

**Solero v Shahem**

2007 NY Slip Op 31617(U)

June 4, 2007

Supreme Court, Kings County

Docket Number: 0029901/2004

Judge: Gerard H. Rosenberg

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At an I.A.S. Term, Part MMTRP 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 4<sup>th</sup> day of June, 2007.

P R E S E N T:

HON. GERARD R. ROSENBERG

Justice.

-----X  
MARISOL SOLERO, INDIVIDUALLY, AND AS  
ADMINISTRATRIX OF THE ESTATE OF KRISTINE  
ELIZABETH SOLERO AND JOSEPH SOLERO,  
Plaintiff,

Index No. 29901/04

- against -

Motion Seq. No. 004, 005, 006

SAM SHAHEM, M.D., et al.,

Defendants.

-----X  
The following papers numbered 1 to 10 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-3, 4-5, 6-7</u>
Opposing Affidavits (Affirmations)_____	<u>8</u>
Reply Affidavits (Affirmations)_____	<u>9, 10</u>
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, plaintiffs Marisol Solero, individually, and as Administratrix of the Estate of Kristine Elizabeth Solero and Joseph Solero (plaintiffs) move, pursuant to CPLR 3126, for an order striking defendants Lutheran Medical Center (LMC), Maimonides Medical Center (MMC), and Shantanu Rastogi, M.D.'s answers and precluding these defendants from testifying at trial for spoliation of dispositive evidence (Motion

Sequence No. 004). Defendants Sam Shahem, M.D., Rosemary Ruggiero-DeCarlo, M.D., Abdul Sheikh, M.D. s/h/a “John” Sheikh, M.D., Louis Lim, M.D., s/h/a “John” Lim, M.D., and LMC (collectively, LMC defendants) cross-move, pursuant to CPLR 3211, for an order dismissing plaintiffs’ claim for emotional distress arising out of the death of their daughter (Motion Sequence No. 006). LMC defendants further cross-move for an order, pursuant to CPLR 3126, precluding plaintiffs’ use of a videotape of Marisol Solero’s labor and delivery based upon its untimely disclosure. Defendants Shantanu Rastogi, M.D., Michelle Dyan, M.D. and MMC (collectively, MMC defendants) cross-move, pursuant to NYCRR 130-1.1 and CPLR 8303-a, for sanctions against plaintiffs for frivolous motion practice (Motion Sequence No. 005).

On November 20, 2003, Marisol Solero, who was approximately 37 weeks into a pregnancy, was admitted to LMC for delivery of her child. The infant, Kristine Elizabeth Solero (infant), was born at approximately 11:15 P.M. on that day, via vacuum. At delivery, the infant was noted to be floppy and pale with poor respiratory tone and low Apgar scores. Following the birth, a chest x-ray was ordered by defendant Abdul Sheikh, M.D., the attending general pediatrician at LMC. According to Dr. Sheikh’s notes, this x-ray indicated that there was “some pneumothorax on the left side.”<sup>1</sup> Thereafter, Dr. Rastogi, who was an attending neonatal physician at MMC, was called into LMC to consult on the case.<sup>2</sup> At LMC,

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<sup>1</sup>A pneumothorax is characterized by air in intra pleural space and can cause lung collapse.

<sup>2</sup>According to Dr. Rastogi, a neonatal coverage agreement existed between LMC and MMC at this time.

Dr. Rastogi viewed the aforementioned chest x-ray of the infant. Shortly thereafter, the infant was transferred to MMC where Dr. Rastogi ordered that a new chest x-ray be performed. Upon admission to MMC, infant's overall status was listed as "critically ill unstable." According to Dr. Rastogi, the second x-ray revealed that the infant's lung had "expanded significantly," which represented an improvement as respects the infant's pneumothorax condition. On December 6, 2003, infant was pronounced dead at MMC.

