

Cordero v St. Vincent's Hosp. & Med. Ctr. of N. Y.

2008 NY Slip Op 31343(U)

May 7, 2008

Supreme Court, New York County

Docket Number: 0105099/2006

Judge: Alice Schlesinger

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PRESENT: ALICE SCHLESINGER

PART LA Part 16

Justice

Index Number : 105099/2006

CORDERO, ILIA

vs.

ST. VINCENT'S HOSPITAL

SEQUENCE NUMBER : 002

STRIKE A PLEADING

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

FILED

MAY 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

ALICE SCHLESINGER J.S.C.

Dated: MAY 07 2008

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COUNTY OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 16

-----X
Ilia Cordero and Jorge Valladares,

Index No. 105099/06

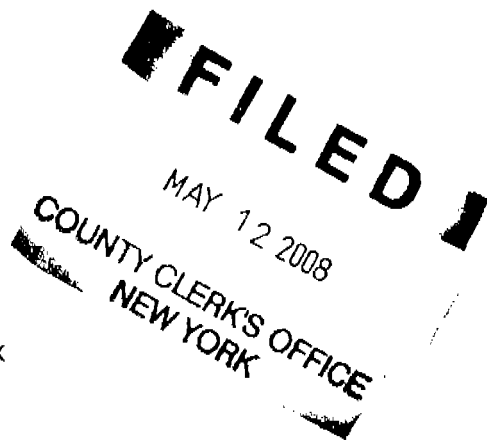
Motion Seq. No. 002

Plaintiffs,
-against-

St. Vincent's Hospital and Medical Center
of New York, Eric M. Wahl, M.D.,
Reginald Ruiz, M.D., "John Does" 1 through
10 and "Jane Roes" 1 through 10

Defendants.

-----X
Schlesinger, J.



Plaintiffs Ilia Cordero and Jorge Valladares commenced this medical malpractice action claiming that defendants St. Vincent's Hospital and Medical Center of New York and its physicians Eric M. Wahl, M.D. and Reginald Ruiz, M.D. (collectively "St. Vincent's") left a sponge and metal ring in Ms. Cordero's abdomen during Caesarian-section (C-section) surgery. Plaintiffs have moved for sanctions pursuant to CPLR §3126 based on defendants' failure to provide discovery, namely, hospital records documenting the purchase of supplies such as surgical sponges and metal rings during the relevant time. St. Vincent's has opposed the motion, asserting that it made a good faith effort to locate the documents and concluded that the documents had not been retained. In reply, plaintiffs request sanctions based on spoliation of evidence by St. Vincent's.

Background

Plaintiff Ilia Cordero underwent two C-section surgeries: the first was performed at St. Vincent's Hospital in New York on August 16, 2001, and the second was performed at Florida Hospital Altamonte in Orlando in August 2004. Thereafter, Ms. Cordero allegedly suffered from pain, soreness, and internal injuries. On or about May 3, 2005, a laparotomy

sponge and attached metal ring were discovered in Ms. Cordero's abdomen, and Ms. Cordero went to Orlando Regional Medical Center where the object was surgically removed by Dr. Smith. After the foreign object was removed, the Florida physician who had performed the second C-section had a note placed in Ms. Cordero's chart which stated:

Telephone call with Dr. J. Smith. He explained at time of laparotomy a surgical sponge was found in the patient's omentum. The sponge had a metal ring attached. I explained that I have never used metal rings, also I asked the L&D [labor and delivery] nurses at FHA [the Florida Hospital] who stated in 18 years the unit never has had sponge rings on the field. At time of C/S 8/04 patient had intense adhesions and I could not remove the uterus. Told Dr. Smith at time of C/S in New York in 2001 patient had emergency C/S and this was most likely time of sponge being left inside patient. He told me patient tolerated procedure well recently and was doing well.

Plaintiffs filed this medical malpractice action in 2006, alleging that St. Vincent's had negligently left the sponge and ring in Ms. Cordero's abdomen during her August 2001 C-section, causing her injury. Plaintiffs then sought discovery to secure proof that St. Vincent's was the source of the foreign object. Specifically, plaintiffs served a demand for a verified bill of particulars dated October 11, 2006, requiring St. Vincent's to: "[i]dentify each entity which supplied surgical sponges and rings to St. Vincent's Hospital for use at St. Vincent's Hospital in 2001" and to identify persons responsible for ordering and inventorying supplies, their positions, and their last known address. (Demand for Verified Bill of Particulars, ¶ 7-9).

In support of their motion, plaintiffs point to various court orders which directed St. Vincent's to respond to the demand. A February 28, 2007 preliminary conference order directed defendants to provide the demanded particulars within 45 days. St. Vincent's did not. On May 30, 2007, a compliance conference order again directed defendants to

provide the particulars within 45 days, yet St. Vincent's again failed to do so. In a subsequent compliance conference order dated September 19, 2007, defendants were directed to provide the information demanded by October 3. When defendants again failed to comply, plaintiffs filed this motion.

In their opposition to the motion, defendants explain that at each conference, they advised the Court that St. Vincent's was emerging from bankruptcy and, due to staffing issues, was having difficulty obtaining the required information. As further evidence of their alleged good faith efforts to comply, defendants in their opposition papers provide plaintiffs with the identification and last known address for Karen King, the Administrative Director of Materials for St. Vincent's Hospital, who was responsible for ordering, receiving, stocking, inventorying and distributing supplies such as surgical sponges and rings in 2001. Defendants' counsel further reveals in her opposition, for the first time, that St. Vincent's has concluded, after a thorough search for records documenting the purchase of supplies in 2001, that the records have not been maintained. In reply, plaintiffs indicate that efforts to locate Ms. King have been unsuccessful, and they seek heightened sanctions based on spoliation of evidence.

Rules Governing CPLR § 3126 and the Willfulness Test

CPLR § 3126 provides the court with broad discretion to impose penalties for a party's failure and refusal to comply with an order to disclose information. The statute states in relevant part that "[i]f any party ... refuses to obey an order for disclosure or wilfully 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 ..." The statute then suggests three alternative sanctions: 1) deeming the issue resolved in

accordance with the allegations of the party seeking disclosure, 2) prohibiting the disobedient party from supporting or opposing the claims at issue; or 3) striking portions of the pleadings of the disobedient party.

To impose drastic sanctions, a court must find “that the offending party’s failure to comply with discovery demands was willful, deliberate and contumacious ...” *Siegman v. Rosen et al.*, 270 A.D.2d 14, 15 (1st Dep’t 2000) (citations omitted). As the First Department explained in *Siegman*: “Generally, willfulness can be inferred when a party repeatedly fails to respond to discovery demands and/or to comply with discovery orders, coupled with inadequate excuses for those defaults ...” *Id.* at 15 (citations omitted). Finding the defendants’ excuses wholly inadequate and conduct suggestive of an intent to evade court orders, the appellate court in *Siegman* reversed the trial court and precluded the defendants from raising any issues arising out of plaintiff’s document demands, stating: “In this matter, in view of the importance of the documents as they pertain to plaintiff’s claims, the efforts expended by defendants to prevent their disclosure through judicial means and, when all legal maneuvering failed, their sudden, unexplained disappearance, the IAS Court should have concluded that defendants’ actions were indeed wilful and warranted the sanctions imposed herein ...” *Id.* at 15 (citations omitted).

In the case before this Court, plaintiffs argue that defendants’ “repeated disregard of the court’s orders” to disclose evidence, absent an adequate excuse, suggests willfulness. (Memorandum of Law in Support of Plaintiffs’ Motion at p. 5). Defendants dispute plaintiffs’ claim of willfulness, explaining that the documents had been inadvertently lost due to the Hospital’s bankruptcy and related personnel changes before the subject demands were even received. Defendants also provide plaintiffs with relevant discovery;

i.e., the name and address for Karen King, St. Vincent's Administrative Director of Materials responsible for supplies in 2001 when Ms. Cordero was hospitalized.

Sanctions should not be imposed if the offending party offers a "reasonable excuse" for noncompliance with certain discovery demands, particularly if an effort is made to provide other relevant discovery. *See Delgado v. City of New York*, 47 A.D.3d 550 (1st Dep't 2008). Here, defendants made a good faith effort to locate the documents by conducting a thorough search and offered a reasonable excuse for the non-production, namely, that the records had been lost due to bankruptcy and related personnel changes. What is more, defendants provided plaintiffs with the name and last known address of an individual who plaintiffs could depose about the issue of supplies. Based on these facts, this Court concludes that a finding of willful disregard of the Court's discovery orders is unwarranted. Therefore, drastic sanctions under CPLR § 3126 are not appropriate.

However, the inquiry does not end there. As noted above, defendants acknowledged in their opposition papers that the hospital records documenting the purchase of supplies in 2001 had been lost, and plaintiffs in response requested sanctions based on defendants' spoliation of evidence.

Rules Governing Spoliation of Evidence

Spoliation of evidence occurs when "a party alters, loses, or destroys key evidence before it can be examined by the other party's expert ..." *Squiteri v. City of New York*, 248 A.D.2d 201, 202 (1st Dep't 1998). Spoliation was originally limited to the intentional destruction of evidence arising out of a party's bad faith. *Kirkland v. New York City Hous. Auth. et al.*, 236 A.D.2d 170, 173 (1st Dep't 1997). However, spoliation has since been expanded by the courts to include the destruction of evidence based on negligence "since

a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense ..." *Squiteri* at 203. As the *Kirkland* Court explained, the "trend toward expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial 'witness' to what really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission ..." 236 A.D.2d at 173 (citation omitted).

In determining what sanctions, if any, should be imposed based on the negligent spoliation of evidence, the courts consider whether a party was on notice of the litigation when the evidence was lost or destroyed, and whether the evidence was critical to a party's proof of the relevant claim. In *Kirkland*, where the New York City Housing Authority (NYCHA) was on notice of a tenant's wrongful death claim based on a fire caused by a stove and negligently failed to take "any steps to assure preservation of the evidence" (the stove), NYCHA could not disclaim responsibility for the loss of evidence. *Id.* at 174. The court also considered that NYCHA's destruction of the stove prevented the third-party defendant installer from examining the evidence and thereby "fatally compromised its ability to defend." *Id.* at 176. For example, without an inspection of the stove, the installer could not confirm that the company had, in fact, installed the stove in the first instance or gather evidence to prove defenses such as NYCHA's own work on the gas connections. Under these circumstances, the Court held that NYCHA's negligent destruction of critical evidence warranted the dismissal of NYCHA's third-party claim against the installer.

In contrast, the First Department in *Thomas v. City of New York*, 9 A.D.3d 277 (1st Dep't 2004) affirmed the denial of plaintiff's motion to strike NYCHA's answer based on defendant's destruction of an elevator door check after the door closed on plaintiff's finger,

causing injury. The key issue in dispute was whether NYCHA had notice of the allegedly malfunctioning elevator door. The court held that plaintiff had failed to establish that the loss of the door check would “substantially hinder” its ability to prove notice; plaintiff had failed to explain why NYCHA’s repair and maintenance records were inadequate to prove notice and whether there were any witnesses to the malfunctioning door before the accident. 9 A.D.3d at 278.

Similarly, in *Tawedros v. St. Vincent’s Hosp. of New York*, 281 A.D.2d 184 (1st Dep’t 2001), a medical malpractice action, the First Department affirmed the trial court’s decision denying plaintiff’s motion to strike the answer of the defendant Hospital based on the Hospital’s loss of the original medical records, finding issues of fact which warranted a trial. Since the defendant had produced a copy of the record, albeit “admittedly incomplete and allegedly altered,” the court concluded that the jury, once given appropriate instructions, could “weigh the credibility of defendant’s explanations for destroying the original record.” *Id.* The court further found that the missing evidence did not deprive plaintiff of the ability to prove his case or give the defendant an unfair advantage. Therefore, drastic sanctions based on spoliation were unwarranted.

