SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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DIANE HUGHES, as Administratrix of goods, chattels, and credits which were of EMELDA HUGHES, Index No.: 805261/14

Plaintiffs,

-against-

DEWITT REHABILITATION & NURSING CENTER, DANIEL KLEIN, M.D., and MARY MOLLOY, N.P.,

Defendants.

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Hon. Joan A. Madden, J.:

Defendant Dewitt Rehabilitation & Nursing Center ("Dewitt") moves for reargument of the decision and order of Justice Alice Schlesinger dated December 19, 2016 ("the original decision"),[1] which granted plaintiff's motion to strike Dewitt's answer to the extent of directing that a missing document charge be made by the trial court, and directing payment of $1,000 in sanctions for Dewitt's failure to produce certain documents. Plaintiff opposes the motion.

This an action for negligence and medical malpractice against defendants for their alleged failure to properly prevent, diagnose and treat plaintiff-decedent's sacral decubitus ulcer resulting in the plaintiff's decedent's sepsis, stroke and death. The plaintiff-decedent was a resident of Dewitt from 2012 to 2014. The original decision addressed plaintiff's motion to strike Dewitt's answer and for sanctions based on spoliation of evidence. Of relevance to the instant motion, plaintiff's claim of spoliation related to Dewitt's failure to produce two sets of communication books, where nurses and other on-floor personnel would record notes at the end of their shift to

[1]Justice Schlesinger has retired from the bench and is now serving as a Judicial Hearing Officer.

be read by the next shift, binder books with titles referring to, *inter alia*, wounds and ulcers. Plaintiff's counsel noticed the binder books during a deposition held at Dewitt in July 2015, and requested that they be produced in September 2015. Counsel photographed the binder books and their titles so they could be easily identified. In the original decision, Judge Schlesinger noted that some of the binder titles included "Weekly Wound Report 2013-2014," "the Wound Rounds Attendance 2013 October to 2015 April," and "Wound Care Management," and "Nosocomial Pressure Ulcer 2013."

Dewitt failed to produce the binders, asserting that it was unable to locate them and that Dewitt "did not believe the binders contain any information regarding [plaintiff-decedent]." Plaintiff then moved to strike Dewitt's answer, alleging spoliation of evidence. In the court's interim order dated November 17, 2016, Judge Schlesinger gave Dewitt additional time to provide details of its search for the records, and to explain how the binders were lost and admonished that "if compliance continues to be unsatisfactory, sanctions shall be imposed."

In the original decision, the court considered two affidavits submitted by Dewitt, one from Scott Mair, an administrator at Dewitt, and another from Marie Lamour, a nurse there. Upon consideration of the statements in these affidavits, the court found that "proper care was not taken to protect and preserve these binders...[and that] Ms. Lamour's recent recollections, at this stage of discovery are both too little and too late [and that] sanctions are therefore in order." Judge Schlesinger nonetheless did not strike Dewitt's answer. Instead, the court found that it was "more appropriate and balanced [to direct] the trial judge to give a missing document charge to the jury as to the binders." The court also directed that "sanctions of $1,000 be paid to [counsel for plaintiff] by the defense within 30 days of the decision, that if for the time and effort expended by her attempt to obtain these documents even after defense counsel knew or should have known that they no longer existed."

Dewitt moves for reargument, asserting that the majority of documents in the binders "were merely copies of accident/incident reports that would also be present in decedent's chart, wound care protocols (which were already provided to plaintiff), quality assurance surveys, questionnaires, and reports." As for quality assurance surveys, questionnaires, and reports, Dewitt argues that such documents need not be produced, and that the court erred in directing that such documents be provided for in-camera review since such documents are not subject to disclosure under the Educational Law section 6527(3), and that the documents at issue are not part of plaintiff decedent's medical records and need not be produced.

In opposition, plaintiff argues that original decision is the law of the case, and that this court cannot review the determination of a coordinate judge. Plaintiff also argues that Dewitt's arguments regarding the nature of the documents, and that they are privileged were not made in opposition to the original motion and, in any event, are without merit.

As a preliminary matter, as Judge Schlesinger has retired, this court has authority to decide the motion to reargue. See Weiss v. City of New York, 277 AD2d 36 (1st Dept 2000). A motion to reargue is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them." Kirkland v New York City Housing Authority, 236 AD2d 170, 175 (1st Dept 1997). Moreover, sanctions for the spoliation of evidence have been held to be appropriate even

where the evidence at issue was destroyed prior to the issuance of any discovery order seeking such evidence, and where the destruction of evidence has not been shown to be intentional or in bad faith. Id; See also Squitieri v City of New York, 248 AD2d 201 (1st Dept 1998).

"When parties involved in litigation engage in the destruction of evidence, a number of remedial options are provided by existing New York statutory and common law." Ortega v. City of New York, 9 NY3d 69, 76 (2007). Thus, under CPLR 3126, "if the court finds that a party destroyed evidence that 'ought to have been disclosed..., the court may make such orders with regard to the failure or refusal as are just.'" Id. This provision gives New York courts "broad discretion to provide proportional relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay the cost to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at trial of the action." Id. (citations omitted). In addition, "where appropriate a court can impose the ultimate sanction of dismissing the action or striking the responsive pleadings, therefore rendering a judgment on default against the offending party." Id. (citations omitted).

However, the severe sanction of dismissing the action or striking responsive pleadings is unwarranted unless the party seeking such sanctions meets its burden of establishing that the evidence destroyed is crucial to the moving parties' case, and that the party suffered prejudice as a result of its destruction. See Balaskonis v. HRH Constr. Corp., 1 AD3d 120 (1st Dept 2003); Riley v. ISS Intern. Service System, Inc., 304 AD2d 637 (2d Dept 2003). At the same time, when the destroyed evidence is not shown to be crucial or its loss prejudicial, lesser sanctions in the form of an adverse inference instruction, a missing document charge or a preclusion order have been found to be a proper exercise of the court's discretion. See Metropolitan New York Coordinating Council on Jewish Poverty v. FGP Bush Terminal, Inc., 1 AD3d 168 (1st Dept

2003); Melendez v. City of New York, 2 AD3d 170 (1st Dept 2003); Foncette v. LA Express, 295 AD2d 471, 472 (2d Dept 2002).

Under this standard, there is no basis for finding that Judge Schlesinger overlooked or misapprehended the law in directing that the trial court to give a missing documents charging and imposing monetary sanctions. See Bin Xin Tan v. St. Vincent Hospital, 294 AD2d 122 (1st Dept 2002)(missing documents charge was appropriate sanction for hospital's failure to produce slides). Specifically, the record shows that Dewitt failed to produce documents as directed by the court which existed prior to the issuance of the order, and that the documents were relevant to the alleged malpractice, as they related to wound care during the period at issue in this action.

As for Dewitt's argument that the documents included quality assurance surveys and questions that are exempt from disclosure under Education Law § 6527(3), and thus do not have to be produced for in camera inspection as previously agreed to by Dewitt, such newly raised argument is not a proper basis for seeking reargument. See DeSoignies v. Cornasesk House Tenants Corp, 21 AD3d 715,718 (1st Dept 2005). Moreover, even if the court were to consider this argument, it is without merit. Significantly, "[t]he party seeking to invoke the privileges of Education Law § 6527 (3) has the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes." See Kneisel v. QPH Inc., 124 AD3d 729, 730 (2d Dept 2015). Here, Dewitt has not met this burden as it cannot show that the unproduced and purportedly lost documents are subject to the privilege afforded under the statute, which is narrowly construed to include those reports generated by, or at the behest of, a quality assurance committee for quality assurance purposes. See Koithan v. Zornek, M.D., 226 AD2d 1080, 1080-181 (4th Dept 1996); Kneisel v. QPH Inc., 124 AD3d at 730 (statutory quality assurance privilege did not bar disclosure of hospital documents in action for wrongful death, negligence and medical malpractice where defendants asserted privilege without showing that the privilege

attached).

Finally, Dewitt's argument that the binders are not discoverable as they are not part of the decedent's clinical record is without legal basis and, in any event, cannot be substantiated in the absence of such binders.

In view of the above, it is

ORDERED that Dewitt's motion to reargue is denied.

DATED: August 22, 2017

J.S.C.

HON. JOAN A. MADDEN
J.S.C.