

**Clement v Kateri Residence**

2008 NY Slip Op 31810(U)

June 20, 2008

Supreme Court, New York County

Docket Number: 0109799/2007

Judge: Shirley Werner Kornreich

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH  
*Justice*

PART 54

Index Number : 109799/2007

CLEMENT, JANICE

vs

KATERI RESIDENCE

Sequence Number : 001

COMPEL

INDEX NO. \_\_\_\_\_

MOTION DATE 6/19/08

MOTION SEQ. NO. \_\_\_\_\_

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

1-8 on this motion to/for compel

*discuss*

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

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

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

PAPERS NUMBERED

1-2

3-5

6-8 (letter w/ priv. log.)

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

**FILED**

JUN 30 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/20/08

**HON. SHIRLEY WERNER KORNREICH**  
*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
JANICE CLEMENT,

Plaintiff,

Index No.: 109799/07

-against-

**DECISION and  
ORDER**

KATERI RESIDENCE,

Defendant.

-----X  
SHIRLEY WERNER KORNREICH, J.

In this action for personal injuries, plaintiff moves to compel the defendant nursing home, Kateri Residence, to respond to plaintiff's demands for discovery and inspection, dated November 20, 2007 (Plaintiff's Demand). Defendant cross-moves for a protective order regarding Plaintiff's Demand, to compel plaintiff to provide authorizations, to dismiss the complaint for failure to provide authorizations, and to dismiss plaintiff's claims for negligent hiring and retention. Defendant objected to many of the document demands on the ground that they sought quality assurance documents shielded by statutory privileges. The parties appeared and argued the motions on June 19, 2008 during a disclosure compliance conference. At that time, defendant's counsel indicated that the privilege log submitted to the court was not the correct one. A second privilege log was hand-delivered to the court later in the day on June 19.

The complaint alleges that plaintiff was a resident in defendant's nursing home for almost four months. It contains three causes of action: negligence, violation of the Public Health Law §§ 2801-d and 2803-c, and negligent and reckless supervision. The verified bill of particulars augments the complaint by adding the theories of negligent hiring and retention. During oral

argument, the parties agreed that plaintiff had a history of multiple sclerosis prior to her admission and that she arrived at defendant's facility with bed sores. The gravamen of the complaint is that the sores became infected while plaintiff was in residence and that she developed skin and bone infections (cellulitis and osteomyelitis) as a result. In addition to these injuries, the bill of particulars alleges that as a result of defendant's conduct, plaintiff sustained, *inter alia*, a torn achilles tendon, osteopenia, radiculopathy, urinary tract infections, incontinence of bowel, myalgia and myositis, abnormality of gait, decreased sensation to both feet, severe bilateral knee pain, severe impairment of ability to perform usual daily activities, severe impairment of quality and enjoyment of life, severe pain, tenderness, swelling, stiffness, discomfort, distress, weakness, depression, stress, psychological difficulties, restriction of motion, degeneration of musculature, severe and persistent headaches, dizziness, tension, vertigo, anxiety, irritability, emotional anguish, loss of appetite and difficulty sleeping.

The privilege for quality assurance records is narrow. *Matter of Subpeona Duces Tecum to Jane Doe*, 99 NY2d 434 (2003). The privilege applies to records generated by or at the behest of quality assurance committees and compilations, studies or comparisons of clinical data derived from multiple records created by or at the behest of such committees for committee use. *Id.* The privilege does not attach to records that facilities are required to maintain by statutory or regulatory dictate for reasons unrelated to quality assurance, even if the quality assurance committee reviews them. *Id.*; *Simmons v. Northern Manhattan Nursing Home*, 2008 Slip Op 5553 (1<sup>st</sup> Dept. 2008). A party seeking to invoke the privilege should compile a privilege log to aid the court in assessing the claim during *in camera* review. *Matter of Subpeona Duces Tecum, supra.*

Applying these principles to the case at bar, defendant shall produce for *in camera* review documents responsive to the following items in Plaintiff's Demand: item 9(c); items 11 and 12, limited to three years prior to the occurrence and bed sore related injuries; item 13; item 35; item 39 and item 59.

In addition, defendant shall disclose the following items requested in Plaintiff's Demand: item 7 excluding date of hiring and date of termination; item 14 limited to three years prior to incident; item 16; item 27 upon payment by plaintiff of copying charges for her medical record; item 32 limited to dates that plaintiff was in defendant's facility (Plaintiff's Residency); item 33 limited to nurse staffing; item 34 (*see Simmons v. Northern Manhattan Nursing Home, supra*); item 36; item 38 excluding subsection (A); item 40; item 42 limited to Plaintiff's Residency; item 44 limited to 2 years prior to incident; item 51 limited to period of Plaintiff's Residency; item 56 limited to development of skin, bone and ulcerative infections.

Items 28, 30, 37, 45, 46 and 48 are stricken. Items 18, 54(F), 55(b), and 58 are withdrawn without prejudice. Defendant shall respond to item 55(a) by making its policy and procedure manual available for inspection and copying. Defendant shall respond to item 61(c) by stating how much insurance has been utilized and how much coverage remains under the relevant policies.

Plaintiff has placed her entire medical history in controversy due to the myriad injuries claimed in the bill of particulars and her history of multiple sclerosis. *Geraci v. National Fuel Gas Distribution Corp.*, 255 AD2d 945 (4<sup>th</sup> Dept. 1998). In the June 19 compliance conference order, plaintiff was ordered to respond to defendants' demands for authorizations to the extent that plaintiff knows the addresses of the providers for whom authorizations were requested. The

balance of the authorizations sought must await identification of provider addresses by defendant, which it agreed to provide at the compliance conference. Defendant represented that the provider names were taken from records in its possession.

The cross-motion to dismiss the negligent retention and hiring claim is denied as the third cause of action, coupled with the bill of particulars, set forth a claim that defendant negligently hired and retained staff that did not possess the proper degree of skill to provide appropriate care to plaintiff. Accordingly, it is

ORDERED that the motion to compel and cross-motion for a protective order regarding plaintiff's document demand, dated November 20, 2007, are disposed of as provided for above; all documents ordered to be disclosed shall be disclosed or made available within 20 days, provided that plaintiff pays for any fee directed to be paid above, and all documents required to be produced for *in camera* review shall be delivered to the court within 20 days; and it is further

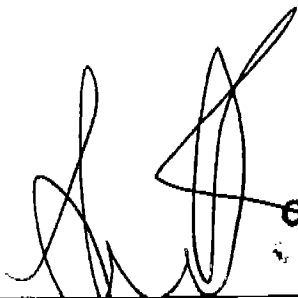
ORDERED that defendant's cross-motion to dismiss plaintiff's claims for negligent hiring and retention is denied; and it is further

ORDERED that defendant's cross-motion regarding authorizations is granted solely to the extent indicated in the compliance conference order issued June 19, 2008 and in all other respects it is denied without prejudice.

The parties were informed of this decision today.

Dated: June 20, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**

JUN 30 2008

COUNTY CLERK'S OFFICE  
NEW YORK