30, 2017, Plaintiff admitted that the signature on the photocopies is his own, ECF No. 41-1 at 83:7-10, but he testified that the notebook pages he signed did not contain the information regarding specific hours worked. See ECF No. 41-1 at 82-91.

At Defendant Gurdip Singh's deposition on March 27, 2017, Mr. Singh testified that Defendant worked 62 hours each week, ECF No. 41-2 at 16-18, and that Mr. Singh's accountant had prepared a written summary of hours and wages, which had been produced as Bates No. D00304, ECF No. 41-2 at 34:23-40:2; 71:15-72:17. That summary supports Defendant Singh's testimony that Plaintiff worked 62 hours per week. See ECF No. 41-6 (Bates No. D00304).

At an April 18, 2017 conference before this Court, the Parties discussed the discrepancy

between the photocopied notebook pages and the accountant's summary, on the one hand, and Plaintiff's March 30, 2017 deposition testimony on the other. Following that conference, this Court ordered Plaintiff to serve follow-up discovery requests if Plaintiff wished to inspect the original notebook pages that were signed by Plaintiff, and to obtain any available metadata underlying the accountant's summary. Plaintiff's counsel does not claim to have previously requested such information.

On April 20, 2017, the Court-ordered deadline, Plaintiff served discovery requests, in which he requested that Defendants make available for inspection the original notebook pages in which Plaintiff's hours had been allegedly recorded. ECF No. 41-8 at 8 (Document Request No. 3). In addition, Plaintiff requested that Defendants produce "all documents referring to, relating to, and/or reflecting the records referred to by Mr. Gurdip Singh during his deposition held on March 27, 2017," specifically including "the records created by his accountant, as well as the metadata for those documents, as referenced on page 39, lines 5-25." Id. (Document Request No. 1). Plaintiff also specifically requested "all versions, drafts and copies of the document marked Bates No. D00304, which Defendant Singh testified was created by his accountant." Id. (Document Request No. 2). Plaintiff's counsel did not issue a subpoena to Mr. Singh's accountant.

The manager of Natural Garden, Nitim Sharma, was deposed on May 4, 2017. ECF No. 41-7. During his deposition, Mr. Sharma testified that he wrote down employees' hours every day on loose sheets of paper that he later delivered to Defendant Singh. Id. at 9:23-11:11. Following the deposition of Mr. Sharma, Plaintiff served a discovery request for the "loose sheet" time records that Mr. Sharma had referenced.

On May 5, 2017, Defendants requested an extension to respond to Plaintiff's discovery

requests on the basis that Defendant Singh had been "unable to properly review Defendants' records" "[d]ue to an extremely heavy workload and recent travel outside of the state . . . ." ECF No. 34.

On May 8, 2017, the Court ordered Defendants to produce the requested metadata and responses, and to make the original notebook pages available for inspection by May 12, 2017. See 5/8/2017 Order. On May 10, 2017, Defendants requested a one-week extension to comply with the Court's Order on the basis that Defendant Singh had fallen ill and been admitted to Woodhull Medical and Mental Health Center.

On May 18, 2017, a status conference was held after which the Court allowed Defendants until June 15, 2017 to produce the requested documents in light of Defendant Singh's medical condition. ECF No. 40. This Court further ordered that Plaintiff make any motions related to non-production by June 30, 2017. That same day, Defendants served responses to Plaintiff's April 20, 2017 post-deposition requests, indicating that Defendants were "in the process of searching for responsive documents." ECF No. 41-10 at 2.

In light of Defendants' failure to produce or make available for inspection the metadata underlying the accountant's summary, the "loose sheet" records prepared by Mr. Sharma, and the original notebook pages containing the relevant wage and hour records, and in light of the alleged discrepancy between the notebook pages Plaintiff signed and the notebook pages that were produced, Plaintiff filed the instant motion for spoliation sanctions. See ECF No. 41. Plaintiff now seeks an order precluding Defendants from offering as evidence (1) the photocopies of the notebook pages (Bates Nos. D00001-D00303), (2) the original notebook pages, (3) the accountant's summary (Bates No. D00304), and (4) the "loose sheet" records Mr. Sharma allegedly prepared. Id. at 3. In addition, Plaintiff seeks an order for an adverse

inference instruction to be presented to the jury based upon the alleged spoliation of the "loose sheet" records, the accountant's summary, the original notebook pages and the copied notebook pages. Id.

Defendants contend that they met their duty to preserve the relevant time and pay records by producing photocopies of the notebook pages and the accountant summary, that the documents requested by Plaintiff were simply misplaced upon moving from one office to another in January of 2017, and that no sanctions are warranted. ECF No. 42 at 2-3.

II. ANALYSIS

a. Spoliation

Spoliation is the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999). A party seeking sanctions based on spoliation of evidence "must establish '(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.'" Coale v. Metro-N. Commuter R. Co., 621 F. App'x 13, 16 (2d Cir. 2015) (quoting Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002)). In addition, where the spoliator acted negligently, the party seeking sanctions "must demonstrate prejudice in order for the Court to consider imposing an extreme sanction such as an adverse inference instruction." Distefano v. Law Offices of Barbara H. Katsos, PC, No. 11 Civ. 2893 (PKC) (AKT), 2017 WL 1968278, at *26 (E.D.N.Y. May 11, 2017).

The Second Circuit has made clear that "a district court has broad discretion in crafting a

proper sanction for spoliation." West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (internal citations & quotations omitted). An appropriate sanction upon a finding of spoliation "should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." Id.

This is a somewhat unusual case because Plaintiff has alleged two different kinds of spoliation. First, Plaintiff alleges that Defendants made significant (and fraudulent) alterations to the notebook pages or the copies of the notebook pages that were produced. Second, Plaintiff contends that Defendants' loss of the original notebook pages, "loose sheet" records that Mr. Sharma referenced at his deposition, and any metadata associated with or additional versions of the accountant summary warrants spoliation sanctions.

Plaintiff has failed to sustain his burden, and sanctions are denied. Plaintiff has not shown that Defendants had a duty to preserve any metadata associated with or additional versions of the accountant summary, the "loose sheet" records Mr. Sharma referenced at his deposition, or the original notebook pages. As to the notebook pages, even if Defendants did have a duty to preserve the documents in question, Plaintiff has not sufficiently demonstrated that he would be prejudiced at trial by Defendants' failure to produce the documents requested such that sanctions are warranted. Plaintiff has failed to demonstrate that Defendants fabricated the hours information on the original notebook pages or the photocopies of the notebook pages that were produced. As to the metadata and "loose sheet" records, Plaintiff has failed to show that Mr. Singh or the company had this information at the time the litigation commenced.

1. Duty To Preserve

"Identifying the boundaries of the duty to preserve involves two related inquiries: when does the duty to preserve attach, and what evidence must be preserved." Star Direct Telecom, Inc. v. Glob. Crossing Bandwith, Inc., No. 05 Civ. 6734T, 2012 WL 1067664, at *3 (Mar. 22, 2012), R&R adopted, No. 05 Civ. 6734T, 2012 WL 4509877 (W.D.N.Y. Sept. 28, 2012). "The obligation 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." Fujitsu Ltd. v. Fed. Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001). Once the duty to preserve attaches, "[a] party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter." Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (emphasis added). "For sanctions to be appropriate, it is a necessary, but insufficient, condition that the sought-after evidence actually existed and was destroyed." Farella v. City of New York, No. 05 Civ. 5711 (NRB), 2007 WL 193867, at *2 (S.D.N.Y. Jan. 25, 2007); see Riddle v. Liz Claiborne, Inc., No. 00 Civ. 1374 (MBM) (HBP), 2003 WL 21976403, at *2 (S.D.N.Y. Aug. 19, 2003) (declining to impose spoliation sanctions where plaintiff offered "no evidence whatsoever that the allegedly missing documents ever existed").

