

Meskin v Javier

2020 NY Slip Op 33867(U)

November 20, 2020

Supreme Court, Kings County

Docket Number: 513348/17

Judge: Ellen M. Spodek

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At an IAS Part MMESP-6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of November, 2020.

P R E S E N T:

HON. ELLEN M. SPODEK,

Justice.

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YEFIM MESKIN, AS AN ADMINISTRATOR OF THE ESTATE OF ISAAK MESKIN, DECEASED, AND YEFIM MESKIN, INDIVIDUALLY,

PLAINTIFF,

-AGAINST-

Index No. 513348/17

DAVID C. JAVIER, M.D., MAIMONIDES MEDICAL CENTER, PREMIER HOME HEALTH CARE SERVICES, INC. AND SENIOR CARE EMERGENCY MEDICAL SERVICES, INC.

DEFENDANTS.

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The following papers numbered 1 to 21 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2, 3-6, 7-9 _____
Opposing Affidavits (Affirmations) _____	10-14, 15-17, 18-19 _____
Reply Affidavits (Affirmations) _____	20, 21 _____

Upon the foregoing papers in this negligence, medical malpractice and wrongful death action, plaintiff Yefim Meskin as an Administrator of the Estate of Isaak Meskin, deceased and Yefim Meskin, individually (plaintiff) moves, in motion (mot.) sequence (seq.) four, for an order, pursuant to CPLR 3126, striking defendant Premier Home Health Care Services, Inc.'s (Premier) answer for its willful destruction of evidence. Premier cross-moves, in mot. seq. five, for an order pursuant to CPLR 3212, granting

summary judgment dismissing plaintiff's action against them.¹ Defendant Senior Care Emergency Medical Services, Inc. (Senior Care) moves, in mot. seq. seven, for an order pursuant to CPLR 3212, granting summary judgment, dismissing plaintiff's action against them.

Background Facts and Procedural History

The instant action stems from the death of plaintiff's brother, Isaak Meskin (decedent or Mr. Meskin), which occurred in late July or early August, 2016. At the time of his death, the decedent was 64 years old and suffered from various conditions including schizophrenia, obsessive compulsive disorder, and Parkinson's disease. For some five years before his death, the decedent was attended to by home health aides employed by Premier. Among these aides was Edward Gardocki, who visited the decedent at his apartment for six- or eight-hour shifts, four days a week. A different aide was assigned for the other days. According to Mr. Gardocki's deposition testimony, his shifts with the decedent began at 2:00 p.m., and he helped the decedent with various tasks including getting dressed, bathing, preparing food, grocery shopping, and making sure the decedent took his medications. Mr. Gardocki also testified that he typically called Premier using the decedent's telephone when he arrived at and left the apartment in order to clock in and out. In addition to clocking in and out, Mr. Gardocki was responsible for

¹In the NYSCEF documents list for this case, Premier's cross motion for summary judgment is mislabeled as mot. seq. four.

preparing a duty sheet after each shift which listed the tasks that he performed during the shift.

On Saturday, July 30, 2016, Mr. Gardocki arrived at Mr. Meskin's apartment for the start of his shift and used the telephone in order to clock in with Premier. According to Mr. Gardocki, immediately upon his arrival, Mr. Meskin told him that he was in pain and wanted to go to the hospital. Accordingly, Mr. Gardocki brought Mr. Meskin to the emergency room at defendant Maimonides Medical Center (MMC or the hospital). Hospital records indicate that he arrived at the emergency room at 3:43 p.m.² Mr. Gardocki testified that he did not notify Premier or Mr. Meskin's next of kin that the he had been taken to the hospital.

