

Johnson v Rimpel

2022 NY Slip Op 33044(U)

September 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 523101/2016

Judge: Bernard J. Graham

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

MINEL JOHNSON and KIRK JOHNSON, as
Administrator of the Estate of ANSEL JOHNSON, deceased,

Index No.: 523101/2016

Plaintiff(s),

DECISION/ORDER

-against-

BERNARD RIMPEL, UMESH MISHRA, JOSEPH
DERGAN, SARINA CRANAGE, STACEY
MARTINDALE, AMER HOMSI, DAVID SCHANER and
THE BROOKLYN HOSPITAL CENTER,

Hon. Bernard J. Graham
Supreme Court Justice

Defendants

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: strike the answer of defendant The Brooklyn Hospital Center and direct said defendant to provide the minutes of any peer review committee pertaining to the Ms. Johnson’s hospitalization of May 2, 2014.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	
Other: (memo).....	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiffs, Minel Johnson, and Kirk Johnson, as Administrator of the Estate of Ansel Johnson, deceased (“plaintiffs”) have moved (seq. # 3), pursuant to CPLR §§ 3211 and 3212, for an Order to strike the answer of defendant, The Brooklyn Hospital Center (“Brooklyn Hospital”) due to spoliation of evidence. Plaintiffs further seek an order to direct said defendant to provide the minutes of any peer review committee meeting pertaining to the cardiac arrest that occurred on May 2, 2014, during the hospitalization of Minel Johnson (“Ms. Johnson”).¹

¹ Minel Johnson is the alleged injured party. Ansel Johnson, deceased, was the spouse of Minel Johnson.

Brooklyn Hospital has opposed the relief sought by the plaintiffs arguing that the plaintiffs failed to demonstrate entitlement to an Order that strikes their answer based upon spoliation of evidence nor has there been any evidence presented which would warrant a finding that their conduct was sanctionable. Additionally, defendant maintains that they have provided responses to all of the remaining discovery requests of the plaintiffs.

Background:

On or about December 28, 2016, an action was commenced on behalf of the plaintiffs by the filing of a summons and complaint with the Clerk's office of Kings County. In said complaint, plaintiffs seek to recover damages based upon alleged negligence and medical malpractice, between March 24, 2014 and July 29, 2014.

Issue was joined on behalf of defendants, Joseph Dergan, M.D. ("Dr. Dergan"), Amer Homsia, M.D. ("Dr. Homsia") and Brooklyn Hospital by the service of a verified answer dated January 10, 2017. Verified answers were also served on behalf of defendant Stacey Martindale, M.D. ("Dr. Martindale") on or about February 1, 2017, as well as defendant Umesh Mishra, M.D. ("Dr. Mishra") dated March 9, 2017.

The plaintiffs, in their Bill of Particulars, maintain that the attending surgeon, defendant Bernard Rimpel, M.D. ("Dr. Rimpel") failed to: provide appropriate post-operative orders; follow up post-operatively, and properly monitor the patient.

As to defendants David Schaner, M.D. ("Dr. Schaner") and Sarina Cranage, M.D. ("Dr. Cranage"), plaintiffs allege that said doctors failed to: provide the appropriate orders pertaining to the administration of Letatol; intubate and properly monitor Ms. Johnson.

As to defendants Umesh Mishra, M.D. ("Dr. Mishra"), and Amer Homsia, who was a resident, plaintiffs allege that said defendants failed to: monitor Ms. Johnson's blood pressure, pulse, oxygen saturation, pulse oximetry and state of consciousness, and allowed Ms. Johnson to remain unresponsive and pulseless with bradycardia. It is further

alleged that said defendants failed to promptly and properly intubate Ms. Johnson and to institute measures to salvage brain function.

Ms. Johnson allegedly sustained injuries which included cardio respiratory arrest, loss of circulation and hypoxic brain damage.

A Preliminary Conference was conducted on March 20, 2018, that resulted in an Order which provided for authorizations, the furnishing of Bill of Particulars, a deposition schedule for both the plaintiffs and the defendants, the scheduling of the physical examination of Ms. Johnson, as well as documentation pertaining to Medicare/Medicaid liens, past earnings, etc.