Here, Plaintiff has not shown that Defendants had an obligation to preserve the requested documents. First, Plaintiff has not shown that any metadata or additional versions of the accountant summary existed at the time this litigation began or became reasonably foreseeable. Defendant Singh testified at his deposition that the accountant summary marked Bates No. D00304, which was produced in discovery, was the only document that the accountant put

together for him after being sued.[1] See ECF No. 41-2 at 71:15-75:8. Although Defendant Singh testified that his accountant used some kind of computer program to maintain records for the business, there is no evidence that other versions of the accountant summary marked Bates No. D00304 or metadata underlying it existed and were within the control of Defendants at the time this lawsuit began.

Second, Plaintiff has not shown that the "loose sheet" records Mr. Sharma referenced during his deposition existed and were within the control of Defendants at the time this litigation began or became reasonably foreseeable. Although Mr. Sharma testified that he kept track of employee hours by writing them down on loose sheets every day, and that he handed those sheets to Mr. Singh every week, ECF No. 41-7 at 9:23-10:17, Plaintiff has not pointed to evidence that would indicate that those "loose sheet" records remained in existence and within the control of Defendants at the time this litigation began.

Plaintiff argues that Defendants should have known that employee wage-and-hour records could be relevant to future litigation such that they had an obligation to preserve all documents related to employee time and wage records at least for the duration of the FLSA's and NYLL's statutes of limitations. ECF No. 41 at 4. The argument that a duty to preserve automatically applies to evidence related to an employee's wages and hours from the point of its creation until the statute of limitations lapses is unsupported by legal authority. A duty to preserve only arises when a party "reasonably anticipates litigation." Pippins v. KPMG LLP,

[1] Although such a document, to the extent it was prepared for purposes of litigation, might be privileged, see United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998), any privilege was waived by the production of the document. See In re Grand Jury Proceedings, 219 F.3d 175, 184 (2d Cir. 2000) ("[W]hen [a] corporation as an entity makes the strategic decision to disclose some privileged information, the courts may find implied waiver, as they do in cases involving individuals.").

279 F.R.D. 245, 256 (S.D.N.Y. 2012). Plaintiff has offered no reason to believe that Defendants should have anticipated litigation prior to the filing of this action. Therefore, any duty to preserve did not arise until this lawsuit began.

Third, Plaintiff has not shown that Defendants had a continuing obligation to preserve the original version of the notebook pages months after photocopies of those same notebook pages had been produced in discovery. There is generally no obligation to preserve identical copies of the same document. See Zubulake, 220 F.R.D. at 218. Moreover, "the duty to preserve evidence does not extend indefinitely." Gaffield v. Wal-Mart Stores E., LP, 616 F. Supp. 2d 329, 337-38 (N.D.N.Y. 2009) (citing Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 458 (2d Cir. 2007)). It can expire once a party has had an "adequate and meaningful opportunity" to inspect the evidence. Id. For example, in Sterbenz, the court did not impose spoliation sanctions and found that an insurer had no duty to preserve a car relevant to the lawsuit three months after informing the plaintiff's attorney of the car's location where the plaintiff's attorney had made no effort to inspect the car during that time. Sterbenz v. Attina, 205 F. Supp. 2d 65, 74 (E.D.N.Y. 2002). Similarly, in Townes ex rel. Estate of Townes v. Cove Haven, Inc., the court declined to impose spoliation sanctions where the moving party had delayed significantly attempting to inspect the evidence. No. 00 Civ. 5603 (RCC), 2003 WL 22861921, at *4 (S.D.N.Y. Dec. 2, 2003).

In response to Plaintiff's document requests, Defendants produced photocopies of the notebook pages on December 6, 2016. Following production of the photocopies, Plaintiff had an "adequate and meaningful opportunity" to attempt to inspect the original notebook, but it was not until Plaintiff's deposition nearly five months later, on March 27, 2017, that Plaintiff first alleged a discrepancy between the photocopies and Plaintiff's memory of the notebook pages he signed.

The alleged discrepancy is an obvious one. The information that Plaintiff claims was added to the notebook pages takes up more than half of each photocopied notebook page. It would not have been difficult for Plaintiff to detect the alleged discrepancy immediately upon receipt of the photocopied pages or at any time prior to Plaintiff's deposition. Yet it was not until months after receipt of the photocopies that the alleged discrepancy was first alleged, and not until April 20, 2017, that Plaintiff first requested to inspect the original notebook pages. ECF No. 41 at 2.

