

**Benacquista v Mount Sinai Hosp.**

2007 NY Slip Op 32516(U)

August 2, 2007

Supreme Court, New York County

Docket Number: 0107875/2005

Judge: Stanley L. Sklar

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SKLAR  
Justice

PART 29

BENACQUISTA, STEVEN,  
ET AL.

INDEX NO. 107875/05

MOTION DATE \_\_\_\_\_

- v -

MOUNT SINAI HOSPITAL,  
ET AL.

MOTION SEQ. NO. 02

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

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

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion be consolidated for disposition  
with motion 001 and is

**MOTION DECIDED IN ACCORDANCE WITH  
THE ATTACHED MEMORANDUM DECISION**

**FILED**

AUG 15 2007

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

Dated: 8/2/07

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
STEVEN BENACQUISTA, as Executor of  
the Estate of LUIGI BENACQUISTA, Deceased,

Plaintiff,

Index No.: 107875/2005

-against-

MOUNT SINAI HOSPITAL, DR. RANDALL GRIEPP,  
DR. GEORGE TOLIS, DR. STEVEN NEUSTEIN, DR.  
INGRID HOLLINGER and DR. MIKHAIL RONDEL,

Defendants.

-----X  
Sklar, J.:

Orders to show cause 001 and 002 are hereby consolidated for disposition.

By order to show cause 001 counsel for all of the defendants in this negligence/ medical malpractice action moves for an order precluding plaintiff, the executor of the deceased patient's estate, from conducting a deposition of non-party witness Lori Finkelstein-Blond R.N., defendant Mt. Sinai Hospital's Associate Director of Infection Control. By order to show cause 002 defendants seek an order precluding plaintiff from obtaining records of non-party treating infectious disease specialist, Dr. Glen Hammer, relating to the Acinetobacter infection rates and morbidity and mortality rates at Mt. Sinai's intensive care units from 2002 - June 26, 2003. See Order to Show Cause, ¶ a It further appears that defendants seek to preclude Dr. Hammer from being questioned at his deposition about such rates.

This is a medical malpractice action in which it is alleged, inter alia, that during the April 2003 surgery to repair the patient's aortic dissection at defendant Mt. Sinai Hospital, plaintiff's decedent was negligently burned by a surgical heating blanket which burn provided a portal for

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bacterial organisms, which contributed to the decedent's development of an infection which led to his death in June 2003. See McDonald aff of June 20, 2007, p.2 In preparing for the deposition of codefendant surgeon Dr. Randall Griep, plaintiff's counsel came across an abstract of an article on controlling an outbreak of a drug-resistant pathogen, acinetobacter baumannii ("AB") in five adult ICUs at Mt. Sinai Hospital. The abstract indicated that the "objectives" were to describe the AB outbreak and the methods used to control it. The abstract further stated that the infection control professionals in January 2003 noted an increase in resistant AB isolates and that from then until August 2003 surveillance cultures were obtained from patients of the infected units on admission, discharge and weekly. The abstract listed the peak attack rates at each ICU and indicated that there had been evidence of cross transmission within but not between the five ICUs and that there had been patient-to-patient spread within each affected ICU. Essentially the abstract indicated that by trying to ensure that the healthcare workers complied with hand hygiene, enforcing protocols, intensively cleaning and disinfecting the environment and by identifying those who were infected and assigning separate healthcare workers to only those who were infected interruption of horizontal transmission was achieved by September 2003. The abstract which was evidently on the website of the National Association of Hispanic Nurses, recited under the title that it had been "[s]ubmitted by administrator on August 21, 2006" and then recited "L. Finkelstein-Blond, D. Ortega BY L. Chen...[and various others including] Mt. Sinai Hospital..., New York State Department of Health Albany, NY."

At his March 27, 2007 deposition Dr. Griep was asked whether there had been an AB outbreak in Mt. Sinai's ICUs in 2003. Dr. Griep could not remember but stated that he would expect that "the infectious disease people" would know. Dr. Griep further testified that had

there been an unusually large outbreak of AB in the "Center 5 ICU" he probably would have been told about it. Dr. Griep testified that there was ongoing surveillance of infections in the ICU and that if the infectious disease people who carry on the surveillance thought there was a significant problem with infection, "above and beyond what one sees, surgery would have stopped." He also testified that had the infectious disease people thought there was a concern about infection, he would have been told and he in turn would have informed the patient before surgery of the "risk of the operation." Based on the abstract and Dr. Griep's testimony, plaintiff claims that the decedent should have been advised of the outbreak and the risks associated with it to him as a surgical patient and that the hospital should have taken more steps to stop the outbreak.

Following Dr. Griep's March 2007 deposition counsel appeared in my part on April 5 where they saw a J.H.O. A stipulation form was filled out, evidently by counsel, indicating that as a result of information obtained at Dr. Griep's deposition Mt. Sinai would produce Dr. Hammer, who was the decedent's infectious disease attending in this case, and Lori Finkelstein-Blond, the hospital's Associate Director of Infection Control. Because defense counsel would not agree to produce these witnesses, the preprinted words on the form indicating that it was a stipulation, were crossed out. Defense counsel was to advise by May 3 if these witnesses were still employed by Mt. Sinai and if they were not was to provide their last known addresses. According to plaintiff's counsel if they were still employed their depositions were to be completed by July 6, 2007. I "so ordered" the form on April 5.

