[* 1]

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

PRESENT: LOBIS Justice PART 6

WILLIAM DESANTIS

-v-

GARY ZITO, M.D.

INDEX NO. 109753/09

MOTION DATE 11/9/10

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for strike answer

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-14
Answering Affidavits — Exhibits	15-20
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

Dated: 2/14/11

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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WILLIAM DESANTIS and ANN DESANTIS,

Plaintiffs,

Index No. 109753/09

-against-

Decision and Order

GARY ZITO, M.D., METROPOLITAN LITHOTRIPTOR ASSOCIATES, P.C. and METROPOLITAN UROLOGICAL SPECIALIST, P.C.,

Defendants.

----------X

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

Plaintiffs move, by order to show cause, for an order, pursuant to C.P.L.R. § 3126, striking the answers of defendants Metropolitan Lithotriptor Associates, P.C. ("MLA") and Metropolitan Urological Specialist, P.C. ("MUS") for spoliation of evidence, and thereupon granting plaintiffs judgment against these two defendants; compelling MLA and MUS to respond to plaintiffs' notice to produce dated May 14, 2010; and granting plaintiffs an extension of time to file their note of issue. That branch of plaintiffs' motion requesting an extension of their time to file their note of issue is moot since they filed it on September 29, 2010 and it has not been vacated.

Plaintiffs' claims against defendants, which sound in medical malpractice, arose out of Dr. Zito's performance of a Greenlight Laser procedure to treat Mr. DeSantis's enlarged prostate, during which Mr. DeSantis's bladder was perforated and his urethra was damaged, such that he will be permanently required to use a catheter to void from his bladder. Dr. Zito performed the procedure at MLA. After the complications arose, either during or immediately after the surgery, Mr. DeSantis was urgently transported to a hospital for further treatment. During plaintiffs' deposition of Dr. Zito,

counsel for plaintiffs determined that a handwritten progress note that Dr. Zito had made right after the procedure was missing from the records that he had received from MLA, although a copy of the progress note was contained in Dr. Zito's own chart for Mr. DeSantis. As it turns out, it is MLA's policy to scan its medical records and destroy the records, daily. Dr. Zito testified that he had removed his progress note from the medical record on the day of the surgery in order to fax the record to himself. Dr. Zito did not know why the progress note was not included with the rest of Mr. DeSantis's record from MLA. The progress note contains no information identifying whom the note is about.

Plaintiffs now argue that MLA's practice has resulted in deletions and missing pages from the record of the Greenlight procedure and has made it impossible to determine distinctions between various written portions of the chart. They point out that there are discrepancies in the recorded times of events on the day of the procedure. Plaintiffs maintain that MLA's practice is a violation of Education Law § 6530(32) and 8 N.Y.C.R.R. § 29.2(a)(3). They further assert that MLA cannot rely on its claim that its scanning practice is a matter of routine, because once a party is on notice that litigation might be forthcoming, it must not destroy records, even pursuant to normal business practices.

If evidence is destroyed, spoliation sanctions may be appropriate if the movant can establish "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)

(citations omitted). The court may punish a party for destroying "key physical evidence" by striking its pleading if the movant is "prejudicially bereft of appropriate means to confront a claim with incisive evidence[.]" N.Y. Cent. Mut. Fire Ins. Co. v. Turnerson's Elec., Inc., 280 A.D.2d 652, 653 (2d Dep't 2001) (citations and internal quotations omitted). For the sanction of striking an answer to be appropriate, however, the party seeking the sanction must demonstrate prejudice so severe so that it truly hinders the ability to prosecute or defend a claim. This is movant's burden.

While it is clear that MLA and MUS destroyed Mr. DeSantis's original medical record, plaintiffs have not met their burden to show that spoliation sanctions are warranted. First, other than the one page progress note by Dr. Zito, plaintiffs have not alleged that anything else is missing from the record. Second, there is a reasonable explanation as to why the progress note was not included in the record scanned after Mr. DeSantis's surgery: Dr. Zito removed the note from the record in order to fax it to his office, and there is nothing on the progress note identifying which patient's records it belongs to. Third, plaintiffs are presently in possession of a copy of Dr. Zito's "missing" progress note. Fourth, and most importantly, plaintiffs have not shown that the destruction of the original record has prevented them from being able to mount an effective prosecution of their case, or that defendants have gained an unfair advantage. Tawedros v. St. Vincent's Hosp. of New York, 281 A.D.2d 184 (1st Dep't 2000). To that extent, plaintiffs have provided no expert opinion evidence indicating that it is impossible to determine what acts of malpractice may have been committed or whether those alleged acts caused plaintiffs' injuries due to the destruction of the original records. Cf. Sawicki v. Davey, 2010 N.Y. Slip Op. 30164[U] (Sup. Ct. Suffolk Co. 2009) (striking a defendant's answer where the defendant destroyed the plaintiff's

original records after scanning the records in an incomplete manner and the plaintiff's expert stated that it was impossible for him to determine whether or when the malpractice occurred, whether the malpractice contributed to plaintiff's injuries, and how plaintiff's injuries came into being). There is sufficient information for all parties to maintain their positions in this action.

