

**Budassi v Memorial Sloan-Kettering Cancer Ctr.**

2009 NY Slip Op 31916(U)

August 24, 2009

Supreme Court, New York County

Docket Number: 110411/08

Judge: Joan B. Lobis

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

PRESENT: HON. JOAN B. LOBIS  
*Justice*

PART 6

BUDASSI, SHIRLEY

Plaintiff(s),

- v -

MEMORIAL SLOAN KETTERING

Defendant(s).

INDEX NO. 110411/08

MOTION DATE 6/23/09

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 27, were read on this motion for to compel.

PAPERS NUMBERED

Notice of Motion / Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_

1-11

Answering Affidavits - Exhibits \_\_\_\_\_

X MOT: 12-18

Repeating Affidavits / swr-reply / letters \_\_\_\_\_

19-23/24-26 / 27-28

Cross-Motion:  Yes [ ] No

MOTION DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION AND ORDER

**FILED**

AUG 26 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/24/09

JBL  
JOAN B. LOBIS, J.S.C.

Check one: [ ] FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
SHIRLEY H. BUDASSI, as Executrix of the Estate of  
STEPHEN P. BUDASSI, deceased, and SHIRLEY H.  
BUDASSI, Individually,

Plaintiffs,

Index No.: 110411/08

- against -

Decision and Order

MEMORIAL SLOAN-KETTERING CANCER  
CENTER; MEMORIAL HOSPITAL FOR  
CANCER AND ALLIED DISEASES,  
RONALD P. DeMATTEO, M.D., STEPHEN B.  
SOLOMON, M.D., WILLIAM ALAGO, M.D.;  
CHARLOTTE ARIYAN, M.D.; RONALD A.  
KROSS, M.D. and STEPHEN PASTORES, M.D.,

Defendants.

**FILED**  
AUG 26 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**JOAN B. LOBIS, J.S.C.:**

In Motion Sequence Number 002, plaintiffs move, by order to show cause, for an order, pursuant to C.P.L.R. §§ 3101 and 3126, and Rules 3106 and 3124, compelling defendants to produce the written statements of Ronald P. DeMatteo, M.D., Stephen B. Solomon, M.D., and William Alago, M.D., regarding the medical care and treatment they provided to decedent Stephen Budassi; compelling defendants to produce complete copies of all documents prepared, received, or sent by defendants regarding New York State Department of Health's ("DOH") investigation of Mr. Budassi's death, including the Statement of Deficiencies and the Plan of Correction; and, compelling defendants to produce all statements made by the named defendants at the morbidity mortality/quality assurance meeting held regarding the death of Mr. Budassi, should any statements exist outside those identified in defendants' privilege log. In opposition,<sup>1</sup> defendants seek denial of plaintiffs' motion and, pursuant to C.P.L.R. §§ 3101 and 3103, vacatur of plaintiffs' discovery demands for Dr. DeMatteo's one-page

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<sup>1</sup> Defendants served a notice of cross motion but apparently did not process it as a timely cross motion. The papers titled "Notice of Cross Motion" are being considered as opposition papers.

\* 3 ]

of personal notes titled "Summary of Events over the past 5 days;" Dr. Solomon's handwritten notes; and, Dr. Alago's various written notes and an e-mail correspondence dated September 17, 2006.

This action concerns the death of plaintiff's decedent, Stephen P. Busassi, who was a patient at Memorial Sloan-Kettering Cancer Center ("MSK" or the "hospital"). Mr. Budassi suffered from a malignant tumor in his liver. On July 31, 2006, a surgical procedure known as a Percutaneous Ethanol Injection ("PEI") was performed. Plaintiffs allege that although defendants had told Mr. Budassi that they would inject only about 5 cc's of ethanol into the tumor, they actually injected 106 cc's of pure ethanol/alcohol into Mr. Budassi's liver tumor. Plaintiffs allege that the massive dose of ethanol caused Mr. Budassi to suffer ethanol/alcohol poisoning; he died on August 1, 2006, the next afternoon following the PEI.

The instant motion concerns plaintiffs' notice of discovery and inspection dated December 4, 2008 (the "D&I"). The D&I seeks copies of any material received or sent by defendants regarding DOH violations of the State Hospital Code, Statements of Deficiencies, and/or Plans of Correction regarding Mr. Budassi. In their response to the D&I, defendants deny the existence of a Statement of Deficiencies or a Plan of Correction, and further assert that any documents prepared for the DOH are privileged insofar as the submissions were required by the State of New York. The D&I also seeks production of copies of any notes maintained by defendants pertaining to Mr. Budassi. In their response to the D&I, defendants assert that certain responsive documents are privileged. Defendants provide plaintiffs with a privilege log as to eight documents, asserting (alternatively, or a combination of two or three of the following) that the documents are privileged because they were prepared in anticipation of litigation; protected by the attorney-client privilege; prepared for a Quality

Assurance Meeting and used during the course of such; or, prepared for an investigation by the New York State Office of Professional Medical Conduct ("OPMC"). The eight documents in question were provided to the court for an *in camera* inspection.

