

Donato v Nutovits

2017 NY Slip Op 32034(U)

January 23, 2017

Supreme Court, Westchester County

Docket Number: 70468/2012

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

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

Plaintiffs,

-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.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 70468/2012
Motion Date: Jan. 23, 2017

Motion Seq. No. 5

The following papers were read on this motion by plaintiffs for an order compelling defendant Hudson Valley Hospital Center (“HVHC”) to provide certain Bylaws demanded by plaintiffs.

Order to Show Cause-Affirmation in Support-Exhibits A-I
Affirmation in Opposition by HVHC -Exhibit A

Upon the foregoing papers and the proceedings held on January 23, 2017, the motion is decided as follows:

Factual Background

As set forth in this court’s Decision and Order dated and entered September 20, 2016, the relevant factual as follows:

In this malpractice and wrongful death action, plaintiffs allege in their complaint the following: Sophie M. Donato a/k/a Sophie Donato (the “decedent”) went to HVHC’s emergency

department (the “ED”) at approximately 6:00 a.m. on December 29, 2010, complaining of abdominal pain. Although initially scheduled to be discharged, she then developed additional symptoms, including vomiting, and was admitted to the hospital’s Progressive Care Unit (“PCU”) by Dr. Matthew Golkar, at approximately 6:00 p.m. The notes in decedent’s hospital records indicate that on December 30, 2010, after her admission to PCU, she was noted to have pain at 2:05 A.M., 4:00 A.M., 6:47 A.M. and 7:30 A.M. The notes in her hospital records further indicate that at 8:45 A.M. she was found to have suffered a cardiac arrest, had no pulse and was not breathing. Decedent was then resuscitated, intubated and diagnosed with “cardiac arrest possibly secondary to aspiration” (Complaint at ¶ 219). Thereafter, she was diagnosed with “extensive pneumonia in the left lower lobe that may be related to aspiration” (*id.* at ¶ 222), “renal failure most likely secondary to cardiac arrest” (*id.* at ¶ 228), “septic shock post cardiac arrest” and bowel obstruction (*id.* at ¶ 230). Decedent then suffered two more cardiac arrests and was pronounced dead at 3:10 P.M.

In the complaint, plaintiffs allege causes of action for medical malpractice and wrongful death. Plaintiffs allege that defendants committed medical malpractice by, inter alia, failing to diagnose, treat and adequately monitor decedent’s conditions of stricture, dilated colon, bowel obstruction and dehydration. Specifically, plaintiffs allege, inter alia, that defendants were negligent since they: failed to timely diagnose large bowel obstruction; failed to obtain a surgery consult; failed to perform an emergency transverse loopcolostomy and/or ileostomy; failed to place an NC (nasogastic) tube; failed to transport decedent to another facility where she could have had a surgical consult; failed to appreciate CT scan findings; failed to appreciate the source of decedent’s infection and/or sepsis; failed to provide appropriate antibiotics; and failed to accurately document treatment rendered. Plaintiffs specifically allege in the first through fourth causes of action that defendants failed to monitor decedent for an extended period of time. Plaintiffs also allege that defendants failed to comply with, inter alia, “manuals, rules, regulations, practices, procedures, techniques and/or functions.”

Although not alleged by plaintiffs in their complaint or bill of particulars, plaintiffs and HVHC agree that, at the time decedent was admitted to the PCU, there were no beds available and decedent remained in the Emergency Department as a “hold.”

Procedural Background

By Decision & Order entered September 20, 2016, this court, in relevant part, directed HVHC to produce certain identified hospital policies and the Table of Contents of Medical Staff Bylaws (hereinafter “Bylaws”) as it existed on December 29-30, 2010. Thereafter, HVHC produced the identified hospital policies and the Table of Contents of the Bylaws.

By letter dated September 29, 2016, plaintiffs demanded the production of certain sections of the Bylaws. Specifically, plaintiffs sought certain sections of the Bylaws from “Part I - Structure,” “Part II - Credentialing” and “Part III - Committees.”

HVHC objected to plaintiffs' demand for the identified sections of the Bylaws as seeking irrelevant information and information privileged pursuant to Public Health Law and Education Law. HVHC also argued that plaintiffs' demand constituted a fishing expedition.

Plaintiff's Present Motion to Compel

Plaintiffs now seek an order compelling HVHC to produce the demanded sections of the Bylaws and a description of the contents of appendixes to the Bylaws.

