At an I.A.S. Trial Term, Part 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 320 Jay Street, Borough of Brooklyn, City and State of New York, on the 26 of July 2016.

PRESENT:

HON. MICHELLE WESTON
Justice

DIANNE HUTCHINSON, AS ADMINISTRATRIX OF THE ESTATE OF SCHWARTZ CANTON, Deceased,

Plaintiff(s),

- against -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, UTICA AVENUE DIALYSIS CLINIC, DAVITA INC., THE BROOKDALE UNIVERSITY HOSPITAL AND MEDICAL CENTER, EMPIRE STATE DC, INC., CARLINE MARIE GUIRAND, and BROOKLYN NEPHROLOGY GROUP, P.C.,

Defendant(s).

ORDER

Index # 500700/11

The following papers numbered 1 to 13 read on this motion	**Papers Numbered**
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	1-6
Answering Affidavit (Affirmation)	7-10
Reply Affidavit (Affirmation)	11-13
Affidavit (Affirmation)	

Upon the foregoing papers and after oral arguments heard, the plaintiff's motion

seeking an order to compel the defendants UTICA AVENUE DIALYSIS CLINIC, DAVITA INC., and EMPIRE STATE DC, INC. to accept service of the Second Supplemental Bill of Particulars; or in the alternative seeks to amend the Bill of Particulars to add a new claim and to extend the time to file the note of issue is granted to the following extent.

Further, plaintiff's motion for sanctions against defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("NYCHHC"), UTICA AVENUE DIALYSIS CLINIC, DAVITA, INC. ("Utica"), EMPIRE STATE DC, INC. ("Empire State"), CARLINE MARIE GUIRAND ("Dr. Guirand"), BROOKLYN NEPHROLOGY GROUP, P.C. ("BNG") for the alleged spoilation of evidence, and the defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, UTICA AVENUE DIALYSIS CLINIC, DAVITA, INC., EMPIRE STATE DC, INC., CARLINE MARIE GUIRAND, BROOKLYN NEPHROLOGY GROUP, P.C. (collectively "defendants") cross motions seeking to dismiss the complaint or preclude plaintiff from presenting evidence based upon missing documentary evidence are all denied.

At issue here is a note which defendant NYCHHC gave to the decedent (Schwartz Canton, hereinafter "Mr. Canton") which cannot be located. Inasmuch as the whereabouts of this note is unknown, plaintiff seeks to add the allegation of spoilation of evidence to the pleadings and requests that the court sanction the defendants for failing to produce the note.

Mr. Canton was discharged from Kings County Hospital on August 23, 2010 following an infection of his left shoulder, in an area where an arteriorvenous fistula ("AVF") shunt was located. On August 25, 2010, Mr. Canton presented for dialysis at defendant Utica. He was observed to have redness and swelling in the area where the shunt was

located. Mr. Canton was transferred to Kings County Hospital for evaluation. At the hospital, Dr. Kirwin evaluated the shunt and cleared Mr. Canton to receive hemodialysis, which was given prior to discharge from the hospital. Dr. Kirwin gave Mr. Canton a note clearing him to receive dialysis from the dialysis center.

On August 27, 2010, prior to receiving dialysis at the center, Dr. Guirand examined Mr. Canton and indicated in the medical records "[patient] has a note from surgeon at the Kings County (who has created that fistula) to use the access where marked." Dr. Kirwin does not dispute the contents of the note cleared the patient to receive dialysis through the access stunt. Dr. Guirand testified she was not given the note. She further testified that generally, after seeing the doctor, the patient would be instructed to give any paperwork to either a nurse or the secretary. A copy of the note is not in Mr. Canton's medical records. There is no evidence in this case exactly what Mr. Canton did with the note after it was shown to Dr. Guirand. On August 31, 2010, Mr. Canton passed away when the shunt ruptured.

Plaintiff relies upon the testimony of Dianne Hutchinson to establish that the note was last in the possession of defendant Utica. Ms. Hutchinson is the mother of Mr. Canton's daughter. She testified Mr. Canton told her that he had a note to take to the dialysis center. She never saw the actual note. Further, Ms. Hutchinson testified when she drove Mr. Canton to the dialysis center on August 25, 2010 he had an envelope in his possession. She did not see what was inside the envelope. Indeed, the only information Ms. Hutchinson has concerning the note is based upon Mr. Canton's statements to her. Plaintiff seeks to draw the conclusion that defendant Utica took possession of the note and either destroyed or loss it. Plaintiff argues that the note is necessary for cross examination

purposes. Plaintiff asserts each defendant had a duty to maintain either the original note or a copy of it within the medical records.

