

**Siryj v Mount Sinai Hosp.**

2009 NY Slip Op 30445(U)

February 23, 2009

Supreme Court, New York County

Docket Number: 100837/06

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LEWIS  
Justice

PART 6

Index Number : 100837/2006  
SIRYJ, MICHAEL  
vs.  
MOUNT SINAI HOSPITAL  
SEQUENCE NUMBER : 005  
COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_

MOTION DATE 11/26/08

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1-25  
26-34  
35-38

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  
ACCOMPANYING DECISION AND ORDER

**FILED**  
MAR - 3 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: Feb. 23, 2009

JBL  
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 6**

-----X  
MICHAEL SIRYJ, an Infant, by his Mother and Natural  
Guardian, TRACEY SIRYJ, and TRACEY SIRYJ,  
Individually,

Plaintiffs,

Index No. 100837/06

-against-

**Decision and Order**

THE MOUNT SINAI HOSPITAL and JANICE DOE,  
last name being fictitious and unknown to plaintiff,

Defendants.

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

Plaintiffs bring this motion, pursuant to C.P.L.R. Rule 3124 and § 3126, to compel defendant's production of the following documents: records reflecting the monitoring of the infant plaintiff's clinical status and condition from the 45-60 minute period that he underwent suctioning under fluoroscopy in the Cath Lab on December 16, 1997; written policies and procedures of the pediatric cardiac intensive care unit (the "PCICU") at Mount Sinai Hospital ("Mt. Sinai") in place on December 16, 1997, regarding the suctioning of infants on ventilators or, in the alternative, the PCICU policy and procedure in Mt. Sinai's present possession; and, written policies and procedures of the cardiac catheterization laboratory (the "Cath Lab") at Mt. Sinai in place on December 16, 1997, as testified to by Robert J. Sommer, M.D., at his deposition.<sup>1</sup>

This is an action for medical malpractice and lack of informed consent arising out of Mt. Sinai's treatment of the infant plaintiff, Michael, on December 16, 1997. Michael was born

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<sup>1</sup> Plaintiffs' moving papers also requested certain radiographic films and reports for chest studies ordered for the infant plaintiff in the period following December 16, 1997, but this portion of plaintiffs' motion was later withdrawn in plaintiffs' reply papers.

prematurely on November 16, 1997, at Bayonne Hospital in New Jersey. On November 17, he was transferred to Mt. Sinai for treatment of a serious congenital cardiac condition known as “transposition of the great vessels.” Mt. Sinai performed surgery to correct Michael’s condition on November 24; plaintiffs acknowledge that the operation—an arterial switch—was successfully accomplished at Mt. Sinai prior to the events giving rise to plaintiff’s medical malpractice action. As he recovered from the surgery in the PCICU, Michael remained intubated with an endotracheal tube, and his breathing was assisted by a ventilator. On December 16, 1997, Michael suffered severe pulmonary bleeding due to hemorrhage during a routine suctioning of the tube by a nurse, necessitating the removal of his endotracheal tube. Three attempts were made to reintubate Michael in the PCICU until he was successfully reintubated on the fourth attempt. During these attempts, Michael suffered an anoxic event. He was transferred to the Cath Lab where he underwent suctioning under fluoroscopy, i.e., with the aid of radiology, to visualize the suctioning. Michael was in the Cath Lab for approximately 45-60 minutes, whereupon he was transferred back to the PCICU. He was discharged on February 19, 1998.

Plaintiffs seek records pertaining to Michael’s clinical status and vital signs during the time he was treated in the Cath Lab. Plaintiffs complain that, other than a brief note by a Dr. Rossi describing the procedure performed in the Cath Lab, no other records were provided regarding the 45-60 minutes Michael spent in the Cath Lab. Plaintiffs refer to the May 1, 2008 deposition testimony of Dr. Sommer, who was the director of the Cath Lab at the time Michael was treated. Dr. Sommer testified that suctioning under fluoroscopy is a procedure that is rarely performed, and that it does not involve catheterization. Procedures such as fluoroscopic suctioning are sometimes performed in the Cath Lab because there is x-ray equipment available there that is difficult to access

in other parts of the hospital. Dr. Sommer further testified that, as a continuation of the infant's care in the PCICU, the infant's vital signs and clinical condition would have been monitored and recorded by a nurse while he was in the Cath Lab, and that "the absence of that data is not correct." Plaintiffs assert that none of the information regarding the infant plaintiff's vital signs while he was in the Cath Lab has been produced by Mt. Sinai.

Prior to Dr. Sommer's deposition, Mt. Sinai produced an affidavit, dated March 24, 2008, from Samin Sharma, M.D., who is the current director of the Cath Lab. Dr. Sharma's affidavit sets forth that he is fully familiar with the practices of the Cath Lab, and that "[w]hen fluoroscopy is used to aid in suctioning in the [Cath Lab], no film, note or separate report is generated. Such was the custom and practice in December 1997 and is still the practice at this date." He further states:

A report would only be generated when an actual catheterization procedure is performed. Suctioning under fluoroscopy is not a catheterization procedure. There are no records that would have been generated in the [Cath Lab] on December 16, 1997 for an infant who underwent suctioning under fluoroscopy on that date.

Additionally, Mt. Sinai's opposition to the instant motion contains an attorney's affirmation which asserts that Mt. Sinai is unaware of any other documentation of the infant's condition, other than what is contained in the hospital chart and has been provided to plaintiff. Mt. Sinai asserts that plaintiffs are demanding the production of material which does not exist.

Plaintiffs' reply to Mt. Sinai's assertions that all available records have been provided is that Dr. Sharma does not possess the requisite knowledge to assert that no records would have been generated, as he was not the director of the Cath Lab in 1997; that the nature of the search conducted has not been provided; and, that Mt. Sinai has "willfully refused to provide an affidavit

or certification from any hospital employee with knowledge stating the status of these treatment records and indicating the nature of any search that was conducted for this material.” Plaintiffs refer to a stipulation, dated February 8, 2008, by which defendant agreed to produce such a certification by March 20, 2008, if the treatment records were not produced. Plaintiffs claim that no such affidavit or certification has ever been provided.

A party “cannot be compelled to produce documents which do not exist or are not in his possession.” Euro-Central Corp. v. Dalsimer, Inc., 22 A.D.3d 793, 794 (2d Dep’t 2005). The problem here is that Dr. Sommer testified that, at the very least, the infant’s vital signs and clinical condition would have been monitored and recorded while he was undergoing the procedure in the Cath Lab. No such records have been produced. There is a discrepancy here that was not resolved by Dr. Sharma’s affidavit. Mt. Sinai is hereby directed to undertake a good faith search for any records covering the care and treatment of the infant plaintiff for the period of time that he underwent suctioning under fluoroscopy in the Cath Lab. Should the records exist, Mt. Sinai is directed to provide plaintiff with a copy of such records within forty-five (45) days of the date of this decision and order. In the alternative, should the records not exist, Mt. Sinai must provide plaintiffs with an affidavit, from an employee with actual knowledge of the search, describing the employee’s familiarity with the records, the nature of the search conducted, and the results of the search; this affidavit shall be provided within sixty (60) days of the date of this decision and order.

Plaintiffs also seek the written policies and procedures in place for the PCICU on December 16, 1997, regarding the suctioning of infants on ventilators. Mt. Sinai maintains that the policies in place for the PCICU on December 16, 1997 cannot be located, and has previously

produced an affidavit by Barbara Niss—an archivist at Mt. Sinai, who states that she maintains copies of revised nursing policies—to that effect. Ms. Niss sets forth that she conducted several searches for the policies in effect on December 16, 1997, including searches on February 4, 11, and 15, 2008, and that the PCICU policies in effect on December 16, 1997 were revised in 1999. In response to this motion, Mt. Sinai annexes what purports to be the 1999 policies and procedures regarding the suctioning of infants.<sup>2</sup> The document is two pages long and appears to be out of order: the first page starts with “Page 1 of 3,” but the second page has a header that states “Page 3 of 3” and has a block of text further down the page that states “Page 2 of 3.” Further, the first page is titled “ENDOTRACHEAL/TRACHEOSTOMY TUBE SUCTIONING,” while the second page is titled “ENDOTRACHEAL/TRACHEOSTOMY TUBE CUFF DEFLATION AND REINFLATION.” Plaintiffs, by their reply, ask the court to reject this document and strike Mt. Sinai’s answer.

“Although CPLR 3126 provides that a court may strike a party’s pleadings for failure to comply with a discovery order or request, the extreme and drastic sanction of striking a party’s pleadings is only justified where the moving party shows conclusively that the failure to disclose was willful, contumacious or due to bad faith.” Dauria v. New York, 127 A.D.2d 459, 460 (1st Dep’t 1987) (citations omitted). There is clearly something wrong with the document Mt. Sinai has produced; but, the existence of certain pages of the document sought indicates that, in all likelihood, the entire document is available for production. Mt. Sinai has already provided an affidavit by a person with knowledge that the PCICU policy in effect on December 16, 1997 cannot be located, despite the fact that three searches were conducted by the person who maintains copies of such

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<sup>2</sup> Deposition testimony from Nurse Janice Migniuolo indicates that the PCICU policy did not substantively change between 1997 and 1999.

policies. The remedy of striking Mt. Sinai's answer is inappropriate under these circumstances. The fact that Mt. Sinai recently provided what appears to be part of the 1999 policy evidences at least a willingness to cooperate on this issue, despite its delay in doing so. Mt. Sinai is hereby directed to produce a certified copy of the 1999 written policies and procedures in place for the PCICU, regarding the suctioning of infants on ventilators, within forty-five (45) days of the date of this decision and order. In the alternative, should a complete copy of the PCICU policy not exist after a good faith search is undertaken, Mt. Sinai must provide plaintiffs with an affidavit, from an employee with actual knowledge of the search, describing the employee's familiarity with the policy, the nature of the search conducted, and the results of the search; this affidavit shall be provided within sixty (60) days of the date of this decision and order.

Finally, plaintiffs seek the written policies and procedures in place for the Cath Lab on December 16, 1997, pertaining to the documentation required to be made when invasive procedures are performed. Plaintiffs requested this material by letter dated December 27, 2007; counsel for both sides stipulated that defense counsel would provide, by February 28, 2008, the "Policy and Procedure Manual for the Cardiac Cath Lab pertaining to the documentation required to be made when invasive procedures are performed," or an attorney response as to the status or existence of those records. The parties also stipulated that if the Cath Lab manual was not produced by March 20, 2008, defense counsel was to supply certification from a hospital employee with knowledge, stating the status or existence of the manual, and indicating the nature of the search conducted. On February 27, 2008, counsel for Mt. Sinai responded that "[t]here is no policy or procedure for the [Cath Lab] with respect to documentation of invasive procedures in effect for December 16, 1997." Mt. Sinai followed up in March 2008 with the affidavit from Dr. Sharma,

described earlier. Dr. Sharma's affidavit does not specifically address the existence of written Cath Lab policies.

Plaintiffs claim that Dr. Sommer's deposition testimony indicates that there were written Cath Lab policies regarding invasive procedures in existence in 1997, and demands the production of such documents. However, during his deposition, Dr. Sommer consistently distinguished catheterization procedures performed in the Cath Lab from other procedures performed in the Cath Lab in order to use the x-ray equipment contained in the Cath Lab, which he specifically stated are not catheter procedures. Dr. Sommer stated that the suctioning under fluoroscopy is "basically a continuation of the care the baby was receiving at the bedside of the ICU, but it's being done under X-ray so that we can optimally suction the baby's lungs." Mt. Sinai, in its opposition, annexes a second affidavit from Dr. Sharma, attesting to the fact that "[i]n 1997 there were no written rules, regulations or protocols governing fluoroscopic suctioning for pediatric patients carried out in the [Cath Lab], and there are no written rules, regulations or protocols governing such procedures carried out in the [Cath Lab] presently." This statement makes technical sense. It appears that suctioning under fluoroscopy can take place in any room in the hospital that has the requisite x-ray equipment; if the PCICU had the requisite equipment, the procedure would have taken place there. The Cath Lab was merely the site of the procedure most convenient for the infant and the staff. The second affidavit by Dr. Sharma particularizes plaintiffs' request in such a way as to be technically responsive to the demand, but is utterly unhelpful. The governing policies regarding suctioning under fluoroscopy would not necessarily be contained in the written policies and procedures of the Cath Lab. It is this distinction that appears to keep tripping up plaintiffs' request for, and Mt. Sinai's production of, what plaintiffs are really seeking: the written policies and

procedures pertaining to the documentation required to be made when suctioning under fluoroscopy is performed. To that end, Mt. Sinai is hereby directed to produce a certified copy of the written policies and procedures in place on December 16, 1997, governing the documentation required to be made when the infant underwent suctioning under fluoroscopy—whether such policies be contained in the Cath Lab’s, the PCICU’s, or any other department’s manual—within forty-five (45) days of the date of this decision and order. In the alternative, should these policies not exist after a good faith search is undertaken, Mt. Sinai must provide plaintiffs with an affidavit, from an employee with actual knowledge of the search, describing the employee’s familiarity with the policies, the nature of the search conducted, and the results of the search; this affidavit shall be provided within sixty (60) days of the date of this decision and order.

Should Mt. Sinai fail to comply with this order to produce the outstanding documents, the court will reconsider plaintiffs’ request to strike Mt. Sinai’s answer, pursuant to C.P.L.R. § 3126.

The motion is decided in accordance with the foregoing. Any requested relief not addressed herein is denied. This constitutes the decision and order of the court.

Dated: February 23, 2009

  
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 JOAN B. LOBIS, J.S.C.

**FILED**  
 MAR - 3 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK