

<b>Kuramoto v Ninomiya</b>
2008 NY Slip Op 33728(U)
February 27, 2008
Supreme Court, New York County
Docket Number: 107883/05
Judge: Sheila Abdus-Salaam
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHEILA ABDUS-SALAAM PART 13  
*Justice*

Seri Kuramoto

INDEX NO: 107883/05

- v -

MOTION DATE 2/7/08

MOTION SEQ. NO. 001

Eifuku Ninomiya, M.D.

MOTION CAL. NO. \_\_\_\_\_

RECEIVED  
MAR 6 2008  
MOTION SUPPORT  
OFFICE

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

FILED

PAPERS NUMBERED

MAR 07 2008

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

NEW YORK

Replying Affidavits \_\_\_\_\_

COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by plaintiffs for an order striking the answers of defendant Lenox Hill Hospital and third-party defendant Center for Maternal Fetal Medicine & GYN Ultrasound (the "Center") based upon the failure to provide sonogram films is denied except to the limited extent that an order of preclusion is granted.

Plaintiffs' complaint in this medical malpractice action alleges negligence during the pre-natal treatment, delivery and neo-natal treatment of the infant plaintiff Seri Kuramoto and the treatment and management of her mother, Mika Kuramoto. The infant was delivered by defendant Dr. Ninomiya on March 11, 2003 at Lenox Hill Hospital. The action was commenced in June 2005. In April 2007, defendant Ninomiya commenced a third-party action against Cecila Avila, M.D. and the Center for Maternal Fetal Medicine & GYN Ultrasound.

In support of the motion, plaintiffs state that they have sought to

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

obtain the sonogram films from a November 12, 2002 sonogram, which they say are necessary to the prosecution of their case, from both the hospital and the Center. The hospital's records did not include those films. The hospital, which takes the position that the Center is a separate entity from the hospital, obtained a copy of plaintiff's records from the Center and in July 2006, forwarded those records to plaintiffs. The sonogram films were not included in those records. By order dated February 7, 2007, the hospital was directed to provide plaintiffs with the films. This was not done because, according to the hospital, it at no time had custody or control over the images, and had no control over the Center.

As noted, a third-party action was commenced against the Center in April 2007. Michael Divon, M.D., the president of a professional corporation that runs the Center, was deposed in December 2007. He testified that in addition to running the Center, he is employed by the hospital and is chairman of the department of obstetrics and gynecology. He also testified that after the infant plaintiff was born and he was made aware of an abnormality, he took the sonogram films (either immediately or within a few days or a couple of weeks of delivery) and stored them in his office at the professional corporation, placing them with other charts on the side of his desk that he believed might have an educational benefit as a teaching aid. He stated that he had not used the Kuramoto films for teaching purposes or ever reviewed the file.

According to Dr. Divon, at sometime in 2006 it came to his attention that the Kuramotos had sued the hospital because there was a request for records. When asked whether he was ever made aware of a court order in the summer of 2006 regarding the production of films<sup>1</sup>, he responded in the

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<sup>1</sup>While plaintiffs had requested copies of her complete files from the hospital and the Center as of 2006, the motion papers do not refer to or include any court order issued in 2006 directing production of the films.

negative. Although Dr. Divon was questioned extensively, the court has not found any question in the deposition transcript as to whether, after learning in 2006 that there was a lawsuit against the hospital, he remembered in 2006 that he had the films in his office. He did testify that he conducted a massive search in his office before requesting the films from the storage facility named Iron Mountain where patients' files are stored, but that the massive search was done after the Center became a party in April 2007.

At some point, OB/GYN Services became a party to this litigation. And when the chart was requested, once we became a party to this litigation, we wanted to provide it. And I remembered that I had it immediately after delivery or within a few days or a couple weeks after delivery, and I put it where I usually put charts of this nature. And I couldn't find it anywhere, so we searched everything. And we called Iron Mountain to ask them if they have it, and we couldn't find it.

[Divon EBT, p. 91]

He testified that there had been a big flood in his office in November 2006 and a lot of his charts were destroyed. His office was cleaned out and many things in his office were discarded. He testified that he is as certain as he can be that the Kuramoto films were discarded in November 2006.

The striking of a defendant's answer is a drastic sanction and the general rule is that a party should not be granted more relief for nondisclosure than is reasonably necessary to protect the party's interests (Gaylord Bros., Inc. v. RND Company, 134 AD2d 848 [1987], citing Oak Beach Inn Corp. v. Babylon Beacon, 62 NY2d 158 [1984], cert. denied 469 US 1158 [1985]). While plaintiffs have the record of the sonogram report which is stored in the Center's computer system, it appears that the sonogram films cannot be produced. It is not clear from the motion papers whether the films are necessary for the prosecution of plaintiffs' claims against the hospital. The allegations of the complaint are general and no bills of particulars have been included with the motion papers. It seems that the hospital's involvement is limited to the labor and delivery. At oral argument,

there was some indication that plaintiffs are claiming that the sonogram report set forth fetal abnormalities that were not communicated to Ms. Kuramoto. Thus, the court cannot determine at this juncture whether the destruction of the sonogram films has even hindered, much less deprived plaintiffs from proving their claims against the hospital (compare Gray v. Jaeger, D.O., 17 AD3d 286 [2005]).

A sanction other than the striking of the pleadings, such as the imposition of a negative inference charge, may ultimately be deemed appropriate (see Allstate Insurance Company v. Kearns, 309 AD2d 776 [2003]). And, based upon the representation by defendant and third-party defendant that the films are not in their possession and cannot be produced, they shall be precluded at trial from offering those films in evidence. However, even were this court to conclude that defendant's and/or third-party defendant's conduct in failing to preserve the sonogram films was at worst contumacious, or at best negligent, plaintiffs have not demonstrated that the striking of the answers is the appropriate remedy.

Accordingly, the motion is denied except to the extent that a preclusion order is imposed.

**FILED**  
MAR 07 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/27/08

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J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE