

Maini v Prendergast

2003 NY Slip Op 30004(U)

December 18, 2003

Supreme Court, New York County

Docket Number: 7_30011/9533

Judge: Sheila Abdus-Salaam

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. SHEILA ABDUS-SALAAM PART 13
Justice

Daniel Maini and Mary Maini

- v -

Theresa Prendergast, M.D., et al..

INDEX NO. 119533199

MOTION DATE 4/30/03*

MOTION SEQ. NO. 02

MOTION CAL. NO. 94

* Fully submitted August 22, 2003

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion 1 Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
SCANNED
JAN 05 2004

Cross-Motion: Yes No

Upon the foregoing papers it is ordered that this motion by defendants for an order granting them summary judgment dismissing the complaint is denied and the cross-motion by plaintiffs for an order pursuant to CPLR 3126 striking defendants'

J.S.C. answers is granted to the extent that the answer of defendant Long Island Jewish Hospital Medical Center ("LIJMC") is stricken.

In this medical malpractice action, plaintiff Daniel Maini claims that he sustained bilateral hearing loss due to the contraindicated and unmonitored administration of the antibiotic Gentamicin during his January-February 1997 admission to the defendant hospital. The record shows that plaintiff was admitted to LIJMC on January 28, 1997 under the surgical service of defendant Theresa Prendergast, who initially diagnosed a perforated appendix. Her plan was to commence antibiotic therapy and to follow the patient closely. By January 31, 1997, plaintiff was improving, and Dr. Prendergast's impression was that he had a resolving periappendiceal abscess. On February 16, 1997 plaintiff was discharged. On March 24, 1997, he was readmitted to LIJMC for a transanal excision of a rectal lesion with ileocoloc resection, which was performed by Dr. Prendergast.

JUSTICE
DATED:

On March 25, 1997, Mr. Maini complained of decreased hearing ability and a neurological consultation found that he had an acute hearing loss.

Plaintiffs claim that the administration of Gentamicin to Mr. Maini during his first hospital admission between January 28, 1997 and February 16, 1997 caused him to sustain a permanent bilateral hearing loss. According to plaintiffs' experts, the unmonitored administration of Gentamicin can lead to hearing loss, especially in the elderly with decreased renal function (Mr. Maini was in his mid-seventies at the time of his admission and apparently had decreased renal function). Plaintiffs claim that Mr. Maini should have been monitored with blood tests no later than **48** hours after the initial Gentamicin dose, but that a Gentamicin level was not taken on Mr. Maini until he had been on that medication for **10** days. Plaintiffs' expert states that without blood tests, one cannot know if the dosage is therapeutic or toxic. He also states that the onset of hearing loss can occur several weeks after Gentamicin has been stopped.

In support of the motion for summary judgment, defendants have submitted the affidavits of Kenneth Schneider, M.D., a board certified otolaryngologist, and Fred M. Kimmelstiel, M.D., a board certified general surgeon. In their affidavits, which are almost identical, these physicians state that Mr. Maini only received one 80 milligram dose of Gentamicin on January **28**, 1997, and that "[t]he testimony reveals that while it was the intention of Dr. Prendergast to order Gentamicin to be given to Daniel Maini three times a day along with his other antibiotic medications- Ampicillin and Flagyl- the order for Gentamicin was written by the resident to be given as a STAT dose and therefore never dispensed by the Nursing staff but for the one time Stat 80 milligram loading dose on January **28**, 1997." (Schneider affidavit, ¶ 6). In that regard, Dr. Prendergast testified at her deposition that upon plaintiff's January **28th** admission, she had ordered three antibiotics (Ampicillin, Flagyl and Gentamicin), but that the resident, Dr. Font-Rodriguez had only written a single dose for Gentamicin and had not written subsequent doses. She further acknowledged that on January 31, 1997, a different resident, Dr. Kahn, had written in the progress notes that Mr. Maini was on Gentamicin as well as Ampicillin and Flagyl. Dr. Prendergast also signed that January 31, 1997 progress note. Nonetheless, it was her testimony that plaintiff was not on Gentamicin on

that day.

