Siryj v Mount Sinai Hosp.

2010 NY Slip Op 30003(U)

January 4, 2010

Supreme Court, New York County

Docket Number: 100837/2006

Judge: Joan B. Lobis

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SCANNED ON 1/6/2010
[* 1]

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

PART 6

Index Number : 100837/2006
SIRYJ, MICHAEL
VS.
MOUNT SINAI HOSPITAL
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE 10/20/09
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

Th... motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-18
Answering Affidavits — Exhibits	19-21
Replying Affidavits	22-24

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/4/10

[signature], 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 6
----------------------------------x
MICHAEL SIRYJ, an infant, by his
Mother and Natural Guardian, TRACEY
SIRYJ, Individually,

Plaintiffs, Index No. 100837/2006

-against-

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

Defendants.
----------------------------------x

FILED
JAN 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

Joan B. Lobis, J.:

Plaintiffs, infant Michael Siryj (Michael) and his mother, Tracey Siryj, suing on his behalf and individually, move for an order, pursuant to CPLR 3212, granting them summary judgment against defendant, Mt. Sinai Hospital (Mt. Sinai), or alternatively, pursuant to CPLR 3126, striking its answer, on the ground that it allegedly spoliated Michael's December 16, 1998 records of a fluoroscopy procedure performed in its pediatric cardiac catheterization lab (PCCL).

Background

Michael was born prematurely, on November 17, 1997, and suffered from life-threatening congenital heart abnormalities. On the day he was born, he was transferred to Mt. Sinai's

[* 3]

pediatric cardiac intensive care unit (PCICU), on a ventilator, and in respiratory distress. Mt. Sinai was, at that time, the only hospital in the state with a PCICU, and only one of a few hospitals in the country with a PCCL.

On November 18, 1997, a balloon atrial septotomy was performed to temporarily increase Michael's oxygen concentration, and on November 25, 1997, an arterial switch operation was performed. A nursing plan of care note, also dated November 25, 1997, but allegedly reviewed on February 2, 1998, recited that low pressure should be used when suctioning the endotracheal tube (ETT), and that the person suctioning should not go below the # 19 mark. A post-operative bleed warranted a re-exploration of Michael's chest on November 28. After that procedure, Michael had difficulty in maintaining adequate oxygenation and blood pressure. On December 1, 1997, Michael was diagnosed with the first of several sepsis episodes. By December 13, both his respiratory and hemodynamic statuses showed improvement. A neurology note of December 15, 1997 indicated that Michael had opened his eyes and followed large objects.

On December 16, 1997, Michael was in the PCICU, still on a ventilator, which was attached to a 3.5 millimeter ETT. Among

[* 4]

the physicians in the PCICU on December 16 was its director, Dr. Anthony Rossi (Rossi). That day, as was routine, a PCICU nurse, Janice Migniuolo (Migniuolo), inspected the ETT, advanced a suction catheter down it, and to keep the ETT from becoming obstructed with mucous and interfering with ventilation, began to suction it with a device on the wall, which allowed her to control the force of the suction. She noted some yellow blood-tinged mucous, but nothing out of the ordinary. However, later in the day, at about 4:30 P.M., when she again went to suction the ETT, a profuse amount of blood, which was eventually diagnosed as a pulmonary hemorrhage, came up the tube, requiring the ETT, which kept filling with blood, to be removed and reinserted three times. The chart indicated that, with the third intubation, the secretions lessened. Danzi aff., ex. A, at 22.

According to the hospital's order sheet, at about 5:00 P.M., a transfusion of packed red blood cells was ordered to be given over the course of 30 minutes. While the records are not entirely clear, it was apparently given somewhere between 4:30 and 6:00 P.M. Danzi aff., ex. A, at 20, 33; Migniuolo ebt, at 101. An x-ray taken at 5:08 P.M., revealed that Michael's left lung had collapsed. According to Rossi, the x-ray also showed some haziness, and a little bit of "white out" in the right lung,

which he characterized as the "very early beginning of some kind of pathologic process in the alveoli." Rossi ebt, at 52. Rossi believed that it was probable that Michael had a tracheal bronchial bleed. Because of the need to re-inflate the left lung (Sommer ebt, at 18), Michael was sent to the PCCL, which had a fluoroscope, which would assist the staff in assessing the left lung's problem, in real time, as opposed to blindly doing the procedure in the PCICU, which presented a risk of injury. Rossi ebt, at 33, 46-48.