Plaintiff seeks to add spoilation of evidence as an allegation in this case. Plaintiff contends that he merely seeks to supplement the original Bill of Particulars which in general terms alleged the defendants violated "the applicable sections of the New York State Education Law and New York State Public Health Law." Plaintiff contends he seeks to specify that the failure to maintain a copy of a note given to the patient in the medical records constitutes a violation of Education Law § 6503 (32). Plaintiff argues a new claim is not being asserted rather he is amplifying the original pleadings. Defendant Empire State counters that leave of the court was required to supplement the bill of particulars which was not obtained. Further, Empire State contends spoilation of evidence is a new theory of the case, unconnected to the previous allegations contained in the original general bill of particular and therefore should not be allowed at this stage in the proceedings.

Defendants have cross moved for sanctions against plaintiff for failure to produce the same note. Defendants contend that the plaintiff was the last person in possession of the original note and therefore has an obligation to produce it for defendant's inspection. Defendants rely upon the fact that Mr. Canton was the last person observed in possession of the note. Dr. Kirwin gave the note to Mr. Canton, Ms. Hutchinson testified she observed Mr. Canton go to the appointment at the dialysis center with an envelope allegedly containing a note, and Dr. Guirand testified Mr. Canton merely showed her the note. Defendants thus contend that any sanctions for the loss of evidence must be against the plaintiff for failure to preserve evidence.

In as much as an inference cannot be drawn in favor of either side establishing possession of the missing note, it would be inappropriate for this court to sanction either side. A question of fact exists as to which party maintained possession of this note. Therefore, it will be for the jury to resolve when weighing all of the evidence. Moreover, neither side has demonstrated prejudice as a result of the missing note. There does not appear to be any dispute as to the content of the note. Dr. Kirwin acknowledges that he cleared Mr. Canton to receive dialysis through the fistula, and Dr. Guirand's note in the chart confirms this. There is no evidence any argument or defenses cannot be advanced due to the absence of this note.

With respect to the application to supplement or amend the bill of particulars, while leave to amend pleadings should be freely granted (see CPLR 3025[b], Carranza v Brooklyn Union Gas Co., 233 A.D.2d 287 [2d Dept. 1996]) "it is equally true that the court should examine the sufficiency of the merits of the proposed amendment" (Hill v. 2016 Realty Associates, 42 A.D.3d 432, 433 [2d Dept. 2007]). Where the proposed amendment is "insufficient as a matter of law or devoid of merit, leave to amend should be denied (Hill at 433).

In Hillman v. Sinha, 77 A.D.3d 887 [2d Dept. 2010], the claim for negligent spoliation was dismissed and the allegations in the bill of particulars corresponding to that cause of action were stricken. The rationale stated was, in situations where spoilation of evidence has been shown, courts have "broad discretion to provide proportionate relief to the party deprived of the lost evidence," including preclusion of proof favorable to the party responsible for the spoilation of the evidence, adverse inference instructions, or, in extreme cases, striking responsive pleadings or dismissing the complaint (Hillman at 888; *see*

Ortega v City of New York (9 N.Y.3d 69, 73 [2007]), CPLR 3126). Thus, these existing remedies are adequate to "deter spoliation" and preserve the victim's ability to be appropriately compensated (Ortega at 79), alleviating the need to recognize spoilation of evidence as an independent tort claim (see, Montagnino v. Inamed Corp., 120 A.D.3d 1317 [2d Dept. 2014]).

In light of the fact that a claim for spoilation of evidence is not a recognizable claim, there is no basis to permit plaintiff to either supplement or amend the bill of particulars to include such claim.

Accordingly, the plaintiff's motion is granted to the extent that the time to file the note of issue is extended until October 31, 2016; and it is further

Ordered, that both plaintiff's motion and defendants' cross motions seeking to have sanctions imposed on the opposing party due to the alleged spoilation of Dr. Kirwin's handwritten note are denied; and it is further

Ordered, that plaintiff is directed to serve a copy of this decision and order on all parties.

This constitutes the decision and order of the Court.

ENTER:

Michelle Weston

Hon. Michelle Weston
J.S.C.