Both of defendants' experts note that the Gentamicin level blood test ordered on February 8, 1997 measured 0.2, which they describe as a "subtherapeutic" level, which could not have resulted in a hearing **loss**. Regarding this 0.2 level, plaintiffs' expert, Thomas B. Cooper, an analytical pharmacologist and Professor of Clinical Psychopharmacology, opines that "[t]he statement that a person given a single dose of 80mg Gentamicin had a plasma level of 0.2ug/ml (1) eleven (11) days after the dosage is not consistent with the known elimination pattern of Gentamicin", and that "[el]even 11 days after a single dose of Gentamicin, the plasma levels essentially should be zero." (Cooper affidavit, ¶ 6, ¶ 7) Thus, this expert concludes that plaintiff received a dose or doses of Gentamicin later than January 28, 1997, and prior to the February 8, 1997 level (¶ 8).

The experts' affidavits and the record frame triable issues as to whether plaintiff received more than one dose of Gentamicin, and whether any failure of defendants to properly monitor the dosage of Gentamicin caused Mr. Maini to sustain a bilateral hearing **loss**. While the hospital's pharmacy billing records and the Medication Record indicate that Mr. Maini received only one dosage of Gentamicin on January 28, 1997, as noted, Dr. Prendergast has testified that she ordered that plaintiff take three antibiotics, including Gentamicin, from January 28, 1997 on an ongoing basis, and the progress note for January 31, 1997 signed by the resident Dr. Kahn and Dr. Prendergast indicates that plaintiff was taking Gentamicin as of that date.

THE CROSS-MOTION

Plaintiff has moved for an order striking defendants' answers pursuant to CPLR 3126 for failure to produce copies of the pharmacy billing records, the rules and regulations for the administration of Gentamicin as of January 1997, and Dr. Prendergast's employment records from defendant Gordon, Held and Prendergast, as was required by this court's prior orders. As noted, there is a dispute between the parties as to whether Mr. Maini received more than one dose of Gentamicin, and there is conflicting evidence in the record. Thus, the pharmacy records are a key piece of evidence on this issue, and defendant LIJMC's failure to produce these records has prejudiced plaintiffs' ability to prove their case.

Defendant was ordered to produce the pharmacy records by orders dated January 18, 2001, January 31, 2002¹ and August 8, 2002. Defendant did not produce those records. In September 2002, over one and one-half years after defendant was first ordered to produce the pharmacy records, defendant provided plaintiffs with an affidavit by James K. Abberton, Director of Pharmaceutical Services, stating that he had performed a search for the records, hardcopy or computerized, and that no pharmacy records exist. Mr. Abberton instead provided a copy of the pharmacy's billing records which indicated that Mr. Maini had only been billed for one dosage of Gentamicin. In November 2002 at his deposition, Mr. Abberton testified that he first learned of this lawsuit and of the request for plaintiff's pharmacy records in September 2002.

Thus, although this court first ordered defendant to produce these records in January 2001, Mr. Abberton testified that he had not been informed of this order until September 2002! Subsequent to the deposition, in February 2003, defendant provided plaintiffs with a copy of the inventory index for the pharmacy provided by Safesite, National Business Records Management, dated March 12, 1997, which purportedly indicates that the pharmacy records for the hospital for the month of January 1997 were destroyed in February 2002. In that the document is dated March 12, 1997 and it lists a February 2002 date for destruction of records, I surmise that this inventory index is a list of the future scheduled dates for destruction of documents, as opposed to a list that was made after the date that the documents were destroyed.

