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

PRESENT: Joan B. Lobis Justice PART 6

Index Number : 117039/2008
MARTINEZ, RAMON
vs.
KLAPPER, ANDREW M.
SEQUENCE NUMBER : 006
RENEWAL

INDEX NO.
MOTION DATE 8/2/11
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-11
Answering Affidavits — Exhibits	12-28; 29-38
Replying Affidavits	39-43

Cross-Motion: ☐ Yes ☑ No

FILED

SEP 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE [illegible]

Dated: 9/23/11

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):

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

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RAMON MARTINEZ, as Administrator of the Estate of TAMARA MARTINEZ, deceased and RAMON MARTINEZ, individually and on behalf of the next of kin

Plaintiff,

- against -

ANDREW M. KLAPPER, M.D., LITETOUCH PLASTIC SURGERY CENTER P.C., NEW YORK SURGERY CENTER a/k/a PARK MED LLC and DR. SOKOL,

Defendants.

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Index No.: 117039/2008

Decision and Order

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

Plaintiff Ramon Martinez, as Administrator of the Estate of Tamara Martinez and individually, moves for an order striking Andrew M. Klapper, M.D.'s answer or, in the alternative, directing the jury to impute an adverse inference at trial due to his spoilation of evidence. Defendants Dr. Klapper and Litetouch Plastic Surgery Center, P.C. (the "Opposing Defendants"), oppose the motion.

This is plaintiff's second motion for to strike Dr. Klapper's answer due to spoilation. By a written decision and order entered on July 28, 2010, I denied his initial motion to strike with leave to renew, finding that plaintiff had not yet established that the lack of the Sequential Compression Pressure Device ("SCD") and boots (devices used during surgery performed on Tamara Martinez) prevented him from proving his causes of action. Because my previous decision invited renewal after further discovery, I will consider this motion de novo even though the Opposing Defendants argue that renewal is not a vehicle to present facts that were previously available to the

moving party and that the motion is not timely.

This action sounding in medical malpractice and wrongful death concerns the death of Ms. Martinez, a thirty-three year old mother of three, on December 25, 2007. Ramon Martinez is her surviving spouse. The facts relevant to this motion are largely undisputed. On December 18, 2007, Ms. Martinez underwent an abdominal lipodystrophy (commonly known as a tummy tuck) at the New York Surgery Center a/k/a Park Med LLC (the "Surgery Center"), an outpatient ambulatory surgery center. Dr. Klapper performed the surgery while Dr. Sokol administered the anesthesia. During the procedure, the SCD and boots were attached to Ms. Martinez's legs to aid in preventing thrombosis. The surgery was deemed successful and Ms. Martinez was discharged to her home that day.

On December 20, 2007, while at her home, Ms. Martinez suffered a cardiac arrest and was transported by ambulance to New York Presbyterian Hospital. On December 21, 2007, Dr. Klapper became aware of Ms. Martinez's hospitalization at NYPH and her underlying condition. On December 24, 2007, Dr. Klapper contacted his medical malpractice insurance carrier to report that his patient, Ms. Martinez, had suffered a pulmonary embolism. Ms. Martinez died on December 25, 2007. According to the autopsy report, Ms. Martinez died from "a bilateral pulmonary thrombosis of [the] lower extremity complicating limited mobility following [the] cosmetic liposuction and abdominoplasty."

On December 26, 2007, the Surgery Center arranged for the SCD unit to be inspected for electrical safety by an outside agency. Thereafter, Dr. Klapper discarded the SCD and the boots.

The exact date of the discarding items is unclear. The parties do not dispute that boots of this nature were regularly discarded after use, although they were occasionally reused if not soiled.

In February 2008, counsel that had been retained by the Estate of Tamara Martinez contacted Dr. Klapper by letter, instructing him to provide a complete copy of the decedent's medical records. Counsel sent a follow-up letter on March 6, 2008. According to a confirmation letter dated April 22, 2008, counsel received the records, albeit allegedly incomplete. The letter does not reference the SCD or the boots.

The record also contains the April 12, 2011 deposition testimony from Debra Rossi, a former employee of Dr. Klapper. Ms. Rossi testified that Dr. Klapper "threw [the SCD] out as soon as the papers came in regarding the lawsuit." Ms. Rossi later set forth that "he was really terrified about the case and he did say that he was throwing [the boots] away because they had not been certified." The Opposing Defendants dispute Ms. Rossi's version of the events and characterize her as a witness of dubious reliability.