By the time Plaintiff first raised the alleged discrepancy and requested the notebook pages, Defendants were no longer under any obligation to continue to preserve the original notebook pages, copies of which had been produced in discovery months earlier.

Plaintiff's failure to sufficiently demonstrate that Plaintiff had an obligation to preserve the requested documents is dispositive of Plaintiff's motion for spoliation sanctions. Nonetheless, the Court addresses the remaining factors to confirm that sanctions are not warranted.

2. Culpable State of Mind

Sanctions for spoliation of evidence "will only be warranted if the party responsible for the loss had a sufficiently culpable state of mind." Estate of Jackson v. Cty. of Suffolk, 12 Civ. 1455 (JFB) (AKT), 2014 WL 1342957, at *11 (Mar. 31, 2014), R&R adopted, 12 Civ. 1455 (JFB) (AKT), 2014 WL 3513403 (E.D.N.Y. July 15, 2014) (internal quotation omitted). To succeed on a motion for spoliation sanctions, the moving party must show that the spoliator acted at least negligently. See Residential Funding Corp., 306 F.3d at 108 ("the culpable state of mind' factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently." (internal quotation marks omitted)). "In the discovery context, negligence is a failure to conform to the standard of what a

party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding." In re Pfizer Secs. Litig., 288 F.R.D. 297, 314 (S.D.N.Y. 2013). "In determining culpability, a case-by-case approach is preferable because failures to produce or preserve can occur 'along a continuum of fault – ranging from innocence through the degrees of negligence to intentionality.'" Wandering Dago Inc. v. New York State Office of Gen. Servs., No. 13 Civ. 1053 (MAD), 2015 WL 3453321, at *11 (N.D.N.Y. May 29, 2015) (quoting Residential Funding Corp., 306 F.3d at 108).

In this instance, assuming for the sake of the discussion that Defendants had a duty to preserve the requested documents, the Court finds that Plaintiff would have demonstrated that Defendants failed "to conform to the standard of what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding." In re Pfizer Secs. Litig., 288 F.R.D. at 314.

Defendants argue they did not act with a sufficiently culpable state of mind because "the records at issue were only misplaced upon moving from one office to another." ECF No. 42 at 3. Assuming Defendants had a duty to preserve such documents, however, Defendants should have taken greater care in moving the few documents relevant to this litigation when conducting the office move. See GenOn Mid-Atl., LLC v. Stone & Webster, Inc., 282 F.R.D. 346, 357 (S.D.N.Y. 2012) (finding spoliation was merely negligent where spoliator failed to take any steps beyond general backup procedures to ensure that emails were preserved), aff'd, No. 11 Civ. 1299 (HB), 2012 WL 1849101 (S.D.N.Y. May 21, 2012).

Plaintiff argues that Defendants' conduct at a minimum constitutes gross negligence. ECF No. 41 at 4. This Court disagrees. Defendants produced photocopies of the wage-and-hour records that Plaintiff signed, and only after that, in the course of conducting an office move,

which involved the handling of boxes by third parties, did Defendants misplace the documents. Defendants' failure to preserve the documents under these circumstances does not constitute gross negligence. Cf. Davis v. Speechworks Int'l, Inc., No. 03 Civ. 533S (F), 2005 WL 1206894, at *4 (W.D.N.Y. May 20, 2005) (finding no culpability where "the boxes were received . . . at a particularly unsettled time in [the alleged spoliator's] personal life," where "the loss of the boxes [was] unexplained," and where there was "nothing in the record to suggest, other than the timing of the loss of the documents, a somewhat suspicious coincidence, that the boxes were purposefully destroyed or disposed of by [the alleged spoliator]").