With respect to the assertion that certain materials were prepared for a Quality Assurance Meeting or an investigation by DOH and, as such, are privileged,

Public Health Law article 28 authorizes the Commissioner of Health 'to inquire into the operation of hospitals' (Public Health Law § 2803 [1] [a]) to determine their compliance with statutes and regulations governing the quality and adequacy of patient care (*see* Public Health Law § 2803 [1] [b]). Hospitals have a quality assurance committee which also processes grievances (Public Health Law § 2805-j [1] [d], [e]) and reports incidents of potential malpractice (*see* Public Health Law § 2805-l [2] [a]); a hospital is required to cooperate with all DOH investigations or inquiries (*see* Public Health Law § 2803 [1] [d] [i]; [4]) and the law is clear that certain records, documentation or committee actions required to be collected and maintained will remain confidential (*see* Public Health Law § 2805-m [2]).

Smith v. Delago, 2 A.D.3d 1259, 1260 (3d Dep't 2003); see also Pub. Health Law §§ 2803, 2805-j, 2805-l, and 2805-m. Correspondingly, Education Law § 6527(3) sets forth, in pertinent part:

Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function . . . nor any report required by the department of health pursuant to section twenty-eight hundred five-1 of the public health law described herein, . . . , shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law. No person in attendance at a meeting when a medical or a quality assurance review . . . was performed, . . . , shall be required to testify as to what transpired thereat. The prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting.

For the attorney-client privilege to attach, "the information sought to be protected from disclosure must be shown by the party asserting the privilege to have been a 'confidential

communication' made to the attorney for the purpose of obtaining legal advice or services." Poteralski v. Colombe, 84 A.D.2d 887, 888 (3d Dep't 1981), citing Matter of Priest v. Hennessy, 51 N.Y.2d 62, 68-69 (1980); see C.P.L.R. § 4503. "The [attorney-client] privilege applies to communications from the client to the attorney when the communication is "'made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose.'"" New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 171 (1st Dep't 2002), quoting Rossi v. Blue Cross & Blue Shield of Greater New York, 73 N.Y.2d 588, 593 (1989).

With respect to the qualified privilege of "materials prepared in anticipation of litigation," the party asserting the privilege must first demonstrate that the materials were prepared "exclusively for litigation." Commerce & Indus. Ins. Co. v. S.H. Laufer Vision World, 225 A.D.2d 313, 314 (1st Dep't 1996); see C.P.L.R. § 3101(d)(2). Materials prepared for more than one reason, and not exclusively for litigation, may subject the materials to disclosure. Commerce & Indus., *supra* at 314. If the party asserting the privilege has established that the materials were prepared exclusively for litigation, the party seeking the disclosure may obtain the disclosure "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." C.P.L.R. § 3101(d)(2). But, if the materials were not prepared exclusively for litigation—*i.e.*, the materials were created for mixed purposes (Commerce & Indus., *supra* at 314, citing Mavrikis v. Brooklyn Union Gas Co., 196 A.D.2d 689 [1st Dep't 1993])—then § 3101(d)(2) does not apply and the party seeking the disclosure is "under no obligation to justify disclosure of [the materials] with a showing of undue hardship." Commerce & Indus., *supra* at 314.

Plaintiffs seek certain papers relating to DOH's investigation into the incident that gives rise to this action. As a result of a complaint filed by Mr. Budassi's son, DOH apparently conducted an investigation into Mr. Budassi's death. In support of their request for any material received or sent by defendants regarding DOH violations of the State Hospital Code, Statements of Deficiencies, and/or Plans of Correction regarding Mr. Budassi, plaintiffs annex to their papers the letter from DOH to decedent's son which states, in pertinent part:

As a result of [DOH's] investigation, [DOH] found [Memorial Hospital for Cancer] in violation of the State Hospital Code and have issued a Statement of Deficiencies to the hospital to that effect (copy attached). The facility is required to submit a Plan of Correction to this office within 15 days.

