

**Lika v Santos**

2011 NY Slip Op 31228(U)

April 28, 2011

Supreme Court, Richmond County

Docket Number: 101474/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.: 101474/08  
Motion No.: 3**

**SABRIJE LIKA**

*Plaintiff*

*against*

**ANDREW SANTOS, M.D.;  
ANTOINE EL KHOURY, M.D.;  
CENTER FOR WOMEN'S HEALTH;  
CHRISTOPHER GRANDE, M.D.;  
IRIS DORIS, M.D.;  
MITCHELL A. MAIMAN, M.D.;  
PETER BENNARDO, M.D.; and  
STATEN ISLAND UNIVERSITY HOSPITAL**

**DECISION & ORDER  
HON. JOSEPH J. MALTESE**

*Defendants*

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**The following items were considered in the review of this motion demanding production of records and cross motion to quash production.**

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Crossmotion and Affidavits Annexed	1 & 2
Answering Affidavits	3
Replying Affidavits	4
Exhibits	Attached to Papers

**Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:**

The motion made by the defendant Peter Bennardo, M.D. to compel disclosure of records maintained by Staten Island University Hospital ("SIUH") is granted in part and denied in part. The cross motion made by SIUH to quash all of Dr. Bennardo's disclosure demands is granted in part and denied in part. Following *in camera* review of records provided by SIUH, portions of those records are to be disclosed to Dr. Bennardo.

**Facts**

On July 24, 2007, the plaintiff, Sabrije Lika, underwent elective hysterectomy at the

defendant hospital, Staten Island University Hospital (SIUH). Intravascular access was established. During the hysterectomy procedure itself, the plaintiff experienced hypotension. Resuscitation of the plaintiff from this event included administration of fluids and infusion of neosynephrine. The infused fluid infiltrated the tissue surrounding the site of the intravascular line through which neosynephrine was being administered. This administration of neosynephrine was stopped. However, changes to the plaintiff's skin had begun. Those changes are expressed in terms analogous to a burn. The process is said to have progressed into a full thickness wound with scarring. The plaintiff required a skin graft.

A complaint was made to SIUH's Department of Patient Representation. The defendant Dr. Bennardo, has moved for compliance with a Notice to Produce. Dr. Bennardo demands:

1. A complete copy of all patient complaints, whether written oral or otherwise, presented by the plaintiff or persons on her behalf, regarding the incident that involved the infiltrations she allegedly suffered.
2. A complete copy of the Hospital's investigations of the patient complaint or incident/accident, including but not limited to all inquiries made to, and responses received from any persons involved in the patient's care related to the incident/accident. This would include all written responses received to those inquiries, or any write up made based upon oral interviews with persons involved.
3. A copy of the Hospital's Rules and Regulations and any Department protocols (anesthesia, surgery, ICU) outlining the procedures, assigned responsibilities, reports and documentation to be followed in responding to, investigating, and memorializing an untoward patient injury from a medical related procedure.
4. A complete copy of all accident or incident reports prepared by Hospital personnel in the regular course of business, regarding the infiltration/burn, in compliance with in-house Hospital rules or protocols, or New York State Department of Health requirements.
5. In the event that Hospital regulations or protocols called for an investigation or inquiry but none was undertaken, or for the preparation of reports or other documentation regarding such investigation or inquiry but no such report or other documentation was prepared, then the Hospital shall state if a report setting forth why no investigation was undertaken or documentation was created, and shall provide a copy of that material.

The defendants, SIUH, Dr. Doris, Dr. El Khoury, and Dr. Maiman, have cross moved to quash the plaintiff's Notice to Produce.

## Discussion

“Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party ...”<sup>1</sup> However, “[u]pon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.”<sup>2</sup> “Every hospital shall maintain a coordinated program for the identification and prevention of medical, dental and podiatric malpractice.”<sup>3</sup> “Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program .... 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.”<sup>4</sup> “No person in attendance at a meeting when a medical or a quality assurance review or a medical and dental malpractice prevention program or an incident reporting function described herein was performed ... shall be required to testify as to what transpired thereat.”<sup>5</sup>

However, “[t]he 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.”<sup>6</sup>

A condition precedent to determining whether records are privileged is a determination that such records are a part of a program of quality assurance review or malpractice prevention. A program of internal investigation and correction within a medical facility fulfills the criteria of

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<sup>1</sup>CPLR § 3101 (a) (1).

<sup>2</sup>CPLR (b).

<sup>3</sup>NY Public Health Law § 2805-j 1.

<sup>4</sup>Education Law § 6527 3.

<sup>5</sup>Education Law § 6527 3.

