

Sciarrino v Kateri Residence
2021 NY Slip Op 33023(U)
December 3, 2021
Supreme Court, Bronx County
Docket Number: Index No. 20474/2015E
Judge: Jr., Kenneth L. Thompson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X

UMBERTO SCIARRINO,
Plaintiff,

Index No: **20474/2015E**

-against-

DECISION AND ORDER

KATERI RESIDENCE and ARCHCARE AT KATERI
RESIDENCE,
Defendants

Present:
HON. KENNETH L. THOMPSON, JR.

_____ X

The following papers numbered 1 to read on this **motion for summary judgment**

No	On Calendar of July 15, 2021	PAPERS
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----		motion sequence #2 NYSCEF
Answering Affidavit and Exhibits-----		motion sequence #2 NYSCEF
Replying Affidavit and Exhibits-----		motion sequence #2 NYSCEF

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Plaintiff moves pursuant to CPLR 3212 for summary judgment on liability on the statutory PHL 2801-d claim against defendants as a discovery and spoliation sanction for failing to preserve and disclose statutorily required clinical records, to strike defendants answer as a spoliation sanction and on the claim against defendants based upon defendant’s “inability to plead and prove it exercised all care reasonably necessary to prevent and limit the deprivation and injury” to plaintiff. Defendants’ cross-motion was denied in an order dated July 14, 2021 of Justice Julia I. Rodriguez. This action arose as a result of personal injuries sustained by plaintiff in a nursing home owned by defendants.

A party who seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it when it was destroyed, the evidence was destroyed with a “culpable state of mind,” and “the destroyed evidence was relevant to the party's claim or defense such that the



trier of fact could find that the evidence would support that claim or defense.”

(*China Dev. Indus. Bank v. Morgan Stanley & Co. Inc.*, 183 A.D.3d 504, 505 [1st Dept 2020]).

Plaintiff has not established that the evidence he seeks was destroyed with a “culpable state of mind.” Therefore, spoliation sanctions are denied.

“To obtain summary judgment it is necessary that the movant establish [a] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in [movant’s] favor [CPLR 3212, subd. (B)], and [movant] must do so by tender of proof in admissible form” (*Friends of Animals v. Asso. Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]).

Plaintiff’s motion predicated upon is on New York Public Health Law § 2801-D. Section 2801-D provides a right of recovery from “[a]ny residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation...a ‘right or benefit’ of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation.”

Plaintiff was discharged from Kateri Residence August 17, 2013, and the nursing home was sold to The Riverside Premier Rehabilitation and Healing Center, (Riverside), on August 28, 2013. Defendants have submitted an affidavit from Annmarie Covone, (Covone), dated June 2, 2021, Executive Vice

President/Chief Financial Officer of defendant, ArchCare at Kateri Residence. Covone avers that “(a)s part of the sale, the incident reports, policies and procedures and administration manuals were all transferred to Riverside. The above lawsuit against Kateri Residence was not commenced until 2015, about two years after the sale.” Defendants’ attorney has suggested that plaintiff serve a subpoena upon Riverside for those sought after documents.

With respect to the production of plaintiff’s clinical records, 10 NYCRR § 415.22(f) describes what shall be contained in the records:

- (f) The clinical record shall contain:
- (1) sufficient information to identify the resident.
 - (2) a record of the resident's comprehensive assessments;
 - (3) the plan of care and services provided;
 - (4) the results of any preadmission screening conducted by the State;
 - (5) progress notes by all practitioners and professional staff caring for the resident; and
 - (6) reports of all diagnostic tests and results of treatments and procedures ordered for the resident.

There is no language in the regulation that mandates documents such as Incident Reports or Policy and Procedure manuals be maintained in the clinical records. Plaintiff has not provided any evidence of a lack of any required documents in the clinical records that have been produced by defendants.

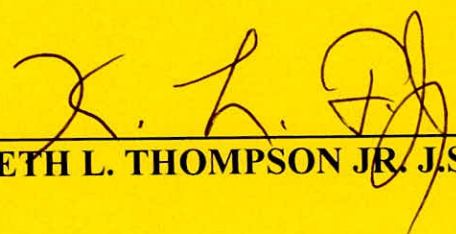
With respect to that branch of plaintiff’s motion that seeks summary judgment for defendant’s “inability to plead and prove it exercised all care reasonably necessary to prevent and limit the deprivation and injury” to plaintiff, the burden on this motion, plaintiff’s motion, and at trial is initially upon plaintiff. The aforesaid branch of plaintiff’s motion misplaces the burden on this motion

upon defendant. Moreover, the affidavit of plaintiff's expert is conclusory. (*Cortez v. Terrence Cardinal Cooke Health Ctr.*, No. 14580, 2021 WL 5182866, at *1 [1st Dept 2021]).

Accordingly, plaintiff's motion is denied without prejudice to plaintiff's ability to move for an adverse inference charge at trial. (*Handwerker v. City of New York*, 90 A.D.3d 409 [1st Dept 2011]).

The foregoing constitutes the decision and order of the Court.

Dated: 12/3/2021



KENNETH L. THOMPSON JR. J.S.C.