

Chaikin v Long Is. Jewish Med. Ctr.

2009 NY Slip Op 32635(U)

October 27, 2009

Supreme Court, New York County

Docket Number: 106305/08

Judge: Alice Schlesinger

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: ALICE SCHLESINGER
SCHLESINGER
Justice

IA PART 16
PART 16

CHAIKIN, RHEA, ETAL.

INDEX NO. 106305/08

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

- v -

LONG ISLAND JEWISH MEDICAL CENTER

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

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

PAPERS NUMBERED

FILED

NOV 04 2009

NEW YORK
COUNTY CLERK'S OFFICE

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

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

Dated: OCT 27 2009

Alice Schlesinger

ALICE SCHLESINGER
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COUNTY OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 16

-----X
RHEA CHAIKIN by her Attorneys-In-Fact,
Linda Pitagorsky and Robert Chaikin,

Plaintiff,

-against-

LONG ISLAND JEWISH MEDICAL CENTER,

Defendant
-----X

SCHLESINGER, J.

Index No. 106305/08
Motion Seq. No. 002

FILED
NOV 04 2009
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Rhea Chaikin commenced this medical malpractice action against defendant Long Island Jewish Medical Center (the Medical Center) for injuries she sustained when she fell from her hospital bed after being placed on a bedpan and left unattended. Plaintiff served a Notice for Discovery and Inspection seeking a copy of the "incident report" prepared by the nurse directly after the fall, or alternatively, the privilege log maintained by the Medical Center should a privilege be asserted. In their Response, defendant asserted that "no incident report" had been prepared by the nurse, that the document she had completed was privileged, and that the Medical Center was unaware of any privilege log. Plaintiff has now moved to compel the production of the document and for a determination that it is admissible at trial. The Medical Center has opposed the motion, contending that the document is privileged as it was prepared in connection with the hospital's quality assurance procedures.

Background

Plaintiff Rhea Chaikin was admitted to the Medical Center on January 1, 2008 for observation following a fall in her home. The following day she fell from her hospital bed after being left unattended on a bedpan, and she suffered various physical injuries, including a right lateral condyle/distal humerus fracture (a right elbow fracture). She

commenced this action asserting that her injuries have left her unable to return home and live independently.

During discovery, plaintiff deposed Nurse Sharon Thompson, the attending nurse at the time of the incident. Nurse Thompson explained how she had set Ms. Chaikin on the bedpan, drawn the curtains, and then left the room with the family members waiting outside the partially open curtains (EBT pp. 57-58). Her recollection was that the bed rails were in place (p 69, l 23-25). She returned to assist the patient as soon as she learned of the fall.

As relevant here, Nurse Thompson also testified about the document she prepared after the fall. Specifically, she stated that after assisting the patient she did not make any notes in the chart but instead made them on "the incident report we filled out" (p 46, l 2-3). When asked why she followed that procedure, the Nurse answered: "It is part of protocol, we have to write a note if the patient falls" (p 46, l 17-18). She then gave the report to the charge nurse, but did not know what happened to the report thereafter or whether it was reviewed by anyone (pp 46-47).

The Governing Statutes

Defendant contends that the document prepared by Nurse Thompson is privileged pursuant to §6527(3) of the Education Law which states in relevant part that:

Neither the proceedings nor the records relating to performance of a medical or quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to section twenty-eight hundred five-l of the public health law ... 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.

The cited provision also protects those individuals present at any medical or quality assurance review meeting from being compelled to testify. Significantly, however, the statute carves out a broad exception for parties to judicial proceedings, stating that:

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 of which was reviewed at such meeting.

Article 28 of the Public Health Law, also relied upon by defendant, contains similar language. Section 2805-I, referred to in the above-quoted provision of the Education Law, requires that hospitals prepare incident reports under circumstances specified in the statute, including “impairments of bodily functions in circumstances other than those related to the natural course of illness.”

Discussion

Defendant urges this Court to broadly construe the governing statutes to exempt the report of Nurse Thompson from disclosure in this case because it relates to the Medical Center’s quality assurance review procedures. However, the case law does not support such a broad reading. Rather, the statutory scheme has a limited purpose to protect the actual workings of quality assurance review committees. As the Court of Appeals explained in *Logue v Velez*, 92 NY2d 13, 17 (1998):

The purpose of the discovery exclusion is to “enhance the objectivity of the review process” and to assure that medical review committees “may frankly and objectively analyze the quality of health services rendered” by hospitals (see, Mem of Assembly Rules Comm, Bill Jacket, L 1c971, ch 990, at 6). By guaranteeing confidentiality to quality review and malpractice prevention procedures, this provision is designed to encourage thorough and candid peer review of physicians, and thereby improve the quality of medical care.

More recently, in 2003, the Court of Appeals confirmed its narrow reading of the privilege articulated in *Logue* in *In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 NY2d 434, 439.

The fact that Nurse Thompson was required by the Medical Center to report the incident does not mean that the report is privileged and exempt from disclosure. "It is the burden of the entity seeking to invoke the privilege to establish that the documents sought were prepared in accordance with the relevant statutes." *Marte v. Brooklyn Hosp. Center*, 9 A.D. 3d 41, 46 (2nd Dep't 2004), citing *Orner v. Mt. Sinai Hosp.*, 305 A.D. 2d 307 (1st Dep't 2003), *Crawford v. Lahiri*, 250 AD2d 722 (1998), and *Van Caloen v. Poglinco*, 214 AD2d 555 (1995). The burden is not satisfied by a showing that the report was received by the hospital's quality assurance committee. *Clement v. Kateri Residence*, 60 AD3d 527 (1st Dep't 2009). "A facility may not create a privilege where none would otherwise exist merely by assigning the duty for compliance or compilation to a quality assurance committee." *In re Subpoena*, 99 NY2d at 440.

In the First Department, the burden can only be satisfied by a particularized showing in evidentiary form, such as an affidavit from an individual with personal knowledge, that the report was prepared at the behest of the quality assurance committee for their purposes and actually utilized by them for their purposes. Thus, in *Clement*, the First Department found that the requested incident reports were not privileged since, while utilized by the quality assurance committee, they were of the type routinely prepared and maintained by the nursing home to comply with regulatory reporting requirements and were not prepared by or at the behest of the committee. See also *Simmons v. Northern Manhattan Nursing Home, Inc.*, 52 AD3d 351, 352 (1st Dep't 2008)(defendant failed to meet burden of demonstrating that all documentation "of and from" the Quality Assurance Committee

related to the quality assurance function so as to qualify for the privilege); *Orner v. Mt. Sinai Hosp.*, 305 A.D. 2d 307 (1st Dep't 2003)(absent proof that job performance evaluations were actually used by the hospital review committee, they are not privileged); *Raptis-Smith v. St. Joseph's Medical Center*, 302 AD2d 246 (1st Dep't 2003)(physician's reading of X-rays not privileged, despite doctor's contract with hospital to interpret X-rays for purposes of quality assurance, where evidence showed the particular review had been completed for diagnostic purposes); *Benacquista v. Mount Sinai Hospital*, 20 Misc 3d 1111(A)(Sup. Ct., NY Co., Sklar, J. 2008)(incident report not privileged, despite reference to quality assurance, where hospital failed to prove the report was prepared at the committee's behest for their use and actually reviewed by it).

As the above cases confirm, the courts carefully scrutinize the evidence presented to determine whether the burden of proof has been satisfied before finding a document privileged. As the court emphasized in *Orner*, "since the purpose of the exemption is to encourage hospitals to review the shortcomings of their physicians, it would be counterproductive to apply the exemption in a case where a hospital never undertook such a review" 305 AD2d at 311, citing *Bush v. Dolan*, 149 AD2d 799, 800 (1989). In their analysis, the courts also remain mindful of the exception applicable to party statements. For example, citing to *Logue* and PHL §2805-m, the Second Department plainly stated: "The statute was *not* intended, however, to extend protection to persons whose conduct is subject to review." *VanBergen v. Long Beach Medical Center*, 277 AD2d 374, 375 (2000)(emphasis added).

The Medical Center in the case at bar has wholly failed to satisfy its burden of proof. Defendant offers only the deposition of Nurse Thompson and legal arguments by counsel.

Conspicuously absent is any affidavit from a hospital administrator with personal knowledge of the details, both specific and general, regarding the report form completed by Nurse Thompson in this case and its use in connection with the hospital's quality assurance review procedures. Such evidence is particularly critical because Nurse Thompson's testimony in no way connected her report to the hospital's quality assurance procedures. The Nurse testified only that she had completed the form as "part of protocol" but had no knowledge as to where the form was sent or how it was used after she completed it. Neither the cases cited by defense counsel, nor the conclusory claims of privilege, prove that the report is exempt from disclosure; counsel's citations are consistent with the law discussed above, and attorney assertions lacking in personal knowledge do not constitute the particularized evidence needed to meet the hospital's burden.

This Court's conclusion that the report is discoverable was confirmed at oral argument when defense counsel voluntarily produced a copy of Nurse Thompson's report for *in camera* inspection. The report contained only statements by Nurse Thompson explaining the incident in question. No writings were included to confirm that the report had been reviewed by the quality assurance committee, and no statements from the committee were included in the report. The contents of the report amounted to no more than Nurse Thompson's notes about the events surrounding Ms. Chaikin's fall, prepared at or about the time of the incident. As such, even assuming the privilege applied, the report would fall under the exception for party statements. Defendant cannot use the statutory privilege to shield parties to the action and secret the relevant facts about the incident.

In sum, defendant has not satisfied its burden of proving that the incident report completed by Nurse Thompson at or about the time of Ms. Chaikin's fall qualifies for the

* 8]
statutory privilege. This conclusion does not mean, however, that the document is admissible at trial. The issues of the admissibility and use of the document at trial are reserved for the trial judge.

Accordingly, it is hereby

ORDERED that plaintiff's motion to compel defendant to produce a copy of Nurse Thompson's report of the incident is granted, and a copy of the document shall promptly be provided to plaintiff's counsel; and it is further

ORDERED that the issues of the admissibility and use of the document at trial are reserved for the trial judge.

This constitutes the decision and order of this Court.

Dated: October 27, 2009

OCT 27 2009



J.S.C.
ALICE SCHLESINGER

FILED
NOV 04 2009
NEW YORK
COUNTY CLERK'S OFFICE