

Lowenthal v New York Downtown Hosp.
2011 NY Slip Op 32173(U)
July 29, 2011
Sup Ct, NY County
Docket Number: 106344/09
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART **IA** PART 16

PRESENT: ALICE SCHLESINGER
Justice

Index Number : 106344/2009

LOWENTHAL, ZVI

VS.

NEW YORK DOWNTOWN HOSPITAL

SEQUENCE NUMBER : 001

ORDER OF PROTECTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

by New York Downtown
Hospital for a protective order is denied in
accordance with the accompanying memorandum
decision.

FILED

AUG 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUL 29 2011

Alice Schlesinger

ALICE SCHLESINGER *v.s.g.*

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

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

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

-----X
ZVI LOWENTHAL, as Executor of the Estate of
ROSE ZVI LOWENTHAL and ZVI LOWENTHAL,
as representative of the Heirs and Distributees of
ROSE LOWENTHAL, deceased; and ZVI LOWENTHAL,
as Executor of the Estate of MARTIN LOWENTHAL,
deceased,

Index No. 106344/09
Motion Seq. No. 001

Plaintiffs,

-against-

NEW YORK DOWNTOWN HOSPITAL and DR. NAJERI,

Defendants.
-----X

SCHLESINGER, J.

FILED

AUG 01 2011

Defendant New York Downtown Hospital has moved in this medical malpractice action for a protective order pursuant to CPLR §§ 3101 and 3103 prohibiting plaintiff's discovery of e-mail correspondence sent on December 9, 2008 by the decedent's surgeon Kenneth McCulloch, M.D. to Steven Friedman, M.D., Chief of the Hospital's Department of Surgery. The Hospital contends that the e-mail is privileged as it was prepared and used in connection with the Hospital's Quality Assurance proceedings. Defendant Dr. Najiri supports the request, though he has never seen the e-mail. Plaintiff vigorously opposes the motion, asserting that the e-mail is not privileged, even if used by the Hospital in its Quality Assurance proceedings, because it was not written by or at the behest of the Quality Assurance Committee.

Background Facts

Plaintiff Rose Lowenthal was admitted to the defendant Hospital on December 2, 2008 for a right hip arthroplasty. The surgery was performed the following day, as planned, by Dr. Kenneth McCulloch, a private attending orthopaedic surgeon with privileges at the

Hospital. The surgery apparently was uneventful and successful. However, due to developments after the surgery, Rose Lowenthal died at the Hospital two days after the surgery, on December 5, 2008 at the age of 89. It is the nonorthopaedic aftercare provided by the Hospital staff that gave rise to this malpractice action; Dr. McCulloch is not a defendant.

According to the plaintiff's attorney Scott Rubin, Dr. McCulloch contacted him during the course of this litigation when he received an *Arons* authorization from defense counsel. Dr. McCulloch advised Mr. Rubin at that time that he had been "so upset by the unnecessary death of Mrs. Lowenthal that he sent an unsolicited letter to the Hospital in order to bring the events to their attention." He added that "he wrote the letter on his own and not at the request of the Hospital." (Aff. in Opp. at ¶5). Mr. Rubin then demanded a copy of the letter from the Hospital's counsel during discovery, and when counsel declined, he was directed to make this motion for a protective order.

Discussion

The framework for the defendant's motion is New York Public Health Law § 2805-j, which mandates that every hospital maintain a medical malpractice prevention program that includes a Quality Assurance Committee. Defendant also relies on the related §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.

Defendant urges this Court to broadly construe the governing statutes to exempt Dr. McCulloch's e-mail from disclosure because it was reviewed by the Hospital's Quality Assurance Committee as part of its review of the Lowenthal case. In support of its position the Hospital provides two affidavits; the first is from Dr. Steven Friedman, the individual to whom the e-mail was addressed, and the second is from Dr. Pauline Hecht, another physician at the Hospital who received a copy of the e-mail from Dr. Friedman.

