

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITIBANK, N.A.,

Plaintiff,

-against-

SUPER SAYIN' PUBLISHING, LLC,
COMPOUND TOURING, INC., 2424, LCC,
SHAFFER C. SMITH, KEVIN R. FOSTER, II,
FOSTER & FIRM, INC., and PROJECT
TWENTY ONE, LLC,

Defendants.

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DOC #:
DATE FILED: 3/1/17

14-Cv-5841 (SHS)

MEMORANDUM ORDER

SIDNEY H. STEIN, U.S. District Judge.

Citibank objects, pursuant to Federal Rule of Civil Procedure 72(a), to the Memorandum and Order of Magistrate Judge Kevin Nathaniel Fox issued January 17, 2017 denying its motion for sanctions for spoliation of evidence against defendants Super Sayin' Publishing, LLC, Compound Touring, Inc., 2424, LLC, and Shaffer C. Smith (collectively, the "Smith Defendants"). Judge Fox determined that Citibank had failed to establish it was prejudiced by any spoliation or that the Smith Defendants acted with intent to deprive Citibank of the information's use in litigation, as required before sanctions may be imposed under Federal Rule of Civil Procedure 37(e), or that the Smith Defendants acted in bad faith, as required to impose sanctions under the Court's inherent powers. He also concluded that Citibank's motion violated Local Civil Rule 7.1(a)(1) for the Southern District of New York by failing to specify (a) the applicable rule or statute

pursuant to which the motion was brought; and (b) the relief sought by the motion. [Doc. No. 194, at 2.] For the reasons below, Citibank's objection is overruled.

Following a timely objection to a magistrate judge's order, a district judge must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A). "[A] magistrate judge's resolution of a nondispositive matter should be afforded substantial deference and may be overturned only if found to have been an abuse of discretion." *McAllan v. Von Essen*, 517 F. Supp. 2d 672, 678 (S.D.N.Y. 2007) (citations omitted). A court abuses its discretion "when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision — though not necessarily the product of a legal error or a clearly erroneous factual finding — cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

Citibank urges that its failure to reference Rule 37(e) in its notice of motion is at most a technical violation of Local Rule 7.1 because the proposed order and memorandum of law that accompanied the notice made abundantly clear that Citibank sought sanctions pursuant to Rule 37(e). Similarly, Citibank urges that it substantially complied with Local Rule 7.1 by seeking in its notice "monetary and evidentiary sanctions for spoliation of evidence," Doc. No. 171 — even though Citibank's proposed order stated that "[a]n adverse inference *shall* be drawn," Doc. No. 171-1, at 1 (emphasis

added), whereas its memorandum of law maintained that “[t]he Court has discretion to instruct a jury that it *may* presume that the lost evidence was unfavorable to the Smith Defendants,” Doc. No. 173, at 3 (emphasis added). In its objection, Citibank stresses that courts regularly overlook “technical” violations of a local rule where the non-moving party was fairly apprised of the basis of the motion and suffered no prejudice. That the magistrate could have overlooked “technical” violations of the local rules does not mean that the magistrate abused its discretion by not overlooking those violations and requiring strict compliance. None of the numerous cases that Citibank cites are to the contrary.

In any event, the magistrate judge properly denied Citibank’s motion on substantive grounds. The current version of Rule 37(e), effective December 1, 2015, provides that a court may impose sanctions only “upon finding of prejudice to another party from loss of the information,” or “upon finding that the party acted with intent to deprive another party of the information’s use in the litigation.”¹ Citibank cited that version of Rule 37(e) in its supporting memorandum, yet it cited case law applying a prior version of Rule 37 that permitted the imposition of sanctions upon merely a showing

¹ Rule 37(e) provides in full: “If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.”

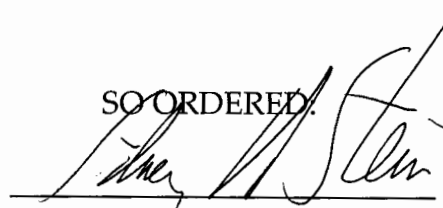
“that the records were destroyed with a culpable state of mind” and “that the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (citations omitted). Under that former Rule 37, “the ‘culpable state of mind’ factor [was] satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or negligently.” *Id.* (alterations and citations omitted). Apparently on the assumption that it need only show that the Smith Defendants acted knowingly or negligently and that the destroyed evidence was relevant, Citibank failed to argue that the Smith Defendants acted with the intent to deprive Citibank of the use of that evidence and failed to adequately establish prejudice from the spoliation, as required by the current Rule 37(e).

The Rule 37(e) amendments described above apply to cases commenced before December 1, 2015, such as this one, “insofar as just and practicable.” *CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 495-96 (S.D.N.Y. 2016) (quoting 2015 U.S. Order 0017). Citibank argues that the Order’s application of the current Rule 37(e) without analyzing whether that application would be just and practicable is clearly erroneous and contrary to law. Moreover, Citibank contends, application of the current Rule 37(e) is not just and practicable because (1) the parties briefed the motion under former Rule 37; (2) Citibank met its burden under former Rule 37; and (3) the conduct relevant to the motion began two years before current Rule 37(e) took effect. But Citibank made this motion more than

nine months after the new Rule 37(e) took effect and cited the current version of Rule 37(e) as the only rule to be applied. [Doc. 173, at 3 n.1] The Order's application of a rule in effect at the time of the motion and cited by Citibank as the operative rule cannot provide a sufficient basis for Citibank to now object that the Order was clearly erroneous or contrary to law. Accordingly, Citibank's objection is OVERRULED.

Dated: New York, New York
March 1, 2017

SO ORDERED.



Sidney H. Stein, U.S.D.J.