

**McCarthy v Northern Westchester Hosp.**

2013 NY Slip Op 32558(U)

April 16, 2013

Sup Ct, Westchester County

Docket Number: 56551/2011

Judge: Francesca E. Connolly

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
GERALD McCARTHY,

Plaintiff,

**DECISION & ORDER**

-against-

Index No. 56551/11  
Motion Date: 4/16/12

NORTHERN WESTCHESTER HOSPITAL,  
DR. ARIEL KORNEILL, MD, DR. KENT  
DUFFY, MD, DR. MICHAEL KULLMAN, MD,  
JASON ROSS, PHOENIX INSTRUMENTS,  
INC., "JOHN DOES 1-10," and "JANE  
DOES 1-10,"

Seq. No. 1

Defendants.  
-----X

CONNOLLY, J.

The following papers numbered 1 to 11 were read on this motion by plaintiff for an order pursuant to CPLR 3124 and 3126 compelling defendant Northern Westchester Hospital to respond to certain discovery requests, or in the alternative, striking the answer of Northern Westchester Hospital, and awarding plaintiff attorney's fees and costs in connection with this motion.

Order to Show Cause - Affirmation in Support - Exhibits	1-9
Affirmation in Opposition - Exhibit	10-11

Upon the foregoing papers and the proceedings held on April 16, 2012, this motion is determined as follows:

Plaintiff alleges he contracted a salmonella infection during a spinal fusion performed by Dr. Kornell and Dr. Duffy at Northern Westchester Hospital (the Hospital). It is alleged defendants owed plaintiff a duty to maintain the operating room and other aspects of his hospital stay in a safe clean environment and defendants breached their duty.

Plaintiff served a notice to produce dated November 10, 2011 demanding the Hospital produce documentation, records, reports, memoranda, inquiries, subpoenas and correspondence to or from the New York State Department of Health (DOH), or any other federal, state, municipal or local agency regarding the allegations in the complaint (Exhibit B, Notice to Produce, p. 4). Plaintiff served combined demands dated November 10, 2011 seeking complete copies of any and all written reports of the incident that is the subject of the litigation prepared in the regular course of business operations or practices of the defendants, or any other person, firm, corporation, association or other

public or private entity, including but not limited to reports arising from internal investigations, reports to or from a governmental agency, reports of investigations conducted by third parties, reports pertaining to disciplinary action and reports to liability insurance carriers (Exhibit C, Plaintiff's Combined Demands to Defendant Northern Westchester Hospital, p. 4). The Hospital served a response to the combined demands dated December 28, 2011, objecting to the demand for incident reports as seeking disclosure of privileged information (Exhibit D, Response to Plaintiff's Combined Demands to Northern Westchester Hospital Center). The Hospital served a response to the notice to produce dated December 29, 2011, objecting to the demand for documentation to or from the DOH, as seeking disclosure of reports generated confidentially under the Public Health Law and Education Law (Exhibit E, Response to Notice to Produce). Plaintiff argues that at a conference on February 9, 2012, the court attorney referee directed that counsel for the Hospital respond to the requested information and if necessary, provide a privilege log. On or about February 28, 2012, the Hospital served a supplemental response to plaintiff's notice to produce. The Hospital objected to the demand for documentation to or from the DOH, as seeking disclosure of reports generated under the Public Health Law and Education Law, and stated plaintiff can obtain a copy of the records directly from the DOH (Exhibit G).

Plaintiff argues only documents which are specifically created for the purpose of an investigation by or in response to a request by the DOH can be claimed to be privileged (Plaintiff's Affirmation in Support, p. 5). Plaintiff contends that a privilege log should be provided and if necessary, the documents should be reviewed by the court *in camera* to determine whether they are privileged.

In opposition, the Hospital contends that the documents at issue are related to performance of a quality assurance review function and are privileged under the Education Law and the Public Health Law. The Hospital argues there is no showing that the Hospital was willful and contumacious in failing to provide discovery and plaintiff fails to even argue the Court ordered the documents at issue to be produced. Together with its opposition papers the Hospital provides a privilege log.