Subsequently, plaintiffs commenced the instant medical malpractice action against several parties including MMC, LMC, Dr. Rastogi, and Dr. Sheikh. Plaintiffs' bill of particulars alleged numerous acts of negligence which caused injuries to Marisol Solero and the death of her infant daughter. Marisol Solero also sought compensation for emotional distress arising out of her own injuries, as well as the death of her deceased infant. During discovery, it became apparent that infant's first chest x-ray taken at LMC was missing, and it is now presumed to be lost. Also during discovery, on or about October 20, 2004, LMC served a demand upon plaintiffs pursuant to CPLR 3601, to produce within 20 days any photographs or videotapes obtained by them which related to the underlying events. On or about October 30, 2006, immediately following the completion of depositions, plaintiffs' counsel served LMC defendants with a videotape copy of Marisol Solero's November 20, 2003 labor and delivery. The video was apparently taken by Marisol Solero's sister, who is not a party to this action. On this same date, plaintiffs filed a note of issue. However, in an order dated April 25, 2007, Hon. Howard A. Ruditzky of this court vacated the note of issue. The instant motions are now before the court.

### *Spoliation Issue*

Plaintiffs move to strike MMC, Dr. Rastogi, and LLC's respective answers and to preclude them from testifying at trial for spoliation of evidence in the form of the initial chest x-ray of the infant taken at LLC shortly after her birth. In so moving, plaintiffs argue that these defendants negligently lost the x-ray in question. Plaintiffs further maintain that the loss of this x-ray has compromised their ability to prove their claims in this case. In support of this argument, plaintiffs submit an expert affirmation by Elliot Newhouse, M.D., a physician board certified in pediatrics and pediatric critical care, who states in pertinent part:

“The treatment for significant pneumothorax is placement of chest tubes. This reverses the pressure and permits the lungs to re-expand. It also works as a safety valve so that in the presence of continual air leak the pneumothorax will be contained and/or diminished and heal. A determination of the necessity for chest tubes turns on the evaluation of both the initial x-ray as well as a chronologic comparison of those taken subsequently. I therefore can say, to a reasonable degree of medical certainty, that the loss of the initial x-ray deprives the plaintiff's [sic] the ability to proffer an opinion in regards to this specific departure. Without this x-ray there can be no proper inferences drawn in regards to determining the severity of the existing lung disease in order to prevent additional morbidity and need for further intervention.”

In opposition to this motion, MMC and Dr. Rastogi maintain that they were never in control or possession of the missing x-ray and therefore, they are not subject to sanctions for spoliation of this evidence. In support of this argument, MMC and Dr. Rastogi point to the undisputed fact that the x-ray was taken at LMC. These defendants also note that, although Dr. Rastogi reviewed the subject x-ray while at LMC, there is no evidence that the x-ray was

brought to MMC when the infant was transferred there. To the contrary, Dr. Rastogi consistently testified that he did not review the missing x-ray at MMC, but instead, ordered that new chest x-rays be taken. MMC and Dr. Rastogi also argue that the loss of the x-ray does not fatally compromise plaintiffs' ability to prove their case, nor does the loss of the x-ray work to MMC's and Dr. Rastogi's benefit. In particular, these defendants note if the x-ray were available, Dr. Rastogi could prove his recollection of events without being subject to cross-examination regarding his memory.

LMC also opposes plaintiffs' motion. Specifically, LMC maintains that the loss of the x-ray does not deprive plaintiffs of the ability to establish their case. In this regard, LMC points out that plaintiffs have alleged numerous departures from accepted medical care in areas concerning pre-natal, peri-natal, and neo-natal care, and that many of these alleged departures are unrelated to the missing x-ray. LMC also notes that there are contemporaneous notes regarding the missing x-ray and that a subsequent x-ray was taken within hours of the missing film. Finally, LMC claims that it cannot be held responsible for the missing x-ray since plaintiffs themselves maintain that "in all likelihood" Dr. Rastogi took and misplaced the x-ray when plaintiff was transferred to MMC.

"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" (*Baglio v St. John's Queens Hosp.*, 303 AD2d 341, 342 [2003]). Furthermore, "[a] pleading may be stricken 'even if the evidence was destroyed before the spoliator became a party, provided it

was on notice that the evidence might be needed for future litigation” (*Baglio* at 342, *quoting DiDomenico v C&S Aeromatik Sup.*, 252 AD2d 41, 53 [1998]). That being said, striking a pleading is an extreme sanction and unless the party that lost or destroyed the evidence acted willfully, contumaciously, or in bad faith, a lesser sanction is usually appropriate although “courts will consider the extent of prejudice to a [non-responsible] party and whether dismissal is necessary as ‘a matter of elemental fairness’” (*Favish v Tepler*, 294 AD2d 396, 397 [2002], *quoting Puccia v Farley*, 261 AD2d 83, 85 [1999]). Finally, a party seeking sanctions for spoliation of evidence must demonstrate that the party it is seeking sanctions against is in fact responsible for the disappearance of the subject evidence (*Payano v Milbrook Prop., Ltd.*, \_\_AD3d\_\_, 2007 NY Slip Op 02916, \*3 [2d Dept, April 3, 2007]).

Here, plaintiffs have failed to demonstrate that Dr. Rastogi and/or MMC were ever in control of the missing x-ray or were otherwise responsible for its disappearance. In particular, it is undisputed that the x-ray was taken at LMC (presumably by an LMC radiologist) at the direction of Dr. Sheikh. Although Dr. Rastogi looked at the x-ray when he was called into LMC to consult on the case, he testified that he never saw the x-ray when he was treating the infant at MMC, but instead relied upon new x-rays taken at MMC. Thus, it is apparent that the missing x-ray never came within the control and possession of MMC or Dr. Rastogi. Under the circumstances, these defendants cannot be sanctioned for the loss of the x-ray.

Turning to plaintiffs’ motion for spoliation sanctions against LMC, inasmuch as the x-ray was taken at LMC and there is no evidence that the x-ray was transferred along with infant to MMC, LMC did have possession and control of the subject film. However, nothing

in the record before the court indicates that the x-ray was lost as the result of willful or contumacious conduct on LMC's part or that LMC acted in bad faith in an effort to frustrate discovery. Furthermore, plaintiffs have failed to demonstrate that the loss of the x-ray has so compromised their case so as to warrant the severe sanction of striking LMC's pleading or precluding it from offering evidence at trial. As plaintiffs' attorney frequently notes, the instant case involves allegations of numerous acts of negligence, many of which are unrelated to the missing chest x-ray. Moreover, contemporaneous notes for the x-ray exist and a subsequent x-ray was taken several hours later. Under the circumstances, plaintiffs' motion to strike LMC's pleading and/or to preclude LMC from offering evidence at trial for spoliation of evidence is denied.

#### ***Videotape Evidence***

The LMC defendants cross-move for an order precluding plaintiffs' use of the videotape of Marisol Solero's labor and delivery based upon plaintiffs' failure to turn over the tape until over two years after the initial demand, and after the depositions of the relevant parties. In support of this cross motion, the LMC defendants note that, under CPLR 3101(i), as well as relevant case law, they are entitled to full disclosure of all videotape evidence prior to depositions (*Tran v New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383 [2003]). In addition, LMC argues that, given plaintiffs' lengthy two-year delay in turning over the videotape, it is clear that plaintiffs' action in this regard were willful and deliberate, and therefore, preclusion of the videotape at trial is warranted.

In opposition to this branch of LMC's cross motion, plaintiffs argue that preclusion of the videotape is not warranted in this case inasmuch as Marisol Solero's sister shot the video in full view of LMC's staff. Accordingly, plaintiffs reason that the LMC defendants cannot claim that they were prejudiced by the delay in turning over the tape since they were fully aware of the videotape's existence. In addition, plaintiffs note that the possessor of the videotape (Ms. Solero's sister) is a non-party to this action and that the video was not made for purposes of litigation. Finally, plaintiffs point out that the instant matter is not yet on the trial calendar and that they have no objection to any additional discovery that may be necessary as a result of the videotape.

Initially, it is clear that the LMC defendants were entitled to production of the videotape in question prior to the taking of their deposition testimony (CPLR 3101 (i); *Tran v New Rochelle Hosp. Med Ctr.*, 99 NY2d 383 [2003]). Furthermore, the court is unconvinced by plaintiffs' counsel's vague excuse that she "only came into possession of [the videotape] toward the end of the discovery process."<sup>3</sup> In this regard, the tape was shot by Marisol Solero's sister during the course of Marisol Solero's labor and delivery, and therefore, plaintiffs clearly "knew or should have known" of the tape's existence long before it was produced (*i.e.*, two years after the initial demand) (*Evans v Anheuser-Busch, Inc.*, 277 AD2d 874 [2000]). Indeed, the fact that a copy of the tape was produced immediately after the conclusion of the final LMC defendant's (Dr. Sheikh) deposition indicates that there was

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<sup>3</sup>Counsel gives no details regarding exactly when and how she came into possession of the videotape.

a willful attempt to avoid the discovery requirements set forth in CPLR 3101 (i). Under such circumstances, courts have held preclusion of the videotape is an appropriate sanction (*Young v Knickerbocker Arena*, 281 AD2d 761, 763 [2001]; *Evans*, 277 AD2d at 874).

