

4. An opinion from the U.S. District Court for the Southern District of New York denying a motion for spoliation sanctions based on the loss of police video of an alleged excessive force incident and finding that a public records request and civilian complaint regarding the alleged incident did not trigger a duty to preserve the video footage.

In *Chepilko v. Henry*, 18-CV-02195, 2024 WL 1203795 (S.D.N.Y. Mar. 21, 2024), U.S. Magistrate Judge Stewart D. Aaron analyzed when police camera footage should be preserved “in anticipation of litigation” for spoliation purposes under Rule 37(e).

In this action, Plaintiff alleged that Defendant Henry, a lieutenant with the New York Police Department (NYPD), used excessive force when he pushed Plaintiff to the other side of a street as Plaintiff attempted to request that Henry’s sergeant provide him with information about a rival ticket vendor. *Id.* at *7. For standing in the street during this incident, Plaintiff received a criminal summons for disorderly conduct in disrupting vehicular traffic, which was dismissed less than a week later. *Id.* at *8. A year later, Plaintiff brought several claims related to the incident, including excessive force, failure to intervene, and malicious prosecution. *Id.* at *12. The case proceeded ultimately to bench trial, and Judge Aaron resolved the discovery dispute in the same order as the decision on the merits.

The parties’ discovery dispute centered around the requirements for preservation of NYPD footage that would have captured the incident. The parties agreed that the NYPD footage at issue was destroyed as a result of the 30-day retention policy NYPD has for its camera footage, but disputed whether the destruction of that footage was appropriate. *Id.* at *3. Plaintiff filed a motion for sanctions under Rule 37(e) as a result of the deletion of this footage, arguing that Defendants had an obligation to preserve the footage when it was deleted. Defendants argued that because Plaintiff filed suit almost one year later, Defendants were not on notice of any obligation to preserve the footage from deletion 11 months prior. *Id.* at *2. Plaintiff countered that other factors triggered the obligation to preserve the footage. *Id.* at *5. Judge Aaron ultimately held that none of these factors triggered the obligation to preserve footage, denied the Rule 37(e) motion, and ultimately rendered judgment for Defendants on the merits.

Judge Aaron first noted that one of the “threshold” factors required for a successful Rule 37(e) sanctions motion was that “the ESI should have been preserved in anticipation of litigation.” *Id.* at *4. Judge Aaron rejected each of the factors that Plaintiff argued triggered an obligation to preserve the footage before the filing of

the complaint almost a year later. First, Judge Aaron rejected Plaintiff's argument that "the incident itself" should have put Defendants on notice of litigation sufficient to trigger obligations to preserve. *Id.* at *5. Judge Aaron refused to "endorse a bright line rule that a police officer should anticipate litigation every time he issues a summons" and noted that as Plaintiff was not injured and the force used was in any case not excessive, Defendants need not have "reasonably foreseen litigation" as a result. Similarly, Judge Aaron noted that a 911 call after the incident did not trigger a preservation obligation as "Plaintiff merely advised the 911 operator that Lt. Henry 'pushed [Plaintiff] several times.'" *Id.* at *5 n.4.

Judge Aaron also rejected Plaintiff's argument that Plaintiff's public records Freedom of Information Law requests for the footage of the relevant cameras, filed immediately after the incident, put Defendants on notice of a duty to preserve. *Id.* at *6. Judge Aaron held that merely initiating a public records request does not necessarily put a department on notice that the records are requested for the purpose of litigation and so does not trigger a preservation obligation.

Finally, Judge Aaron rejected the argument that a Plaintiff-prompted investigation by the New York City Civilian Complaint Review Board triggered any obligations to preserve. Plaintiff argued that the investigation, which resulted in a request for NYPD footage by the Civilian Complaint Review Board and an interview with the sergeant involved in the incident, triggered an obligation to preserve. *Id.* at *5. Judge Aaron rejected this argument, noting that the Civilian Complaint Review Board is separate from the NYPD and that the mere filing of a complaint with the Board, or an investigation thereof, does not necessarily trigger an obligation to preserve. *Id.* at *6.

Accordingly, Judge Aaron rejected Plaintiff's Rule 37(e) sanctions motion in its entirety.