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| Richardson v Garely |
| 2022 NY Slip Op 33269(U) |
| September 28, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 805308/2017 |
| Judge: Erika M. Edwards |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

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REMY RICHARDSON,

Plaintiff,

- v -

ALAN GARELY, M.D., SOUTH NASSAU COMMUNITIES
HOSPITAL, ALEX KY, M.D., and THE MOUNT SINAI
HOSPITAL,

Defendants.

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INDEX NO. 805308/2017MOTION DATE 02/16/2022MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for

STRIKE PLEADINGS

Upon the foregoing documents, the court grants in part Plaintiff Remy Richardson's ("Plaintiff") motion to strike Defendant Alan Garely, M.D.'s ("Dr. Garely") answer for spoliation to the extent that Plaintiff may seek an adverse inference charge and the preclusion of evidence at trial in a manner to be determined by the trial judge. The court denies the portion of Plaintiff's motion seeking to strike Dr. Garely's answer. Additionally, the court denies the portion of Plaintiff's motion seeking to amend the complaint to add a claim for punitive damages.

Plaintiff moves to strike Dr. Garely's answer and argues in substance that Dr. Garely failed to provide Plaintiff's complete medical record in response to Plaintiff's discovery demands. Specifically, Plaintiff argues in substance that on March 31, 2019, Dr. Garely provided an uncertified copy of Plaintiff's medical records, including Plaintiff's medical chart, in response to discovery demands. Plaintiff further argues in substance that on November 26, 2019, Dr. Garely produced what was alleged to be a complete copy of Plaintiff's medical chart at his deposition. However, this version of Plaintiff's medical chart differed from the one previously produced. Plaintiff contends that Dr. Garely's deposition testimony revealed that neither version of the medical chart was complete as they were missing certain records like operative reports, the medical history, physical form, and diagnostic testing. Plaintiff further contends that Dr. Garely agreed to provide the complete medical record after his deposition. Plaintiff argues in substance that Dr. Garely failed to provide a complete and accurate copy of the medical record. Plaintiff further argues in substance that the actions of Dr. Garely in failing to provide Plaintiff's complete record is of such a nature that it warrants amending the complaint to add a claim for punitive damages.

Dr. Garely opposes the motion to strike and argues in substance that spoliation is improper because the medical records were maintained by his employer, Mount Sinai South Nassau Hospital (“MSSN”). Dr. Garely further argues in substance that Plaintiff was provided with a chart that was certified as complete by MSSN. Additionally, Dr. Garely argues in substance that Plaintiff failed to establish that he deliberately destroyed or negligently lost or mislaid the documents in question.

The drastic remedy of striking a party's pleading for failure to comply with discovery orders is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]). “Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses” (*id.*).

On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a ‘culpable state of mind,’ which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense (*Duluc v AC & L Food Corp.*, 119 AD3d 452 [1st Dept 2014]). In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing (*id.*).

The sanction of the striking of an answer is warranted only where the alleged spoliation prevents the movant from inspecting a key piece of evidence which is crucial to the movant's case or defense (*see Bach v City of New York*, 33 AD3d 544 [1st Dept 2006]). However, the court has broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation or employing an adverse inference instruction at the trial of the action (*see CPLR 3126; VOOM HD Holdings LLC v Echostar Satellite LLC*, 93 AD3d 33, 46 [1st Dept 2012]; *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 249 [1st Dept 2011]; *General Security Ins. Co. v Nir*, 50 AD3d 489, 490 [1st Dept 2008]). An adverse inference charge will prevent a party from using the absence of certain to its advantage (*see Sanchez v City of New York*, 181 AD3d 522 [1st Dept 2020]; *General Motors Acceptance Corp. v New York Central Mutual Fire Ins. Co.*, 104 AD3d 523, 526 [1st Dept 2013]; *Suazo v Linden Plaza Assocs., L.P.*, 102 AD3d 570 [1st Dept 2013]).

On July 26, 2022, the court met with the parties to discuss the substance of this motion. During the conference, counsel for Defendant The Mount Sinai Hospital (“Mount Sinai”) addressed Dr. Garely's argument that his employer, MSSN, maintained Plaintiff's records. Mount Sinai advised the court that although it maintains patients' medical records, it only maintains records that were uploaded to their system by a patient's physician. As such, to the extent that their records are incomplete, it is a result of a physician failing to upload a complete file to their system.¹

¹ The court notes that during the conference Defendant Mount Sinai discussed its process of maintaining records. However, Defendant Mount Sinai did not submit response papers in connection with the present motion.

In the present case, Dr. Garely testified at his deposition that the medical chart presented on that day and marked as evidence was not complete. Specifically, Dr. Garely testified that during patient visits he took handwritten notes and after the visit he dictated a report based on his notes. As such, each visit had a handwritten note and a dictated report. However, Dr. Garely noted that on more than one occasion, the medical record he provided at his deposition did not contain both a handwritten note and a dictated report for each of Plaintiff's visits. Although, Dr. Garely testified that he would have the hospital's information technology department look into producing Plaintiff's complete medical file, including the handwritten notes and dictated reports, to date he has failed to produce the complete medical file.

The court finds that striking Dr. Garely's answer or amending the complaint to add a claim for punitive damages is unwarranted, as Dr. Garely's failure to maintain or produce Plaintiff's complete medical file was not willful or contumacious. However, the sanctions of an adverse inference charge or preclusion of evidence may be deemed an appropriate recourse and can be requested at the time of trial. This court finds that such sanctions are more appropriately tailored to restore the balance between Dr. Garely's right to defend himself and any prejudice to Plaintiff that may arise if Dr. Garely testifies about medical visits and records that were not previously produced during discovery.

Therefore, the court grants in part Plaintiff's motion to strike Dr. Garely's answer for spoliation to the extent that Plaintiff may seek an adverse inference charge and the preclusion of evidence at trial in a manner to be determined by the trial judge. The court denies the portion of Plaintiff's motion seeking to strike Dr. Garely's answer. Additionally, the court denies the portion of Plaintiff's motion seeking to amend the complaint to add a claim for punitive damages.

To the extent not addressed herein, the court considered all remaining arguments of the parties and denies any additional relief requested, but not expressly granted herein.

As such, it is

ORDERED that the court grants in part Plaintiff Remy Richardson's motion to strike Defendant Alan Garely, M.D.'s answer to the extent Plaintiff Remy Richardson may seek an adverse inference charge and the preclusion of evidence at trial in a manner to be determined by the trial judge; and it is further

ORDERED that the court denies the portion of Plaintiff Remy Richardson's motion seeking to strike Defendant Alan Garely, M.D.'s answer and to amend the complaint to add a claim for punitive damages; and it is further

ORDERED that counsel for the Plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten (10) days of the date of this order; and it is further

ORDERED that the parties must appear for a compliance conference on November 29, 2022, at 10:00 a.m. in Room 412 of 60 Centre Street, New York, New York, 10007.

This constitutes the decision and order of the court.

9/28/2022
DATE

Edmund Edwards
FRANK M. EDWARDS, M.S.C. EDWARDS
J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE