

**Matter of State Bd. for Professional Med. Conduct v
Payne Whitney Psychiatric Clinic**

2011 NY Slip Op 32056(U)

July 21, 2011

Supreme Court, New York County

Docket Number: 400783/2011

Judge: Saliann Scarpulla

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

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

IN THE MATTER OF THE APPLICATION OF
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

Petitioner,

- v -

PAYNE WHITNEY PSYCHIATRIC CLINIC,
NEW YORK PRESBYTERIAN HOSPITAL, and
DR. D.B.,

Respondents.

INDEX NO. 400783/2011

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 were read on this motion for a protective order.

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

PAPERS NUMBERED	
_____	<u>1</u>
_____	<u>2-3</u>

Cross-Motion: Yes No

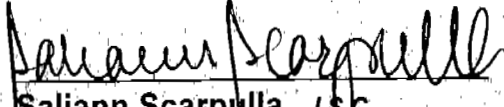
Upon the foregoing papers, it is

ORDERED that the petition is determined in accordance with the accompanying decision/order dated July 21, 2011. It is further

ORDERED that petitioner is to come to Room 279, 80 Centre Street to pick up the documents submitted for in camera review as soon as is practicable.

This constitutes the Decision and Order of the Court.

Dated: July 21, 2011


Saliann Scarpulla, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
IN THE MATTER OF THE APPLICATION OF
STATE BOARD FOR PROFESSIONAL
MEDICAL CONDUCT,

Petitioner,
-against-

Index No.: 400783/2011
Submission Date: 5/25/11

PAYNE WHITNEY PSYCHIATRIC CLINIC,
NEW YORK PRESBYTERIAN HOSPITAL, and
DR. D.B.,

DECISION AND ORDER

Respondents.

For an Order Pursuant to Mental Hygiene Law § 33.13(c).

-----X

For Petitioner:
Eric T. Schneiderman,
Attorney General of the State of New York
120 Broadway, 24th Floor
New York, New York 10271

For Respondent Dr. D.B.:
Wood & Scher
222 Bloomingdale Road, Suite 311
White Plains, New York 10605

Papers considered in review of this petition:

- Verified Petition 1
- Aff in Opp 2, 3

UNFILED JUDGMENT

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HON. SALIANN SCARPULLA, J.:

In this proceeding, petitioner State Board for Professional Medical Conduct (the "Board"), seeks an order, pursuant to Mental Hygiene Law §33.13(c)(1) and (8), directing disclosure by respondent Payne Whitney Psychiatric Clinic ("Payne Whitney") of a certified copy of the record of treatment provided by Payne Whitney to respondent "Dr.

D. B.,”¹ and that said records be maintained by the Board as confidential pursuant to Public Health Law §230. Respondent Dr. D.B. opposes the petition as premature and unwarranted, and argues that he should be given an opportunity to be interviewed first, so as to provide an explanation of the issues under investigation.

As stated in its Verified Petition, the Board is investigating allegations that Dr. D.B., a physician licensed to practice medicine in New York, has a psychiatric condition which impairs his ability to practice, and which would constitute professional misconduct pursuant to Education Law §6530(8). The Office of Professional Medical Conduct (“OPMC”),² as alleged in the Verified Petition, acquired information to substantiate these allegations. Pursuant to Public Health Law §230(10(a)(i), the Board is bound to investigate all complaints of professional misconduct it receives.

The Board states that it obtained information that Dr. D.B. was admitted to the inpatient psychiatric unit at the Payne Whitney in 2008, 2009 and 2010. Dr. D.B. acknowledges that he received inpatient psychiatric care on three occasions. The Board is now seeking a certified copy of the clinical records of treatment provided to Dr. D.B. at

¹The Board, in compliance with Public Health Law §230(10)(1), must keep any information obtained in an investigation confidential, and may not disclose the names of patients. Accordingly, the pseudonym “Dr. D.B.” is being used to refer to the patient/physician under investigation.

² Pursuant to the verified petition, the OPMC “is an administrative agency within the Department which operates on the Board’s behalf and under its discretion. OPMC’s duties, pursuant to PHL §230, are to investigate and, in appropriate circumstances, institute disciplinary hearings against members of the medical profession.”

Payne Whitney. The Board argues that the interests of justice “significantly outweigh the need for confidentiality,” in accordance with the requirements of Mental Hygiene Law § 33.13(c)(1), as the Board expects the records to reflect that Dr. D.B. has a psychiatric condition which impairs his ability to practice medicine.

