

Castillo v Dependable Ambulette Inc.
2015 NY Slip Op 31902(U)
September 14, 2015
Supreme Court, Bronx County
Docket Number: 300613/12
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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CLARA CASTILLO, as Administrator of the
Estate of AURA NUNEZ, Deceased, and
CARLA CASTILLO, Individually,

Plaintiff(s)

- against -

DEPENDABLE AMBULETTE INC., THE NEW
YORK AND PRESBYTERIAN HOSPITAL,
COLUMBIA UNIVERSITY DIALYSIS CENTER
and ISABELLA GERIATRIC CENTER, INC.,

Defendant(s)
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DECISION/ORDER

HON. DOUGLAS E. MCKEON

Plaintiff has moved for an order striking the answer of defendant Dependable Ambulette Inc. for spoliation of a surveillance video and for summary judgment against the same defendant. Plaintiff has also moved for an order striking the answer of all defendants for repeated delays herein and compelling them to produce responses to outstanding discovery demands. Cross-motion by Isabella Geriatric Center against plaintiff for an order compelling plaintiff to comply with defendant's demand for a verified Bill of Particulars, cross-motion by Columbia University Dialysis Center to strike the answer of Dependable Ambulette for spoliation and for summary judgment, cross-motion by defendant Isabella Geriatric Center to strike the

answer of Dependable Ambulette Inc. are consolidated with plaintiff's motions for disposition and decided as follows.

This is an action for negligence and medical malpractice involving a then 76 year old woman who presented to the NYPH Emergency Room on January 25, 2011. She had a fracture to her right lower extremity and there is a question of how and when this fracture occurred. One claim against defendant Dependable Ambulette is a failure to properly transport the decedent in the ambulette and a failure to properly train its employees in the transportation of patients. The preliminary conference order of October 9, 2012 directed Dependable to produce a copy of the video of the date of occurrence ten days before the plaintiff's deposition. A copy of the video was produced as part of the plaintiff's motion pending before the Court. The medical records maintained by Isabella Geriatric Center where decedent was a resident indicate that she advised personnel there on January 25, 2011 that she had fallen out of a wheelchair while returning from dialysis on January 24th. It was not until the following day that she complained of pain and a deformity of her right lower extremity and was taken to the emergency room as discussed, *supra*. The records from NYPH indicate that decedent claimed to have fallen on the way to dialysis. By letter dated April 8, 2013 NYPH asked counsel for Dependable for a complete copy of the videotape after a discussion with Dependable which indicated that the videotape produced showed decedent being taken to dialysis instead of the return trip from dialysis. By letter dated April 22, 2013 counsel for Dependable

advised that there is no further videotape of the incident.

Decedent's records indicate she sustained an injury either while being taken to or returning from dialysis. It seems that the attorney for Dependable, in a conversation with NYPH, initially stated the video showed decedent being taken to dialysis but later stated the video showed the decedent being returned from dialysis. While it is unknown what portion of the video has been provided the video is not complete. One portion of the transport is missing and movant and cross-movants claims that the lack of it deprives the parties of an opportunity to establish their respective claims. As such, movant and cross-movant seek an order striking the pleadings for failing to turn over the entire videotape because its absence leaves all parties without a mechanism to establish exactly what and exactly when decedent's injury occurred. Movants also seek summary judgment against Dependable.

Defendant Empire State Dialysis Center poses the same arguments in its cross-motion as does defendant Isabella Geriatric Center. All movants argue that Dependable has destroyed a vital piece of evidence by not maintaining an accurate and complete copy of its surveillance video. They argue that had it been provided it would depict the precise cause of the accident and injury. The destruction of the surveillance video has prejudiced the defendants in defending this matter. They argue that a missing evidence charge would not be appropriate but that striking Dependable's pleading is warranted.

As an initial matter, the Court grants that portion of plaintiff's motion to strike

the answer of defendants Dependable, New York Presbyterian, Columbia University Dialysis Center and Isabella Geriatric Center only to the extent of compelling all defendants to produce responses to plaintiff's outstanding discovery demands including the notice of discovery and inspection of May 31, 2013 within 30 days of entry of this order. Furthermore, the cross-motion by Isabella to dismiss plaintiff's action for failing to comply with their demand for a verified Bill of Particulars is granted only to the extent that plaintiff is directed to provide defendants with the verified Bill of Particulars within 30 days of entry of this order.

Plaintiff is directed to provide the Arons authorizations to NYPH upon being provided with the name of the attorney who will conduct the interview. The Court notes that plaintiff has provided NYPH with many authorizations. Plaintiff is directed to provide authorizations to obtain records from Beth Israel Medical Center, Life Care Inc., Dr. Teak, Dr. Lucak and any primary care physicians with whom decedent treated for five years prior to her death. Any other outstanding authorizations are also to be provided.

In opposition to the motion and cross-motion, Dependable informs the Court that there were not two cameras that recorded the incident in question but that there was a single camera with two lenses affixed to the windshield of the vehicle in issue. The footage in its entirety was preserved and the total unedited video has been exchanged. Therefore, any assertion that Dependable destroyed part of the video or failed to present it for litigation is untrue. Dependable states that there is no

portion of the video that has not been exchanged. Dependable has provided the affidavit of its President, Roman Syrkin, who explains that some of the original footage was corrupted and could not be extracted from the SD card but that the card itself has been preserved and is available for inspection. Dependable argues that it has not destroyed any evidence and that the fact that any data was corrupted was outside its control. Furthermore, Dependable argues that significant discovery including EBT's of the parties remain outstanding so that the motions are premature and that deposition testimony is essential to determine where there might be any liability for plaintiff's alleged injuries.

The medical records indicate that the decedent's fall took place during her transport from Columbia following dialysis treatment back to Isabella on January 24, 2011. The source of this information was decedent herself. According to nursing notes maintained by Isabella, dated January 25, 2011, decedent reported that she fell on January 24, 2011 in the ambulette while returning to Isabella after dialysis. Therefore, there is also an accident report completed by Isabella which reflects that decedent stated "I fell in the ambulette yesterday while coming back from the dialysis unit." However, opposing counsel have submitted a copy of the NYPH record that reflects that decedent fell out of her wheelchair on her way to dialysis. However, this record does not identify the source of the information and the description provided had no bearing on the care and treatment that NYPH rendered. Defendants argue that because of the contradictory accounts of the accident,

neither plaintiff nor the co-defendants can affirmatively demonstrate how and when the accident occurred.

The instant motion and cross-motions are denied at this time and may be renewed and reargued upon completion of discovery including relevant examinations before trial. Plaintiff argues that the dismissal of defendant's pleading is appropriate because the loss of the video fatally compromises plaintiff's claim without the need to prosecute the action. However, there is no evidence that the party wilfully destroyed the evidence herein. As further discovery could lead to a better understanding of the particulars of the injury and how it occurred the remaining motion and cross-motions are denied at this time.

So ordered.

Dated: 9/14/15

A handwritten signature in black ink, appearing to read "Douglas E. McKeon", written over a horizontal line.

Douglas E. McKeon, J.S.C.