In directing the catheter in such a procedure a "soft and floppy" guidewire, which was "designed not to injury [*sic*] structures" (Sommer ebt, at 23) might be used, as it was in this case, according to the hospital's records. Danzi aff., ex. A, at 16. Although a fluoroscopy procedure on an infant, under the circumstances presented, had been done only a few times at Mt. Sinai (Sommer ebt, at 39), it had the advantage, as compared with using a bronchoscope, of being able to ventilate a tiny infant, at the same time that any plug was located and cleared. Rossi ebt, at 24.

Migniuolo testified that Dr. Robert Sommer (Sommer), the head of the PCCL, was notified that Michael was being brought to

[* 6]

the PCCL, and was given an oral report about Michael. Migniuolo, accompanied by a PCICU physician, whom she could not identify, and Michael's chart, dropped Michael off at the PCCL. Since Rossi and Sommer were deposed about 10 years after the event, and since there was no notation in the chart as to who performed the fluoroscopy procedure, neither could definitively say whether they had performed the procedure. Apparently, since the procedure did not involve a cardiac catheterization or other procedure, which was within the usual realm of the catheterization staff in the PCCL, and was essentially performed in the PCCL for the sake of expediency, because it had a fluoroscope, the procedure could be performed by either an intensivist or a cardiac catheterization specialist. Sommer testified (ebt, at 56-57) that either he or Rossi would have performed the procedure. Since the procedure was essentially an extension of the PCICU's treatment, any record of the fluoroscopy would have been in the PCICU's chart rather than in PCCL records. *Id.* at 17, 24, 28-30, 38-39, 46, 60, 62.

The fluoroscopy procedure, which was performed at some time between 5:15 P.M. and 6:15 P.M., was incapable of finding the cause of a bleed (Rossi ebt, at 49), and Sommer testified (ebt, at 83) that he presumed that the bleeding had ceased at the time that

[* 7]

Michael arrived at the PCCL. Neither Rossi nor Sommer could state what caused the hemorrhage, but both acknowledged that a hemorrhage could be caused by suctioning, among other things. The blockage was cleared during the procedure and Michael left the PCCL with a 3.5 millimeter ETT in place.

Michael then returned to the PCICU, where Rossi wrote a note in the chart, indicating that Michael's lung had collapsed, that he had been brought to the PCCL to visualize the suctioning of the "LL," that both lungs had undergone fluoroscopy, and that the patient was doing well with decreased "vent support and excellent profusion." Danzi aff., ex. A, at 31. Rossi's note also mentioned a post-procedure x-ray, which showed bilateral white out and RDS (respiratory distress syndrome).

According to Rossi (ebt, at 28-30) who did not think that the standard of care necessarily required a procedure note to be made of the fluoroscopy, his note was not a procedure note, but was simply a progress note. Sommer testified (ebt, at 24, 26, 69-70, 77-78) that either the person who "performed the procedure or potentially whoever was in charge of the baby's care" should write a note in the chart about the procedure, and that Rossi's note satisfied that requirement. Sommer also testified that the

standard of care required that notes of Michael's vital signs, among other things, should have been entered into the chart, at "regular intervals," by the nurses who were monitoring him in the PCCL, which intervals he could not define, and that the absence of such "data is not correct." *Id.* at 38-52, 63. He further testified that "[t]he monitoring should be as if the baby were in the [P]ICU." *Id.* at 33. Rossi basically testified (ebt, at 36-39) that such information only needed to be recorded hourly, and that since it was recorded in the PCICU, once Michael returned, that was sufficient.

Migniuolo's post-fluoroscopy note of December 16 recounted the day's events and indicated that the # 3.5 ETT had a large air leak. The ETT was then changed to a larger size, so that it would fit more snugly and not permit as much air to come out of its sides. Rossi testified (ebt, at 59-60) that this was not at all uncommon (*see also* Sommer ebt, at 95 ["(a)ll babies have air leaks"]), and that what essentially happened was that, because of the patient's RDS, the ventilator settings needed to be increased, causing increased volume and pressure, thus causing more air to leak out the sides of the ETT. *See also* Migniuolo ebt, at 167.

[* 9]

On December 18, 1997, a chest x-ray, ordered by Rossi, showed pulmonary congestion and a pneumomediastinum.[1] A consultation report of January 27, 1998 indicated that the infant had opened his eyes spontaneously, but without tracking. Some of the hospital's records, following the fluoroscopy, revealed an abnormal EEG, "considerable cerebral atrophy," and findings "consistent with hemorrhagic periventricular leukomalacia." Danzi aff., ex. A, at 61, 63, 65.

The Action

Plaintiffs commenced this action, naming Mt. Sinai and Janice "Doe," a nurse (presumably Janice Migniuolo), who was never served, alleging claims sounding, *inter alia*, in medical malpractice. The bill of particulars focused largely on matters which occurred prior to Michael's arrival in the PCCL. Neither the fluoroscopy, nor the use of a guidewire was specifically mentioned in the pleadings. As a result of the alleged

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[1] According to *Stedman's Electronic Medical Dictionary*, volume 4, "a pneumomediastinum is an escape of air into mediastinal tissue, usually from interstitial emphysema or from a ruptured pulmonary bleb," which is defined as "a large flaccid vesicle." A vesicle is "a small sac containing liquid or gas." *Ibid.* A mediastinum is "[t]he median partition of the thoracic cavity." *Ibid.*

malpractice, it is claimed that Michael suffered from a pulmonary hemorrhage, suffers from severe brain damage, and is dependent on his parents for all of his daily needs. Bill of Particulars, ¶ 15.

During discovery, plaintiffs' counsel sought hospital records created during the period of time when Michael was in the PCCL. Initially, after no such records were produced, Mt. Sinai provided the affidavit of the current director of the PCCL, Samin Sharma, M.D., who stated that, under current and past practices, no separate report, film or note would be generated in the PCCL when fluoroscopy was used to aid suctioning, and that such materials would only be generated when a catheterization procedure was performed. Thereafter, pursuant to court order, the hospital then provided the affidavit of its Associate Director of Medical Records, who indicated that a search for such records had been made of the medical records department, that records of emergency fluoroscopic suctioning done in the PCCL typically would become part of the medical record in the PCICU, that if medical records were discovered, which were not part of the original chart, they would be sent to the medical records department and become part of the chart, and that, other than the records previously provided, there were no records in or from the

PCCL concerning Michael's December 16, 1997 fluoroscopy procedure.

The Instant Motion

Plaintiffs now move for an order either granting them summary judgment, or striking Mt. Sinai's answer on the ground that it spoliated records made in the PCCL. Plaintiffs' relying, on, among other items, the hospital's chart, which allegedly showed a decline in Michael's condition after the fluoroscopy, and the affidavit of its expert pediatrician, Dr. Gregory Allen Ross (Ross), maintain that the records of the fluoroscopy are critical, that the hospital was required to preserve them, and that their absence prejudices plaintiffs, because without them, they cannot know what happened in the PCCL, exactly when the transfusion took place, what steps were taken to stop the bleeding, or who performed the procedure, although Ross conceded that it was likely performed by Rossi or Sommer.

Ross claims that "[i]t is reasonable to conclude that there was a departure from accepted standards of medical care in the [P]CCL given Michael's condition before he was treated with an unknown procedure in the [P]CCL and his condition after it and without the records it is impossible for me to know for certain." Ross aff., at 4. Ross, relying on the hospital's records, then

[* 12]

effectively asserts that Mt. Sinai departed from accepted standards of practice in using a guidewire, and in failing to properly oxygenate the infant and control the hemorrhage, and that such departures injured Michael. Ross aff., at 8-9, 13.

Plaintiffs' counsel claims that obvious alterations and discrepancies in the chart demonstrate that the spoliation of the fluoroscopy records was intentional, and that, since the infant's condition allegedly deteriorated after the fluoroscopy, as reflected in the hospital's chart, the hospital was on notice of a potential lawsuit, thereby creating a motive to alter the chart.

In response, Mt. Sinai asserts that plaintiffs have failed to establish that there were records created in the PCCL. Mt. Sinai further asserts that it had no reason to suspect litigation, and spoliate evidence or alter the chart. Mt. Sinai also maintains that, even if such records were created, plaintiffs have failed to show that they were crucial to the prosecution of the action.

The opposing papers are supported by Mt. Sinai's pediatric expert, Bruce Greenwald, M.D. (Greenwald), who opines that the records which exist are sufficient to meet the hospital's recording requirements; that Mt. Sinai, at the time, was one of only a few institutions where fluoroscopy guided suctioning of an

infant could be done and notes that Sommer testified that the guidewires were soft and floppy; that plaintiffs' expert's argument about a post-procedure note of air leaking from the ETT is irrelevant and wrong, in that the air did not leak from the ETT but from around it, a condition which was properly addressed; that the fluoroscopy was not conducted to find the origin of the bleed, but was done to re-inflate the left lung; that the bilateral white out was only a vestige of the blood which had accumulated during the hemorrhage (*see also* Rossi ebt, at 70-71); that the difference in Michael's pre- and post- fluoroscopy blood gases only reflected the hemorrhage, not what occurred in the PCCL; and that the pneumomediastinum had no medical significance and was a benign complication of the mechanical ventilation.

Discussion

A party seeking the imposition of substantial and severe sanctions for spoliation of evidence must demonstrate that the entity or individual sought 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 [that individual or entity] was on notice that such evidence might be needed for future litigation." *Haviv v Bellovin*, 39 AD3d 708, 709 (2d Dept 2007); *see also Dessources v Good Samaritan Hospital*, 65 AD3d 1008, 1010

[* 14]

(2d Dept 2009) (plaintiff's expert's speculative affidavit was inadequate to establish that the loss of fetal monitoring tapes was crucial evidence); *Utica Mutual Insurance Co. v Berkoski Oil Co.*, 58 AD3d 717 (2d Dept 2009); *Tapia v Royal Tours Service, Inc.*, - AD3d- , 2009 NY Slip Op 08606, *2 (2d Dept 2009)(plaintiffs must show that "they are 'prejudicially bereft of the means of prosecuting'" the action [internal citation omitted]). Where there is an issue of fact as to whether spoliation occurred, that issue is for the trier of fact. *Marcano v Calvary Hospital, Inc.*, 13 AD3d 109 (1st Dept 2004); *see also Haviv*, 39 AD3d at 709 (questions, as to destruction or loss of medical records and whether defendant was on notice of their need for litigation, warranted a hearing).

Sanctions can be ordered whether the spoliation was negligent or intentional. *Baglio v St. John's Queens Hospital*, 303 AD2d 341 (2d Dept 2003); *Squitieri v City of New York*, 248 AD2d 201 (1st Dept 1998). The court is given a broad degree of discretion in deciding what sanction is appropriate, and since striking a party's pleading constitutes drastic relief, the court is required to consider the prejudice to the other side, particularly, absent willful conduct. *Utica Mutual*, 58 AD3d at 718; *see also Minaya v Duane Reade International, Inc.*, 66 AD3d 402 (1st Dept 2009). "[A] less severe sanction or no sanction is

appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense." *Denoyelles v Gallagher,* 40 AD3d 1027, 1027 (2d Dept 2007). When a lesser sanction is imposed, it "is a matter best left to the discretion of the trial court and should be made on the basis of the record before it at the time." *Quinn v City University of New York,* 43 AD3d 679, 680 (1st Dept 2007); *Kugel v City of New York,* 60 AD3d 403 (1st Dept 2009).

Following a review of the papers and the applicable law, plaintiffs' motion is denied. Initially, it is unclear whether the records claimed to have been spoliated ever existed. The thrust of Sommer's testimony regarding this seldom performed procedure appears to have been about records which should have been created, rather than records which actually were created. Sommer could not state at what intervals information should have been recorded, and Rossi testified that the standard was to record vital signs only once an hour, which, in fact, was done. Thus, plaintiffs have not established as a matter of law that the hospital failed to preserve evidence. *Leevson v Bay Condos, LLC,* 67 AD3d 972 (2d Dept 2009). Nor is it readily apparent that Mt. Sinai was on notice of potential litigation, because Michael, who arrived with "grave" heart problems and in need of surgery, had

[* 16]

multiple episodes of sepsis, long periods of poor oxygenation and hypotension before December 16, and had suffered a hemorrhage, and thus had many risk factors for neurological injury. Greenwald also observed that Michael went home from the hospital feeding by mouth, a "good result."