Plaintiffs contend that a violation of the Bylaws is "some evidence of negligence." Plaintiff relies upon, inter alia, case law where the court held that a hospital's failure to abide by its own rule or bylaw was some evidence of negligence (*Haber v Cross County Hosp.*, 37 NY2d 888 [1975][patient fell from bed and hospital had rule directing bed rails be set up]; *Dillon v Silver*, 134 AD2d 159 [1st Dept 1987] [physician refused to provide treatment to plaintiff and hospital bylaws required attending physician on call to accept all patients referred]).

Plaintiffs also rely upon this court's prior finding that, to the extent the Bylaws address patient care, they may contain information leading to evidence bearing on plaintiffs' claims. Accordingly, plaintiffs contend that the sections of the Bylaws which contain relevant evidence or information reasonably calculated to lead to discovery or information bearing on the claims should be produced. Plaintiffs further assert that the prosecution of the action would be prejudiced by HVHC's failure to fully disclose the Bylaws. Plaintiffs challenge HVHC's contention that certain demanded information in the Bylaws is privileged.

Plaintiffs' specific contentions as the identified sections of the Bylaws which plaintiffs seek are set forth in the Analysis.

HVHC contends that the sections of the Bylaws requested by plaintiffs are not material, necessary or relevant to the claims asserted in the present action. HVHC asserts that, unlike in the present action, the case law relied upon by plaintiffs involved policy, procedure or bylaws, or other discovery, which were directly at issue and related to the claims at issue. HVHC argues that the Bylaws sought by plaintiffs are not directly related to either the standards of patient care or any alleged errors or omissions of defendant physicians or hospital staff. HVHC further contends that plaintiffs' demands constitute harassment and is an improper use of the discovery process.

Moreover, HVHC contends that plaintiffs' request for Bylaws pertaining to Peer Review are improper and constitute an impermissible intrusion into HVHC's privileged right to conduct investigation of adverse healthcare outcomes.

HVHC's specific objections to plaintiffs' demand for certain identified sections of the Bylaws are set forth in the Analysis.

HVHC has submitted to this court for in camera review the demanded sections of the Bylaws, except for the section of the Bylaws titled “Peer Review Procedures.” HVHC states that if the court determines that the section of the Bylaws dealing with peer review are discoverable, the section will be produced for in camera review.

Analysis

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The burden is upon the party seeking the discovery to “demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*D’Alessandro v Nassau Health Care Corp.*, 137 AD3d 1195 [2d Dept 2016]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

I. Bylaws Regarding Hospital “Structure”

Plaintiffs first seek “Part I” of the Bylaws which relates to the “Structure” of HVHC and contains sections titled “Categories of the Medical Staff,” “Officers,” “Staff Departments,” and “Committees.” Plaintiffs argue that these sections of the Bylaws are needed to provide context to other sections of the Bylaws.

A review of the Bylaws submitted for in camera review demonstrate that these sections of the Bylaws are actually labeled Article 1: Categories of the Medical Staff, Article 2: Officers, and Article 3: Staff Departments. Due to the organization of the Bylaws provided for in camera review, it appears that Article 4 relates to Committees.

Plaintiffs specifically argue that since Article 1 of the Bylaws, titled “Categories of the Medical Staff,” includes sections labeled “Active Staff,” “Courtesy Staff” and “Consulting Staff,” disclosure of the Article is warranted so that plaintiffs know which category a staff member belongs and the applicability of the sections of the Bylaws to that staff member. Similarly, plaintiffs argue that disclosure of the Articles of the Bylaws titled Officers, Staff Departments and Committees should also be disclosed to provide context.

HVHC asserts that those sections of the Bylaws relating to the administrative functioning of the hospital have nothing to do with the standard of care or how care should be delivered to HVHC’s patients. Rather, HVHC asserts that those Bylaws are to insure the appropriate

administrative/organizational structures are in place to achieve the goal of excellent patient care. Moreover, HVHC contends that the reference to the Bylaws in a single policy titled “Contacting a Member of the Medical Staff (for Patient Care Issues)” does not throw open the door to scrutinize all of HVHC’s Bylaws.

After an in camera review of the foregoing Articles and sections of the Bylaws, this court agrees with HVHC that those Articles and sections of the Bylaws do not contain any information regarding the standard of care, the procedures regarding the delivery of care to patients, the procedures for maintaining hospital records, or any other information which is relevant to plaintiffs’ claims or may lead to information bearing on plaintiffs’ claims. As asserted by HVHC, the administrative and organizational structures set forth in those sections of the Bylaws are not relevant to plaintiffs’ claims.