"The 'quality assurance privilege' set forth in Education Law §6527(3) shields from disclosure certain records and reports generated by a hospital in performing either a medical malpractice or quality assurance review" (*Leardi v Lutheran Med. Ctr.*, 67 AD3d 651 [2d Dept 2009]). The statute mandates that three categories of documents are confidential: records related to a medical and quality assurance functions, records related to participation in a medical and dental malpractice prevention program, and reports required by the DOH pursuant to Public Health Law 2805-l (*Leardi v Lutheran Med. Ctr.*, 67 AD3d 651 [2d Dept 2009]). Public Health Law §2805-m(2) provides in part that none of the documentation required pursuant to sections §2805-j, the reports required pursuant to §2805-l, or any incident reporting requirements imposed on hospitals shall be subject to disclosure. Public Health Law §2805-l requires that all hospitals report certain events to the DOH, including patients' deaths or impairments of bodily functions in circumstances other than those related to the natural course of illness, disease or proper treatment. Every hospital is required to maintain a program for the identification and prevention of medical, dental and podiatric

malpractice, including the establishment of a quality assurance committee with the responsibility to review services rendered in the hospital to improve the quality of care and prevent malpractice, and the maintenance and collection of information concerning the hospital's negative outcomes and incidents (Public Health Law 2805-j(a)(e)). The party seeking to assert the privilege of quality assurance bears the burden of demonstrating that the documents demanded were prepared in accordance with the relevant statutes (*Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]; *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41, 46 [2d Dept 2004]). Documents simply duplicated by the quality assurance committee are not necessarily privileged (*Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]).

In order to assert the privilege, a hospital is required to demonstrate that it has a review procedure and the information claimed to be privileged was obtained or maintained in accordance with the review procedure (*Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]). In *Kivlehan*, the Court held that the affidavit from a credentials coordinator stating the file only contained information collected for quality assurance purposes and to comply with the Public Health Law provisions concerning physician credentialing was insufficient to meet this burden. Here, counsel for the Hospital merely provides a privilege log stating certain documents were prepared pursuant to the Public Health Law, Education Law, and in response to DOH requests. The privilege log states an "internal case review" was prepared by the Department of Infection Control at the Hospital and is privileged as records related to a quality assurance review function. The privilege log states a "record request" prepared by Nurse Gresser of the DOH and certain portions of plaintiff's medical chart compiled in response to DOH requests are privileged. Counsel notes that these portions of plaintiff's chart were previously exchanged. The Hospital fails to cite to any caselaw indicating the portions of plaintiff's chart which were provided to the DOH are privileged. The medical chart was prepared in the course of plaintiff's care and treatment, not at the request of the DOH, and is therefore not shielded from disclosure. Furthermore, the privilege log fails to demonstrate that the "record request" or the "internal case review" were prepared in accordance with the relevant statutes and are privileged. Plaintiff's combined demands dated November 10, 2011 seek disclosure of all incident reports and in its response the Hospital objects to the demand for incident reports as seeking disclosure of privileged information. The Hospital fails to address on this motion whether an incident report was prepared.

As the nature of the "record request" and "internal case review" are not clear from the record, it is impossible to determine whether these documents or any portion thereof are shielded from disclosure because they contain information generated through the performance of a quality assurance function, or because they were required by the DOH pursuant to Public Health Law 2805-l. The Hospital is directed to submit to the Court the "record request" and "internal case review" noted on the privilege log for *in camera* review. Furthermore, the Hospital shall also submit for *in camera* review copies of any incident report related to this matter for a determination regarding whether it was generated in accordance with the relevant statutes. If no such incident report was generated, the Hospital shall provide an affidavit from a person with knowledge at the Hospital to that effect.

Plaintiff seeks an order striking the answer of Northern Westchester Hospital. Insofar as

plaintiff does not demonstrate on this motion that the Hospital willfully and contumaciously failed to provide court ordered discovery, an order striking defendants' answer or of preclusion is not warranted (See *Matter of Blauman-Spindler v Blauman*, 68 AD3d 1105 [2d Dept 2009]; *Voutsinas v Voutsinas*, 43 AD3d 1156 [2d Dept 2007]; *Gateway Tit. & Abstract, Inc. v Your Home Funding, Inc.*, 40 AD3d 919 [2d Dept 2007]).

In view of the foregoing, it is

ORDERED that plaintiff's motion for an order compelling Northern Westchester Hospital to respond to certain discovery demands is granted to the extent that Northern Westchester Hospital shall provide to the Compliance Part Clerk, on or before April 30, 2012, the "record request" and "internal case review" noted on the privilege log for *in camera* review; and it is further

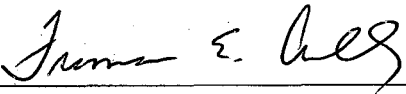
ORDERED that the Northern Westchester Hospital shall submit copies of any incident report related to this matter for *in camera* review. If no such incident report was generated, the Hospital shall provide an affidavit from a person with knowledge employed by the Hospital stating the Hospital is not in possession of any incident reports related to this matter; and it is further

ORDERED that the branch of the plaintiff's motion seeking attorney's fees and costs in connection with this motion is denied; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on May 9, 2012 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
April 16, 2012

  
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HON. FRANCESCA E. CONNOLLY  
J.S.C.

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