

**Arons v Jutkowitz**

2005 NY Slip Op 30130(U)

July 6, 2005

Supreme Court, Richmond County

Docket Number: 0013810/1998

Judge: Thomas P. Aliotta

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# SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF RICHMOND

Index No.: 13810/1998

Motion Calendar No.:

Motion Sequence No.:

JCP8

MANUEL ARONS, Executor of the Estate of PHYLLIS ARONS, and MANUEL ARONS, Individually,

*Petitioner(s)/Plaintiff(s)*

## DECISION/ORDER

*against*

Present: **HON. THOMAS P. ALIOTTA**  
Justice, Supreme Court

**ROBERT JUTKOWITZ and ROBERT FULOP, WILLIAM GAEL, STATEN ISLAND UNIVERSITY HOSPITAL "JOHN DOE" MITNICK (#7786), FIRST NAME FICTITIOUS, TRUE FIRST NAME UNKNOWN, "RICHARD ROE" CARLSTROM (#7786), first name fictitious, true first name unknown, and ST. VINCENT'S MEDICAL CENTER OF RICHMOND,**

*Respondent(s)/Defendant(s)*

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this

**ORDER TO SHOW CAUSE DIRECTING PROVISION OF AUTHORIZATIONS, ETC. SUBMITTED APRIL 25, 2005.**

Papers	Numbered
	<b>Notice of Motion and Affidavits Annexed</b>
	.....
	<b>Order to Show Cause and Affidavits Annexed.</b>
	.....
	1&2 <b>Answering Affidavits. (Affirmation)</b>
	.....
	.....3, 8

<b>Reply Affidavit (Affirmation)</b>	.....7, 9
<b>Pleadings - Exhibits</b>	.....
<b>Stipulations - Minutes</b>	.....
<b>Filed Papers</b>	
..AFFIRMATION IN SUPPORT.....	.....4
SUPPLEMENTAL AFFIRM. IN SUPPORT.....	5
NOTICE OF CROSS-MOTION.....	.....6

**Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:**

**CONTINUED ON NEXT PAGE**

Defendant, Robert Fulop, M.D., moves by Order to Show Cause for an Order pursuant to 45 C.F.R. § 164.512(e)(1)(i) and 45 C.F.R. §164.508 directing plaintiff to provide authorizations permitting defense counsel to speak with certain physicians who rendered care to the plaintiff relating to claims being made in this action, if the physicians voluntarily agree to such interviews.

Plaintiffs oppose said motion.

Defendants, Staten Island University Hospital, William Gael, M.D., Lori Mitnick Weinberg and Charles Carlstrom support defendant's motion and submit a Supplemental Affirmation in Support in order to advise the Court of a new recent decision on point.

CPLR 4504 codifies the physician/patient confidentiality privilege which prohibits health

care providers from releasing confidential information about their patients. However, by filing a medical malpractice claim, the patient puts his or her medical condition at issue and waives such privilege (see, *Koump v Smith*, 25 NY2d 287; see also, *Zimmerman v Jamaica Hospital*, 143 AD2d 86). Defendants have been permitted to interview a party's treating physicians, but only after the note of issue has been filed (*Levande v Dines*, 153 AD2d 671). Recent court decisions have determined that HIPAA regulations require authorizations from the plaintiff in order for the defendants to conduct post-discovery interviews with treating physicians (see, *Steele v Clifton Springs Hospital and Clinic*, 2005 NY SlipOP 25015; *O'Neil v Klass*, 11/19/04 NYLJ 17 (Col. 1); *Keshecki v St. Vincent's Medical Center*, 5 Misc.3d 539).

Applying these standards to the case at bar, this Court grants defendants' motion to the extent that plaintiffs are directed to provide authorizations to defense counsel within seven (7) days of the date of this Order. Defendants are directed to serve such authorizations in compliance with the following: the authorization must, on its face state in **BOLD** letters that the purpose of the interview is to assist the defendants in defense of a lawsuit and it is not at the request of the plaintiff. The authorization must contain the name and address of the person to whom the health care provider may give an interview if he or she wishes and must identify the persons or entities the interviewer is representing and must conform in all respects to 45 C.F.R. § 164.508(c). The authorizations may **not** be combined with a subpoena and there must be a separate authorization for each interview.

Within 72 hours after the interview, the defendant must provide the plaintiff with any and all written statements, materials or notations and any document obtained from the interviewed health care provider, as well as copies of any memoranda, notes, audio or video recordings of any oral

statements made by the health care provider. The defendant's counsel need not disclose their conclusions, impressions or analysis of any of the statements.

Plaintiff cross-moves for an Order striking the Answer of the defendant Fulop on account of his negligent loss or intentional destruction of key evidence, to wit: the deceased plaintiff's medical records. Alternatively, plaintiff seeks the lesser sanction of preclusion. In attempting to get copies of defendant Fulop's records regarding the deceased plaintiff, Phyllis Arons, plaintiffs state that they were notified on August 11, 1998 that said records were unable to be located. This was a full year following plaintiffs' initial discovery request. In his Examination Before Trial, defendant Fulop testified that he believed the records to have been destroyed by a contractor, along with other files, during renovation of his office. Plaintiff argues that the defendant's testimony was implausible and that defendant Fulop deliberately withheld plaintiff's medical records. Because plaintiffs are severely prejudiced, they urge the Court to strike defendant's Fulop's Answer or, in the alternative, preclude him from testifying.

Plaintiff also points out that defendant's behavior is evidence of professional misconduct in failing to maintain a patient's records for at least six (6) years [Education Law, §6530(32)].

Defense, by its opposition, argues, *inter alia*, that a spoliation motion is a dispositive motion and, as such, must have been made within 60 days following the filing of the Note of Issue in Richmond County, thus urging the Court to deny the motion. Defendant further argues that in the original summary judgment motion herein, plaintiff relied upon the concept of fraudulent concealment rather than spoliation. At that time, plaintiffs' counsel revealed that they had been able to reconstruct much of plaintiff's medical file through documents obtained from third parties. Defendant also states that the loss of the file was not willful and that Dr. Fulop did not know about plaintiff's litigation when the files were lost. Defendant claims that the lost medical file is, therefore, not fatal to plaintiff's case due to its reconstruction and that defendant Fulop lost the file before he had notice of the litigation.

In the striking of a pleading, the prejudice to the wronged party must be severe, and the plaintiff must prove that he is severely prejudiced by reason of the missing records, and that the loss fatally compromises his claim (*Kirschen v Marino*, WL 203-8952). CPLR 3126 enables the Court to strike pleadings or parts thereof when a party fails to disclose information which the Court finds ought to be disclosed pursuant to notice duly served. Applicable New York State case law provides that an action will be dismissed as a sanction for spoliation where a party, intentionally or negligently, disposes of crucial items of evidence before the adversary has the opportunity to inspect

them (see, *Kirkland v New York City Housing Authority*, 236 AD2d 170; see also, *Squitieri v City of New York*, 248 AD2d 201).

In the instant case, this Court determines that plaintiffs' cross-motion must be denied. Plaintiffs' ability to reconstruct the file sufficiently to prove a *prima facie* case of malpractice against this defendant dispels the notion that the missing evidence is fatal to his claim. Further, the plaintiff's decedent's demise occurred during the renovation of the defendant doctor's office. The evidence presented is insufficient to determine whether the records were already destroyed at that point in time or, if not, whether the doctor was then on notice that the evidence might be needed for future litigation (see, *Kirkland, supra*).

Accordingly, the sanction of striking defendant Fulop's Answer or precluding testimony would be inappropriate herein.

The foregoing constitutes the Decision and Order of the Court.

Law Clerk to notify both sides of this Decision/Order.

**Dated:**

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**THOMAS P. ALIOTTA**  
**J.S.C.**

ASN by \_\_\_\_\_ on \_\_\_\_\_

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