However, even if the records did exist, and assuming, arguendo, that Mt. Sinai was on notice that any such records might be needed for potential litigation, plaintiffs have failed to establish that they are "prejudicially bereft of the means of prosecuting" the action. *Tapia*, -AD3d-, 2009 NY Slip Op 08606, at *2. The plaintiffs' bill of particulars focuses to a large extent on alleged acts of malpractice occurring before Michael was transported to the PCCL, including negligent and aggressive endotracheal suctioning, and the failures to a) timely and properly perform the septostomy, b) notify a physician after the nurse noted blood-tinged sputum before the hemorrhage, c) check the suction intensity before suctioning the infant, d) timely treat the collapsed lung, e) properly diagnose Michael after the suctioning, f) properly insert the appropriate ETT, so as to adequately oxygenate the infant, and g) timely perform a bronchoscopy. Indeed, one of plaintiffs' counsel's claim's, that the note dated November 25, 1997, regarding how to suction the ETT, was fabricated, relates more to plaintiffs' claim of

[* 17]

aggressive and improper suctioning in the PCICU, which allegedly caused the pulmonary hemorrhage, than to anything which happened later in the PCCL.

That plaintiffs' expert could not render an opinion with "certainty" is unavailing. In a medical malpractice action, the expert's opinion need only be given to a reasonable degree of medical certainty, that is, the entire opinion must reach "an acceptable level of certainty," such that it is evident that it was not premised on "supposition or speculation." *Matott v Ward*, 48 NY2d 455, 460, 463 (1979). Absolute certainty is not required. *Id.* at 459.

It is readily apparent that, when viewing Ross's affidavit as a whole, he had concluded that the use of guidewires, noted in the chart, amounted to malpractice, and that plaintiffs will be claiming at trial that it caused a pneunmomediastinum, and injury to Michael. Moreover, it is also clear from Ross's affidavit that other evidence exists, including the comparison between the pre- and post-fluoroscopy x-rays taken on December 16, 1997, the latter of which showed bilateral white out; the December 18, 1997 x-ray, which showed the pneumomediastinum; and the post-fluoroscopy notations in the chart, which showed a large air leak, requiring the placement of an ETT with a larger diameter,

[* 18]

an alleged decline in the infant's neurological condition, and a lower oxygen level, as measured by the blood gases, which presumably would allow plaintiffs' expert to opine at trial that Mt. Sinai was negligent in the PCCL in certain respects, such as in failing to keep Michael sufficiently oxygenated through the use of an appropriately sized ETT (Ross aff., at 13) and that such negligence caused injury to the infant.

That plaintiffs are uncertain whether Rossi or Sommer performed the procedure is irrelevant, since neither recalled the procedure, and there is a lack of any claim on this motion that Mt. Sinai would not be liable for either. Ross's bald and conclusory assertion about the relevance of the timing of the transfusion is unavailing, as is his claim about there being no notations in the chart about finding the source of the bleed during the fluoroscopy, where Rossi asserted that such procedure was incapable of finding a bleed, and where the deposition testimony of Sommer and a chart entry suggested that the bleed had either ceased or lessened before the procedure was performed.

In light of the foregoing, plaintiffs' motion is denied. The denial is without prejudice to any application plaintiffs are advised to make during trial for a missing documents charge. *Quinn v City of New York*, 43 AD3d at 680; *Rodriguez v 551 Realty LLC*, 35 AD3d 221 (1st Dept 2006); *see* PJI 1:77.

This case is hereby scheduled for a pre-trial conference before me on Tuesday, January 19, 2010 at 9:30 A.M.

Accordingly, it is

ORDERED that plaintiffs' motion for an order granting them summary judgment against Mt. Sinai Hospital or striking Mt. Sinai Hospital's answer is denied, without prejudice to any application plaintiffs are advised to make at trial for a missing documents charge; and it is further

ORDERED that this case is hereby scheduled before me for a pre-trial conference on Tuesday, January 19, 2010 at 9:30 A.M.

Dated: 1/4/10

ENTER:

J.S.C.

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