Nevertheless, the court finds that the drastic sanction of preclusion is not appropriate here for two reasons. First, as plaintiff points out, the subject tape was not a surveillance video. Rather, the tape was shot openly by Marisol Solero's sister for purposes of recording the birth of what she no doubt hoped to be a healthy child. Thus, the LMC defendants had an independent basis to know of the videotape's existence prior to their depositions. Consequently, the LMC defendants cannot claim that they were unfairly prejudiced by the delay in producing the tape. In addition, the note of issue has yet to be filed in this case. Thus, the LMC defendants are free to make any applications for additional discovery which may be necessary as a result of the production of the videotape.

### ***Emotional Distress Claim***

The LMC defendants also cross-move to dismiss plaintiffs' claims for emotional distress for the injuries to and/or death of her infant daughter. In so moving, the LMC defendants note that the Court of Appeals has repeatedly held that a parent may not recover damages for emotional distress arising from an injury to his or her child. In opposition to this branch of the LMC defendants' cross motion, plaintiffs argue that they have a viable emotional distress claim inasmuch Marisol Solero suffered independent injuries as a result of the LMC defendants' malpractice.

It is well-settled that a parent may not recover damages for emotional distress on the theory that his or her child was born impaired as a result of the defendant's negligence (*Sheppard-Mobley v King*, 4 NY3d 627 [2005]; *Becker v Schwarz*, 46 NY2d 401, 414-15 [1978]). However, it is equally well-settled that a mother may seek damages for emotional harm that she suffered as a result of an independent injury suffered before or during childbirth (*Ferrara v Bernstein*, 81 NY2d 895, 898 [1993]). Here, the complaint alleges that Marisol Solero suffered independent injuries in the form of a postpartum hemorrhage and second-degree laceration. Accordingly, the LMC defendants' cross motion to dismiss plaintiffs' emotional distress claim is granted, but only to the extent that plaintiffs seek damages resulting from the injuries to and death of their daughter.

#### ***Cross Motion for Sanctions***

Finally, the MMC defendants cross-move, pursuant to NYCRR 130-1.1 and CPLR 8303-a, for an order awarding them costs and sanctions against plaintiffs. In so moving, the MMC defendants argue that plaintiffs' motion for spoliation sanctions against them is completely frivolous inasmuch as there is no evidence that the MMC defendants were responsible for the lost chest x-ray taken at LMC.

Although the evidence before the court indicates that the MMC defendants were not responsible for the loss of the subject chest x-ray, it cannot be said that plaintiffs' claim against the MMC defendants with regard to the spoliation of key evidence are so completely without merit so as to warrant sanctions under NYCRR 130-1.1 and CPLR 8303-a (*Carella*


*v Reilly and Assoc.*, 22 AD3d 623, 624 [2005]). Consequently, MMC's cross motion for sanctions is denied.

***Summary***

In summary, the court rules as follows: plaintiffs' motion for an order striking LMC, MMC and Dr. Rastogi's answers and/or precluding these defendants from offering evidence at trial for spoliation of key evidence is denied (Motion Sequence No. 004). That branch of the LMC defendants' cross motion which seeks an order precluding plaintiffs from using the videotape of Marisol Solero's labor and delivery at trial is denied; that branch of the LMC defendants' cross motion which seeks dismissal of plaintiffs' emotional distress claim is granted, but only to the extent that plaintiffs seek damages for emotional distress resulting from the injuries to and death of their daughter (Motion Sequence No. 006). MMC defendants' cross motion for costs and sanctions against plaintiffs is denied (Motion Sequence No. 005).

This constitutes the decision and order of the court.

ENTER

  
HON. GERARD H. ROSENBERG

J. S. C.