Plaintiff contends that Dr. Klapper disposed of the SCD and boots after he knew or should have had reason to believe that a lawsuit against him was imminent. Plaintiff asserts that without being able to examine the device, his expert cannot offer an opinion on the theory of the case that a defective SCD caused Ms. Martinez's pulmonary emboli. In support of this contention, Bruce Charash, M.D., opines to a reasonable degree of medical certainty that it is the standard of care to utilize a properly functioning SCD and boots during surgery and "that to not use said equipment or

to use said equipment while not in proper operating order would constitute departures from good and accepted standards of practice since such a situation would substantially increase the likelihood of a patient developing clots, pulmonary emboli and death."

In opposition, the Opposing Defendants argue that there is no basis to strike Dr. Klapper's answer. Although Ms. Rossi was not deposed until after the first motion, defendants argue that plaintiff had been aware of her existence as a potential witness for some time. Thus, they argue that Ms. Rossi's testimony presents no new facts. The Opposing Defendants further assert that, in any event, Ms. Rossi's testimony is not credible. The Opposing Defendants dispute the claim that an inspection of the SCD and the boots is necessary to plaintiff's prosecution of the action or that plaintiff has been prejudiced in anyway. They further assert that the items were discarded in the ordinary course of Dr. Klapper's practice and that there is no evidence that suggests that the boots or SCD malfunctioned. Co-defendant Surgery Center takes no position on the motion, but nevertheless argues that there is no credible evidence that the SCD malfunctioned and that plantiff's motion is just a "second bite at the apple."

The sanction of striking an answer for spoliation of evidence is appropriate where a defendant intentionally or negligently destroys or discards a crucial item of evidence needed to prosecute an action before the plaintiff has had a chance to inspect the item. Kirkland v. New York City Hous. Auth., 236 A.D.2d 170, 173 (1st Dep't 1997); see also New York Cent. Mut. Fire Ins. v. Turnerson's Elec., Inc., 280 A.D.2d 652, 653 (2d Dep't 2001). The proponent of a spoliation motion must establish that, at the time that the evidence was lost or destroyed, the party in possession

of the evidence knew or should have known that a lawsuit was likely. Bear, Stearns & Co., Inc. v. Enviropower, LLC, 21 A.D.3d 855, 855-56 (1st Dep't 2005); DiDomenico v. C & S Aeromatik Supplies, Inc., 252 A.D.2d 41, 53 (2d Dep't 1998). The moving party must also establish that its ability to prosecute or defend the action is seriously prejudiced. New York Cent. Mut. Fire Ins., 280 A.D.2d at 652. The court has the discretion to impose less drastic alternatives to striking a pleading, such as allowing the jury to draw an adverse inference or issuing a preclusion order. Schantz v. Fish, 79 A.D.3d 481 (1st Dep't 2010); Utica Mut. Ins. Co. v. Berkoski Oil Co., 58 A.D.3d 717, 718 (2d Dep't 2009).

That Ms. Martinez succumbed to a pulmonary embolism, the condition that the SCD is designed to prevent, should have triggered Dr. Klapper's concern about future litigation. Indeed, Dr. Klapper contacted his insurance carrier shortly after learning of Ms. Martinez's death, indicating that he understood that a lawsuit was possible. Furthermore, letters from plaintiff's counsel to Dr. Klapper dated February 25, March 6, and April 22, 2008 respectively were indications that a lawsuit was imminent. Plaintiff has thus established that Dr. Klapper had knowledge of an impending lawsuit. However, as there is a sharp dispute as to whether Dr. Klapper destroyed the SCD and boots intentionally, negligently, or in the regular course of business, the character of the action will have to be determined by a jury.

As plaintiff can still present his theory that the SCD was not working properly because a pulmonary embolism would not ordinarily occur with a functioning SCD, the striking of Dr. Klapper's answer or a ruling requiring an adverse inference at trial is not warranted at this time.

However, the timing of the inspection of the machine following Ms. Martinez's death gives the court concern that, without the machine, plaintiff cannot attack the inspection report. Knowing that a lawsuit was possible, Dr. Klapper should have been more prudent about the SCD and preserved it for inspection by plaintiff. Given Dr. Klapper's failure to preserve the SCD, all of the defendants are precluded from any mention or use of the inspection of December 26, 2007. See Utica Mut. Ins. Co., 58 A.D.3d at 717. The issue of whether an adverse inference is permissible shall be left for the trial judge. Accordingly, it is hereby

ORDERED that the branch of the motion seeking an order striking Dr. Klapper's answer is granted to the extent that defendants may not mention or offer as proof the inspection of Advanced Chemical Consulting Corporation of December 26, 2007; and it is further

ORDERED that the parties shall appear for a previously scheduled pre-trial conference on October 25, 2011, at 9:30 a.m.

Dated: September 23, 2011

JOAN B. LOBIS, J.S.C.