Dr. Friedman indicates that, as Chief of the Department of Surgery at the Hospital, he is a member of the Quality Assurance Committee for his department. He has served in those capacities since 2004 and continuing to date, including December 2008 when Mrs. Lowenthal passed away at the Hospital two days after her surgery. Dr. Friedman describes the circumstances that led to the e-mail as follows (at ¶¶9-10):

Shortly after the death of Ms. Lowenthal, Dr. McCulloch approached me in the hospital to discuss the care and treatment received by Ms. Lowenthal at New York Downtown Hospital during her admission from December 2-5, 2008. He told me that we [*sic*] wanted to bring her care and treatment to my attention so that the hospital could review the event, make any appropriate changes, and evaluate risk and responsibility in the patient's care.

As is my custom and practice, I asked Dr. McCulloch to put any recommendations into an e-mail so that it could [be] presented to the Department of Surgery's Quality Assurance Committee for review. The Lowenthal case would be reviewed by the Quality Assurance Committee given the patient's mortality.

In his affidavit, Dr. Friedman further confirms his receipt of the e-mail from Dr. McCulloch on December 9, 2008 and states (at ¶11) that he reviewed it "in anticipation of the Quality Assurance Committee's review" scheduled for February 26, 2009. He explains (at ¶12) that he then gave a copy of the e-mail to Dr. Pauline Hecht, Associate Chair of the Hospital's Department of Surgery and Chair at that time of the Department of Surgery's

Quality Assurance Committee. Dr. Friedman did not give anyone else the e-mail. According to Dr. Friedman, he attended the meeting of the Quality Assurance Committee on February 26, 2009 when the Committee reviewed the e-mail in connection with its review of the circumstances surrounding Mrs. Lowenthal's death and then placed it in the file maintained in the Quality Control Department for the Hospital (¶13).

As particularly relevant here, Dr. Friedman boldly asserts (at ¶13) that "Dr. McCulloch's email was created exclusively for review by the Quality Assurance Committee and was restricted solely to the members of that committee." He then cites the controlling statute (at ¶15), which he claims protects the document from disclosure, and argues (at ¶14) that "disclosure would have a devastating and severely chilling effect on the integrity of the review process and ultimately, in the quality of care we provide our patients."

Much of the wording in Dr. Hecht's affidavit is identical to that of Dr. Friedman, suggesting that counsel drafted both documents. For much of her tenure, including the time relevant here, Dr. Hecht was Associate Chair for the Department of Surgery and Chair of the Quality Assurance Committee for her department. In describing the work of the Committee, Dr. Hecht states (at ¶6) that: "Patient mortality is one of the criteria that *may* commence review by the Quality Assurance Committee." (Emphasis added).

Specifically with respect to the Lowenthal case, Dr. Hecht explained the circumstances surrounding her receipt of Dr. McCulloch's e-mail as follows (at ¶9):

As Chair of the Department of Surgery's Quality and Assurance Committee [I] prepared the case for presentation before the review committee. Part of my preparation included interviewing Dr. McCulloch regarding Ms. Lowenthal's care and treatment. During my interview Dr. McCulloch advised me that he had sent an email to the Chair of the hospital's Surgery Department, Steven Friedman, M.D., so that the hospital could review the Lowenthal case and make appropriate changes and evaluate the responsibility in the patient's care.

Dr. Hecht confirms in her affidavit (at ¶11) that the Committee reviewed the Lowenthal case on February 26, 2009 and that Dr. McCulloch's e-mail was "one of the documents reviewed by the Committee on that date." The Committee did not distribute the e-mail beyond the Committee members and then filed it in The Quality Control Department with restricted access. Dr. Hecht concludes her affidavit (at ¶12), as Dr. Friedman did his, emphasizing the importance of keeping the e-mail privileged and the "chilling effect" that disclosure would have "on the integrity of the review process and ultimately, in the quality of care we provide our patients."

While both Dr. Friedman directly claims, and Dr. Hecht strongly suggests, that Dr. McCulloch drafted his e-mail "exclusively for review by the Quality Assurance Committee," Dr. McCulloch's position is quite different. At oral argument, plaintiff's counsel submitted a brief, straightforward affirmation from Dr. McCulloch that explains his reasons for writing the e-mail. Plaintiff's counsel explained to the Court when he presented the affirmation that he had reached out to Dr. McCulloch earlier, but he had been unable to obtain a written statement before the oral argument date. Considering the importance of the affirmation to the dispute at hand and the circumstances overall, the Court accepted the affirmation over the objection of defense counsel.