Significantly, defendant has not offered any explanation or excuse for its failure to comply with the court orders directing production of the pharmacy records. Given that two of these orders pre-dated the destruction of the records that is said to have occurred in February 2002, and in light of Mr. Abberton's

¹Additionally, although defendant was ordered to produce the rules and regulations for the administration of Gentamicin by order dated January 31, 2002, those rules and regulations have never been produced. Defendant does not even address this failure to produce in its opposition to plaintiff's cross-motion, but in a letter written by plaintiffs' counsel to defense counsel dated August 22, 2002, plaintiffs' counsel refers to defense counsel's March 26, 2002 letter indicating that LIJMC no longer possesses those rules and regulations.

testimony that he first became aware of the request for the records in September 2002, it is evident that there was absolutely no effort on the part of defendant to comply with the orders. If defendant had timely complied, the pharmacy records could have been produced well before they were allegedly destroyed in February 2002. Rather than offer an explanation for its failure to comply with this court's orders directing them to produce key evidence in this case, defendant takes the position that it has done all it can do to comply by virtue of supplying the affidavit of Mr. Abberton, producing him for deposition, and providing plaintiffs with a copy of the billing records for the pharmacy. However, defendant cannot escape the consequences of ignoring court orders and of destroying key evidence by its belated and inadequate attempt at partial compliance. Here, as in DiDomenico v. C & S Aeromatic Supplies, Inc., 252 AD2d 41, "[b]ecause [defendant] acted with knowledge, with persistence, without explanation or excuse, and in violation of two court orders, its behavior was clearly wilful." (Id., p. 43).

"It is well settled that when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading (citations omitted)." (Baglio v. St. John's Queen's Hospital, 303 AD2d 341) . Just as in Baglio, id., where the missing fetal monitoring strips would give "fairly conclusive evidence as to the presence or absence of fetal distress", in this case, given the conflicting evidence as to whether Mr. Maini received more than one dose of Gentamicin, the pharmacy records would have given fairly conclusive evidence on this issue, and their absence deprives plaintiffs of an important piece of evidence necessary to prove their claim.

In Sage Realty Corp.v. Proskauer Rose LLP (275 AD2d 11), the First Department held that dismissal of a complaint was an appropriate sanction where the plaintiff had deliberately destroyed evidence that had been demanded in discovery. In this case, defendant destroyed evidence that had not only been continually demanded in discovery, but had been ordered produced by this court. Under these circumstances, and the total absence of any explanation for this conduct, the striking of defendant's answer is warranted. Accordingly, the answer of defendant LIJMC is hereby stricken. Judgment in favor of plaintiffs is granted on

the issue of liability.

With respect to the personnel records of Dr. Prendergast, defendant Gordon and Held was directed to respond to plaintiffs' outstanding demand for these records by order dated February 13, 2003. Defendant's response, as set forth in these motion papers, is that it need not produce these records because the records are not discoverable. Defendant cites two cases in support of its position, Kiefer v. John T. Mather Mem. Hospital (93AD2d 856) and Carroll v. Nunez (137AD2d 911). These cases are inapplicable because they concern hospital files and the privilege afforded by Education Law section 6527 (3), whereas plaintiffs in this case seek the employment records from Gordon and Held, not the hospital. And, even in the context of discovery of hospital personnel records, material such as job performance evaluations are not protected from disclosure unless the defendant can show that they are privileged pursuant to the Education Law (see Orner v. Mount Sinai Hospital, 305 AD2d 307, 310). Defendant has not made any showing that the sought discovery is protected by any privilege.

As was noted by the First Department in Meder v. Miller (173 AD2d 392), a case cited by plaintiffs, "*** personnel records must be disclosed, at least to the extent of requiring an in camera inspection by the court, whenever there is a reasonable possibility that these files contain relevant and material documents." Plaintiffs contend that Dr. Prendergast's employment records may contain information about her treatment of Mr. Maini being the cause of her termination or reason for departure from Gordon and Held. Defendant does not argue here that the records are not relevant, only that they are not discoverable. As mentioned, the case law indicates that the records are discoverable. Accordingly, defendant is directed to produce the records for an in camera inspection by January 8, 2004 by delivering them to the Part 13 courtroom.

This constitutes the order of the court.

Dated: 12/18/03

SA-S

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION