

Siegel v Bartella

2008 NY Slip Op 32844(U)

October 15, 2008

Supreme Court, New York County

Docket Number: 602169/2007

Judge: Stanley L. Sklar

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

STANLEY L. SKLAR

PRESENT: _____

PART 29

Justice

Index Number : 602169/2007

SIEGEL, ROBERTA

INDEX NO. _____

vs

BARTELLA, M.D., LIA

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

STRIKE ANSWER

MOTION CAL. NO. _____

is 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 DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

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

Dated: 10/15/08



STANLEY L. SKLAR^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

-----X
ROBERTA SIEGEL and ROBERT SIEGEL,

Plaintiffs,

Index # 602169/2007

-against-

LIA BARTELLA, M.D. and MEMORIAL HOSPITAL
FOR CANCER AND ALLIED DISEASES

Defendants.

-----X

SKLAR, J.:

In this medical malpractice action in which it is claimed that defendants failed to timely diagnose and treat plaintiff Roberta Siegel’s (“Siegel”) breast cancer, Siegel and her husband who have sued derivatively move for an order striking the answers of defendants Lia Bartella, M.D. and Memorial Hospital for Cancer and Allied Diseases (“the hospital”) on the ground of spoliation of evidence, namely the films of Siegel’s yearly mammograms from 1996-2005.

Siegel who in 1994 had a mastectomy of her right breast due to cancer went for yearly mammograms at the hospital’s radiology department as ordered by her oncologist, Dr. Linda Vahdat. On October 10, 2005, Siegel presented to the hospital for her yearly mammogram. Before a patient had her mammogram the hospital’s support staff would send over a jacket that contained prior films taken of the patient. Some of the films were stored at the hospital’s on-site library and other films were at another location. See Bartella ebt 14 Dr. Bartella, a staff radiologist at the hospital who interpreted that October10 mammogram, saw a suspicious mass

and had a sonogram performed that day. In her report of those two studies Dr. Bartella recited that she had compared them with the 2003 and 2004 studies and that the 2005 study showed a mass at the 3:00 quadrant, 4 cm from the nipple, measuring 1.9 cm along its longest axis and that the mass was suspicious for carcinoma. Dr. Bartella testified at her deposition that based on her description it was possible that this mass could have been in the retro-areolar region depending on the size of the patient's areola (see Bartella ebt 33-34), but that she could not say at her deposition whether the mass was in that area because she did not have the 2005 films (Id, 22). She recommended an ultrasound guided biopsy and advised Siegel of her findings. According to Dr. Bartella (ebt 17) as a general proposition after performing studies if no further action were needed, she would place the old studies and the current one in the jacket and place it in the slot that was made available to her, and the support staff would take care of it. However, when another procedure was to be performed the same day, Dr. Bartella's custom was to personally hand the old and new films to the physician performing that procedure. Id 16-17 These were the procedures used by all the radiologists in her department for handling films. Id 18

The physician who performed the ultrasound guided biopsy that day was a Dr. Dershaw, the hospital's head of breast imaging. After turning the patient over to Dr. Dershaw, Dr. Bartella had no further contact with the patient. Dr. Dershaw performed the biopsy and obtained six cores which were examined by the pathologist. The histological findings indicated a stromal fibrosis, a benign condition, and the patient was advised by Dr. Dershaw to return in a year for a mammogram.

Siegel returned to the hospital on October 6, 2006 for a mammogram ordered, according to the report, by Dr. Vahdat which study was interpreted by Dr. Ralph Wynn, a staff radiologist. His report indicated that prior studies were not available for comparison and that the patient's

last clinical breast exam had been on September 25, 2006. According to the report, there was a density noted by Dr. Wynn in the left lateral breast which had previously been core biopsied and found to have been benign. Dr. Wynn found no evidence of malignancy, and since the prior films were unavailable, he recommended that Siegel return for a repeat mammogram in six months to “confirm stability.”

Siegel was concerned about the unavailability of her prior films for comparison and contacted a patient representative from the hospital who told her not to worry because missing films usually turned up. When they did not, Siegel went to see Dr. Vahdat who examined Siegel and allegedly told her that she did not like the way her breast looked and that she was not going to wait six months. Dr. Vahdat sent Siegel for an MRI of her breast which was performed at East River Medical Imaging on December 14, 2006. The MRI report recited that a comparison had been made with the October 2006 mammography films and that the MRI showed an abnormal area in the lower outer quadrant of the left breast with dimensions of about 2.5 x 2.5 x 2.5 cm that corresponded with the dense fibroglandular tissue on the mammogram. The report further stated that the possibility that such area represented an enhancing neoplasm had to be strongly considered. In addition the report indicated that at about the 12:00 position there was another irregular area which was not a mass which possibly represented enhancing fat necrosis. Also, a prominent axillary node was seen. A targeted biopsy was recommended of the mass and it was suggested that a biopsy of the other area be considered as well.

Siegel was then referred to a breast surgeon, Dr. Alexander Swistel, who sent Siegel for an ultrasound guided biopsy, which was performed by radiologist Dr. Thomas Kolb who correlated his study with the 2006 mammogram. The ultrasound showed a mass larger than 3.3 cm in the left retro-areolar region which was suspect for carcinoma and a 9 mm solid nodule in

the left 2:00 axis, 3 cm from the areolar margin and about 3 cm from the larger mass. According to the report, the mammogram view overlying “this area shows this to correlate with areas of mammographic density and ultrasound-guided biopsy of both masses was performed.” See Kolb report of 12/21/06 No discrete mass was found in the 12:00 area, and the mammographic views of this area could not localize this region. Ibid The pathology showed infiltrating carcinoma in the left retro-areolar region and benign breast parenchyma with stromal fibrosis in the 2:00 axis where the ultrasound had showed a 9 mm nodule. See Kolb path report of 12/27/06 to Dr. Swistel Whether this benign 9 mm nodule was reflected in the 2005 mammogram is questionable since Dr. Bartella’s 2005 report indicated that the mass she observed was 1.9 cm along its longest axis. Siegel ultimately underwent a left mastectomy. The pathology report indicated that there was infiltrating and in situ ductal carcinoma in addition to fibrocystic changes, including cysts, of the uninvolved breast tissue. Also, some of Siegel’s lymph nodes were positive for metastatic cancer. Siegel testified (ebt 142-143) that Dr. Swistel told her that the malignancy should have been found the year before when the biopsy was performed.

Siegel and her husband thereafter commenced this action against Dr. Bartella and the hospital alleging in essence that they were negligent in failing to timely diagnose Siegel’s breast cancer, inter alia by failing to properly interpret the 2005 mammogram and properly perform biopsies (see bill of particulars as to the hospital items 5 f-g), thereby causing the cancer to spread and advance to a terminal stage. The complaint (§ 24) further alleges that defendants were negligent in losing or destroying the 2005 mammogram.

During discovery plaintiffs by notice to produce dated November 27, 2007 demanded copies of Siegel’s yearly mammogram films from 1996-2005. Defendants agreed to produce them as reflected in the preliminary conference order dated January 8, 2008 which also set a note

of issue date of July 31, 2008. By response dated June 20, 2008 defense counsel whose firm represents both defendants sent plaintiffs a copy of an October 10, 2005 ultrasound but did not produce copies of the 1996- 2005 mammograms. Instead affidavits were provided from the manager of the hospital's radiology unit, Bruce Peters, and from the Supervisor of Record Management of the hospital's Main Campus Library, Randolph Eagle, regarding their futile search for the requested 1996-2005 mammograms.

In essence Eagle stated that the Main Campus Library kept mammogram films of all patients for 14 months in separate jackets for each patient so that if a patient returned for a follow-up mammogram the films would be retrieved from the Main Campus Library and sent to the location where the diagnostic test was to be performed. Each jacket had a bar code that would be scanned onto the Main Campus Library's computer when the jacket was sent out so that the locale where it was sent could be recorded. When the jacket was sent back to the Main Campus Library, it would be scanned back into its computer so as to indicate that it had returned. Eagle asserts that he supervised a search of the Main Campus Library and was unable to identify or locate the "subject" films. Eagle did not indicate where the films older than 14 months were located or whether there was a search for those films.

Peters asserts that when the radiology practice group was performing a follow-up mammogram it would retrieve in advance the patient's films from the Main Campus Library, which would track them out to the group. Then, when done with the films the group would track the films out on its computer to indicate that they went back to the Main Campus Library which would then track them back into its computer. Peters maintains that the films were tracked out of the Main Campus on October 14, 2005 but were never tracked back into the Main Campus Library's computer. Peters does not indicate whether the films were ever tracked out of the

practice group's computer. Peters further avers that he personally searched the entire radiology practice location including the "radiologists' individual practice clusters and holding bins" and could not locate the films. There is no indication whether Peters spoke to Dr. Dershaw or Dr. Bartella to ascertain whether they could have placed the films elsewhere, and neither physician's affidavit was provided by defense counsel, although as previously noted Dr. Bartella testified that in accordance with custom she would have personally handed the films to the physician (in this case Dr. Dershaw) performing the procedure. Plaintiffs evidently did not voice any concern about the adequacy of these affidavits and instead filed the note of issue on July 31, 2008.

Meanwhile, on July 24 they served the instant motion to strike the defendants' answers based on their alleged spoliation of the 1996-2005 mammograms. In essence the moving affirmation of plaintiffs' counsel notes that medical providers are required to maintain patients' records for 6 years and alleges that the Siegels cannot get an expert's opinion without these films because they are the "only direct evidence that will prove that the defendants were negligent." Hurwitz aff. ¶ 14 No affidavit from a physician was provided by plaintiffs to support this assertion, that the 2005 ultrasound films (it seems that there were two October 10, 2005 ultrasound studies, one done by Dr. Bartella and the other by Dr. Dershaw) would be inadequate to establish malpractice or that the advanced stage of the cancer in 2006 would in and of itself be insufficient to demonstrate that the cancer was diagnosable in October 2005. Indeed Siegel's deposition testimony previously mentioned that Dr. Swistel told her that the cancer should have been found the year before when the biopsy was performed would seem to undercut the latter proposition.

Defendants oppose the motion urging, inter alia, that plaintiffs have failed to establish that they would be unable to prove their case absent the mammograms, that the defendants

cannot be sanctioned for the missing films since they were missing before defendants knew they might be needed for a malpractice suit, thus demonstrating that their loss was inadvertent, and that in any event Dr. Bartella would not be liable for any missing mammograms since she was not their custodian and based on her deposition testimony to the effect that she would have given them to Dr. Dershaw on the day of the mammogram (see *Maliszewska v Potamkin New York LP*, 281 AD2d 353).

In reply plaintiffs fail to specifically address defense counsel's contention that Dr. Bartella would not be liable for the missing films. However plaintiffs' counsel asserts that the fact that the films were inadvertently lost or were lost before defendants knew there might be a claim is irrelevant here where the hospital was required by law to maintain the records. See, e.g. *Gray v Jaeger*, 17 AD3d 286; *Herrera v Matlin*, 303 AD2d 198. Plaintiffs also append the affidavit of their expert radiologist, Dr. Stanley Sprecher, who opines in essence that the 2005 mammogram films as well as the other mammogram films are needed to establish malpractice. Dr. Sprecher maintains that Dr. Bartella's 2005 mammogram only referred to a mass in the 3:00 position which turned out to be benign and did not refer to one in the retro-areolar region. However as previously noted, Dr. Bartella at her deposition could not say whether the mass referred to in her report included the retro-areolar region because it depended on the size of Siegel's areola. Dr. Sprecher does not indicate whether any other evidence is available, such as the 2006 mammogram films, showing the size of Siegel's areola. In addition, while Dr. Sprecher in effect states that the ultrasound films of the guided biopsy performed by Dr. Dershaw are inadequate to ascertain whether a retro-areolar mass was then visible because they did not show the entire breast, he does not indicate whether he examined the ultrasound films taken earlier the same day by Dr. Bartella.

Following review of all the papers the motion is denied. Aside from the fact that plaintiffs during discovery did not exhaust the possibility that some or all of the films could be located with some further effort, plaintiffs' initial set of moving papers failed to establish that the 1996-2005 mammograms were essential to establish a prima facie case. Evidence and arguments presented for the first time in the reply papers are unavailing (see *Dannasch v Bifulco*, 184 AD2d 415; *Azzopardi v American Blower Corp*, 192 AD2d 453; *Seefeldt v Johnson*, 13 AD3d 1203), and in any event as just noted there were deficiencies in Dr. Sprecher's affidavit. In conclusion the motion is denied. The denial of this motion is without prejudice to any application plaintiffs may be advised to make before the trial judge for a missing documents charge.

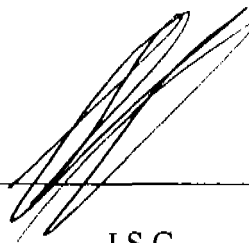
Settle order.

Dated:

60 Centre Street

New York, N.Y.

Stanley L. Sklar
10/15/2008



J.S.C.

STANLEY L. SKLAR