SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. DANIEL PALMIERI
Justice Supreme Court

----------X TRIAL TERM PART 22

MICHAEL G. HUGHES and EILEEN HUGHES,

INDEX NO.. 014858/11

Plaintiff,

Mot. Seq. # 001
Mot. Date - 10-10-13
Submit Date: 11-26-13

-against-

STEPHEN H. COVEY, M.D., SOUTH SHORE HEART ASSOCIATES, P.C. and SOUTH NASSAU COMMUNITIES HOSPITAL,

Defendants.

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The following papers have been read on this application :

Notice of Motion, dated 9-18-13.....1
Opposition Affirmation, dated 10-24-13.....2
Reply Affirmation, dated 11-25-13.....3

Plaintiffs' motion to strike the answers of defendants Covey and South Shore Heart Associates, P.C. (defendant), is granted and judgment against these two defendants in favor of plaintiffs on the issue of liability is granted. The quantum of damages shall be reserved for the trial.

All requests for relief not specifically addressed are denied.

Defendant South Nassau Communities Hospital has not submitted any opposition.

Defendant conducted a stress test upon Michael Hughes on May 30, 2009. The test result images were memorialized in an optical computer disk. The basis for this action is that the defendant misread or misinterpreted the stress test results and that

subsequent treatment, which was predicated upon the erroneous interpretation, was not necessary. Plaintiff's claim that defendant Covey admitted the error to them and apologized, has been refuted by Covey. Although Covey has not submitted any affidavit in opposition to this motion, his complete oral deposition is attached to his opposing papers.

Requests for plaintiff's records were made in writing as early as December 2010, and correspondence on the subject of the missing test results ensued in early 2011. It is known that Covey reviewed the test images on his computer screen in early June 2009, and that after a request was made for the records, Covey responded on January 28, 2011, that due to "technical difficulties, we are unable to retrieve the pictures from the nuclear stress test ..." and on February 1, 2011, that "while transferring the digital pictures from the optical disk, the transfer failed which caused the pictures to be lost".

Notably absent from defendant's submission is any information as to the chain of custody of the optical disk during the interval of more then one year and seven months after the test, how, when and where it was stored and the persons with access to it. Further, defendant provides no information as to when the attempts to make copies occurred and if the disk content was verified to be uncorrupted prior to the transfer.

Defendant's excuse that the loss of the evidence was due to technological issues beyond his control and a broken printer, even if true, ignores that it was the professional and legal responsibility of the defendant to preserve the lost evidence and the excuse fails to adequately specify what steps were taken to comply with such responsibilities. Education Law §6530 (32), 8 NYCRR §29.2(a)(3).

Defendant's claim that plaintiffs failed to cite the CPLR section pursuant to which they have moved is a mere irregularity and may be overlooked because plaintiffs' supporting papers make clear the relief that has been requested.

The plaintiffs have established substantial prejudice in their ability to support their contentions and an inability to reconstruct or obtain the lost evidence from other sources. Defendant's conclusory assertions to the contrary do not offer the means or mechanism by which plaintiffs might be able to obtain equivalent evidence from other sources. That it was not the custom of defendant to provide nuclear stress test photos when patient records were requested, is supportive of defendant' cavalier approach to how it dealt with this specie of record storage and is no excuse for the failure. Defendant's evidence as to the loss of a printer is nonspecific, vague, speculative and insufficient to establish an excuse for the inability to print out test result images.

Absent from the submissions about the broken printer is evidence as to how a broken printer damaged the storage disk or any evidence as to the availability of other printers. However, the affidavit of a computer engineer confirms the inability to obtain any content from the disk.

The affidavit of an employee of the corporate defendant is of little or no probative value since he has no personal knowledge of the facts surrounding a defective printer and he makes no mention of the availability of other printers. However, he does confirm that he could not obtain any information from the disk.

Finally, the submission of medical expert testimony is equally lacking in specificity because unless the experts actually saw the lost evidence, how could they

render an opinion as to its lack of significance, especially where, as here, the claim is that defendant misinterpreted the test results. In any event, the Court finds that the opinions submitted, even if accepted as correct, are inadequate to stave off defendant's breach of professional and legal responsibilities. Dr. Covey testified that he used the images on the disk to interpret the study and on page 51 of his deposition transcript, he rendered a detailed description of the way he reviews test results. Absent the lost images, the contention of Dr. Covey and his expert cannot be challenged.

Because striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, the prejudice that results from the spoliation must be considered in order to determine whether such drastic relief is necessary as a matter of fundamental fairness. Thus, where a party destroys key evidence such that its opponents are deprived of appropriate means to confront a claim with incisive evidence, the spoliator may be punished by the striking of its pleading. A less severe sanction is appropriate, however, where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense. Furthermore, where the plaintiffs and defendant are equally affected by the loss of the items in their investigation of the accident and neither have reaped an unfair advantage in the litigation, it is improper to dismiss a pleading on the basis of spoliation of evidence. *DeLos Santos v. Polanco*, 21 AD3d 397, 398 (2d Dept. 2005).

Although defendant's conduct in failing to maintain plaintiff's medical records was not necessarily contumacious or intentional, it was clearly negligent and defendant breached his ethical and statutory duty to retain plaintiff's medical records for at least six

years. Education Law §6530 (32); 8 NYCRR 29.2[a][3]. Since this failure may have deprived plaintiff of any means of establishing a prima facie case, the striking of defendant's answer is the appropriate remedy. *Melcher v. Apollo Med. Fund Mgt, L.L.C.* 105 AD3d 15, 24 (1st Dept. 2013) [Internal citations and punctuation omitted]; *Gray v. Jaeger*, 17 AD3d 286 (1st Dept. 2005); *Herrera v. Matlin*, 303 AD2d 198 (1st Dept. 2003).

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. However, where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or no sanction, may be appropriate. A sanction for spoliation of evidence may be warranted even if the evidence was destroyed before the spoliator became a party to the subject lawsuit, provided it was on notice that the evidence might be needed for future litigation. *Jaminder v. Uniondale Union Free School Dist.*, 90 AD3d 610,611 (2d Dept. 2011) [internal citations and punctuation omitted], *Bagio v. St. John's Queens Hosp.*, 303 AD2d 341 (2d Dept. 2003).

Here, requests for records were made well before the action was commenced and that plaintiffs had engaged counsel was disclosed to defendant. Significantly, it is known that defendant viewed the test result images but defendant has not identified when their destruction took place. The nexus between the loss of a printer and the destruction of the evidence is not adequately explained.

Here, it cannot be said that the prejudice is equally applicable to both sides because defendant, through their experts, have argued the missing evidence is no longer relevant because Covey had an opportunity to review it and place the results in his report. Thus, a

lesser sanction can be readily deflected by defendant and plaintiff will be deprived of the opportunity to properly respond. Moreover, Covey has denied making the admission of fault attributable to him, thus reducing this evidence to a question of fact.

As noted above, an adverse inference instruction is too easily deflected, and merely to preclude the defendant from introducing evidence of how tests are conducted, memorialized and interpreted invites testimony that is conclusory or incomplete and could lead to confusion and speculation on the part of the jury. Hence, the draconian remedy imposed here is the most suitable, considering the gravity of the spoliation.

Based on the foregoing, the motion is granted and judgment against the defendants Covey and South Shore Heart Associates is granted pursuant to CPLR §3126(3).

This constitutes the Decision and Order of the Court.

ENTER

DATED: December 12, 2013

HON. DANIEL PALMIERI
Supreme Court Justice

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