The copy of the Statement of Deficiencies that accompanies the letter indicates that it was printed on October 2, 2008. In response to the motion, defendants annex an affidavit by James M. Gillson, M.D., Administrator for Regulatory Affairs for Memorial Hospital for Cancer and Allied Diseases, who states that the hospital "did not receive any statement of deficiencies from the [DOH] for care involving patient Stephen Budassi. Therefore, [the hospital] has no plan of correction."

The letter and copy of the Statement of Deficiencies annexed to plaintiffs papers strongly indicates that defendant hospital received a Statement of Corrections from DOH and that the hospital was obligated to provide DOH with a Plan of Correction. But even assuming that these documents are in the hospital's possession, they are not subject to production. The cases plaintiffs cite in support of their contention that the documents are discoverable are distinguishable from the instant circumstances. In Mantica v. New York State Department of Health, 94 N.Y.2d 58 (1999), the issue was "whether patients may obtain their own medical records from a State agency pursuant to New York State's Freedom of Information Law" and involved different disclosure laws. Hale v. Odd Fellow

\* 7 ]

& Rebekah Health Care Facility, 188 Misc. 2d 498 (Sup. Ct. Niagra Co. 2001), also cited by plaintiffs, involved a nursing home that the court specifically held was not subject to the same confidentiality provisions as hospitals. And, while plaintiffs cite Smith v. Delago, *supra*, in support of their contention that defendants must be compelled to produce these documents, in that case the plaintiffs had already received a packet of documents from DOH in response to a Freedom of Information Law request. The Third Department found that the Smith plaintiffs were entitled to the production of DOH's statement of deficiencies, "redacted to remove conclusions of law and the opinions of DOH," but upheld the lower court's determination that the remaining documents related to the DOH investigation were privileged from use in the case under Pub. Health Law § 2805-m. Smith, *supra* at 1261. Given that they already have an unredacted copy of the Statement of Deficiencies which was provided to decedent's son, plaintiffs' request for further material received or sent by defendants regarding DOH violations of the State Hospital Code, Statements of Deficiencies, and/or Plans of Correction is denied as privileged under Pub. Health Law § 2805-m.

The privilege log asserts that Dr. DeMatteo's notes are protected from disclosure because they were prepared in anticipation of litigation, and that Dr. Solomon's notes are protected because they were prepared for a Quality Assurance Meeting at which he spoke. However, Dr. Solomon's affidavit annexed to defendants' opposition papers indicates that he did not attend the Quality Assurance Meeting and that he did not refer to his notes when speaking to the doctor—Dr. George Getrajdman—who presented the case to the Quality Assurance Committee. In their papers, defendants assert that both Dr. DeMatteo's and Dr. Solomon's notes were prepared exclusively for litigation. They also assert that Dr. DeMatteo's notes are a privileged confidential communication with his attorneys.

In his affidavit, Dr. DeMatteo states that he spoke with Mr. Budassi's son on July 31, 2006, who Dr. DeMatteo reports was "very angry." Dr. DeMatteo maintains that when Mr. Budassi died the next day, he contacted MSK's Department of Legal Affairs and "discussed [his] thoughts with an attorney there and set forth [his] recollection in one page of personal notes titled 'Summary of Events over the past 5 days.'" The date at the top of the notes is August 5, 2006. Dr. DeMatteo states that the notes were made to "memorialize [his] memory of the events contemporaneously with the events." He sets forth that the notes were forwarded to MSK's Department of Legal Affairs. He goes on to state that he "prepared the notes so that the attorneys would have [his] fresh version of the facts and could offer legal advice and counsel using [his] version of the facts."

Dr. Solomon also prepared notes. In his affidavit, he states that after Mr. Budassi died, he "anticipated that there would be an investigation." Accordingly, he prepared a single page of handwritten notes. The date at the top of the notes is "7/31/06", which is the day before Mr. Budassi died. Dr. Solomon states that the notes were not given or shown to anyone, are not part of the patient's chart, and were kept in a file that he created for himself for this case.

Dr. Solomon does not assert that he prepared the notes in exclusively in anticipation of litigation. He retained the notes in a personal file; he states he prepared the notes in anticipation of an investigation, but this statement is too broad to be interpreted as litigation, especially in light of the fact that there was an internal Quality Assurance investigation and external investigations that occurred as a result of the incident which is the subject of this lawsuit. Moreover, it appears that Dr. Solomon's notes were prepared before Mr. Budassi even died; the notes are dated July 31, 2006, and an *in camera* review of the notes reveals that there is no reference to Mr. Budassi's death. Dr.

