

Donato v Nutovits

2016 NY Slip Op 32764(U)

November 2, 2016

Supreme Court, Westchester County

Docket Number: 70468/2012

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

NYSCEF DOC. NO. 172

RECEIVED NYSCEF: 11/02/2016

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
KENNETH DONATO, SR., Individually and as
Administrator of the Estate of SOPHIE M. DONATO
a/k/a SOPHIE DONATO, deceased,

SHORT FORM ORDER

Plaintiffs,

Index No. 70468/2012

-against-

RONALD NUTOVITS, M.D., EMERGENCY
MEDICAL ASSOCIATION OF NEW YORK, P.C.
a/k/a EMERGENCY MEDICAL ASSOCIATES,
MATTHEW GOLKAR, M.D., DAVID L. BURNS,
M.D., THE WESTCHESTER MEDICAL PRACTICE,
P.C., and HUDSON VALLEY HOSPITAL CENTER,

Defendants.

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LEFKOWITZ, J.

By Decision and Order dated September 20, 2016, this Court (Lefkowitz, J.) directed plaintiff to produce by September 26, 2016, for this Court's in camera review any further relevant portion of the deposition transcript of Nurse Bacdayan concerning her notes (or lack thereof) in decedent's chart. Such Order also directed defendant Hudson Valley Hospital Center ("HVHC") to produce to this Court its policy entitled "Transfer of ICU Patients to Another Facility," and its policy denominated as Number 04-6011.26.6 as it existed on December 29, 2010. As relevant here, such Order also reserved determination of discoverability as to 10 additional policies that HVHC previously tendered for in camera inspection:

- 04-6120-12.2 ("Nursing Staff in ICU/PCU");
- 07-7720.06.3 ("General Documentation Requirements");
- 07-7720-07.3 ("History and Physical Examination Documentation Requirements");
- 07-7720.08.2 ("Progress Note Documentation for the Medical Staff");
- 07-7720-09.1 ("Consultation Documentation Requirements for the Medical Staff");
- 07-7720-10.1 ("Discharge Summary Documentation Requirements for Medical Staff");
- 07-7720-12.1 ("Amendments to the Closed Medical Records");
- 07-7720-15.3 ("Medical Record Content");
- 07-7720-18.1 ("Authentication of Medical Record Entries"); and
- 07-7720-20 ("Retention and Destruction of Protected Health Information").

On September 26, 2016, plaintiff uploaded, as NYSCEF Doc. 171, a cover letter dated September 23, 2016, attached to pages 21-27 and 81-87 and 103-104 of the transcript of Myrna Bacdayan's deposition of November 12, 2015. Also on such date, HVHC tendered to this Court HVHC policies and procedures denominated as 04-6011.26.6 ("Cardiac Arrest Team") and 04-6120-3.2 ("Transfer of Special Care Patients to Another Facility"). On this basis, it appears to the Court that the record is now sufficient for this Court to render discoverability determinations that the Order reserved to this in camera inspection.

Upon review of the in camera materials, and based on the criteria set forth in the Decision and Order, the Court determines as follows:

Policy 04-6011-26.6 ("Cardiac Arrest Team") is discoverable. Such policy concerns, among other things, allocating cardiac code responses between different units, which may be relevant because decedent's cardiac code allegedly arose while awaiting transfer between units.

Policy 04-6120-12.2 ("Nursing Staff in ICU/PCU") is discoverable. Such policy may bear on another HVHC policy requiring nursing staff to provide to patients awaiting admission from the Emergency Department a standard of care suitable for inpatients.

Policy 07-7720-10.1 ("Discharge Summary Documentation Requirements for the Medical Staff") is discoverable. Such policy reasonably may bear on several issues, including whether HVHC properly charted decedent's condition after death.

Policy 04-6120-3.2 ("Transfer of Special Care Patients to Another Facility") is not discoverable. It concerns transfer outside HVHC and does not bear on any plaintiff allegation or otherwise reasonably suggest that its disclosure may lead to discoverable evidence.

Policies 07-7720-06.3 ("General Documentation Requirements"), 07-7720-07.3 ("History and Physical Examination Documentation Requirements") and 07-7720-09.1 ("Consultation Documentation Requirements for the Medical Staff") are not discoverable. These policies do not reasonably bear on any plaintiff allegation of policy violations or other malpractice.