Moreover, in light of this court’s following holdings with respect to the discovery of other demanded sections of the Bylaws, this court finds plaintiffs’ contention that the foregoing Articles are necessary to provide “context” to other demanded sections of the Bylaws to be unpersuasive.

Accordingly, those branches of plaintiffs’ motion seeking an order compelling HVHC to produce the Articles/sections of the Bylaws titled “Categories of the Medical Staff,” “Officers,” “Staff Departments,” and “Committees” are denied.

II. Sections of the Bylaws Titled “Clinical Privileges” and “Emergency Situations”

With respect to the sections of the Bylaws titled “Clinical Privileges” and “Emergency Situations,” which are both contained in Article 5 of the Bylaws relating to Credentialing, plaintiffs contend that those sections contain relevant evidence or information reasonably calculated to lead to the discovery of information bearing on the claims in this action. Plaintiffs rely upon the testimony of defendant David Burns, M.D., that, at the time of treatment of decedent, he had “no idea” what the Bylaws stated as to when he, as a consultant, was required to see a patient. Plaintiffs further argue that decedent’s “Codes” on December 30, 2010 constituted an emergency situation.

First, HVHC contends that these sections of the Bylaws requested by plaintiffs contain nothing regarding the timing of consultations. Second, HVHC asserts that the section of the Bylaws titled “Emergency Situations” permits members of the medical staff to administer treatment in an emergency situation even if that provider does not have specific departmental status or grant of clinical privileges. Third, as to plaintiffs’ request for the subsection of the Bylaws under “Clinical Privileges” titled “Clinical Privileges that Cross Specialty Lines,” HVHC contends that plaintiffs have provided no justification for the demand. HVHC argues that the subsection of the Bylaws bears no relevance to the issues in the action. Accordingly, HVHC contends that those demanded sections and subsection of the Bylaws do not contain any information which is relevant to the issues in this action.

Upon an in camera review of the sections titled “Clinical Privileges” and the subsection titled “Clinical Privileges that Cross Speciality Lines,” this court agrees with HVHC that the section and subsection do not contain any information which is relevant to the issues in this action or may lead to information bearing on plaintiffs’ claims. The section and subsection do not contain any procedures or policies regarding a consultation by a physician at HVHC. Rather, the section and subsection only set forth the procedure for the granting of privileges by HVHC to physicians. Notably, there is no allegation by plaintiffs that the individual defendant physicians were improperly granted privileges at HVHC.

Similarly, an in camera review of the section titled “Emergency Situations” also reveals no relevant information as to the issues in the action or information which may lead to information bearing on plaintiffs’ claims. As stated by HVHC, the section merely authorizes members of the medical staff to administer treatment in emergency situation regardless of the staff members’ department status or grant of clinical privileges.

The branches of plaintiffs’ motion seeking an order compelling HVHC to produce the sections of the Bylaws titled “Clinical Privileges” and “Emergency Situations” and the subsection of the Bylaws titled “Clinical Privileges that Cross Speciality Lines” are, therefore, denied.

III. Subsections under the Section of the Bylaws Titled “Automatic Relinquishment”

Moreover, plaintiffs contend that the deposition testimony of Nurse Bacatlayan regarding her notes missing from decedent’s records, provides a basis for the discoverability of Bylaws governing the maintenance, amendment, authentication, retention and destruction of medical records, including the sections of the Bylaws titled “Failure to Complete Medical Records” and “Failure to Provide Requested Information.” Plaintiffs rely upon this court’s finding in the prior Decision and Order dated September 20, 2016, that Nurse Bacadayan’s testimony gives “some basis to consider the discoverability of HVHC policies governing the maintenance, amendment, authentication, retention and destruction of medical records.”

As to the foregoing sections of the Bylaws, plaintiffs also rely upon the deposition testimony of defendant Matthew Golkar, M.D., that he did not see a Cardiopulmonary Arrest Record in plaintiffs’ decedent’s hospital records, and his testimony that he did not know if a Cardiopulmonary Arrest Record was mandated by hospital bylaws.

As noted by HVHC, those sections are actually sub-subsections contained within the Article of the Bylaws relating to Credentialing and are contained under the section titled “Peer Review” and the subsection titled “Automatic Relinquishment.” HVHC asserts that those Bylaws are directed at insuring that physicians complete their charting or face the penalty of the withdrawal of clinical privileges. HVHC contends that those Bylaws have nothing to do with the standard of patient care or the quality of medical documentation.

