

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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ANDREA LOBIONDO,

Plaintiffs,

- against -

I. MICHAEL LEITMAN, LENOX HILL HOSPITAL
and RICHARD YEU LEM

Defendants.

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Index
Number: 10037/04

Motion
Date: SEPT. 20, 2007

Motion
Cal. Number: 1
Motion Seq. No. 2

The following papers numbered 1 to 10 read on this motion in limine by plaintiff for an order admitting certain records into evidence and excluding others.

	<u>Papers Numbered</u>
Order to Show Cause -Affirmation-Exhibits.....	1-3
Affirmation of Service.....	4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff, in limine, for an order admitting certain records into evidence and excluding others is granted to the extent that all records of Elite Physical Therapy, Inc., both computer-generated and handwritten notes relating to the examination and treatment of plaintiff shall be excluded.

In this medical malpractice action, plaintiff alleges that she sustained injury to her left shoulder as a result of defendants' negligence in performing a left breast biopsy upon her on March 24, 2003. A trial of this action was commenced by this Court on February 26, 2007. Medical records of Elite Physical Therapy, Inc., a medical service provider that performed physical therapy on plaintiff in 2003, were delivered to this Court pursuant to subpoena and stipulated into evidence on said date. Two days later,

plaintiff's attorney noticed that the medical records provided by Elite were materially different from the records of Elite that counsel had obtained in 2003. Counsel apprised this Court of the discrepancy at a side-bar. When counsel for both sides were called into chambers for a conference, plaintiff's attorney showed copies of the records he had obtained from Elite in 2003 indicating that plaintiff had presented to Elite on March 12, 2003 for treatment of right shoulder pain and indicating no limitations in her left shoulder. There was also a subsequent progress note indicating bilateral shoulder pain on March 31, 2003.

In contrast, the Elite records subpoenaed for trial make no reference either to right shoulder pain on March 12, 2003 or to the March 31st office visit. The printed evaluation charts and narratives were different from the ones in the records plaintiff had obtained in 2003. Most significantly, they indicate left shoulder limitations. In addition, defendants' attorney noted that the records that he had obtained from Elite in 2005 were different from both the records that plaintiff had obtained from it in 2003 and the subpoenaed records before the Court.

Plaintiff's counsel had assumed that the subpoenaed records were the same as the records he had obtained in 2003. It is his opinion that the time-line presented by his version of the records supports plaintiff's claim that her left shoulder was injured during the biopsy on March 24, 2003, since it was documented that on March 12 she had complained only of right shoulder pain, but that on March 31, one week after her biopsy, she presented with pain to both shoulders. In contrast, the version furnished to the Court pursuant to subpoena indicates that plaintiff had a left shoulder problem on March 12, 2003, before the biopsy.

Since the version of Elite's records subpoenaed for trial was damaging to plaintiff's case but had already been admitted into evidence and, therefore, plaintiff, if she were to proceed, would be placed in the position of having to impeach her own physical therapist's records, this Court, upon application of plaintiff's counsel, granted a mistrial.

This Court also granted the parties leave to conduct a deposition of Elite so as to ascertain the reason for the apparent discrepancies among the three versions of Elite's records and so that it could be determined which version, if any, should be admitted into evidence at the new trial. The deposition of Elite was conducted by the attorneys for plaintiff and defendants on May 8, 2007.

Plaintiff now moves, in limine, for an order that her version

of the records obtained in 2003 be admitted into evidence and that the subpoenaed version and defendant's version be excluded.

At his deposition, Fotis Tsolis, owner of Elite, could not explain the discrepancies other than to suggest that they might have been due to a computer glitch.

With respect to how the computer records were generated, Tsolis testified that he jots down some notes and "right there" enters the information, depending on time constraints. He testified that he input the information himself in 2003 (transcript p. 10). The notes were input by Tsolis, except for prescriptions, which a secretary would input (pp. 10-11). He also testified that his computers crashed two or three times from 2003 to 2007 and remembers that a technician from Dell came and erased whatever was on the computer, as there was a virus (p. 14). When asked what effect the erasure had on the information in the computer, he initially said he did not think it had any effect, but then said he did not know (p. 14). He also said that there were updates to the computer system with new formats and templates, and that he "changed some of the wording" in patients' reports (p. 15). When asked why there are three separate and distinct sets of computer records, he said, *inter alia*, "The only thing I can think of is that someone - - whenever either of the formats changed as it went along . . . I assume it was a different format and maybe the computer system retrieved different information" (P. 53).

The attorneys for the parties failed to establish at the deposition whether any versions of Elite's record were maintained in the regular course of business. Plaintiff's counsel failed to ascertain whether the computer records that plaintiff had obtained in 2003 were maintained in the regular course of Elite's business. Counsel merely asked Tsolis if the information contained in plaintiff's set of computer records was in a format that was maintained in the regular course of business. Tsolis responded, "It was definitely a format that I had used, it seems very familiar at the time" (p. 48). Therefore, this information elicited by plaintiff's counsel and Tsolis' response were not illuminating in the least on the question of whether plaintiff's set of computer records had been maintained in the regular course of Elite's business.

When asked who entered the information into the computer with respect to each of the three versions, Tsolis, in contrast to his earlier testimony, said that it was "most likely the secretary" (pp. 53-54). However, he did not know which secretary inputted the information and did not even know what secretaries were working for him in 2003. He said, "I don't know who was there or what shift or

who printed it or who mailed them, I don't recall" (p. 54).

When asked who generated the Court's version of the records pursuant to the subpoena, he answered, "I don't know offhand who did it . . ." (P. 56). Again, when asked if he could explain why the Court's set of records is different from plaintiff's and defendant's sets, he answered in the negative and speculated that a student who had worked for him as an aide or helper who "cleaned rooms or did what was needed" may have inputted the information (pp. 71-75).

Pursuant to CPLR 4518, a written record may be admissible under the business record exception to hearsay, if it was made in the regular course of business, if it was the regular course of business to make it and if it was made contemporaneously or reasonably contemporaneously with the event that was documented.

Assuming, arguendo, that all three versions of the computer records were made in the regular course of Elite's business and that it was the regular course of Elite's business to generate them, the record on this motion fails to establish that they were made contemporaneously or reasonably contemporaneously with Tsohis' examinations of plaintiff. Since Tsohis was unable to account for the significant discrepancies among the three versions or account for the existence of three separate versions and had no knowledge as to who inputted, generated or printed the information in those record or when they were inputted, the parties have failed to establish that any of the computer generated records were created contemporaneously with or within a reasonable time after Tsohis examined plaintiff.

The rationale underlying the business record exception to the hearsay rule is that business records are generally trustworthy and reliable (see Alexander, Practice Commentaries, McKinney's Cons Laws of NYC, Book 7B, CPLR C4518:1; see generally Pencom Systems, Inc. V. Shapiro, 237 AD 2d 144 [1st Dept 1997]). Thus, the requirements under CPLR 4518 for admission of a hearsay business record are for the purpose of making sure that the document sought to be admitted bears sufficient indicia of reliability.

Moreover, CPLR 4518(a) also provides, "An electronic record . . . used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record."

Tsolis' inability to account for the contradictory and materially different versions of the same purported records, other than to surmise that the existence of three sets containing markedly different information may be attributable to a "computer glitch" caused by a virus, his inability to identify who actually inputted the information into the computer, his tacit admission that the information may have been inaccurately inputted by an inexperienced student who had worked for him cleaning rooms or doing odd jobs, and that the information may have been changed subsequently to its original entry, leads this Court to conclude that none of the computer records of any of the three versions are reliable as business records and, therefore, none of the computer records of Elite, either those furnished to the Court by subpoena, those obtained by plaintiff's counsel in 2003 or those obtained by defendant's counsel in 2005 are admissible.

With respect to handwritten notes that Tsolis wrote, he could not state exactly when he wrote the note marked as exhibit 12 at the deposition and could not definitively identify to which visit this note pertained. Likewise, the moving papers fail to establish that the other handwritten notes of Tsolis, marked as exhibits, 13, 14 and 15, were written contemporaneously or reasonably close in time to any office visit. Therefore, the handwritten notes marked as exhibits 12 through 15 would be inadmissible.

This Court does not reach at this time the issue of whether the prescriptions written by other medical providers or the medical history form filled in by plaintiff are admissible.

Accordingly, the motion in limine is granted solely to the extent hereinabove provided. The attorneys for the parties are directed to appear for jury selection in this Part, Courtroom 505, on October 10, 2007 at 9:30 A.M. Neither the date nor the time of the appearance shall be changed without the express permission of the Court.

Dated: September 25, 2007

KEVIN J. KERRIGAN, J.S.C.