Further, plaintiffs have not shown that MLA's daily practice of scanning medical records into digital format and destroying the original paper version of the record violates the law. Compare Tumance v. Merchant, 5 Misc. 3d 1001[A] (Table), *3 n.2 (App. Term 1st Dep't 2004), with Sawicki, 2010 N.Y. Slip Op., at *4. Under New York Education Law § 6530(32), physicians must maintain "a record for each patient which accurately reflects the evaluation and treatment of the patient" and must retain a patient's record for at least six years. Failure to maintain and retain a patient's record for at least six years is considered unprofessional conduct. 8 N.Y.C.R.R. § 29.2(a)(3). While the court does not condone the practice of destroying original medical records, neither provision specifies that "a record for each patient which accurately reflects the evaluation and treatment of the patient" requires that the record be the original record.

Accordingly, that branch of plaintiffs' motion seeking spoliation sanctions is denied. The denial is without prejudice to any application plaintiffs may make to the trial court for a missing documents charge or an adverse inference instruction. See Quinn v. City Univ. of New York, 43 A.D.3d 679, 680 (1st Dep't 2007); Chung v. Caravan Coach Co., 285 A.D.2d 621, 622 (2d Dep't 2001). See also N.Y. P.J.I.3d 1:77.

Plaintiffs also move to compel MLA and MUS to respond to plaintiffs' notice to produce dated May 14, 2010 (the "May Notice"), in which plaintiffs demand that defendants produce a "copy of any occurrence screen entry information" (the "Occurrence Screen") with respect to Mr. DeSantis's procedure. Plaintiffs claim that Occurrence Screen contains information concerning the events of Mr. DeSantis's "botched procedure." As set forth in this court's compliance conference order dated May 25, 2010 (the "May Order"), defendants were to respond to the May Notice within thirty (30) days of the date of the conference order, or by June 24, 2010. Plaintiffs complain that MLA and MUS have never responded to the May Notice, and argue that MLA and MUS waived their right to assert that the Occurrence Screen is privileged because they failed to respond to the May Notice and disobeyed the May Order.

MLA and MUS assert that their response to the May Notice was that the Occurrence Screen is privileged. They maintain that they should not be compelled to produce the Occurrence Screen, which consists of one page "created solely for quality assurance and performance improvement purposes only, and for internal use" by MLA and MUS. They note that their employee, Nurse Mary O'Hara, testified that the Occurrence Screen is generated solely to improve patient care. Defendants assert that the Occurrence Screen "is a document which is fully and expressly of a type and kind intended to be protected by New York Education Law section 6527 and Public Health Law section 2805."

MLA and MUS have provided an adequate response to the May Notice; plaintiffs concede that they knew by August 30, 2010, that MLA and MUS intended to assert that the

Occurrence Screen was privileged. C.P.L.R. Rule 3122(a) provides that the party to whom a notice of inspection or production of documents is served has twenty (20) days to respond, setting forth with reasonable particularity the reasons for each objection when documents are not produced. It is then incumbent on the party seeking disclosure to move for an order to compel compliance or production, pursuant to Rule 3124. Alternatively, the party objecting to production could move for a protective order under C.P.L.R. § 3103. Notwithstanding these provisions, neither party made any formal motion until plaintiffs' order to show cause in late September 2010. It is apparent that neither side complied strictly with the time requirements set forth in the C.P.L.R. Given their mutual failure to comply with the time restrictions in the C.P.L.R., the court will consider the merits of both sides' positions.

It is impossible to determine, from the description of the Occurrence Screen provided by either side, whether the Occurrence Screen is a document prepared in connection with a quality assurance review function and/or a malpractice prevention program, thereby protecting it from disclosure. Defendants who are seeking to invoke the privilege have the burden of demonstrating that the documents sought were prepared in accordance with the statutes. Ross v. Northern Westchester Hosp. Ass'n., 43 A.D.3d 1135, 1136 (2d Dep't 2007). The mere assertion of the privilege is not sufficient. Accordingly, counsel for MLA and MUS shall produce the Occurrence Screen for an *in camera* review; should the court determine that this document does not qualify as privileged, it will be subject to production.

Accordingly, it is hereby

ORDERED that MLA and MUS shall submit the Occurrence Screen by February 15, 2011, to the chambers of the undersigned, room 690 at 60 Centre Street, New York, New York, for an *in camera* review; and it is further

ORDERED that the remainder of plaintiffs' motion is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference and oral argument on Motion Sequence Number 002 on February 22, 2011, at 10:00 a.m.

Date: February 14, 2011

JOAN B. LOBIS, J.S.C.