Solomon's notes do not appear to have been prepared exclusively for litigation and if they were never sent to anyone, as he states, they could not be considered a privileged communication. Dr. Solomon's notes are not protected by the attorney-client privilege or the privilege granted to materials prepared exclusively for litigation. In contrast, Dr. DeMatteo's summary appears to have been prepared by him for the attorneys in MSK's Department of Legal Affairs and provided to them. Under the circumstances described above, and after an *in camera* review of Dr. DeMatteo's notes, the court concludes that this material was made for the purpose of obtaining legal advice, and is protected from disclosure by the attorney-client privilege.

There are six documents in question that were generated by Dr. Alago, the physician who administered the ethanol during the PEI procedure. The privilege log lists the six documents as "A" through "F", and for the sake of clarity, the documents will be referred to herein as they were listed in the privilege log.

Document A is an e-mail communication dated September 17, 2006, from Dr. Alago to Patricia Soto, Administrator of the Department of Radiology. The privilege log asserts that this communication is protected as material prepared in anticipation of litigation; defendants' opposition papers further assert that Document A is a privileged communication to an attorney. In his affidavit, Dr. Alago states that he wrote the e-mail after he saw a letter from the "hospital's patient representative" to Mr. Budassi's family about the procedure in question. He states that he wanted to clarify some of the facts and circumstances; that he believed litigation was likely; and, that he also sent the e-mail to MSK's Department of Legal Affairs. Even by Dr. Alago's own assertion, the e-mail was neither prepared "exclusively for litigation" nor for the purpose of obtaining legal advice from an

attorney, which is confirmed by a review of the document. At best, Document A is a mixed-use document subject to disclosure. Document A is not protected by the attorney-client privilege nor the privilege granted to materials prepared exclusively for litigation, and is discoverable.

Document B consists of seven page of handwritten notes, purportedly written at the request of the attorneys from MSK who handled the OPMC hearing. The privilege log asserts that Document B is a privileged communication between attorney and client, that the notes were prepared in anticipation of litigation, and that the notes are part of the OPMC investigation. The privilege log sets forth that the notes were provided to MSK's Department of Legal Affairs as part of its investigation. Dr. Alago states that after the OPMC commenced its investigation, he met with outside attorneys hired by MSK to handle the investigation. At the outside attorneys' request, he prepared the notes, which he provided to the outside attorneys, and to MSK's Department of Legal Affairs, but not to the OPMC. Dr. Alago states that he understood these notes would remain confidential; that the notes contain the facts and circumstances that the outside attorneys asked him to provide; and, that he understood that the outside attorneys represented both his and MSK's interests. Under these circumstances, Document B appears to have been prepared at the request of Dr. Alago's attorneys for the purposes of obtaining legal advice, and a review of the document supports this finding. Document B is protected from disclosure based on the privilege afforded to communications between attorneys and their clients.

Document C is described in the privilege log as two pages of notes made by Dr. Alago as part of the Quality Assurance process and forwarded to the Quality Assurance Department. The log asserts that the notes were made within twelve days of Mr. Budassi's death. Defendants assert that

Document C is privileged because it is part of the Quality Assurance process. Dr. Alago asserts that as part of the Quality Assurance investigation that was conducted, he prepared Document C, which was discussed with the Quality Assurance Committee. He sets forth that the pages consist of formulas and numbers only—an assertion which the court confirms by its *in camera* inspection of Document C. As set forth, supra, such materials provided to a quality assurance committee are generally immune from discovery, except when the statement is made by a party “to an action or proceeding the subject matter of which was reviewed at such meeting.” Education Law § 6527(3). While counsel for Dr. Alago sets forth that Document C was “not prepared with the intent of serving as a party statement provided to a Quality Assurance Committee,” there is no basis to determine this from the notes themselves. Merely because the notes contain formulas and numbers instead of words does not mean that the notes are not a statement. Document C is discoverable as a statement made by a party and shall be disclosed. See vanBergen v. Long Beach Med. Ctr., 277 A.D.2d 374, 375 (2d Dep’t 2000); Schwartzberg v. Trivedi, 189 A.D.2d 151, 154 (4th Dep’t 1993).

The privilege log describes Document D as “[t]wo pages of notes documenting conversations with patient’s family made within three days of the decedent’s death.” The privilege log states that Document D is protected from disclosure as a document prepared in anticipation of litigation; defendants’ opposition papers further argue that Document D is a protected attorney-client communication. Dr. Alago asserts that on August 1, 2006, and the following few days, he had conversations with Mr. Budassi’s son and daughter. He wrote two pages of notes about these conversations. The notes also record a conversation with another physician at MSK and set forth what had been discussed during the informed consent discussion. Dr. Alago asserts that the notes were not added to the chart and were personal; that the notes were sent to MSK’s Department of Legal Affairs;

that he believed litigation might ensue due to Mr. Budassi's son being "very upset" and due to the bad therapeutic outcome; that he never spoke to the named plaintiff to this action, Ms. Budassi (decedent's wife); and, that he "wanted to create a contemporaneous record of events." Neither Dr. Alago's affidavit nor a review of Document D supports defendants' contention that the document was a confidential attorney-client communication. Similar to Document A, Document D does not appear to have been prepared "exclusively for litigation" nor for the purpose of obtaining legal advice from an attorney. Document D is discoverable as a mixed-use document and is not protected by the privilege granted to materials prepared exclusively for litigation.

Document E is described on the privilege log as "[o]ne page of statistics made in anticipation of litigation." Defendants also argue in their opposition papers that the document is a privileged attorney-client communication. Dr. Alago describes Document E as a "page of numbers" created during the OPMC investigation at the "request of [MSK's] outside counsel to reassess mortality rates associated with percutaneous alcohol ablation." He states that he also provided this page to MSK's Department of Legal Affairs. Dr. Alago asserts that Document E was created after the Quality Assurance investigation and was not provided to the Quality Assurance Committee. By Dr. Alago's own explanation, the notes do not fall into the narrow categories of documents afforded protection as attorney-client communications or documents prepared exclusively for litigation. Unlike Document B, which Dr. Alago specifically stated he understood to be a confidential communication to MSK's outside counsel regarding the OPMC investigation, Document E does not appear to have been created in order to obtain legal advice or services; rather, it appears to have been created, as Dr. Alago sets forth, to reassess mortality rates, and as such falls outside the protection afforded to attorney-client communications made for the purposes of obtaining legal advice. Nor, by this

reasoning, could Document E be said to have been prepared exclusively for litigation. Document E is not protected by either the attorney-client privilege or the privilege granted to materials prepared exclusively for litigation, and is discoverable.

Document F is described in the privilege log as “[o]ne page of notes documenting a discussion with a member of the Quality Assurance Committee. The notes were made in March, 2007 and were made in preparation for the OPMC submissions and were forwarded to the Dept. of Legal Affairs.” Defendants assert that Document F is privileged from disclosure because it was part of the Quality Assurance process, was made in anticipation of litigation, and is a protected attorney-client communication. Dr. Alago sets forth that he

had a conversation with a member of the Quality Assurance committee about the pending [OPMC] investigation and made one page of notes about that conversation. The conversation took place before the Quality Assurance meeting but the notes were made several months later. These notes were forwarded to the Department of Legal Affairs.

Dr. Alago states that the Document F was prepared to “refresh [his] recollection about the conversation.” By Dr. Alago’s assertion, this document was not part of quality assurance process because it was created “months later.” Even if it were considered a part of the quality assurance proceedings, the analysis regarding party statements as set forth in the discussion of Document C would apply here as well. Document F was not made for the purpose of obtaining legal advice; it was made, as Dr. Alago states, to refresh his recollection of a conversation that had taken place several months prior to the generation of Document F. It also does not appear, nor have defendants demonstrated, that the notes were made exclusively for litigation. A review of Document F indicates that, at best, it was created for mixed reasons, the primary reason being to refresh Dr. Alago’s recollection regarding this conversation with an unnamed member of the Quality Assurance committee

about the separate OPMC investigation. Under these circumstances, and having conducted *in camera* review, Document F shall be disclosed.

Accordingly, it is

ORDERED that defendants shall provide copies of the following items to plaintiffs within twenty (20) days of the date of this decision and order: (1) notes by Dr. Solomon dated July 31, 2006; (2) e-mail correspondence from Dr. Alago to Patricia Soto, of MSK's Hospital Administration, dated September 17, 2006; (3) two pages of notes by Dr. Alago, made within twelve days of decedent's death; (4) two pages of notes by Dr. Alago documenting conversations with the patient's family, made within three days of Mr. Budassi's death; (5) one page of statistics by Dr. Alago; and, (6) one page of notes by Dr. Alago documenting a discussion with a member of the Quality Assurance Committee, dated March 2007; and it further

ORDERED that plaintiff's demands for Dr. DeMatteo's notes and Dr. Alago's seven pages of notes are hereby vacated.

The motion is determined in accordance with the foregoing. All requests for relief that are not granted are denied. The parties shall appear for a conference on October 6, 2009 at 9:30 a.m. This constitutes the decision and order of the court.

Dated: August 27, 2009

**FILED**  
AUG 26 2009  
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NEW YORK  
JOAN B. LOBIS, J.S.C.