After an in camera review of the sub-subsections of the Bylaws titled “Failure to Complete Medical Records” and “Failure to Provide Requested Information,” this court agrees with HVHC that those subsections of the Bylaws do not contain any relevant information or information which may lead to information bearing on plaintiffs’ claims. As stated by HVHC, the section titled “Failure to Complete Medical Records” only sets forth the penalty for failing to complete medical records. The section does not detail the requirements or procedures for completing medical records. The section titled “Failure to Provide Requested Information” relates to a physician’s failure to provide information pertaining to the physician’s qualifications and does not refer to the creation or maintenance of medical records.

The branches of plaintiffs’ motion which seek an order compelling HVHC to produce the subsections of the Bylaws titled “Failure to Complete Medical Records” and “Failure to Provide Requested Information,” therefore, must also be denied.

IV. Section of the Bylaws Titled “Peer Review Procedures for Questions Involving Medical Staff Members”

Plaintiffs contend that HVHC improperly objected to the disclosure of the section of the Bylaws relating to peer review on the basis of privilege. Plaintiffs contend that the privilege provided by the Public Health Law and the Education Law to peer review applies only to the peer review of a particular patient’s treatment and not to Bylaws which apply to “patients at large.” Moreover, plaintiffs argue that HVHC’s claim of privilege in response to the demand for the section of the Bylaw relating to peer review was inadequate since it failed to comply with CPLR 3122 (b). CPLR 3122 (b) requires notice of the legal ground upon which a document is being withheld, as well as a description of the type of the document, the general subject matter of the document, the date of the document, and such other information needed to identify the document. Plaintiffs do not specify how they contend that HVHC’s response failed to comply with CPLR 3122 (b).

Plaintiffs further contend that since plaintiffs’ decedent was dead just over 33 hours after she first complained of abdominal pain, it would be incredible if HVHC did not invoke the peer review provisions. Accordingly, plaintiffs contend that they “should be allowed to obtain the pertinent Bylaws to find out if the Hospital failed to follow its own rules concerning peer review/investigation and/or whether suspension or restriction of Clinical Privileges was warranted.”

HVHC asserts that the section of the Bylaws relating to peer review is protected from discovery pursuant to Public Health Law § 2805-j and Education Law § 6527. Initially, HVHC contends that a plaintiff cannot argue that a hospital was negligent for failing to conduct an investigation or seeking peer review of a case since that would compel hospitals to conduct a review of every case. HVHC further contends that, in any event, its peer review procedure is not material or necessary to the prosecution of the present action, and the decision of whether to

conduct an investigation into the care and treatment of plaintiffs' decedent is not relevant to the issues in this action and is not admissible at trial.

The “quality assurance privilege” set forth in Education Law § 6527 (3) shields from disclosure “the proceedings [and] the records relating to performance of a medical or quality assurance review function or participation in a medical or dental malpractice prevention program” (Education Law § 6527[3], *see Logue v Velez*, 92 NY2d 13, 15 [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” (*Logue v Velez*, 92 NY2d at 17, *quoting* Mem of Assembly Rules Comm., Bill Jacket, L 1971, ch 990 at 6). The privilege attaches to the proceedings and work product of a hospital’s quality assurance committee (*Park Assocs. v N.Y. State Attorney General*, 99 NY2d 434 [2003]).

Public Health Law § 2805-j requires each hospital to maintain a coordinated program for the identification and prevention of, inter alia, medical malpractice, including the establishment of a quality assurance committee (Public Health Law § 2805-j [1]). Moreover, Public Health Law § 2805-m provides, inter alia, that information collected and maintained pursuant to Public Health Law § 2805-j and any incident reporting requirements shall be kept confidential (Public Health Law § 2805-m [1]).

The party seeking to assert the privilege of quality assurance bears the burden of demonstrating that the information and documents demanded were obtained or prepared in accordance with the relevant statutes (*Daly v Brunswick Nursing Home*, 95 AD3d 1262 [2d Dept 2012]); *Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]; *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41 [2d Dept 2004]). In order to assert the quality assurance 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 at 597).

