

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, SECOND DEPARTMENT**

Rodman v. Ardsley Radiology, P.C.

80 A.D.3d 598 (N.Y. App. Div. 2d Dep't 2011) · Decided January 11, 2011

SUMMARY

The Appellate Division reverses an order denying plaintiffs' motion to strike defendants' answers based on spoliation of evidence in a medical malpractice action. Although striking the answers was unwarranted because the plaintiffs were not entirely deprived of a means to prove their claims, the court directs that an adverse inference charge be given at trial concerning the defendants' unexplained loss of mammogram films.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Skelos, J.P.; Dickerson, J.; Belen, J.; Lott, J.
JURISDICTION	New York
DECIDED	January 11, 2011
DISPOSITION	reversed
PROCEDURAL POSTURE	Plaintiffs appealed from the portion of an order denying their cross motion under CPLR 3126 to strike defendants' answers as a sanction for spoliation of evidence.
STANDARD OF REVIEW	Abuse of discretion and review as a matter of law concerning the sanction imposed for spoliation under CPLR 3126.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Rodman v. Ardsley Radiology, P.C., Joseph McCarthy, M.D.

TOPICS

sanctions

discovery dispute

medical malpractice

evidence

appellate procedure

PRACTICE AREAS

civil procedure

evidence

medical malpractice

appellate procedure

QUESTIONS PRESENTED

1. Whether the unexplained loss of mammogram films warranted sanctions under CPLR 3126.
2. Whether the spoliation justified striking the defendants' answers or instead warranted an adverse inference charge at trial.

HOLDINGS

1. Yes. When a party negligently loses or intentionally destroys key evidence, the court may impose a sanction under CPLR 3126, and the defendants' unexplained loss of mammogram films warranted a sanction.
2. No. Striking the defendants' answers was not warranted because plaintiffs did not demonstrate that the spoliation left them prejudicially bereft of any means of proving their claims.
3. Yes. The appropriate sanction was an adverse inference charge concerning the defendants at trial.

KEY QUOTATIONS

“Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126” (80 A.D.3d at 598)

“the plaintiffs did not show that the spoliation left them “prejudicially bereft” of a means of proving their claims” (80 A.D.3d at 599)

FACTUAL BACKGROUND

The plaintiffs alleged that Ardsley Radiology, P.C., and Dr. Joseph McCarthy failed to properly read a mammogram and diagnose the injured plaintiff's breast cancer. The defendants lost the subject mammogram films, which they were statutorily obligated to maintain. The loss placed the plaintiffs at a significant disadvantage in proving essential elements of their malpractice claims, but the plaintiffs were not left completely without a means of proving those claims.

PROCEDURAL HISTORY

In a medical malpractice action, the Supreme Court, Westchester County, denied plaintiffs' cross motion to strike the answers of Ardsley Radiology, P.C., and Joseph McCarthy, M.D., based on the unexplained loss of mammogram films. The Appellate Division reversed in part, directing that an adverse inference charge be given at trial while declining to impose the more severe sanction of striking the answers.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The lower court was directed to give an adverse inference charge at trial pertaining to Ardsley Radiology, P.C., and Joseph McCarthy, M.D.; the request to strike their answers was otherwise denied.

CASES CITED

- Holland v. W.M. Realty Mgt., Inc., 64 A.D.3d 627, 629 (2009)
- Shayovich v. 800 Ocean Parkway Apt. Corp., 77 A.D.3d 814, 815-816 (2010)
- Zaytsev v. Zelman, 73 A.D.3d 909 (2010)
- Utica Mut. Ins. Co. v. Berkoski Oil Co., 58 A.D.3d 717, 718 (2009)
- Gotto v. Eusebe-Carter, 69 A.D.3d 566, 567-568 (2010)
- Lichtenstein v. Fantastic Mdse. Corp., 46 A.D.3d 762, 764 (2007)
- Coleman v. Putnam Hosp. Ctr., 74 A.D.3d 1009 (2010)
- Tapia v. Royal Tours Serv., Inc., 67 A.D.3d 894 (2009)

OPINION

PER CURIAM.

In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County (Connolly, J.), entered November 25, 2009, as denied their cross motion pursuant to CPLR 3126 to strike the answers of the defendants Ardsley Radiology, EC., and Joseph McCarthy, M.D., on the ground of spoliation of evidence.

Ordered that the order is reversed insofar as appealed from, on the law and in the exercise of discretion, with costs, the plaintiffs' cross motion pursuant to CPLR 3126 to strike the answers of the defendants Ardsley Radiology, EC., and Joseph McCarthy, M.D., on the ground of spoliation of evidence is granted to the extent of directing that an adverse inference charge pertaining to those defendants be given at trial, and the cross motion is otherwise denied. "Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (Holland v W.M.

Realty Mgt., Inc., 64 AD3d 627, 629 [2009]). The Supreme Court has broad discretion in determining the appropriate sanction (see Shayovich v 800 Ocean Parkway Apt. Corp., 77 AD3d 814 [2010]; Zaytsev v Zelman, 73 AD3d 909 [2010]; Utica Mut. Ins. Co. v Berkoski Oil Co., 58 AD3d 717, 718 [2009]), and in making this determination, must consider "the degree to which the spoliation prejudiced the party aggrieved" (Shayovich v 800 Ocean Parkway Apt.

Corp., 77 AD3d at 815; see Gotto v Eusebe-Carter, 69 AD3d 566, 567-568 [2010]; Lichtenstein v Fantastic Mdse. Corp., 46 AD3d 762, 764 [2007]). In this medical malpractice action, the plaintiffs allege, inter alia, that the defendants Ardsley Radiology, P.C., and Dr. Joseph McCarthy (hereinafter the respondents) failed to properly read a mammogram and diagnose the injured plaintiffs breast cancer.

The unexplained loss by the respondents of the subject mammogram films, which they were obligated by statute to maintain (see e.g. Education Law § 6530 [32]), placed the plaintiffs at a

significant disadvantage as to their ability to establish essential elements of their case.

Thus, although the *599extreme sanction of striking the respondents' answers was not warranted because the plaintiffs did not show that the spoliation left them "prejudicially bereft" of a means of proving their claims (*Shayovich v 800 Ocean Parkway Apt. Corp.*, 77 AD3d at 816 [internal quotation marks omitted]), some sanction was warranted, and an appropriate sanction would be an adverse inference charge pertaining to the respondents at trial (see *Coleman v Putnam Hosp.*

Ctr., 74 AD3d 1009 [2010]; *Shayovich v 800 Ocean Parkway Apt. Corp.*, 77 AD3d 814 [2010]; *Gotto v Eusebe-Carter*, 69 AD3d at 567-568; *Tapia v Royal Tours Serv., Inc.*, 67 AD3d 894 [2009]; *Utica Mut. Ins. Co. v Berkoski Oil Co.* 58 AD3d at 718). Skelos, J.P., Dickerson, Belen and Lott, JJ., concur.