

Williams v Lenox Hill Hosp.
2010 NY Slip Op 31760(U)
July 7, 2010
Supreme Court, New York County
Docket Number: 100660/09
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Lobis
Justice

PART 6

Index Number : 100660/2009
WILLIAMS, TONYA
vs.
LENOX HILL HOSPITAL
SEQUENCE NUMBER : 001
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE 6/15/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

1-3
4-9
10

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 *decided in accordance*
with accompanying decisions and order.

FILED
JUL 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/7/10 _____ Jsh
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
NEW YORK COUNTY: IAS PART 6**

-----X
TONYA WILLIAMS,

Plaintiff,

Index No. 100660/09

-against-

FILED
Decision and Order

LENOX HILL HOSPITAL,

Defendant.

FILED
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NEW YORK
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JOAN B. LOBIS, J.S.C.:

Lenox Hill Hospital ("Lenox Hill") moves for a protective order relative to a "quality assurance incident report" (the "incident report") prepared by Lenox Hill regarding a fall that plaintiff experienced while a patient at the hospital. Lenox Hill claims that the incident report is privileged under the Education and Public Health laws. Plaintiff objects to the issuance of a protective order, arguing that Lenox Hill has delayed in moving for the protective order, and that the delay constitutes a waiver of Lenox Hill's right to assert that the incident report is privileged. Alternatively, plaintiff asserts that Lenox Hill has not met its burden to show that the incident report is indeed privileged. Lenox Hill submitted a copy of the incident report for an in camera review. The motion is decided as follows.

This is an action sounding in medical malpractice and negligence relating to injuries that plaintiff suffered on or about December 5, 2006, when she fell from her bed while being treated at Lenox Hill. Plaintiff was already HIV positive and suffering from Lupus. The fall caused her spleen to rupture and necessitated that she undergo a complete splenectomy. Plaintiff alleges that the removal of her spleen, in the context of her pre-existing illnesses, has placed her at risk for future infections and death.

Plaintiff served Lenox Hill with a notice of discovery and inspection on or about July 24, 2009, by which she demanded copies of statements or incident reports related to the fall on December 5, 2006. Plaintiff repeated the request for the incident report during the February 12, 2010 deposition of a physician from Lenox Hill. On February 23, 2010, the parties appeared in court for a conference and the court ordered defendant to provide plaintiff with a copy of the incident report, and if no incident report exists, defendant was to so advise plaintiff, in writing, within thirty (30) days of the order. Apparently, at this point in the discovery process, Lenox Hill was still endeavoring to determine whether such report existed and to locate same. Plaintiff states that, after two letters in March and April reminding defendant's counsel that the report was still outstanding, defense counsel contacted plaintiff's counsel by telephone to inform plaintiff's counsel that Lenox Hill would be moving for a protective order regarding the incident report. This motion by Lenox Hill followed.

Initially, plaintiff's counsel argues that by virtue of the delay in moving for a protective order, defendant has waived the right to assert that the incident report is privileged. C.P.L.R. Rule 3122(a) provides that the party to whom a notice of inspection or production of documents is served has twenty (20) days to respond, setting forth with reasonable particularity the reasons for each objection when documents are not produced. It is then incumbent on the party seeking disclosure to move for an order to compel compliance or production, pursuant to Rule 3124. Notwithstanding these provisions, neither party made any formal motion regarding the July 24, 2009 notice of discovery and inspection. The issue was addressed at the February 23, 2010 conference, and the schedule set forth above was so ordered. Once again, neither plaintiff nor defendant moved

to compel or for a protective order, respectively, until the schedule so-ordered on February 23, 2010, had well expired. It is apparent that neither of the parties complied strictly with the time requirements set forth in the C.P.L.R. Given their mutual failure to comply with the time restrictions in the C.P.L.R., and given the language in C.P.L.R. § 3103(a) that a motion for a protective order may be brought "at any time," the court can excuse any failure to comply with the time limits in Rule 3122 and will consider the motion on the merits. See, Cynthia B. v. New Rochelle Hosp. Medical Center, 60 N.Y.2d 452, 458 fn. 2 (1983); Calbi v. General Motors Corp., 204 A.D.2d 148, 148-49 (1st Dep't 1994).

Defendant argues that the incident report is protected under Education Law § 6527(3) and Public Health Law § 2805, which require hospitals to report to the Department of Health the death of, or injury to, any patient from a cause other than one related to his or her illness. In pertinent part,

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

In order to prevail, Lenox Hill must demonstrate that the incident report was prepared in accordance with the statutes. See Ross v. Northern Westchester Hosp. Ass'n., 43 A.D.3d 1135, 1136 (2d Dep't 2007).

The court has conducted an in camera review of the incident report in question. The incident report clearly relates to Lenox Hill's performance of a medical or a quality assurance review function. The production of the report for an in camera review is sufficient to satisfy defendant's burden of demonstrating that the incident report was prepared in accordance with the aforementioned statutes and that there were quality assurance review protocol in place at the time of the incident. See, e.g., Klingner v. Mashjoff, 50 A.D.3d 746, 747 (2d Dep't 2008). Accordingly, it is hereby

ORDERED that defendant Lenox Hill Hospital's motion for a protective order regarding the incident report, which has been submitted to the court for an in camera review, is granted, and the incident report is hereby exempt from disclosure.

The court notes that the parties are scheduled to appear for a conference on July 13, 2010, at 10:00 a.m.

Dated: July 7, 2010

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JUL 09 2010
NEW YORK
COUNTY CLERK'S OFFICE
JB
JOAN B. LOBIS, J.S.C.