At an IAS Term, Part 14 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of April 2003

P R E S E N T :

HON. THEODORE JONES,
Justice.

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ROSARIO LAZZARO, et al.,

Index No. 28170/95

Plaintiffs,

- against -

MJM INDUSTRIES, INC., et al.,

Defendants.

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GELCO BUILDERS, INC.,

Third-party Plaintiff,

- against -

JBS GROUP CORP.,

Third-Party Defendant.

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The following papers number 1 to **4** read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	**1-2**
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	**4**
_____ (Affirmations)	
Other Papers	

Upon the foregoing papers, defendant Reuben Hoppenstein, M.D. ("Dr. Hoppenstein") moves for an order (1) compelling defendant Hospital For Joint Diseases Orthopedic Institute ("HJDOI" or "the hospital") to produce certain x-ray films taken of the plaintiff at its facilities, or in the alternative, (2) directing HJDOI to indemnify Dr. Hoppenstein for any judgment entered against him.

Factual Background

In this medical malpractice action, plaintiff Rosario Lazzaro alleges that Dr. Hoppenstein negligently performed surgery on his cervical spine on May 28, 1996, which took place at HJDOI. Dr. Hoppenstein claims that, for over a year, he has been attempting to obtain certain pre-operative and post-operative films of the plaintiff, dated 5/22/96, 5/31/96 and 6/6/96, which were taken by the radiology department at HJDOI (***see*** Reddington Affirmation October 14, 2002, Exhibit **A).** In that regard, Dr. Hoppenstein notes that this court has issued three separate orders (dated 1/23/02, 4/24/02 and 9/4/02) pursuant to which HJDOI was directed to provide the foregoing x-ray films.

On or about May 6, 2002, the attorneys for HJDOI forwarded a letter to Dr. Hoppenstein's attorney stating that copies of the intra-operative films dated 5/28/96, and the other films dated 5/22/96, 5/31/96 and 6/6/96 would be turned over upon receipt of a check in the sum of $378.28 covering the reproduction costs. On June 11, 2002, Dr. Hoppenstein's counsel responded by sending a check for the stated amount. In response, the hospital's attorneys sent Dr. Hoppenstein's counsel a letter, dated September 11, 2002, enclosing only

the intra-operative films dated 5/28/96, and stating that HJDOI was not in possession of the films dated 5/22/96, 5/31/96, and 6/6/96. Dr. Hoppenstein now seeks an order compelling HJDOI to produce the requested films, or, in the alternative, indemnification from HJDOI on the ground that it has spoliated evidence that is crucial to his defense of this action. In the event HJDOI is unable to produce the requested films, Dr. Hoppenstein contends that indemnification is the only appropriate sanction because HJDOI is responsible for destroying all of the evidence by means of which he might have defended himself against plaintiffs allegations. Dr. Hoppenstein further contends that the missing films are crucial because they were taken shortly before and shortly after plaintiffs surgery.

In opposition, HJDOI maintains that it has produced all of the x-ray films that were taken of plaintiff during the surgical procedure, and that the intra-operative films dated May 28, 1996 were the only films that could be located. HJDOI contends there is no evidence that it ever maintained the other requested films or that it ever had a duty to do so. In fact, it contends that it was custom and practice for all private attending physicians, such as Dr. Hoppenstein, to maintain diagnostic films in a central filing room located in the Rutherford Building, which is where the private attending offices are located. Further, HJDOI asserts that Dr. Hoppenstein's arguments in support of indemnification are without merit since there is no proof that the films remained in its possession, or that they were in fact destroyed rather than lost. In particular, with respect Dr. Hoppenstein's allegation that a certain film, dated

May 31, 1996, is missing, HJDOI claims that there is no evidence in the plaintiffs medical chart that this film was ever taken.

Additionally, with respect to the chest x-ray dated June 6, 1996, a report of which is contained in plaintiff's medical records, HJDOI contends that it was Dr. Hopperstein's custom and practice to maintain these films in his own private office. Since the intra-operative x-rays as well as the actual report of the June 6, 1996 x-ray film have been produced, HJDOI contends that there is no prejudice to Dr. Hoppenstein's defense in this action. Further, HJDOI argues that Dr. Hoppenstein has failed to show how the lack of post-operative films prejudices his ability to defend himself against plaintiff s allegations, or why he believes said films will help rather than hinder his defense of this action. HJDOI therefore argues that Dr. Hoppenstein is not entitled to indemnification because he has failed to show that the films in question are in fact crucial to his defense.

In response, Dr. Hoppenstein submits an affidavit wherein he states that he is particularly concerned about HJDOI's failure to locate the cervical spine films taken on May 22, 1996, six days before the date of plaintiff's surgery. He contends that recovery of this film is necessary because it shows the condition of plaintiffs cervical spine prior to the surgery. Further, Dr. Hoppenstein contends that it was custom and practice that the films be retained at HJDOI and placed in its central filing room.

