

Mungeer v Leeds

2008 NY Slip Op 31744(U)

June 20, 2008

Supreme Court, New York County

Docket Number: 0107798/2006

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 20

MUNGER, ZACHARY WILLIAM

INDEX NO.

107798/06

MOTION DATE

6/3/08

MOTION SEQ. NO.

03

-v-
GARY LEEDS, M.D., ET AL

MOTION CAL. NO.

The following papers, numbered 1 to 32 were read on this motion ~~to~~ for Striking answer

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-21

22-27, 28-31

32

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

[Faint, illegible text]

FILED

JUN 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/20/08

[Signature]

J.S.C.

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 COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 20**

-----X
ZACHARY WILLIAM MUNGEER,

Plaintiff,

-against-

GARY LEEDS, M.D. and FAMILY MEDICAL
GROUP OF MANHATTAN, P.C. and DUANE
READE, INC.,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

Index No. 107798/06

Decision and Order

FILED
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NEW YORK

Defendants Gary Leeds, M.D. and Family Medical Group of Manhattan, P.C. (collectively "Dr. Leeds") move, by order to show cause, for an order striking Duane Reade, Inc.'s ("Duane Reade") answer on the grounds that Duane Reade lost or destroyed crucial pieces of evidence causing severe prejudice to the defense, or in the alternative, precluding Duane Reade from introducing any such prescriptions into evidence at the time of trial. Dr. Leeds further seeks to vacate plaintiff's note of issue and certificate of readiness, on the grounds that discovery has not been completed. Dr. Leeds also seeks to compel Duane Reade to produce George Kowalski, Pharmacy District Manager of Duane Reade for a further deposition. At oral argument on June 6, 2008, the court learned that Mr. Kowalski was produced for a deposition that took place on May 22, 2008; therefore, this request is moot. Plaintiff joins in Dr. Leeds' request to strike Duane Reade's answer, but opposes the remedy of preclusion and opposes Dr. Leeds' request to vacate plaintiff's note of issue.

This is an action for medical malpractice. Plaintiff commenced this action on June 5, 2006 against Dr. Leeds, alleging that Dr. Leeds improperly prescribed plaintiff a topical steroid cream, Lotrisone, for an extended period of time, resulting in permanent striae. This prescription was filled and refilled approximately fourteen times for plaintiff at Duane Reade. After the non-party deposition of Mr. Kowalski, plaintiff subsequently sued Duane Reade on March 21, 2007, for improperly dispensing the steroid cream without a prescription. The cases were consolidated on June 26, 2007.

During his February 20, 2007 deposition, Mr. Kowalski produced copies of some of plaintiff's prescriptions. Plaintiff's counsel specifically requested that he preserve and maintain the other original prescriptions for later discovery and inspection. According to Mr. Kowalski, Duane Reade requires its pharmacies to maintain the original prescription records for seven years. Education Law 6810(5) requires original records to be maintained for five years. Court orders, dating back to June 19, 2007, required production of the front and reverse sides of said original prescriptions after Duane Reade was made a party. As of Mr. Kowalski's most recent deposition on May 22, 2008, he is unable to locate any of the original prescriptions.

Presently, photocopies of the front side of some prescriptions have been produced. Mr. Kowalski stated at his deposition that pharmacists often write on the back of the original prescriptions. According to Education Law 6810(4)(a), oral authorization for refilling prescriptions shall be written on the reverse side of the original prescription. Since Duane Reade cannot locate the original prescriptions and there are no copies of the reverse side of the prescriptions, Dr. Leeds claims his defense is "irreparably and irretrievably damaged."

To impose a sanction for spoliation, “it must first be established that the individual to be sanctioned was responsible for the loss or destruction of evidence crucial to the establishment of a claim or defense, at a time when he was on notice that such evidence might be needed for future litigation.” Haviv v. Bellovin, 39 A.D.3d 708, 709 (2d Dep’t 2007). “The sanction of striking a pleading may be applied ‘even if the evidence was destroyed before the spoliator became a party’ [to the action], provided [the spoliator] was on notice that the evidence might be needed for future litigation.” N.Y. Cent. Mut. Fire Ins. Co. v. Turnerson’s Elec., 280 A.D.2d 652, 653 (2d Dep’t 2001). The fact that the spoiled evidence was not requested prior to its destruction is not an excuse when the party who destroyed the evidence was on notice that said evidence would be needed for future litigation and should have preserved it. DiDomenico v. C & S Aeromatik Supplies, Inc., 252 A.D.2d 41, 53 (2d Dep’t 1998).

Duane Reade was in control of the original prescriptions at the time of the alleged loss or destruction and was on notice that said prescriptions should be preserved, as they were needed in future litigation. Duane Reade was obligated to preserve the original prescriptions as a matter of law based on Education Law 6810(5), which states, “records of all prescriptions filled or refilled shall be maintained for a period of at least five years.” Since the prescriptions were filled beginning in 2004, the original prescriptions should have been preserved until 2009, regardless of whether Duane Reade was actually notified of future litigation. Therefore, it is presumed that Duane Reade was in control of the existing original prescriptions when the subpoena and court orders were served. See Kuriansky v. Azam, 176 A.D.2d 943, 944 (2d Dep’t 1991). Furthermore, at the first deposition of Mr. Kowalski on February 20, 2007, Duane Reade was requested to preserve and turn over the original prescriptions. Continuous requests were made, with court orders dating back to June 19,

2007, asking for this information. Although Duane Reade asserts that it was not a party at the time the items were lost, Duane Reade was aware of the need to preserve the original prescriptions. See DiDomenico, supra, 252 A.D.2d at 52-53.

Spoliation sanctions are appropriate when a litigant disposes of crucial items of evidence before the adversary has an opportunity to inspect them. Kirkland v. N.Y. City Hous. Auth., 236 A.D.2d 170, 173 (1st Dep't 1997). When key physical evidence is destroyed, litigants “are prejudicially bereft of appropriate means to confront a claim with incisive evidence;” thus the spoliator may be punished by the striking of its pleading. N.Y. Cent. Mut. Fire Ins. Co., supra, 280 A.D.2d at 653 (citation omitted).

For the sanction of striking an answer to be appropriate, however, the prejudice to the party seeking the sanction must be so severe so that it truly hinders the ability to defend a claim. This is movant's burden. Although Dr. Leeds claims that he is irreparably deprived of the “the right and ability to put forth a complete defense” without the original prescriptions, he has not demonstrated that he cannot mount an effective defense. See Thomas v. City of N.Y., 9 A.D.3d 277 (1st Dep't 2004). Dr. Leeds has copies of the fronts of some prescriptions, thus not completely barring a proper defense. Moreover, he can testify from his memory and his records as to what occurred. See Roman v. North Shore Orthopedic Assn., 271 A.D.2d 669, 670 (2d Dep't 2000); Abar v. Freightliner Corp., 208 A.D.2d 999 (3d Dep't 1994). There is sufficient information for all parties to maintain this action. See, Chiu Ping Chung v. Caravan Coach Co., 285 A.D.2d 621 (2d Dep't

2001); Buda v. New England Orthotic & Prosthetics Sys., LLC., 7 Misc. 3d 1025[A](Table), 2005 WL 1189033 (Sup. Ct. N.Y. Co. 2005).

The motion is denied, except that the issue of whether Duane Reade shall be precluded from offering the prescriptions into evidence is deferred until trial. This constitutes the decision and order of the court.

Date: June 20, 2008



JOAN B. LOBIS, J.S.C.

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