3. Relevance and Prejudice

When a party seeks severe sanctions "such as dismissal, preclusion, or the imposition of an adverse inference," the court must consider "whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence." Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010), abrogated on other grounds by Chin v. Port Auth. of New York & New Jersey, 685 F.3d 135 (2d Cir. 2012). "Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner." Id. When a spoliating party was merely negligent, however,

> the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction. The innocent party may do so by adduc[ing] sufficient evidence from which a reasonable trier of fact could infer that 'the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction. In other words, the [innocent party] must present extrinsic evidence tending to show that the destroyed [evidence] would have been favorable to [its] case.

Id. at 467-68 (internal citations & quotation marks omitted); see Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d at 109 ("the party seeking an adverse inference must adduce

sufficient evidence from which a reasonable trier of fact could infer that the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction"); Great Northern Ins. Co v. Power Cooling, Inc., 2007 WL 2687666, at *11 (E.D.N.Y. 2007) ("If a party destroyed evidence through negligence then there must be extrinsic evidence to demonstrate that the destroyed evidence was relevant and would have been unfavorable to the destroying party."); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 77 (S.D.N.Y. 1991) ("some extrinsic evidence of the content of the evidence is necessary for the trier of fact to be able to determine in what respect and to what extent it would have been detrimental [to the spoliator]."); De Espana v. Am. Bureau of Shipping, No. 03 Civ. 3573 (LTS) (RLE), 2007 WL 1686327, at *8 (June 6, 2007) (declining to impose spoliation sanctions where the movant had "not met its burden of demonstrating with sufficient evidence that the missing emails would have contained relevant information unfavorable to [the spoliator], or that [the movant] is now prejudiced without those records"), objections overruled sub nom. Reino de Espana v. Am. Bureau of Shipping, Inc., No. 03 Civ. 3573 (LTS) (RLE), 2008 WL 3851957 (S.D.N.Y. Aug. 18, 2008).

As one scholar explained,

> If the goal of the litigation process is simply to achieve the optimal level of preservation of evidence, allocating the cost of spoliation onto the spoliator through an adverse inference instruction could well be appropriate. But the goal of litigation should be ascertaining the true facts in the case, not efficiently preserving evidence. Therefore, a jury should not be instructed to draw an inference for the sake of punishing a party unless there is a reasonable logical and evidentiary basis for the court's concluding that the inference is likely to be true.

Charles W. Adams, Spoliation of Electronic Evidence: Sanctions Versus Advocacy, 18 Mich. Telecomm. & Tech. L. Rev. 1, 17 (2011).

Courts in this Circuit have affirmatively adopted this view. See, e.g., Turner, 142 F.R.D.

at 77 ("where the destruction was negligent rather than willful, special caution must be exercised to ensure that the inference is commensurate with information that was reasonably likely to have been contained in the destroyed evidence"). For example, in Zubulake IV, the court relied in part on e-mails that had been selected by the plaintiff "as being the most relevant among all those produced in UBS's sample restoration" to conclude that the lost emails would be no more likely to support the plaintiff's claims. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 221 (S.D.N.Y. 2003); see Barsoum v. NYC Hous. Auth., 202 F.R.D. 396, 401 (S.D.N.Y. 2001) (notes of meeting between employment discrimination plaintiff and supervisor suggested non-discriminatory motive for the adverse action taken against plaintiff and thus tended to show that the audio tape of the same meeting that was destroyed by plaintiff would have been unfavorable to plaintiff's case).

Here, assuming an obligation to preserve, Defendants acted at most negligently by failing to preserve the documents requested. Thus, the Court does not presume relevance and prejudice, and Plaintiff has not offered sufficient extrinsic evidence for the Court to conclude that the original notebook pages are "reasonably likely" to contain information that would support Plaintiff's theory that Defendants fabricated the hours information on the photocopied notebook pages or information that would support Plaintiff's underlying wage-and-hour claims. Plaintiff has not offered sufficient extrinsic evidence for the Court to conclude that the "loose sheet" records or any additional versions of or metadata underlying the accountant summary (to the extent they existed and were subject to preservation) would be favorable to Plaintiff. Plaintiff has not provided extrinsic evidence that the "loose sheet" records or any additional versions of the accountant summary or metadata underlying it would be favorable to Plaintiff. Plaintiff contends that Defendants' failure to produce the "loose sheet" records prejudices