Final Pre-Note orders were issued on July 2, 2019, by JHO Martin Schneier, as well as on November 20, 2019, by Justice Lizette Colon, which provided for the completion of depositions and the filing of the Note of Issue.

Upon the death of the co-plaintiff Ansel Johnson on August 24, 2021, this matter was stayed until the appointment of Kirk Johnson, as the administrator of his estate on January 27, 2022, by the Kings County Surrogate's Court.

Facts:

Ms. Johnson was a patient at Brooklyn Hospital from March 24, 2014 through July 29, 2014. On May 2, 2014, (during the course of that hospital admission) Ms. Johnson, following hernia surgery, experienced cardiac arrest which allegedly resulted in her sustaining hypoxic brain damage. Thereafter, Ms. Johnson spoke with slurred speech and was wheelchair bound.

Following her discharge from Brooklyn Hospital, Ms. Johnson was a patient at Rusk Institute and then Queens Nassau Rehabilitation and Nursing Home until December 2014. Upon her release from the Nursing Home, Ms. Johnson resided in her home for three months before relocating to Florida to live with her sister.

Parties' Contentions:

Here, the Court is presented with the issue as to whether the failure of the defendant Brooklyn Hospital to produce statements made by defendants at an alleged peer review committee meeting pertaining to the May 2, 2014 medical incident during the hospitalization of Ms. Johnson should result in a finding of spoliation of evidence.

In support of plaintiffs' motion, in which counsel for the plaintiffs allege spoliation of evidence, is the absence of the record of a notetaker whose role was to fill out a cardiac arrest form in the hospital record. Instead, the arrest form that appears in the record is alleged to be incomplete, as it does not address the actions taken by the code team who came to treat the cardiac arrest; nor is there an indication of the application of ventilation or intubation but only that atropine was administered to Ms. Johnson. Additionally, the hospital record contains two different versions as to the duration of the cardiac arrest (it was reported to be five minutes as well as seven minutes).

In further support of plaintiffs' motion, counsel refers to the deposition testimony of defendant Dr. Martindale, a senior resident who had cared for Ms. Johnson during the afternoon prior to the cardiac arrest. Dr. Martindale testified that she had submitted a written presentation to a mortality or morbidity committee but had not retained a copy of that statement. Plaintiffs' counsel maintains that if the hospital did not maintain a copy of her statement that would be tantamount to intentional spoliation of evidence.

In opposing the relief sought herein, defendant's counsel maintains that there has been no spoliation nor has there been a willful or contumacious failure on the part of the defendants to comply with discovery.

Defendant's counsel asserts that since 2014, the practice of Brooklyn Hospital is to not retain any handwritten notes or written statements in peer review cases. Nevertheless, Victoria Agramonte, the Senior Director of Performance Improvement and Patient Safety at Brooklyn Hospital, searched for any handwritten notes and written statements by Dr. Martindale in the hospital's peer-review file with respect to the review of the hospital's care of Ms. Johnson which was addressed in a quality assurance

proceeding. The search proved unsuccessful (see affidavit of Victoria Agramonte annexed as NYSCEF Doc. No. 98).

As to the absence of Ms. Martindale's statement, counsel contends that "the mere loss of a record, while perhaps careless, does not, without more, establish willful or contumacious conduct..." (Nabozny v. Cappelletti, 267 AD2d 623, 699 NYS2d 589 [3rd Dept. 1999] and does not support a spoliation sanction and/or the striking of defendant's answer. Additionally, counsel for the plaintiffs has not shown that the alleged spoliated evidence was central to their case or that they were prejudiced by the purported loss of the evidence. Further, defendants maintain that Dr. Martindale was not involved in Ms. Johnson's treatment when the latter coded, had no first-hand knowledge of the cardiac arrest and in fact her shift had ended when she coded.

As to the production of the remainder of the discovery requests, defendant Brooklyn Hospital asserts they cannot produce additional records, cardiac arrest notes, or incident reports related to Ms. Johnson where no such additional records exist.

Discussion:

It is well settled that 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 the striking of its pleading. Hughes v Covey, 131 AD3d 581, 582 [2nd Dep't 2015]; Baglio v St. John's Queens Hosp., 303 AD2d 341, 342 [2nd Dep't 2003]; *see* DiDomenico v C&S Aeromatik Supplies, 252 AD2d 41, 52 [1998]; Foncette v LA Express, 295 AD2d 471 [2002]. A pleading may be stricken "even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation." Baglio v St. John's Queens Hosp., 303 AD2d at 343, *citing* DiDomenico v C&S Aeromatik Supplies, 252 AD2d at 53; New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec., 280 AD2d 652 [2d Dep't 2001].

Under 10 NYCRR §405.10 (a)(4) medical records must be retained in their original or legally reported form for a period of at least six (6) years from the date of

discharge or three (3) years after the patient's age of majority (18 years), whichever is longer, or at least six (6) years after death. In addition, failure to comply with disclosure requests may result in penalties being incurred under CPLR §3126, and failure to preserve critical evidence may be deemed spoliation.

However, Dr. Martindale's written statement from the peer review is not a "medical record" and as such, does not fall under the statutory duty to retain such information. In addition, the absence of documentation in the medical record of the specific actions taken by the code team in responding to Ms. Johnson's cardiac arrest does not amount to a negligent loss or intentional destruction of key evidence, but rather potentially raises a question of fact as to what treatment was performed during that time, which would then be submitted to the jury.

Here, the plaintiffs, as the party alleging spoliation, have the burden of demonstrating that the defendant Brooklyn Hospital intentionally or negligently disposed of critical evidence, and 'fatally compromised' plaintiff's ability to prove their claim. Lentini v Weschler, 120 AD3d at 1201 [2d Dep't 2014]; Utica Mut. Ins. Co. v Berkoski Oil Co., 58 AD3d 717, 718 [2009]; Lawson v Aspen Ford, Inc., 15 AD3d 628, 629 [2005]. Plaintiffs have failed to offer any evidence that the allegedly incomplete record of the code team's response to Ms. Johnson's cardiac arrest, as well as the absence of Dr. Martindale's written statement from the peer review, has "fatally compromised" plaintiffs' ability to prove their claim. While Dr. Martindale's written statement may have been discoverable under the exception to Public Health Law §2805-m² had it been retained, plaintiffs did not prove that said statement was intentionally or negligently disposed of. Defendants stated that, at the time of the incident at issue, it was Brooklyn Hospital's regular practice to not retain handwritten notes or written statements in peer review cases. In addition, defendants assert that the record reflects Dr. Martindale was

² The New York State Education Law § 6527(3), shields from disclosure "the proceedings [and] records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program." Logue v Velez, 92 NY2d 13, 17 [1998], quoting NY EDUC §6527[3]. Public Health Law §2805-m provides that "statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such a meeting" are not immune from disclosure. See VanBergen v. Long Beach Med. Ctr., 277 AD2d 374, 374, 717 NYS2d 191 [2nd Dept. 2000].

not involved in Ms. Johnson's treatment, and was not even on duty, at the time Ms. Johnson coded.

The determination of spoliation sanctions, whether the spoliation was intentional or negligent, lies within the broad discretion of the court. Lentini v Weschler, 120 AD3d at 1201 [2d Dep't 2014]; *see* Ortega v City of New York, 9 NY3d 69, 76 [2007]; Shayovich v 800 Ocean Parkway Apt. Corp., 77 AD3d 814, 815 [2010]; Denoyelles v Gallagher, 40 AD3d 1027 [2007]. A court may impose a sanction less severe than the striking of the responsible party's pleading or no sanction "where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense." Hughes v Covey, 131 AD3d at 583; Denoyelles v Gallagher, 40 AD3d at 1027; *see* Falcone v Karagiannis, 93 AD3d 632, 634 [2012].


As Dr. Martindale's written statement would not have contained any first-hand knowledge of Ms. Johnson's cardiac arrest, and plaintiffs have not shown that the absence of this written statement is crucial to their ability to prove their claim, the absence of such record does not amount to spoliation.

Conclusion:

Accordingly, the motion by plaintiffs to strike the defendants' answers is denied. This shall constitute the decision and order of this Court.

Dated: September 7, 2022
Brooklyn, NY

ENTER


Hon. Bernard J. Graham, Justice
Supreme Court, Kings County