

Rogers v Aston

2017 NY Slip Op 32604(U)

December 14, 2017

Supreme Court, New York County

Docket Number: 805368/2015

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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MARY ROGERS,

INDEX NO. 805368/2015

Plaintiff,

-against-

SHERRELL J. ASTON, M.D., MANHATTAN EYE,
EAR, AND THROAT HOSPITAL, A DIVISION OF
LENOX HILL HOSPITAL, NORTH SHORE LONG
ISLAND JEWISH HEALTH SYSTEM, INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action seeking damages for alleged medical malpractice, plaintiff Mary Rogers, moves for an order (a) compelling the defendant Manhattan Eye, Ear, and Throat Hospital, A Division of Lenox Hill Hospital (hereinafter "Lenox Hill") to serve a response to plaintiff's demands and this Court's Orders, (b) compelling Lenox Hill, to produce for inspection the cannulas and syringes used in plaintiff's surgery on a date certain, (c) a conditional order striking the defendants' answers pursuant to CPLR §3126¹, (d) finding Lenox Hill, abused the discovery process by destroying crucial evidence, (e) precluding defendants from making any contentions or presenting any evidence of any kind in defense of the allegations contained in plaintiff's complaint, (f) striking defendant Lenox Hill's answer, or striking defendants' affirmative defenses, and

¹ While parts of plaintiff's motion are addressed to all defendants, it appears that the discovery issues relate only to Lenox Hill and not Dr. Aston, whose opposition to the motion is not opposed by plaintiff. In addition, the court notes that the action was dismissed against defendant North Shore Long Island Jewish Health System, Inc., by decision to order dated December 5, 2016.

precluding the defendants from offering evidence as indicated, and (g) ordering the jury at the time of trial be charged as to the presumption of spoliation.

Background

This action, sounding in medical malpractice, concerns a face lift, cheek lift and fat graft surgery performed on plaintiff Mary Rogers (hereinafter “plaintiff”) by defendant Dr. Sherrell Aston on October 6, 2015. Plaintiff alleges that defendants committed malpractice, including by injecting fat beyond the eye area agreed to by plaintiff, and that the surgery resulted in plaintiff developing a bacterial infection, mycobacterium abscessus.

At issue on this motion is Lenox Hill’s failure to produce the cannula² and syringes used in plaintiff’s surgery, or reasonable exemplars thereof, or an affidavit from a person with knowledge to explain the surgical implements used in plaintiff’s surgery. Compliance Conference Orders on three different occasions (November 12, 2016, January 25, 2017, March 30, 2017) have directed the defendant to produce the surgical implements, or a facsimile sample,³ for plaintiff’s discovery and inspection. Plaintiff asserts that this evidence is crucial to proving that the improper sterilization and handling of cannula and syringes and was a substantial factor in causing plaintiff’s infection following her cosmetic surgery.

²A cannula is defined as “[a] hollow tube with a sharp, retractable inner core that can be inserted in a vein, an artery or another body cavity.” See Medical Dictionary eMedicineHealth; <https://www.emedicinehealth.com/script/main/art.asp?articlekey=1109>

³As it is more appropriate, this decision and order uses the term exemplar instead of the term facsimile, which is in the discovery orders.

In support of her theory that the cosmetic surgery caused her infection, plaintiff cites to deposition testimony of her treating physician Inez Mbagha, a specialist in the field of infectious disease, that plaintiff's infection was associated with the surgery based on the fact that "several days or weeks later [plaintiff] had nodular lesions in the sites where she had surgery." (Dr. Mbagha's EBT at 14-15). Plaintiff also relies on Dr. Aston's deposition testimony that if the cannula had been properly sterilized "there would be no bacteria,"[and that] the infection was the result of something that was present at the surgery and that he did not disagree that the surgical instruments were the source of the bacteria. ((Dr. Aston's EBT at 169-170, 176-177, 180).

Lenox Hill opposes the motion, asserting that the cannulas are routinely sterilized for reuse, while the syringes are routinely discarded after surgery. With respect to the cannulas, in its affirmation of its attorney, Lenox Hill asserts that "upon information and belief" the cannulas made available to plaintiff a tray of cannulas from Lenox Hill Hospital on July 18, 2017, "were of the type utilized by Dr. Aston during the procedure at issue." Lenox Hill further asserts that once it is confirmed that the type of cannulas inspected were the correct cannulas, plaintiff can purchase them.