Application of the Spoliation Rules to the Case at Bar

Applying the above cases to the case at bar, this Court must first determine whether the defendants were on notice of plaintiffs’ claims when the relevant supply records were lost or discarded. St. Vincent’s declared bankruptcy in 2004, before the Florida physicians detected the surgical sponge in Ms. Cordero’s abdomen and before this lawsuit was commenced. Therefore, assuming the records were lost due to the bankruptcy, it cannot

be determined based on the papers presented that St. Vincent's was on notice of the need to preserve the supply records.¹

Nevertheless, sanctions may still be warranted based on spoliation of evidence if plaintiffs can demonstrate that the lost evidence is critical to proving their claim. While records documenting the purchase of sponges and metal rings in 2001 could serve as an "impartial witness" as in *Kirkland, supra*, to identify the type of surgical sponges and metal rings used by St. Vincent's in 2001, plaintiffs have not demonstrated at this stage of the litigation that the loss of those records will "fatally compromise" or even "substantially hinder" their ability to prove their case. Discovery is far from complete. Plaintiffs have not yet deposed the defendant physicians, and efforts can be continued to locate hospital witnesses, such as the former Administrative Director of Materials Karen King, who could potentially identify the type of sponges and metal rings used by St. Vincent's during the relevant time. Further, since St. Vincent's first confirmed the loss of the records in its opposition papers and plaintiffs briefed the spoliation issue for the first time in their reply papers, defendants have not had a full opportunity to be heard on the issue.

This case is readily distinguishable from the other medical malpractice cases cited by plaintiffs in their Reply Memorandum. For example, in both *Gray v Jaeger*, 17 AD3d 286 (First Dep't 2005) and *Herrera v Maitlin*, 303 A.D.2d 198 (First Dep't 2003), the defendant physician had failed to maintain the plaintiff patient's medical records for the time required by the Education Law. In both cases, the court found that the failure to maintain the records had deprived plaintiff of "any means of establishing a prima facie case." Similarly, in *Baglio*

¹ Plaintiffs argue in their Reply that St. Vincent's was required by Department of Health laws and regulations to maintain the supply records to complete annual financial reports. However, the cited provisions are general in nature and not dispositive here.

v *St. John's Queens Hospital*, 303 A.D.2d 341 (First Dep't 2003), the defendant hospital had lost the fetal monitoring strips. Since plaintiff was claiming that the infant had negligently been deprived of oxygen during his delivery, and since the fetal monitoring strips were considered "the most critical evidence to determine fetal well-being," the loss of the strips deprived the plaintiff of any means of proving her medical malpractice claim. 303 A.D.2d at 342.

For the reasons stated above, this Court cannot determine at this stage of the litigation based on the information presented whether loss by St. Vincent's of its supply records will deprive plaintiffs of any means of proving their medical malpractice claim. Therefore, it would be inappropriate for the Court to impose a drastic sanction against defendants based on spoliation of evidence at this time. However, should discovery reveal that the loss of the evidence substantially hinders plaintiffs' ability to prove their case, plaintiffs may renew their motion.

Conclusion

Plaintiffs have failed to establish that sanctions are warranted for defendants' willful disregard of court orders pursuant to under CPLR § 3126. Further, the request for sanctions based on spoliation of evidence is premature. Accordingly, it is hereby

ORDERED that plaintiffs' motion for sanctions is denied without prejudice to renewal in accordance with this decision. Counsel shall appear for a status conference on May 7 as previously scheduled to discuss the status of discovery.

This constitutes the decision and order of this Court.

Dated: May 7, 2008

MAY 07 2008

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