As to the discoverability of HVHC Policies 07-7720-12.1 ("Amendments to the Closed Medical Records"), 07-7720-15.3 ("Medical Record Content"), 07-7720-18.1 ("Authentication of Medical Record Entries") and 07-7720-20 ("Retention and Destruction of Protected Health Information"), plaintiff argues their discoverability because, plaintiff asserts, Nurse Bacdayan testified that decedent medical records were missing from her chart with Bacdayan consulted it during her treatment of decedent. On this basis, plaintiff argues that HVHC policies regarding the maintenance, amendment, authentication, retention and destruction of medical records are discoverable.

As the underlying Order made clear, this determination depends partly on whether Bacdayan testified that *her* notes were missing from decedent's chart, not whether Bacdayan

would have expected to see others' notes that she did not see. While this Court takes notice of the HVHC affidavits referenced in the prior Decision and Order of this Court (Lefkowitz, J.) dated April 6, 2016, which tend to suggest that plaintiff has a true and complete copy of decedent's medical record and that HVHC did not alter its contents (NYSCEF Docs. 111-112), plaintiff then asserted that Bacdayan's transcript materially conflicts with the HVHC affidavits. At that time, the Court did not need to reach the question of whether an audit trail would be discoverable inasmuch as HVHC averred that a software change made such production impossible. Here, however, the further pages of Bacdayan's transcript that plaintiff supplied – while reasonably susceptible of multiple interpretations – can be construed to suggest that Bacdayan indeed deemed *her* notes missing and not merely theoretical notes that she would have expected to see on inspection of decedent's record (*see* Tr., at 22, line 12-13 [“I didn't see any notes. I didn't see any of my notes...”]). Given the liberal standard for discovery under CPLR 3101(a), this Court must conclude that Bacdayan's deposition transcript gives at least some basis to consider the discoverability of HVHC policies governing the maintenance, amendment, authentication, retention and destruction of medical records.

The foregoing analysis supports disclosure of Policy 07-7720-08.2 (“Progress Note Documentation for the Medical Staff”), which governs the frequency of progress notes of the kind that Bacdayan testified she would have expected to see in decedent's chart. Review of the other four HVHC medical records policies whose disclosure plaintiff seeks in connection with this issue, however, indicates that none of these four policies are relevant to the issue presented or otherwise to plaintiff's prosecution of this action – even construing them and the record in the light most favorable to disclosure. Accordingly, the balance of plaintiff's application for their disclosure must be denied. Accordingly, it is hereby

ORDERED that the reserved branches of plaintiff's CPLR 3124 motion are granted to the extent that, on or before November 10, 2016, defendant HVHC shall tender to plaintiff a copy of Policy 04-6011-26.6 (“Cardiac Arrest Team”), 04-6120-12.2 (“Nursing Staff in ICU/PCU”), Policy 07-7720-08.2 (“Progress Note Documentation for the Medical Staff”) and Policy 07-7720-10.1 (“Discharge Summary Documentation Requirements for the Medical Staff”), in such form as HVHC tendered them for this Court's in camera review; and it is further

ORDERED that all other branches of plaintiff's CPLR 3124 motion to compel discovery not otherwise granted herein or in the underlying Decision and Order of September 20, 2016, are denied; and it is further

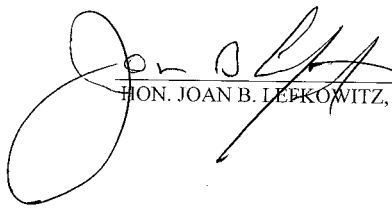
ORDERED that at the next conference, the Court Attorney Referee assigned to hear and report in this action pursuant to CPLR 3104 shall return to plaintiff and defendant HVHC their respective in camera submissions on which this Order relies; and it is further

ORDERED that plaintiffs shall serve a copy of this Decision and Order with Notice of Entry on all counsel within seven days of entry; and it is further

ORDERED that all counsel shall appear for a conference in the Compliance Part, Room 800 of this Courthouse, at 9:30a.m. on November 17, 2016, at which time this Court anticipates that this action will be certified for trial.

The foregoing constitutes the Order of this Court.

Dated: White Plains, New York
November 17, 2016


HON. JOAN B. LEEKOWITZ, J.S.C.

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