At the next compliance conference on May 24 defense counsel indicated that only Finkelstein-Blond was still employed by Mt. Sinai but that they would not produce her for

[\* 5 ]  
deposition. Instead order to show cause 001 as to her was presented and signed by me on June 6. Later that month plaintiff's counsel served subpoenas to take Dr. Hammer's EBT and to have him bring with him to his EBT records in his control or possession regarding treatment of plaintiff's decedent, the incidence of AB in Mt. Sinai's ICUs in 2002 and 2003 through June 26, 2003, and deaths from AB complications in 2002 - June 26, 2003 of patients in Mt. Sinai ICUs.

Defense counsel now seeks an order barring plaintiff from deposing Finkelstein-Blond because defense counsel asserts that the abstract reflects a quality assurance and control study which was reported to the State's Department of Health pursuant to Public Health Law § 2805-1. Defense counsel further maintains that her deposition is barred by Education Law § 6527(3).

Plaintiff's counsel maintains that defendants' failure to appeal from the April 5, 2007 order constituted a waiver. At oral argument plaintiff's counsel indicated that the sort of information he would like to learn from Finkelstein-Blond is whether the cardiothoracic ICU was one of the five ICUs involved in the AB outbreak prior to plaintiff's decedent's admission to that unit and if so when Mt. Sinai learned about it. Plaintiff's counsel also would like to ascertain if there was notification to the hospital's infectious disease people of the AB infections at least in the cardiothoracic unit before the decedent's admission.

Defense counsel stated at oral argument that publication of the abstract waived the quality assurance privilege only to the extent of that which is within the four corners of the abstract.

Order to show cause 001 is denied. The burden of establishing a quality assurance privilege is on the party asserting it. See *Kivlehan v Waltner*, 36AD2d597, 598 (2d Dept., 2007). On this application there has been no affidavit provided from anyone at the hospital who has firsthand knowledge that the study and collection of data underlying the abstract was only for

quality assurance purposes. See e.g. *Logue v Velez*, 92 NY2d 13, 18 (1998) All that has been provided is defense counsel's affirmation. Moreover relevant information (for example about whether there was an AB outbreak in the cardiothoracic unit and whether the hospital's infectious disease personnel were aware of it before the decedent's admission to that unit) may be in Finkelstein-Blond's possession which information may have been acquired other than through or for a quality assurance function. Also, it may be that there are regulatory mandates of the City's or State's Departments of Health imposed on the hospital for maintaining information relating to infections which mandates are "not expressly related to quality assurance." Cf *In the Matter of Doe*, 99 NY2d 434, 440 (2003) Further, defense counsel concedes that any privilege which might apply to the abstract has at least to some extent been waived. Since it has not been established on this record that the quality assurance privilege applies and that the only relevant information that plaintiff's counsel will be able to obtain from Finkelstein-Blond is protected by the quality assurance privilege, the application to bar her deposition is denied.

This leaves order to show cause 002 which seeks to preclude plaintiff from obtaining records in the possession of Dr. Hammer evidently pertaining to AB "infection rates as well as mortality and morbidity rates" at Mt Sinai's ICUs between 2002 and June 26, 2003, which according to defense counsel is what was sought via the subpoena duces tecum served on Dr. Hammer. See *Ng aff*, ¶ 9 In actuality the subpoena sought, as is relevant here, records in Dr. Hammer's control or possession relating to incidences or deaths from complications of AB infections in the ICUs between those dates. Ng asserts again without any affidavit from one with firsthand knowledge that the records relating to rates are privileged pursuant to quality assurance functions. Ng further states that that Dr. Hammer as one who is not a hospital employee does not

maintain any control over such records. Ng adds at the end of his affirmation (§ 23) that since Dr. Hammer is not a Mt. Sinai employee, he has no authority to provide EBT testimony about "Acinetobater infection, morbidity and mortality rates." During oral argument defense counsel indicated that his firm was in contact with Dr. Hammer and that he indicated that he does not have any such records.

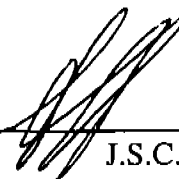
Order to show cause 002 is denied. Again for the reasons set forth above defendants have failed to meet their burden of demonstrating that such records are privileged. Moreover, the application mischaracterizes the information sought by the subpoena because it does not seek rates but rather records relating to the incidences of the infection and deaths from it. Even assuming arguendo that the hospital generated records that it established were covered by the quality assurance privilege, that does not eliminate the possibility that Dr. Hammer has other non-privileged records reflecting incidences of and deaths from AB infections. In addition to the extent if any that this application seeks to have me prospectively ban a line of deposition questioning, I decline to do so, because I do not know what particular questions will be posed and whether any information Dr. Hammer has to offer relating to incidences of the infection and deaths from them is privileged or will be claimed to be privileged after the questions are posed.

Accordingly application 002 is denied.

The foregoing constitutes the order and decision of the court.

Dated: August 1, 2007  
60 Centre Street  
New York, NY 10007

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AUG 15 2007  
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J.S.C.