In his affirmation, Dr. McCulloch confirms that he was the orthopaedic surgeon who performed a hip arthroplasty on Rose Lowenthal in December 2008. He indicates (at ¶3) that Mrs. Lowenthal "had an uneventful surgical intraoperative course and early postoperative period but died several days after the procedure" at the Hospital. Significantly, Dr. McCulloch then describes the circumstances surrounding his writing of the e-mail, emphasizing (at ¶4) that he wrote it on his own to criticize the care provided by the Hospital staff, and not for the Quality Assurance Committee:

As a result of Mrs. Lowenthal's death, I wrote a letter of my own volition, and not at the request of another individual or department, that discussed the circumstances surrounding her death. The letter was critical of her non-orthopaedic medical care and the New York Hospital Housestaff rotating at New York Downtown Hospital who were involved in her care.

In keeping with that description of the letter's purpose, Dr. McCulloch then indicates that he sent the letter to the Surgical Residency Director, the Chief of Surgery, and the Chief of Orthopaedics. With respect to the use of the letter for quality assurance purposes, Dr. McCulloch implicitly questions the seriousness of that claimed use, stating (at ¶6): "I was not invited to participate in a Quality Assurance Meeting or Morbidity and Mortality Meeting referable to Mrs. Lowenthal."

Defense counsel urges this Court to broadly construe the controlling statutes to confer a privilege not only on documents created by or at the behest of the Quality Assurance Committee, but also on those documents — like the e-mail at issue here — that simply were reviewed by the Committee. 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 1971, 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.

Even assuming that Dr. Friedman requested that Dr. McCulloch express his concerns in writing with the intention that Dr. Friedman would then give the e-mail to Dr. Hecht who compiles material for the Committee, that fact does not mean that the e-mail 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). 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.

The burden of proving privilege 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); *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 its specific use).

The Hospital in the case at bar has wholly failed to satisfy its burden of proving that Dr. McCulloch's e-mail is exempt from disclosure pursuant to the limited privilege afforded by law. Looking first at the governing statute quoted above, Education Law §6527(3), the Court finds that the e-mail does not fall within any of the categories of documents described as privileged. Those categories include the "proceedings" and "records" relating to an institution's quality assurance review function or medical malpractice prevention program. Clearly, the e-mail is not a transcript of the proceedings; nor can it reasonably be viewed as a record relating to the quality assurance function. While the Legislature intended to protect the confidentiality of the proceedings so as to foster open discussion, it did not intend to create a broad privilege that shields persons or institutions such as the Hospital here whose conduct is subject to review. *VanBergen v Long Beach Medical Center*, 277 AD2d 374, 375 (2nd Dep't 2000), citing *Logue, supra*.¹

¹ The statute also exempts any report required by the Department of Health pursuant to Public Health Law § 2805-l. The referenced reports are those that hospitals must file to report certain types of incidents, which the e-mail is not.

Nor do the affirmations proffered by the defense prove that the e-mail falls within the limited statutory privilege. Dr. Friedman merely indicates that Dr. McCulloch approached him about the Lowenthal case, that Dr. Friedman requested that Dr. McCulloch send him his comments in writing, and that Dr. Friedman gave Dr. Hecht the e-mail when he received it. Even assuming Dr. Friedman requested the e-mail with the intention of giving it to the Quality Assurance Committee, Dr. McCulloch's statement was undeniably motivated in the first instance by his own concerns. Dr. Hecht merely indicates that she received the e-mail from Dr. Friedman, as she was charged with compiling documents related to the Lowenthal case, and that she gave the e-mail to the Committee for review. Thus, neither of these doctors affirms that Dr. McCulloch purposefully created the e-mail for the exclusive use of the Quality Assurance Committee.

What is more, as discussed above, Dr. McCulloch directly refuted any such suggestion that he created the e-mail for the Quality Assurance Committee. He explained that he was upset by what he perceived as the unnecessary death of his patient Rose Lowenthal, that he spoke with Dr. Friedman, the Chief of Surgery, to criticize the nonorthopaedic aftercare provided by Hospital staff, and that he then wrote the e-mail confirming those criticisms. Dr. McCulloch's affirmation is far more credible than the affirmations offered by the defense, as it is a straightforward recitation of the facts with no attempt to argue the law. It is also wholly consistent with the report by plaintiff's counsel of the telephone call he received from Dr. McCulloch earlier in the litigation.

In addition, Dr. McCulloch's recitation of the facts in his affirmation is wholly consistent with this Court's understanding of the e-mail's purpose, after having reviewed it *in camera*. As suggested by the statement in his affirmation that the e-mail was "critical"

of the post-operative care and treatment provided to Mrs. Lowenthal, Dr. McCulloch in his e-mail was essentially expressing his outrage at certain actions and inaction by the Hospital staff. While it is true, as stated in the affirmations from Dr. Friedman and Dr. Hecht, that Dr. McCulloch did advise Dr. Friedman in the e-mail that the Hospital should "make appropriate changes and evaluate risk and responsibility [in connection with Mrs. Lowenthal's] care," it is clear that his primary reason for writing the e-mail was to bring to the Hospital's attention the shocking events leading to Mrs. Lowenthal's death about which he had not been informed in a timely fashion.

Disclosure of the e-mail is supported by the public policy behind the law, which protects the confidentiality of proceedings and records of the Quality Assurance Committee so as to foster discussion and improve the quality of care; the statute was not designed to shield persons or institutions charged with wrongdoing. For that reason, the statute expressly allows for the disclosure statements made to the Quality Assurance Committee by a party to litigation when related to the subject matter of the litigation. As Dr. McCulloch drafted the e-mail at issue here for a purpose wholly independent of the Quality Assurance Committee, disclosing it will not breach the confidentiality of the Committee's proceedings, even if the e-mail was later forwarded to the Committee and reviewed by its members.

The Hospital has failed to cite a single appellate case from the First Department to support its position. Nor do any of the other cited cases justify the protective order requested here. In *D'Angelis v Buffalo General Hospital*, 2 AD3d 1477 (4th Dep't 2003), the court exempted from disclosure a written evaluation prepared by a nonparty physician that — unlike here — the doctor had drafted expressly (and apparently solely) for review by the Quality Assurance Committee. Similarly distinguishable is *Burnside v Foot Clinics of New*

York, et al., 115 Misc. 2d 85 (Sup. Ct., NY Co. 1982), which exempted from disclosure the treating physician's report to the Quality Assurance Committee prepared expressly for the Committee's review. To the extent the Hospital relies on *Benacquista v Mount Sinai Hospital*, 20 Misc. 3d 1111 (Sup. Ct., NY Co. 2008) to argue that any document used by the Quality Assurance Committee is exempt from disclosure, that reliance is misplaced. Justice Sklar there ordered the hospital to disclose an incident report prepared by a nurse, even though the pre-printed form used indicated that it was prepared for the hospital's Quality Assurance Program and was confidential, finding that the report was "multi-motivated" and not prepared and used solely for quality assurance purposes.²

In sum, the defendant Hospital has not satisfied its burden of proving that the December 9, 2008 e-mail written by Dr. McCulloch when he learned of Mrs. Lowenthal's death is exempt from disclosure pursuant to the limited privilege afforded by the Public Health and Education Laws.

Accordingly, it is hereby

ORDERED that the motion by the defendant New York Downtown Hospital for a protective order is denied, and the Hospital is directed to provide a copy of Dr. McCulloch's e-mail to all counsel within seven days of the date of this decision.

FILED

This constitutes the decision and order of this Court.

Dated: July 29, 2011

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ALICE SCHLESINGER

² The co-defendant cites *Katherine F. v Perez*, 94 NY2d 200(1999), which is also readily distinguishable. The court there exempted from disclosure incident reports required by the Public Health Law and the Mental Hygiene Law prepared in connection with an investigation of the alleged sexual assault of a minor patient by the institution's employee.