<sup>6</sup>Education Law § 6527 3.

such a program. Such a program should have goals of evaluating the quality of care provided; identifying dereliction or lapses from proper care; and improving care when possible. This process may extend into allegations of sexual abuse,<sup>7</sup> or even evaluating a physician's academic qualifications.<sup>8</sup>

Dr. Bennardo moves for production of complete copies of complaints and investigations related to the plaintiff's incident. The court has inspected documents relating to the incident, sent from the Department of Patient Representation, that have been made available by SIUH for *in camera* review.<sup>9</sup> Those documents include a summarized communications from a complaining individual who is not a party to this action. The documents also include responses to the complaint from individual professionals who are parties to this action. The format of the documents includes an section for denoting corrective actions. Consequently, the documents provided for *in camera* review include an acceptance of a complaint, a review of information pertinent to the complaint, and proposed corrective actions. Therefore, the documents presented for *in camera* review are material from a quality assurance review or medical malpractice review. Hence, the documents reviewed *in camera* are subject to the rules of privilege pertaining to quality assurance review reports. Consequently, that portion of those documents composed of the statements of parties to the instant action are not privileged. Contrariwise, the remainder of the quality assurance review documents that were evaluated are privileged and may not be released.

The portions of the quality assurance review documents that were submitted by parties to the instant action are Dr. Bennardo's submission, and a response made by Dr. Dori. The information in those two portions of the material is not privileged. In this instance, the complaining party is not a party to this action, and the complaint made by that individual is privileged. The recommendations made, and the final determinations or the corrective actions

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<sup>7</sup>*Katherine F. vs. State*, 94 NY 2d 200, 205-206 [1999]

<sup>8</sup>*Logue vs. Velez*, 62 NY 2d 13, 19 [1998].

<sup>9</sup>*See, for example, Chardavoyne vs. Cohen*, 56 AD 3d 508, 509 [2d Dept 2008].

made or taken as a result of the quality assurance review process are also privileged.

Consequently, SIUH is not required to provide to Dr. Bennardo with a complete copy of all documents relating to the current action. Dr. Bennardo must be provided with a copy of the statement he made, and with a copy of the response made by Dr. Dori in response to the complaint received by SIUH. Dr. Bennardo may not have access to the remainder of the documents made available for *in camera* inspection because those portions of the material that were presented to the court are privileged. To indicate what actions were taken or not taken in response to the hospital's evaluation would be to reveal the processes of the review procedure and would be privileged. Dr. Bennardo may not have that information without a release by those with authority to remove the privilege the information enjoys.

At SIUH, there is a Department of Patient Representation that assumes the responsibility of accepting complaints made by a variety of individuals, including patients and patient's representatives. According to the SIUH Administrative Policy and Procedure Manual, ADM III B 32.0 Complaints/Grievances of Patients and/or Patients' Companions directs that quality of care complaints must be addressed immediately pursuant to ADM I 30.2 Criteria for Identification of Quality of Care Issues. "In order to assert the quality control assurance privilege, a hospital is required, at a minimum, to show that it has a review procedure and that the information for which the exemption was obtained or maintained in accordance with that review procedure."<sup>10</sup> The information presented to the court for *in camera* evaluation was manifestly obtained and maintained in accordance with a quality assurance review procedure.

Because SIUH has asserted privilege over the records of the evaluation of complaints pertaining to the plaintiff, SIUH must show that it has a quality assurance review procedure. Consequently, SIUH's "Administrative Policy and Procedure Manual, ADM III B 32.0 Complaints/Grievances of Patients and/or Patients' Companions" and "ADM I 30.2 Criteria for Identification of Quality of Care Issues" must be provided to Dr. Bennardo.

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<sup>10</sup>*Kivlehan vs. Waltner*, 36 AD 3d 597, 599 [2d Dept 2007].

Accordingly, it is hereby

ORDERED, that the communications made to Staten Island University Hospital by the defendant parties Peter Bennardo, MD and Iris Doris, MD in response to the inquiries of the Department of Patient Representation regarding this incident are to be provided to the defendant Peter Bennardo, MD by May 19, 2011; and it is further

ORDERED, that Staten Island University Hospital's "Administrative Policy and Procedure Manual, ADM III B 32.0 Complaints/Grievances of Patients and/or Patients' Companions" and "ADM I 30.2 Criteria for Identification of Quality of Care Issues" must be provided to the defendant Peter Bennardo, MD by May 19, 2011; and it is further

ORDERED, that all parties shall return to **DCM Part 3, 130 Stuyvesant Place, Third Floor**, for a pretrial conference on **Thursday, May 19, 2011 at 9:30 AM**.

ENTER,

DATED: April 28, 2011

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Joseph J. Maltese  
Justice of the Supreme Court