Discussion

CPLR 3126 provides that when a party "refuses to obey an order for disclosure or

willfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regard to the failure or refusal as are just." ***(see*** CPLR *3* 126; ***Di Domenico*** v ***C & S Aeromatik Supp., Inc.,*** 252 AD2d 41, 48). In order to invoke the drastic remedy of preclusion, the court must determine that the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious ***(see Vatel*** v ***City*** *of New* ***York,*** 208 AD2d 524,525). "When a party alters, loses or destroys key evidence before it can be examined by the other party's expert" it warrants that sanctions be imposed on the spoliator of the evidence ***(Squitieri*** v ***City of New York,*** 248 AD2d 201, 202). A spoliator of key physical evidence can be punished by the court in a number of ways, including striking its pleadings or precluding its testimony at trial. A sanction can be imposed even if the destruction of key evidence occurred as a result of negligence, rather than willful conduct and even if the evidence was destroyed before the spoliator became a party to the lawsuit ***(see Di*** *Domenico*, 252 AD2d at 53).

Here, while HJDOI may have engaged in dilatory tactics in responding to Dr. Hoppenstein's demands for certain pre-operative films, the court does not find that its conduct was willful, contumacious, or in bad faith ***(see*** *CPLR* ***3126; cf., Birch Hill Farm v Reed,*** 272 AD2d 282). Moreover, Dr. Hoppenstein has not demonstrated that the

loss/destruction of the subject films will fatally compromise his defense *(compare Kirkland* v *New York City Hous. Auth.,* 236 AD2d 170, 176) or leave him without the means to defend plaintiffs action *(compare DiDomenico*, 252 AD2d at 53). Dr. Hoppenstein's mere conclusory assertion that the missing pre-operative films were significant because they showed plaintiffs cervical spine prior to the surgery is insufficient to establish that the subject films were in fact crucial to his defense against plaintiffs action or otherwise contained any evidence helpful to his defense *(see Gomez* v *Metro Terms. Corp.* 279 AD2d *550; Gallo* v *Bay Ridge Lincoln Mercury,* 262 AD2d 450, 451; *cf., DiDomenico,* 252 AD2d 41). Under these circumstances, the court finds that HJDOI's alleged destruction and/or loss of the films presents no insurmountable burden to Dr. Hoppenstein.

However, while this court cannot order a party to produce evidence it does not have *(see Castillo v Henry Schein, Inc.,* 259 AD2d 651; *Wilensky* v *JRB Mktg. & Opinion Research,* 161 AD2d 761), **the court *finds that*** Dr. **Hoppenstein is *entitled to*** a **more complete** explanation as to why HJDOI is unable to locate these seemingly important x-ray films. Thus, the court concludes that Dr. Hoppenstein is entitled to a detailed statement, made under oath, by an employee or officer with direct knowledge of the facts concerning the past and present status of the relevant films, including what efforts, if any, were made to preserve

them, whsther such films were routinely destroyed, or whether a search had been conducted in every location where the films were likely to be found *(see, Jackson* v *City of New York,* 185 AD2d 768, 770; *see also, Wilensky v JRB Marketing & Opinion Research, Inc.,* 161 AD2d 761, 763; *Vieyra* v *Briggs & Stratton Corp.,*166 AD2d 645,647).

Moreover, the court finds the manner in which HJDOI responded to Dr. Hoppenstein's demands, as well as this court's discovery orders, was improper in that it engaged in dilatory tactics resulting in unnecessary delays. There is no indication that HJDOI made any efforts to obtain the subject films in response to Dr. Hoppenstein's initial request, or at any time prior to this court's April **24,** 2002 order. In light of the repeated failure of HJDOI to provide said films, this court has been faced with needless motion practice. The court therefore finds the circumstances fully warrant the imposition of a $2,000 penalty pursuant to CPLR 3126 as fair recompense for time spent by Dr. Hoppenstein's counsel in attempts to obtain compliance with this court's discovery orders ***(see*** *Taub* v *Wolwick,* 168 AD2d 492, *see also,* McKinney's Commentary C3126:8 to CPLR 3126).

Conclusion

In sum, Dr. Hoppenstein's motion is granted to the extent that HJDOI is hereby ordered to either produce the subject pre-operative films within 30 days of the date of this

order to the extent said films are within the its "possession, control or custody", or an affidavit, made under oath, by an employee or officer with direct knowledge of the facts concerning the past and present status of the relevant films, including what efforts, if any, were made to preserve them, whether such films were routinely destroyed, or whether a search had been conducted in every location where the films were likely to be found.

It is further ordered that Dr. Hoppenstein shall be reimbursed for attorneys' fees incurred in making the instant motion in the total amount of $2,000 to be paid by HJDOI, said sum to be paid within thirty **(30)** days of the date of service of this order with notice of entry. That branch of Dr. Hoppenstein's motion seeking indemnity fro HJDOI is denied.

The foregoing constitutes the decision and order of this court.