As for the syringes, in the same attorney affirmation, Lenox Hill asserts that the syringes used during surgery were discarded, there is no information in the chart identifying the type of syringes, and the only information Lenox Hill has is Dr. Aston's testimony that "we usually use a 20cc syringe [and] [i]f provided with additional information, it is possible that a sample 20cc syringe could be made available for discovery and inspection; however, it is equally possible for plaintiff to obtain a sample 20cc syringe on her own." (Dr. Aston's EBT at 121-123).

In reply, plaintiff counters that “the purported inspection [of the cannulas] was a fiasco” and that “[a]t the inspection there were five random cannulas, none of which were identified by anyone with knowledge as one of the cannula Dr. Aston described during his deposition.” With regard to the syringes, plaintiff argues Dr. Aston’s testimony does not preclude Lenox Hill from producing a facsimile of the 20cc referred to by Dr. Aston during his deposition.

Discussion

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). “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 not warranted 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, the 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).

Here, there is evidence in the form of testimony from Dr. Aston and Dr. Mbagha that improper sterilization and handling of the cannula and syringes used in plaintiff's surgery could lead to plaintiff's bacteria infection. While this testimony establishes the relevance of these surgical instruments, spoliation sanctions in the form of striking Lenox Hill's answer is not warranted here as the record shows the cannula was routinely sterilized for reuse, and the syringes were routinely disposed of following surgery and thus that these surgical instruments were not negligently or intentionally destroyed. See Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 N.Y.3d 543, 547 (2015) (a party seeking sanctions for spoliation of evidence "must show the party having control of the evidence at the time of its destruction and had an obligation to preserve it at the time of the destruction.").

Under these circumstances, the failure to comply with three discovery orders directing Lenox Hill to provide evidence related to the surgical instruments, is more appropriately remedied through discovery sanctions under CPLR 3126. While Lenox Hill has provided a “tray of cannulas,” it has not established these cannulas were identified as the type used by Dr. Aston. As to the syringes, although Lenox Hill has provided identifying information through Dr. Aston’s deposition, it has failed to produce an exemplar. Lenox Hill will be given a final opportunity to produce exemplars of the instruments at issue, and if it fails to do so as directed below, the court will impose sanctions as per CPLR 3126.⁴

Accordingly, plaintiff’s motion is granted to the extent of directing Lenox Hill to produce exemplars of the cannula and syringes used in plaintiff’s surgery, together with an affidavit from a person or persons with knowledge of the type of cannula and syringes used during plaintiff’s surgery, setting forth the specifications of exemplars of the cannulas and syringes, including the manufacturer, model, size, and the basis for determining that these instruments are the same as those used during plaintiff’s surgery.

Alternatively, to the extent the type of instrument used cannot be conclusively identified,

⁴ Plaintiff cites to McHugh v. City of New York, 150 AD3d 561 (1st Dept 2017) to further support his contention that striking the defendants’ answer is appropriate. However, the circumstances here are distinguishable from McHugh. In McHugh, defendants failed to comply with five so-ordered discovery stipulations, and the witness defendant eventually produced in resolution of the first motion to strike was unprepared, after which defendants refused plaintiff’s request to produce a witness with knowledge. In reversing the trial court’s denial of plaintiffs’ second motion to strike defendants’ answer, the First Department wrote that the defendants’ “unexplained noncompliance with a series of court-ordered disclosure mandates over a period of nearly three years constituted willful and contumacious behavior, warranting the striking of their answer.” Id at 562. In contrast, here, Lenox Hill has at least attempted compliance with the court’s orders by producing a tray of cannulas and identifying information about the syringes.

the affidavit shall provide a detailed explanation as to the reason for this failure, and shall provide identifying information in accordance with the above of the different types of cannulas and syringes used at the time of plaintiff's surgery for that type of surgery.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion is granted to the extent that within 20 days of e-filing this order Lenox Hill shall produce exemplars of the cannula and syringes used in plaintiff's surgery, together with an affidavit of a person or persons with knowledge consistent with this decision and order; and it is further

ORDERED that if Lenox Hill fails to comply with this order, sanctions per CPLR 3126 shall be imposed; and it is further

ORDERED that the parties shall appear by conference all on January 11, 2018 at 4:30 pm to confirm compliance with this order; and it is further

ORDERED that this motion is otherwise denied.

DATED: December 14, 2017.

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J.S.C