Plaintiff "in that they would be direct evidence concerning the hours that Defendants claim he worked," but Plaintiff offers no reason to believe that the records would support Plaintiff's version of events that he worked 72 rather than 62 hours per week. Similarly, Plaintiff does not offer extrinsic evidence tending to show that any metadata or additional versions of the accountant summary would support his claims. Plaintiff merely argues that the failure to produce these documents "prevents Plaintiff from determining if the summary is a recent fabrication or an ex post facto document prepared for litigation purposes, as opposed to a contemporaneously-created business record of Plaintiff's hours and wages." Accordingly, Plaintiff has not shown that he would be sufficiently prejudiced at trial by the absence of the "loose sheet" records or additional versions of the accountant summary to warrant sanctions.

The only extrinsic evidence Plaintiff has provided relates to Plaintiff's theory that the original notebook pages would support Plaintiff's claims. It is Plaintiff's own self-serving deposition testimony that the pages he signed did not contain information regarding the hours he worked. This, on its own, is insufficient to justify an adverse inference.

Having thoroughly reviewed the photocopies of the notebook pages, the Court finds that Plaintiff's testimony is not sufficient evidence from which a reasonable factfinder could find that Defendants improperly added the dates and hours worked to the notebook pages in preparation for this litigation, given physical characteristics of the photocopies of the notebook pages produced, and that the information Plaintiff does not recall takes up more than half of each notebook page. It would seem highly unusual for an employer to use only the very bottom of each page to list the total wages received. It is also worth noting that the text allegedly added to the documents does not relieve Defendant of liability, and it is largely consistent with text that Plaintiff remembers being present at the bottom of the pages. See ECF No. 41-3, 41-4, 41-5

(Bates No. D00001-D00303); ECF No. 41-1 at 83.

Plaintiff has not offered evidence, or even a theory, as to how the records Defendants produced might have been fabricated, given that they contain Plaintiff's signature on each page, or how production of the original notebook pages might reveal any such fraudulent conduct. See Estate of Jackson v. Cty. of Suffolk, No. 12 Civ. 1455 (JFB) (AKT), 2014 WL 1342957, at *8 (E.D.N.Y. Mar. 31, 2014) (declining to impose spoliation sanctions for allegedly tainted evidence when the plaintiff "provide[d] no good faith factual basis concerning by whom, in what way, or at what point these pieces of evidence were 'significantly altered'"), adopted sub nom. Estate of Jackson ex rel. Jackson v. Cty. of Suffolk, No. 12 Civ. 1455 (JFB) (AKT), 2014 WL 3513403 (E.D.N.Y. July 15, 2014); Scalera v. Electrograph Sys., Inc., 262 F.R.D. 162, 179 (E.D.N.Y. 2009) (declining to impose sanctions when duty to preserve emails had been "unquestionably" breached where movant "failed to demonstrate that any destroyed emails would have been favorable to her position").

Accordingly, Plaintiff has not shown that he would be sufficiently prejudiced at trial by the absence of the original notebook pages to warrant the requested sanctions. To grant the requested relief would convert a document management issue into an adverse inference of doubtful accuracy at trial.[2]

[2] The absence of sanctions at this stage would not preclude Plaintiff from raising the issue of spoliation as to the notebook pages at trial if permitted by the trial judge. See Klezmer ex rel. Desyatnik v. Buynak, 227 F.R.D. 43, 51-52 (E.D.N.Y. 2005) (declining to impose sanctions and "allow[ing] plaintiffs to argue to the jury that it should draw an adverse inference from the fact of the missing records"). A jury could be permitted to consider the differing accounts as to the accuracy of the photocopies and Defendants' explanation for the nonproduction of the original notebook in deciding whether to credit the legitimacy of the records Defendants produced.

III. CONCLUSION

For the reasons stated above, Plaintiff's motion for sanctions against Defendants for spoliation of evidence is denied.

Dated: Brooklyn, New York
March 7, 2018

Vera M. Scanlon

VERA M. SCANLON
United States Magistrate Judge