

Rosenthal v Mount Sinai Hosp.
2011 NY Slip Op 34243(U)
October 6, 2011
Supreme Court, New York County
Docket Number: 150107/10
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ELLEN ROSENTHAL,

Plaintiff,

Index No. 150107/10
Motion Seq. No.002

-against-

THE MOUNT SINAI HOSPITAL, DR. TAMARA L.
KALIR, and DR. GAETANO V. BELLO,

Defendants.

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SCHLESINGER, J.:

In this medical malpractice action, counsel for the plaintiff Ellen L. Rosenthal is moving to amend the complaint to add a request for punitive damages. Counsel is also asking to compel defendant Dr. Gaetano Bello to submit to an Examination Before Trial. He has failed to appear as of this date.

This case concerns an alleged delay, by eighteen months, in the diagnosis and treatment of Ms. Rosenthal's endometrial cancer. There are three defendants, Mount Sinai Hospital, Dr. Tamara L. Kalir, a pathologist, and Dr. Bello, a gynecologist. The factual basis for plaintiff's request for this relief comes from the deposition testimony of Dr. Kalir. According to moving counsel, Dr. Kalir described Dr. Bello as a "recidivist loser" of pathology reports (these were counsel's words on page 2 of his Affirmation in Support).

On January 25, 2008, Dr. Bello performed a D&C on Ms. Rosenthal. Following this surgical procedure, pursuant to protocol, Dr. Bello sent the removed tissue to Mount Sinai's Pathology Department for analysis. According to Dr. Kalir, upon receiving the specimen, an analysis was done in a timely fashion and sent to Dr. Bello on January 28, 2008. However, it appears Dr. Bello did not see this report and called Dr. Kalir to tell her that he had not received the report. Pursuant to Dr. Kalir's testimony (p 29), Dr. Bello said: "I

never got the pathology report on Ellen Rosenthal". Dr. Kalir did explain that she did what she always did when receiving a call from one of the doctors: "I get into my computer system and look up that patient". She did that: "in that moment when he called me with her name, I looked it all up to see whether, in fact, it was done and if it were done in a timely fashion" (p 31). She found that it had been done and she so told Dr. Bello on the phone: "I said 'Guy, I signed this out about a year ago, and it's cancer.'" (pp 31-32).

The testimony that gave rise to this motion followed the above and reads as follows on pages 32-33:

Q. When he told you he never received the report, did you accept that as being a true statement of fact?

A. Yes.

Q. Did you make an inquiry of anyone to figure out why he didn't receive it?

A. Ordinarily, if it were a clinician for whom this may have happened perhaps for the first time, I would have. However, in Dr. Bello's case, this was a rather common occurrence that he would call either me or my secretary, Millie, and say that they never got the – the office didn't get the report.

So this was not the first time. And on other occasions when this had happened and I had inquired, my secretary told me that "You know, Dr. Kalir, I know I sent them the report. I can't imagine why they don't have it, so I'll just refax it to them."

So this was our kind of standard way we treated that office request. That's why I didn't take that further. I assumed that the issue was the same as previous. In other words, we felt that we had made the delivery and that the not receiving it was due to some – to their end, not our end, which is why I didn't inquire further.

Moving counsel then went on to cite several additional passages from the deposition to show that Dr. Kalir did not misspeak. He concluded his citation to her testimony with the following from pages 35-36:

Q. Okay. So would it be fair to say you are satisfied the system worked on Mount Sinai Hospital's end, but there was some kind of failure at Dr. Bello's end that he didn't receive the report?

A. Yes. That's what I'm saying.

Counsel concludes this part of his affirmation, the factual basis, with Dr. Kalir's production of the Pathology Department's log book showing that delivery of the report had been made to Dr. Gaetano V. Bello at 6:01:31 p.m. on January 28, 2008.

Counsel then argues that Dr. Kalir's account shows a clear, unmistakable pattern of "repetitive, recurring neglect that rises to the level of recklessness and gross indifference to the patient's care and well-being" deserving of punitive damages being added (p 4). Both defendants oppose the amendment.

Discussion

While punitive damages are recoverable in a medical malpractice action, it is a rare event. There must be a showing of such gross indifference and/or recklessness and/or outrageous conduct so as to verge on the criminal. The reason for this almost criminal standard is because punitive damages are not only meant to punish the "guilty" or responsible party. They are also meant to serve as an example to others. Hence, they are sometimes called "exemplary" damages.

Defense counsel for Dr. Bello in its opposition agrees with the very high standard necessary to allow for punitive damages. However, he argues that the acts must be

somehow intentional or motivated by ill will, and certainly "a recidivist loser of pathology reports" does not show any such state of mind. But I believe counsel too narrowly defines the standard. In virtually all cases where punitive damages are allowed, there is no accusation of intent to do harm. If there were, it truly might be in fact a criminal matter. But the negligence must be greater than mere negligence; there must be recklessness or some other kind of grossly careless behavior.

Here we have a statement by a colleague of Dr. Bello, who is also a co-defendant, that Dr. Bello often complained of non-receipt of reports and that in prior instances, an investigation of the circumstances showed that the reports had been sent. Dr. Kalir's testimony is in part based on hearsay statements by Millie, her secretary. Certainly neither Dr. Bello, nor anyone else, has spoken to that subject or challenged the assertion. That must be done. Dr. Bello must be produced soon and given an opportunity to be heard. So, in the first instance, I find the motion is premature.

But the larger question is, could such a pattern or practice of misplacing reports that have in fact been sent, possibly to the detriment of patients, if established, rise to the level of reckless or egregious conduct. I believe it could. Physicians such as Dr. Bello who subject their patient to surgical procedures, in part to ascertain if a serious condition exists, and whose patients rely on the doctor for this information, are obligated to ascertain the results of the tests soon after the procedures and promptly inform the patients of the results and discuss what further treatment, if any, is called for.

Therefore, if in fact it comes to light that Dr. Bello habitually lost reports or failed to make sure that they were received and thereby habitually failed to inform his patients of the test results in a timely fashion and as a result his patients have suffered some harm,

that could be a sufficient predicate for this kind of rarely allowed damages. While it is a high threshold, on some occasions, it is met. These occasions sometimes involve a pattern or practice which affects a number of patients adversely. Evil intent is not necessary.

Based on the above, I am now denying the plaintiff's motion to add a request for punitive damages, but the denial is without prejudice to raise again if a true factual basis for the request is established during discovery. Therefore, I am allowing plaintiff's counsel to pursue this subject with Dr. Bello in depth and do whatever other investigation is believed necessary. Further, as stated earlier, Dr. Bello should be deposed, the sooner the better.

Accordingly, it is hereby

ORDERED that the plaintiff's motion to amend the complaint to add a request for punitive damages is denied without prejudice; and it is further

ORDERED that the plaintiff's motion to compel Dr. Bello to appear for a deposition is granted to the extent of directing the deposition to proceed no later than November 16, 2011 in accordance with the terms of this decision.

Dated: October 6, 2011

OC, 06 2011



J.S.C.
ALICE SCHLESINGER