

Carlisi v Queens-Long Is. Med. Group

2007 NY Slip Op 33254(U)

October 5, 2007

Supreme Court, Nassau County

Docket Number: 0180-05/

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19**

**Present: HON. WILLIAM R. LaMARCA
Justice**

VINCENZA CARLISI, as Administrator of the Estate of ANTHONY CARLISI, LENA CARLISI, an Infant, by and through her mother and natural guardian, VINCENZA CARLISI, VERA CARLISI, and Infant, by and through her mother and natural guardian VINCENZA CARLISI, VINCENZO CARLISI, an Infant, by and through his mother and natural guardian, VINCENZA CARLISI, MICHAEL CARLISI, an Infant, by and through his mother and natural guardian, VINCENZA CARLISI, ANTHONY CARLISI, an Infant, by and through his mother and natural guardian, VINCENZA CARLISI, and VINCENZA CARLISI, Individually,

**Motion Sequence # 002
Submitted July 18, 2007**

Plaintiffs,

-against-

INDEX NO: 10180/05

**QUEENS-LONG ISLAND MEDICAL GROUP,
P.C. and CALVIN LEE CHU, M.D.,**

Defendants.

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Spera Affidavit.....	3
Reply Affirmation.....	4

Counsel for plaintiffs, VINCENZA CARLISI, as Administrator of the Estate of ANTHONY CARLISI, LENA CARLISI, an infant by her mother and natural guardian, VINCENZA CARLISI, VERA CARLISI, and infant by her mother and natural guardian VINCENZA CARLISI, VINCENZO CARLISI, an Infant by his mother and natural guardian, VINCENZA CARLISI, MICHAEL CARLISI, an infant by his mother and natural guardian, VINCENZA CARLISI, ANTHONY CARLISI, and infant by his mother and natural guardian, VINCENZA CARLISI, and VINCENZA CARLISI, individually, move for an order, pursuant to CPLR §3126, striking defendants' answer for failing to comply with the order of the Court, dated October 19, 2006, based upon spoliation of evidence or, in the alternative, directing the production of Anthony Spera, an employee of defendant, for an Examination Before Trial (EBT) within twenty (20) days and, if not produced, striking defendants' answer, and for an order precluding defendants' expert from testifying at trial based upon defendants' failure to properly provide his or her qualifications. Defendants, QUEENS LONG ISLAND MEDICAL GROUP P.C. and CALVIN LEE CHU, M.D., oppose the motion, which is determined as follows:

This litigation arises from alleged wrongful death of decedent, ANTHONY CARLISI, then 54 years of age, who was a patient at the medical offices of defendant, QUEENS LONG ISLAND MEDICAL GROUP, P.C., commonly referred to as a HIP Center. Plaintiffs allege that decedent's primary care physician, defendant CALVIN CHU, failed to properly diagnose, monitor and timely treat decedent's coronary disease during the spring, summer and autumn of 2003, his complaints of chest pains on exertion and shortness of breath. It is alleged that, as a result of decedents' lack of care, he died on November 1, 2003 after a major coronary attack. The plaintiffs are his survivors, his wife and five (5) children.

Counsel states that the case is presently on the trial calendar.

Counsel points out that, notwithstanding the certification order of the Court, on October 19, 2006, the parties entered into a "So Ordered" Stipulation on said date, in which it was agreed that defendants would provide plaintiffs with a "Duplicate of Echocardiogram Tape or CD-Rom within 10 days". Said study was performed on August 1, 2003 and plaintiffs claim the defendants' answer should be stricken for failure to provide this critical piece of medical evidence, in violation of the October 19, 2006 order of the Court. In the alternative, plaintiffs request that defendants' employee, Dr. Andrew Spera, the physician who performed the study, be produced for an EBT. Counsel asserts that he repeatedly demanded a duplicate recording of the echocardiogram, but was only presented with several "blurred still images, a hand written report with several lines crossed off" and not the videotape or CD-ROM recording, as demanded. In frequent correspondence with defendants' counsel, counsel for plaintiffs explained the need for the tape of the echocardiogram, which shows the "motion of the heart", and not merely still frames. Counsel states that in early April 2007, he was first advised that defendants were not able to locate and, consequently, not able to produce the full echocardiogram of decedent's heart. Counsel for plaintiffs states that he later learned that the video of the echocardiogram existed at one point but was destroyed one (1) year after the study, in 2004. He argues that destruction of the medical record is in violation of statute and the Physicians Code of Conduct and that, throughout discovery, no mention was made that the tape was purportedly destroyed in 2004. Indeed, counsel for defendants signed the "So Ordered" Stipulation to produce the tape in October 2006. Counsel states that when he served a notice to depose Dr. Spera about the practice of destroying medical records

and about the writings that were crossed off the handwritten report, he was told that Dr. Spera would not be produced and that the instant motion was required.

Counsel for plaintiffs annexes the affirmation of Alan Feit, M.D., a board certified cardiologist, who states that an echocardiogram is a medical record and that only the entire study will accurately reflect the evaluation as conducted. He contends that, like any imaging study, such as an x-ray or MRI, the records must be maintained for a minimum of six (6) years to accurately reflect the evaluation and treatment of the patient. Counsel refers the Court to 8 NYCRR §29.2(a)(3) which requires meaningful medical records be maintained for a minimum of six (6) years. Dr. Feit states that the still images provided are medically useless because the heart's motion, a goal of the study, cannot be determined from still photos and that the moving images are needed for proper evaluation. Dr. Feit states that, given that decedent was hypertensive and diabetic, the echocardiogram would have likely demonstrated thickening of the wall of the left ventricle, reflective of hypertensive disease of the heart and other abnormalities, that should have heightened Dr. Chu's suspicion of coronary disease, prompting immediate life saving treatment. Counsel for plaintiffs urges that defendants' answer be stricken for destroying this critical piece of evidence, in violation of statute, which has only come to light now that the case has been placed on the trial calendar, citing *Baglio v St John's Queens Hospital*, 303 AD2d 341, 755 NYS2d 427 (2nd Dept. 2003).

Furthermore, counsel for plaintiffs seek to preclude defendants' expert witness from testifying at trial based upon a purportedly incomplete Expert Witness Exchange, dated May 21, 2007, and a Supplement, dated May 25, 2007, which counsel for plaintiffs rejected. It is his position that, although defendants provided the expert's Board

Certifications, the jurisdictions in which the expert was licenced, the medical school attended, the expert's area of expertise and the institutions in which the expert served, but no dates or time frames with respect to said information, the disclosure is insufficient, citing *Thomas v Alleyne*, 302 AD2d 36, 752 NYS2d 362 (2nd Dept. 2002). Counsel for plaintiffs urges that defendants be ordered to comply with proper expert disclosure or be precluded from testifying at trial.

In opposition to the motion, counsel for defendants point out that, since their substitution as attorneys for defendants in January 2006, they have diligently worked to comply with plaintiffs discovery demands and that the Preliminary Conference Order was fully complied with by February 1, 2006. Furthermore, counsel for defendants state that Dr. Spera was not produced for deposition because same was not demanded until April 24, 2007, after the filing of the Note of Issue, however, counsel for plaintiffs was advised that defendants would produce an Affidavit of Dr. Spera addressing any questions with respect to how the echocardiogram was performed, recorded and stored, as requested in the April 24, 2007 correspondence, annexed to the moving papers as Exhibit "G". Counsel for defendants point out that the echocardiogram was taken on August 1, 2003, and the tape was discarded and/or reused approximately one (1) year thereafter, well before the lawsuit was commenced in June 2005. Counsel claims that the echocardiogram is properly maintained by defendants in the form of still frames, on what is considered a "tape" or a "strip", which has been exchanged in response to plaintiffs' demand, and the report of same was provided when plaintiffs scanned the original chart. Counsel for defendants claim that they only received the information, in April 2007, that it was the custom and practice of the QUEENS LONG ISLAND MEDICAL GROUP, P.C. to maintain the video

tapes for one (1) year, after communicating with Dr. Spera.

In an Affidavit of Dr. Spera, who is employed by the QUEENS LONG ISLAND MEDICAL GROUP, P.C. and was employed by same in August 2003, he relates that the echocardiograms are administered by technicians and interpreted by cardiologists and that the technician fills out the cover page of the study and that none of the handwriting on that sheet is his handwriting. Dr. Spera contends that each days echocardiograms are recorded on one separate videotape, which is stored for approximately one (1) year. He claims that he reviewed and interpreted the videotape in the case at bar and prepared a comprehensive report. It is his position that the report, taken in conjunction with the still frames that are maintained, provide an accurate summary of what the videotape of the echocardiogram showed, and provide a useful tool for subsequent treating physicians. He states that maintenance of the echocardiogram videotape is not medically necessary after the one (1) year period when there is a comprehensive report as well as available still frames of the echocardiogram.