In support of its petition, the Board submits four letters sent by Assistant Attorney General Roy P. Nemerson (“Nemerson”) to Dr. D.B., advising him that upon the request of OPMC, the Office of the Attorney General of the State of New York would seek a court order, pursuant to Mental Health Law §33.13(c)(1) and (8), requiring disclosure by Payne Whitney of the clinical records of Dr. D.B.’s evaluation and treatment. The letters were sent by both first class and certified mail to the addresses Dr. D.B. registered with the State Department of Education. The certified letters were returned to Nemerson marked “Return to Sender” and “Unclaimed.”

The Board also submits in support of its petition certain documents *in camera* to the Court. The Board avers that these documents establish that it has a substantial basis to investigate Dr. D.B.

In opposition, Dr. D.B. submits an attorney affirmation and his own affidavit. Dr. D.B. states that he was “duly discharged from Payne Whitney” and that he is “not mentally impaired nor in need of medical treatment for mental impairment. Because I was hospitalized three times I am required to see a psychiatrist on an out-patient basis twice a month. However, I do not think my visits with the psychiatrist are necessary or

are doing any good.” Neither Payne Whitney nor respondent New York-Presbyterian Hospital submitted papers in this proceeding.

Discussion

Mental Hygiene Law §33.13(c)(1) “requires that information contained in records required to be maintained by facilities licensed or operated by the Offices of Mental Health, Mental Retardation and Developmental Disabilities, including the identification of patients or clients and clinical records or information tending to identify patients or clients, shall not be a public records, and shall not be released except pursuant to a court order requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality.” *Heard v. Cuomo*, 142 A.D.2d 537 (1st Dep’t 1988). *See also Lee v. New York City Transit Auth.*, 175 Misc. 2d 632, 634 (Sup. Ct. Kings Co. 1998) (patient’s medical records are ordinarily privileged and may not be disclosed absent a waiver, or by a court order finding the interests of justice significantly outweigh the need for confidentiality) (citations omitted).

Such medical records can, pursuant to Mental Hygiene Law §33.13(c)(8), be disclosed “to the state board for professional medical conduct or the office of professional discipline or their respective representatives when such persons or entities request such information in the exercise of their statutory function, power and duties provided, however, that” when the subject of inquiry is also a patient, the information shall only be released by court order pursuant to §33.13(c)(1).

After reviewing the verified petition and documents submitted in support, including those submitted *in camera*, and the affidavit in opposition, it is clear that the “interests of justice significantly outweigh the need for confidentiality,” and the Payne Whitney treatment records should be disclosed to the Board. The Board is obligated to investigate the allegations that Dr. D.B. suffers from a psychiatric condition which impairs his ability to practice medicine, and in order to fully comply with its obligations, the Board must be able to review the records of Dr. D.B.’s inpatient psychiatric care. *See State Board for Professional Medical Conduct v. New York State Comm’r of Mental Hygiene*, 64 A.D.2d 224 (3d Dep’t 1978) (finding “it was plainly reasonable for Special Term to conclude that petitioner could not adequately and properly fulfill [its] responsibility and protect the public interest without access to [the patient-physicians’s] records” at the treating psychiatric center).

In accordance with the foregoing it is

ORDERED and ADJUDGED that petitioner State Board for Professional Medical Conduct’s petition is granted; and it is further

ORDERED that respondent Payne Whitney is ordered to provide to petitioner State Board for Professional Medical Conduct a certified copy of the records of treatment rendered by Payne Whitney to Dr. D.B. within thirty (30) days of the date of entry of this order; and it is further

ORDERED that petitioner State Board for Professional Medical Conduct maintain the disclosed records as confidential, pursuant to Public Health Law §230; and it is further

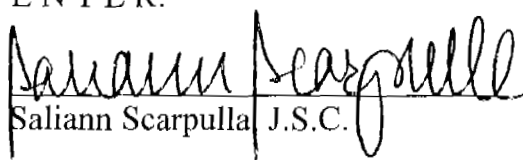
ORDERED that petitioner State Board for Professional Medical Conduct, within ten (10) days of the date of this order, resubmit affidavits of service which properly preserve the confidentiality of Dr. D.B., pursuant to Public Health Law §230(10)(1)³; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
July 21, 2011

ENTER:


Saliann Scarpulla J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

³ The Court has removed the original affidavits of service which revealed the identity of Dr. D.B. from the Court files.