Here, plaintiffs correctly contend that the quality assurance privilege applies only to the records, reports and proceedings of a quality assurance committee (*see Bennett v Stybel*, 59 AD3d 652 [2d Dept 2009] [incident reports prepared by hospital were privileged from disclosure in medical malpractice action]; *Klinger v Mashioff*, 50 AD3d 746 [2d Dept 2008]), and not to the existence and structure of said committee. Notably, both Education Law § 6527 (3) and Public Health Law § 2805-m, by their own language, limit the confidentiality provided under the statutes to records, reports, information collected and maintained, and proceedings. Public Health Law § 6527 (3) provides: “Neither the proceedings nor records relating to the performance of a medical or a quality review function or participation in a medical and dental malpractice prevention program nor any report required ... shall be subject to disclosure” Similarly, Public Health Law § 2805-m provides that “information required to be collected and maintained pursuant to sections twenty-eight hundred five-j ..., reports required to be submitted ... shall be kept confidential and shall not be released” It is also notable that in order to demonstrate the applicability of the quality assurance privilege, a hospital must demonstrate the

existence of a quality assurance review procedure and that the information which it asserts is privileged from disclosure and was obtained or maintained in accordance with that quality assurance review procedure (*Daly v Brunswick Nursing Home*, 95 AD3d 1262; *Kivlehan v Waltner*, 36 AD3d 597).

Despite the foregoing, plaintiffs have not demonstrated entitlement to the disclosure of the sections of the Bylaws relating to HVHC's peer review procedures insofar as plaintiffs have not established the relevance of such information to plaintiffs' claims. In the present action, plaintiffs do not allege that HVHC was negligent in maintaining or operating its peer review procedure, nor do plaintiffs allege that HVHC's peer review procedure contributed to the death of plaintiffs' decedent.

Accordingly, the branch of plaintiffs' motion seeking an order compelling HVHC to produce the sections of the Bylaws titled "Peer Review Procedures" is denied.

V. Appendixes A, A1, B and C

On the present motion, plaintiffs also contend that HVHC failed to advise them what was contained in Appendixes A, A-1, B and C to the Bylaws, as demanded by plaintiffs in their letter demand.

HVHC contends that the appendixes to the Bylaws sought by plaintiffs do not contain any information relevant to the standards of care and are irrelevant to the issues in the present action. HVHC asserts that the appendixes refer to a listing of professionals in different areas of medical practice who are permitted to practice at HVHC, namely podiatrists, acupuncturists, nurse practitioners, physicians assistants, and licensed midwives.

In view of the foregoing, HVHC has now provided plaintiffs with the demanded descriptions of the appendixes to the Bylaws. Accordingly, that branch of plaintiffs' motion seeking an order compelling HVHC to provide a description of the appendixes is denied as moot.

In view of the foregoing, it is

ORDERED that the motion seeking to compel the production of certain identified sections of defendant HVHC's Medical Staff Bylaws and a description of Appendixes A, A1, B and C to the Bylaws is denied; and it is further

ORDERED that, in the event that the documents submitted for in camera review are not returned to counsel for HVHC at oral argument, counsel for HVHC shall pick up the in camera documents from the "Pick-Up" Basket located in the Compliance Part Clerk's Office, Room 812; and it is further

ORDERED that counsel for the parties shall appear for a conference in the Compliance Part, Courtroom 800, on February 2, 2017 at 9:30 A.M., at which time it is contemplated that the

action will be certified as ready for trial; and it is further

ORDERED that plaintiffs shall serve a copy of this Decision and Order with notice of entry upon counsel for all parties within 7 days of entry.

Dated: White Plains, New York
January 23, 2017



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

TO:

Pirrotti & Glatt Law Firm PLLC
By Adam Glatt, Esq.
Attorneys for Plaintiffs
2 Overhill Road, Suite 200
Scarsdale, NY 10583
BY NYSCEF

Gerspach Sikoscow, LLP
Attorneys for Defendants Ronald Nutovits, M.D.
and Emergency Medical Association of NY, P.C.
40 Fulton Street, Suite 1402
New York, NY 10038
BY NYSCEF

Skived, Morgan, Died wards, Weinberg & Nicholson, LLP
Attorneys for Defendants Matthew Golkar, M.D., David L. Burns, M.D.
and The Westchester Medical Practice, P.C.
709 Westchester Avenue
White Plains, NY 10604
BY NYSCEF

Pilkington & Leggett, P.C
By Jonathan A. Bath, Esq.
Attorneys for Hudson Valley Hospital Center
222 Bloomingdale Road, Suite 202
White Plains, NY 10605
BY NYSCEF

cc: Compliance Part Clerk