Counsel for defendants assert that plaintiffs have not demonstrated that the failure to have the entire echocardiogram, as opposed to the still frames and report, has deprived plaintiffs of a means of proving their medical malpractice claim against DR. CHU and QUEENS LONG ISLAND MEDICAL GROUP, P.C. Counsel for defendants argues that the case at bar is distinguishable from the *Baglio* case where plaintiff was deprived of fetal monitoring strips and thus the means of proving their medical malpractice claim against the hospital. Counsel states that no "bad faith" can be shown to support plaintiffs' claim of spoliation of evidence, citing, *inter alia*, *Nationwide Insurance Co. v Rocklyn Fuel Oil Corp.*, 7 Misc 3d 1003A, 801 NYS2d 237 (Supreme Nassau Co. 2005).

Moreover, counsel for defendants contends that the portion of the motion that seeks to preclude its expert is premature and without merit. Counsel points out that defendants have reserved their right to amend the expert response and that *Thomas v Alleyne*, cited by plaintiffs' counsel, does not require any further information in an expert response than has already been provided. Counsel for defendants' urges that their answer not be stricken and that they not be required to supplement their expert exchange as they have made every effort to comply with all outstanding discovery demands.

Sanctions for the spoliation of evidence are within the broad discretion of the courts. *Iannucci v Rose*, 8 AD3d 437, 778 NYS2d 525 (2nd Dept. 2004). The Court "may, under appropriate circumstances, impose a sanction 'even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] . . . was on notice that the evidence might be needed for future litigation'". *Iannucci v Rose, supra*, quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 682 NYS2d 452 (2nd Dept. 1998), and citing *Favish v Tepler*, 294 AD2d 396, 741 NYS2d 910 (2nd Dept. 2002) and *Baglio v St. John's Queens Hosp, supra*. Nevertheless, "[r]ecognizing that striking a pleading is a drastic sanction to impose in the absence of wilful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness." *Iannucci v Rose, supra*, citing *Favish v Tepler, supra*. Where the moving party is not deprived of their ability to establish their claim or defense, a sanction less severe than striking a pleading is appropriate. *Iannucci v Rose, supra*, citing *Chiu Ping Chung v Caravan Coach Co.*, 285 AD2d 621, 728 NYS2d 767 (2nd Dept.

2001) and *Klein v Ford Motor Co.*, 303 AD2d 376, 756 NYS2d 271 (2nd Dept. 2003).

After a careful reading of the submissions herein, the plaintiff's application to strike the defendants' pleading based upon the disposal of the echocardiogram tape is denied. "The plaintiff] failed to demonstrate that the defendant intentionally attempted to hide or destroy evidence or that they 'negligently disposed of any key physical evidence after being placed on notice that it might be needed for future litigation.'" *Goll v American Broadcasting Companies, Inc.*, 10 AD3d 672, 783 NYS2d 599 (2nd Dept. 2004) citing *Popfinger v Terminix Intl. Co. Ltd. Partnership*, 251 AD2d 564, 674 NYS2d 769 (2nd Dept. 1998) and *Andretta v Lenahan*, 303 AD2d 527, 756 NYS2d 454 (2nd Dept. 2003). Plaintiffs have failed to demonstrate that defendants were placed on notice, prior to commencement of the action in June 2005, that the videotape might be needed for future litigation, nor have they demonstrated that reliance on the still images and report of the echocardiogram will deprive them of their ability to present and prove their case at trial. See, *Friel v Papa*, 36 AD3d 754, 829 NYS2d 569 (2nd Dept. 2007). It is the judgment of the Court that the practice of preserving the videotape for a period of one (1) year and thereafter retaining still images and a comprehensive report constitutes "meaningful medical records" as required by the statute. 8 NYCRR §29.2(a)(3). Thus, this is not a case in which the defendant reaped an unfair advantage in the litigation as a result of its conduct. See, *Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 791 NYS2d 119 (2nd Dept. 2005) quoting *Ifraimov v Phoenix Indus. Gas*, 4 AD3d 332, 772 NYS2d 78 (2nd Dept. 2004); see also, *De Los Santos v Polanco*, 21 AD3d 397, 799 NYS2d 776 (2nd Dept. 2005). Based on the foregoing, it is hereby

ORDERED, that plaintiffs' motion to strike defendant's answer based upon spoliation of evidence is denied; and it is further


ORDERED, that plaintiffs' motion to preclude defendants' expert from testifying at trial is denied. Defendants shall supplement the expert response to include the requested dates and time frames for their expert. Defendants have not demonstrated that there is a reasonable probability that such disclosure would cause said expert to be subject to unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice.

Thomas v Alleyne, supra.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 5, 2007



WILLIAM R. LaMARCA, J.S.C.

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ENTERED

OCT 10 2007

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