At the hospital, Mr. Meskin complained of constipation and rectal pain. MMC's records indicate that an enema was administrated. At 11:17 p.m., the hospital's records indicate that Mr. Meskin had a bowel movement and "reports he is feeling much better." MMC's records further indicate that at 2:00 a.m. on July 31, 2016, he had another bowel movement and reported feeling better. A chest x-ray and CT scan of the abdomen and pelvis were then performed in order to rule out any intestinal obstructions. The CT scan indicated fecal impaction with rectal distention, a distended bladder, a slightly enlarged prostate, and a sclerotic lesion within the right iliac wing, which was likely benign. According to the radiological imaging, there was no evidence of a bowel obstruction. At

² Premier's records indicate that Mr. Gardocki's shift on July 30, 2016 began at 10:00 a.m. This is inconsistent with Mr. Gardocki's testimony as well as MMC's records which reflect that the decedent arrived at the emergency room at 3:43 p.m.

5:50 a.m., the hospital records indicate that the “patient is ready to go home, condition much improved.”

While Mr. Meskin was being treated at the hospital, Mr. Gardocki remained with him for several hours. According to Mr. Gardocki, at some point, he was told by a female doctor to go home and that if the decedent needed additional treatment, he would remain in the hospital and if not, he would be discharged home. Mr. Gardocki further testified that the doctor advised him to return to the decedent’s apartment the next day. In addition, Mr. Gardocki testified that a nurse at the hospital gave him a business card with a phone number to call and inquire about the decedent’s status, but he lost the card. In any event, when he left MMC at approximately 9:00 p.m. on July 30th, Mr. Gardocki did not know whether Mr. Meskin would be discharged from the hospital or admitted for further treatment.

After Mr. Meskin was deemed stable and suitable for discharge from the emergency room, MMC arranged to have defendant Senior Care transport him back to his apartment in an ambulette. A Senior Care ambulette, staffed by EMTs Danielle Conigliaro and William Cabaez, was dispatched to MMC at 9:08 a.m., and, at 9:50 a.m., the EMTs arrived at the decedent’s bedside. At 10:18 a.m., while en route to the decedent’s apartment, it was discovered that the hospital failed to remove a heplock from the decedent’s right arm. The ambulette returned to MMC in order to have the heplock removed. At 11:00 a.m., the ambulette left the hospital again and arrived at the decedent’s apartment at 11:20 a.m. Upon arriving at the apartment, the Senior Care

EMTs assisted the decedent off the stretcher, and he walked to his couch. At that time, his vital signs were normal. However, Mr. Meskin was unable to sign the drop-off paperwork due to “severe weakness.” The Senior Care EMTs left the apartment at 11:59 a.m.

According to Mr. Gardocki’s deposition testimony, he returned to Mr. Meskin’s apartment at 9:00 a.m. on July 31, 2016, but there was no answer when he buzzed the apartment while outside the apartment building. Eventually, another tenant let Mr. Gardocki into the building, and he rang the bell on the door to Mr. Meskin’s apartment and called the apartment several times using his cell phone. However, Mr. Gardocki received no response. At that point, Mr. Gardocki received a call from Premier’s shift manager asking him why he had not clocked in. Mr. Gardocki testified that he informed the shift manager that he had brought the decedent to the hospital the day before and he assumed that he was still in the hospital. Thereafter, Mr. Gardocki was instructed to go home.

In addition to Mr. Gardocki, Marina Lipkina appeared for a deposition on behalf of Premier. In this regard, Ms. Lipkina was the Premier case coordinator assigned to Mr. Meskin. Ms. Lipkina testified that she learned from other Premier staff on Monday, August 1, 2016 that Mr. Meskin was in the hospital. Ms. Lipkina further testified that she informed “Gwen” from the insurance carrier United of this situation and decedent’s home health aide services were put on hold until such time as Premier was notified that he had been discharged from MMC. In this regard, Ms. Lipkina testified that Premier

would typically be notified when a patient had been discharged from the hospital by a hospital social worker, by the insurance carrier, by the client, or by the client's family. Ms. Lipkina further testified that it was not part of Premier's protocol to confirm that a patient was in the hospital or to seek updates from the hospital on the patient's status.

On August 8, 2016, after receiving complaints of a foul odor emanating from the decedent's apartment, members of the New York City Police Department as well as the building superintendent gained access to the decedent's apartment through a fire escape window and found the decedent's body on the floor in an advanced stage of decomposition. Thereafter, EMS arrived and pronounced Mr. Meskin dead at 2:45 p.m. No internal autopsy was performed, and the Medical Examiner listed the immediate cause of death as atherosclerotic cardiovascular disease.

According to Mr. Gardocki, after Premier was informed of the decedent's death, he prepared a handwritten "incident report" in his native language of Polish that was translated into English. However, this report was not provided to plaintiff during discovery.

In this case, Plaintiff alleged that Premier was negligent and otherwise departed from accepted standards of home health care services in failing to provide for the decedent's safety and security while he was under its supervision, in permitting the decedent to be left unattended, in failing to employ home health attendants with the requisite skill in monitoring patients, and in failing to contact the hospital in order to determine if the decedent was or was not admitted to the hospital. Plaintiff further

alleged that these departures and negligence caused the decedent's death from atherosclerotic cardiovascular disease, cardiac arrest, inability to breath, and falling. Plaintiff also alleged that Senior Care was negligent and otherwise departed from accepted standards of EMT care in failing to employ EMTs with the requisite skills in caring for patients, in failing to properly evaluate the decedent, in leaving the decedent unattended and unaccompanied, and in failing to coordinate and communicate with decedent's home health care attendant prior to leaving the decedent unaccompanied in his apartment. Finally, plaintiff alleged that these departures and negligence caused the decedent's death.

Senior Care's Motion for Summary Judgment

Senior Care moves for summary judgment dismissing plaintiff's claims against them. In so moving, Senior Care does not argue that the care provided by its EMTs was within accepted standards. Instead, Senior Care contends that plaintiff cannot prove that its actions or inactions proximately caused the decedent's death and as such, plaintiff's complaint against Senior Care must be dismissed. In support of this argument, Senior Care submits an expert medical affirmation by Malcolm Phillips, M.D., a physician board certified in internal medicine and cardiovascular disease. Dr. Phillips opines, to a reasonable degree of medical certainty, that it is scientifically impossible to determine how the decedent died. In support of this claim, Dr. Phillips points to the fact that no internal autopsy was performed on the decedent, the decedent's death was not witnessed, and no accurate time of death was established. Under the circumstances, Dr. Phillips

maintains that any number of acute changes could have caused decedent's death after Senior Care's EMTs left the apartment including a heart attack, pulmonary embolus or other fatal blood clot, or a fall and fasting to death. Accordingly, Dr. Phillips concludes that there is no causative connection between any act or omission by Senior Care's EMTs and the injuries alleged by plaintiff in this action.

In opposition to Senior Care's motion, plaintiff maintains that Senior Care has failed to meet its prima facie burden in moving for summary judgment. In particular, plaintiff contends that Senior Care has merely pointed to purported gaps in his proof, which is insufficient to demonstrate entitlement to summary judgment.

In further opposition to Senior Care's motion for summary judgment, plaintiff maintains that there are issues of fact regarding whether Senior Care's EMTs departed from accepted standards of care and as to whether this departure caused the decedent's death. In support of this argument, plaintiff submits an expert medical affirmation by Kevin R. Brown, M.D., a physician board certified in emergency medicine. Dr. Brown opines, to a reasonable degree of medical certainty, that the Senior Care EMTs departed from accepted standards and Senior Care's own policies in leaving the decedent unattended at his apartment and/or in failing to return the decedent to the hospital when extreme weakness prevented the decedent from signing the drop off paperwork. Dr. Brown further opines that, had the Senior Care EMTs not left the decedent unattended or had they returned him to MMC, the decedent's death would have been avoided.

As previously noted, the sole basis asserted by Senior Care in support of its summary judgment motion is that plaintiff cannot prove that the actions or inactions of its EMTs proximately caused the decedent's death inasmuch as the decedent's death was unwitnessed and no internal autopsy was performed on the decedent. However, it is well settled that "[m]erely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden" when moving for summary judgment (*Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404, 405 1st Dept. 2018). This is true even when the gap in evidence involves something as fundamental as the ability to prove causation (*id.* at 405; *Montemarano v Atlantic Express Transp. Gp., Inc.*, 123 AD3d 675, 675-676 2nd Dept. 2014; *Pappalardo v Long Is. R.R. Co.*, 36 AD3d 878, 880 2nd Dept. 2007). Instead, the movant must submit affirmative evidence establishing that its alleged negligence did not, as a matter of law, proximately cause the plaintiff's injury or death (*Hairston*, 157 AD3d at 405). Here, Senior Care merely points to gaps in plaintiff's evidence and has not submitted any affirmative evidence establishing that its employees did not cause the decedent's death. Senior Care's EMTs left the decedent at his apartment while noting the fact that his condition had changed since he was released from MMC, that he was too weak to sign the discharge papers. The Senior Care EMT's failure to return to MMC with the decedent when his condition changed deprived him of a chance to survive what was causing the weakness in the first place, setting into motion a terrible chain of events resulting in Mr. Meskin's death. Under the circumstances,

Senior Care has failed to meet its prima facie burden and its motion for summary judgment must be denied regardless of the sufficiency of the opposition papers.

Premier's Cross Motion for Summary Judgment

Premier cross-moves for summary judgment dismissing plaintiff's complaint against them. Premier maintains that they did not deviate from accepted standards of care in its oversight of the decedent. In support of this contention, Premier submits an expert affidavit by Elizabeth N. Braun, M.S. R.N., a registered nurse duly licensed to practice in the State of New York. Nurse Braun opines, to a reasonable degree of medical and nursing certainty, that Premier was compliant with accepted standards of care to have Ms. Lipkina inform the insurance carrier United on August 1, 2016 that the decedent was hospitalized when she learned of this information from Mr. Gardocki, thereby placing home health aide services on hold. Nurse Braun further states that it was not required by accepted standards of care for Premier to contact MMC to confirm that the decedent was admitted to the hospital. In further support of her contention that Premier did not have a duty to investigate the decedent's status, Nurse Braun notes that Mr. Gardocki presented to the decedent's apartment on the morning of July 31, 2016 before the Senior Care ambulette arrived at the apartment. Thus, Nurse Braun opines that Premier did not abandon Mr. Meskin inasmuch as Mr. Gardocki had knowledge that Mr. Meskin was left in the safety of the hospital staff's control and observation. Finally, Nurse Braun avers that Premier was compliant with accepted standards of care for

Premier's services to be resumed only after the insurance carrier or MMC informed Premier that the decedent was discharged, which never occurred.

In further support of its cross motion for summary judgment, Premier argues that plaintiff's negligence claims against it must be dismissed inasmuch as plaintiff cannot prove proximate cause in this case. In support of this contention, Premier submits an expert affirmation by Vincent P. Garbitelli, M.D., a duly licensed physician, board certified in internal medicine. Dr. Garbitelli opines, to a reasonable degree of medical certainty, that the decedent's injuries and death were not caused by Premier's actions or inactions since it cannot be determined by any medical expert precisely when or how the decedent died. In support of this contention, Dr. Garbitelli notes that Mr. Meskin's death was unwitnessed and no internal autopsy was performed. Dr. Garbitelli further states that, although the death certificate lists the cause of death as "atherosclerotic cardiovascular disease," there are many possible causes of death and without a microscopic examination of body fluids and tissues and/or a post-mortem drug screen, the exact cause of death cannot be determined. Finally, Dr. Garbitelli opines that, inasmuch as Mr. Meskin's death was unwitnessed, it is impossible to know whether he died during the eight-hour per day window when Premier provided home health aide services or whether he died during the 16 hours per day when no services were provided.

In opposition to Premier's cross motion, plaintiff maintains that Nurse Braun's affidavit is insufficient to demonstrate Premier's prima facie entitlement to summary judgment inasmuch as the affidavit is fraught with unsubstantiated allegations which are

contradicted by the record. In this regard, plaintiff notes that Nurse Braun does not distinguish between a patient who presents to the emergency room and is released (as occurred here) and one who is admitted to the hospital and then discharged. Plaintiff also notes that Nurse Braun ignores the fact that Mr. Gardocki violated Premier's own policies in waiting until the morning of July 31, 2016 to report that the decedent was in the hospital. Further, plaintiff argues that the statement made by Mr. Gardocki to Premier on July 31, 2016 that the decedent was hospitalized was erroneous because he never was hospitalized. In any event, plaintiff maintains that even assuming decedent's presentation to the emergency room constituted a hospitalization, by the time Mr. Gardocki notified Premier, the decedent had already been released from the emergency room. Accordingly, plaintiff maintains that Nurse Braun's opinion is based upon erroneous assumptions. Finally, plaintiff argues that, in opining that Mr. Gardocki validly believed that the decedent was in the hospital based merely upon the fact that nobody answered the door to his apartment on the morning of July 31, 2016, Nurse Braun ignores the fact that Mr. Gardocki was provided with contact information on a business card when he was still at the hospital. However, Mr. Gardocki purportedly lost the card and failed to contact the hospital.

In further opposition to Premier's cross motion, plaintiff argues that, even if Nurse Braun's affirmation is sufficient to make a prima facie showing of its entitlement to summary judgment, there are issues of fact regarding whether Premier was negligent and otherwise failed to comply with accepted standards of care. In this regard, Plaintiff

submits an expert affidavit by Lubov Sheynfeld, R.N., a registered nurse duly licensed to practice nursing in the State of New York. Nurse Sheynfeld opines, to a reasonable degree of medical and nursing certainty, that Premier breached its own policies as well as the standards in the home health care industry when Mr. Gardocki failed to immediately notify Premier that the decedent had been taken to the emergency room. According to Nurse Sheynfeld, this standard is in place to allow health care providers to coordinate so as to ensure continuity of care. Nurse Sheynfeld states that Mr. Gardocki's failure to promptly notify Premier of the decedent's status led to a break in the care needed by the decedent. Nurse Sheynfeld further opines that Premier breached the standards of care in placing a hold on services based upon decedent's mere Sheynfeld visit to the emergency room as opposed to an actual hospital admission. In any event, Nurse Sheynfeld notes that, at the time the hold on services was placed, the decedent had already been discharged from the emergency room. Finally, Nurse Sheynfeld opines that Premier breached accepted standards of home nursing care in failing to verify the whereabouts of the decedent once it was notified by Mr. Gardocki on July 31, 2016 that the decedent was hospitalized. In particular, Nurse Sheynfeld maintains that the fact that Mr. Gardocki returned to the decedent's apartment on the morning of July 31, 2016 demonstrates that Premier did not know whether or not the decedent had been admitted to MMC. Under the circumstances, Nurse Sheynfeld avers that Premier had a duty to verify decedent's whereabouts before placing his services on hold.

In further opposition to Premier's cross motion, plaintiff maintains that Dr. Garbitelli's affirmation claiming that causation cannot be proved is insufficient to make a prima facie showing of Premier's entitlement to summary judgment. In particular, plaintiff maintains that Premier is merely pointing to alleged gaps in plaintiff's proof, which is insufficient to support a motion for summary judgment.

It is well settled that, where a defendant home health aide is responsible for caring for an individual in daily activities, the defendant's abandonment of that individual can result in liability (*Auer v Affiliated Home Care of Putnam, Inc.*, 63 AD3d 972, 2nd Dept. 2009; *Esposito v Personal Touch Home Care*, 288 AD2d 337, 338, 2nd Dept. 2001; *Willis v City of New York*, 266 AD2d 207, 208, 2nd Dept. 1999). Here, it is undisputed that the decedent suffered from Parkinson's disease and schizophrenia and required home health aide services on a daily basis in order to assist him in basic activities including getting dressed, bathing, preparing food, grocery shopping, and the administration of prescription medication. It is also undisputed that Premier failed to provide these services between the time the decedent was dropped off at his apartment by the Senior Care ambulette on the morning of July 31, 2016, and the discovery of the decedent's body by members of the NYPD on August 8, 2016. Further, Premier has failed to make a prima facie showing that it was justified in placing decedent's services on hold during this time period. In particular, Nurse Braun's opinion in this regard is based on the erroneous assumption that the decedent was admitted to MMC when the record reveals that the decedent merely presented to and was released by the emergency room department and

was never admitted to the hospital. Moreover, even if the decedent's time at the emergency room were to be considered an admission to the hospital, at the time Premier contacted United and placed services on hold, the decedent had already left the hospital.

Finally, even if Premier's submissions were sufficient to make a prima facie showing that it did not abandon the decedent, inasmuch as he was admitted to the hospital, plaintiff's opposition papers raise triable issues of fact regarding whether Premier breached a duty and otherwise failed to comply with applicable standards of care in failing to contact MMC and confirm decedent's status prior to placing decedent's services on hold. In this regard, Mr. Gardocki testified that a nurse at the hospital gave him a business card with a phone number to call and inquire about the decedent's status, but he failed to call this number and then lost the card.

Accordingly, to the extent that Premier's cross motion for summary judgment is based upon the argument that it was not negligent and complied with applicable standards of care in the home health aide industry, the cross motion is denied.

Turning to Premier's alternative argument that plaintiff's complaint must be dismissed based upon his inability to prove proximate cause, as the court noted in ruling on Senior Care's summary judgment motion, a movant does not establish its entitlement to summary judgment by pointing to gaps in a plaintiff's proof. Here, Premier merely points to gaps in plaintiff's proof and has failed to submit affirmative proof demonstrating that its actions and/or inactions did not proximately cause the decedent's injuries and death. Accordingly, to the extent that Premier's cross motion for summary

judgment is based upon lack of proximate cause, the motion must be denied (*Hairston*, 157 AD3d at 405; *Montemarano*, 123 AD3d at 675-676; *Pappalardo*, 36 AD3d at 880).

Mr. Meskin was deprived of a chance at survival by the numerous missteps committed by Premier personnel in this case. Starting with Mr. Gardocki losing the business card with the phone number of MMC and failing to follow up on Mr. Meskin's status at the hospital, then again failing to follow up when he went to Mr. Meskin's apartment on the morning of July 31, and not getting an answer at the apartment, and then when Ms. Lipkina suspended Premier's homecare services based upon the erroneous belief that Mr. Meskin had been admitted to the hospital when neither Mr. Gardocki nor Ms. Lipkina nor anyone else at Premier confirmed whether or not Mr. Meskin was in fact at the hospital, all of these steps added up to a terrible chain of events which led Mr. Meskin to lay undiscovered in his apartment for eight days. Any chance Mr. Meskin had to survive was lost, caused by Premier's ill-fated actions.

Accordingly, Premier's cross motion for summary judgment dismissing plaintiff's action against it is denied.

Plaintiff's Motion to Strike Premier's Answer

Plaintiff moves for an order striking Premier's answer for its willful destruction of evidence. In support of its motion, plaintiff notes that Mr. Gardocki testified that, after Premier learned of the decedent's death, he prepared a handwritten incident report regarding his actions on July 30 and July 31, 2016. Plaintiff further notes that Ms. Lipkina testified that she maintained a file for the decedent which was taken away by two

managers from Premier after decedent's death. However, notwithstanding the fact that plaintiff made two separate demands for the incident report and the Lipkina file, Premier has failed to turn over these records. According to plaintiff, Premier's failure to preserve this evidence was a breach of their statutory duty and otherwise willful. In addition, plaintiff maintains that this spoliated evidence is the very instrumentality that gives rise to plaintiff's claims. Under the circumstances, plaintiff argues that the appropriate remedy for this spoliation is the striking of Premier's answer.

In opposition to plaintiff's motion to strike its answer, Premier argues that such an extreme sanction is only warranted when it is shown that loss of the evidence was willful, deliberate, or contumacious and the loss of the evidence prevents the moving party from proving its case. Here, Premier maintains that its failure to provide the incident report and the Lipkina file was not willful, deliberate or contumacious. In particular, Premier notes that it has turned over hundreds of pages of requested documents and has made diligent efforts to find the subject records but has been unable to locate them. In support of this claim, Premier submits affidavits by its contract manager, Lenora Asanova and its director of operations, Alyssa Haskaj, both of whom state that they conducted a search for Mr. Gardocki's handwritten incident report and determined that it is lost and cannot be found. Premier also submits affidavits by its contract managers Leona Johnson and Vera Stengach, both of whom state that they conducted a thorough search for Ms. Lipkina's file but determined that the file is lost and cannot be found. As a final matter, Premier maintains that, although the missing records might be of some probative value,

their loss hardly deprives plaintiff of the ability to prove his case given the fact that plaintiff had the opportunity to depose both Mr. Gardocki and Ms. Lipkina regarding their actions and communications between July 30 and August 8, 2016.

“Under the common-law doctrine of spoliation, ‘when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by striking its pleading’” (*Jennings v Orange Regional Med. Ctr.*, 102 AD3d 654, 655, 2nd Dept. 2013, quoting *Denoyelles v Gallagher*, 40 AD3d 1027, 1027, 2nd Dept. 2007). However, striking a pleading is a drastic sanction to impose and, in the absence of willful or contumacious conduct, courts must consider the prejudice suffered by the non-responsible party before imposing such a sanction (*Pennachio v Costco Wholesale Corp.*, 119 AD3d 662, 663, 2nd Dept. 2014). “[W]here the moving party has not been deprived of the ability to establish his or her case or defense, a less severe sanction is appropriate” (*Squillacioti v Independent Group Home Living Program, Inc.*, 167 AD3d 673, 675, 2nd Dept. 2018).

Here, plaintiff has failed to demonstrate that Premier’s loss of the incident report and file was caused by willful, contumacious, or deliberate conduct. Rather, it appears that the loss of these records was caused by inadvertence and/or negligence. Further, although these records would presumably be of some evidentiary value to plaintiff, it cannot be said that their loss has deprived him of the ability to prove his case. In particular, plaintiff had the opportunity to depose both Mr. Gardocki and Ms. Lipkina

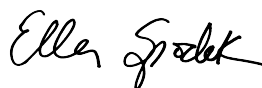
regarding their actions during the relevant time period. Under the circumstances, the court finds that the lesser sanction of directing that an adverse inference be given at trial with respect to Mr. Gardocki's incident report and Ms. Lipkina's file is appropriate (*Squillacioti*, 167 AD3d at 676).

Summary

In summary, plaintiff's motion, in mot. seq. four, for an order striking Premier's answer for spoliation of evidence is granted only to the extent of directing that an adverse inference charge be given at trial with respect to the missing records. Premier's cross motion, in mot. seq. five, for summary judgment dismissing plaintiff's complaint against them is denied. Senior Care's motion, in mot. seq. seven, for summary judgment dismissing plaintiff's complaint against them is denied.

This constitutes the decision and order of the court.

ENTER,



J. S. C.