

Estate of Savage v Kredentser
2017 NY Slip Op 32874(U)
August 21, 2017
Supreme Court, Albany County
Docket Number: 900156-2015
Judge: Gerald William Connolly
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ESTATE OF JOYCE SAVAGE, HOWARD ALVIN
SAVAGE, INDIVIDUALLY AND AS THE ESTATE
REPRESENTATIVE,

DECISION AND ORDER

Index No.: 900156-2015

RJI No.: 01-15-117128

Plaintiffs,

-against-

DR. DANIEL C. KREDENTSER, WOMEN'S
CANCER CARE ASSOCIATES, LLC, ST. PETER'S
HOSPITAL CENTER OF THE CITY OF ALBANY,
INC., ST. PETER'S NURSING AND REHABILITATION
CENTER, INC. and JOHN DOES 1 THROUGH 50,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Denise L. Savage, Esq.
Savage Law PLLC
Attorneys for Plaintiffs
500 Carteret Street
Beaufort, South Carolina 29902

Mandy McFarland, Esq.
Thorn, Gershon, Tymann & Bonanni, LLP
*Attorneys for Defendants Kredentser and Women's Cancer
Care Associates, LLC*
5 Wembley Court, P.O. Box 15054
Albany, New York 12212-5054

Amanda Kuryluk, Esq.
Maguire Cardona, P.C.
*Attorneys for Defendants St. Peter's Hospital of the City of Albany and
St. Peter's Hospital and Nursing Rehabilitation Center*
16 Sage Estate
Albany, New York 12204

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Connolly, J.:

By Decision and Order dated April 12, 2017, the Court, *inter alia*, granted a protective order to Defendants Dr. Daniel C. Kredentser and Women's Cancer Center Associates, LLC (collectively, the Kredentser Defendants) in this medical malpractice action with respect to 355 documents, except for document 223 (which the Court ordered be disclosed in redacted form) constituting Dr. Kredentser's credentialing file (provided that such documents were not otherwise subject to disclosure due to their creation or maintenance by St. Peter's Hospital Center of the City of Albany, Inc. and St. Peter's Nursing and Rehabilitation Center, Inc. (the "St. Peter's Defendants")). The Court additionally directed the St. Peter's Defendants to submit an affidavit of a representative of such defendants addressing a one page undated "Report" (which had not been disclosed) that listed 5 patient complaints/grievances pertaining to Dr. Kredentser, along with the applicability of any asserted exemption with respect thereto, and stayed the motion of the Kredentser Defendants seeking a protective order with respect to such undated "Report". Via demand No. 20, plaintiffs sought "[a]ll records pertaining to reviews, complaints and any other reports concerning the physician Defendants in this Action" (Pl. Discovery Demands, ¶20).

Education Law 6527(3) and Public Health Law 2805-m protect from disclosure records relating to performance of a medical or quality assurance review function or participation in a medical malpractice prevention program (*see Savage v St. Peter's Hospital Center*, 150 AD3d 1452 [3d Dept 2017]). The party asserting these statutory privileges bears the burden of establishing their applicability by demonstrating that a review procedure was in place and that the requested documents were prepared in accordance with such procedure (*Id.*; *see also Stalker v Abraham*, 69 AD3d 1172,

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1173 [3d Dept 2010]).

Public Health Law 2805-j provides, in pertinent part, that “[e]very hospital shall maintain a coordinated program for the identification and prevention of medical ... malpractice. Such program shall include at least the following: (a) [t]he establishment of a quality assurance committee with the responsibility to review the services rendered in the hospital in order to improve the quality of medical ... care of patients and to prevent medical ... malpractice ... (d) [a] procedure for the prompt resolution of grievances by patients ... and (e) [t]he maintenance and continuous collection of information concerning the hospital’s experience with negative health care outcomes and incidents injurious to patients, patient grievances ...”.¹

In response to the Court’s directive regarding the one-page undated “Report”, the Court is now in receipt of the affidavit of Ms. Ryan, Director of Patient Safety and Quality Improvement for St. Peter’s Health Partners Acute Care of Albany, which encompasses St. Peter’s Hospital. Ms. Ryan avers that as part of her employment, she oversees St. Peter’s Quality Assurance Department and is personally familiar with the procedure and process by which patient complaints are generated and maintained by the Hospital pursuant to Public Health Law §§2805-j, 2805-k, 2805-m and

¹Public Health Law 2805-k provides, *inter alia*, that prior to granting or renewing professional privileges or association of any physician or hiring a physician, a hospital shall request from the physician certain information including, *inter alia*, the name of any hospital with or at which the physician has or had any association, employment, privileges or practice; reasons for discontinuation; any pending professional medical misconduct proceedings and the substance of the allegations; and documentation of course work and training as mandated by the Public Health Law and Education Law. Information must be requested from any hospital or facility with or at which such physician had or has privileges, was associated, or was employed. Public Health Law §2805-l further provides that all hospitals shall be required to report events defined as an “adverse event” to the necessary entity.

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Education Law §6527. She further asserts that following the Court's April 12, 2017 Decision and Order, when the Hospital's quality assurance database for patient complaints pertaining to Dr. Kredentser was reviewed, it was discovered that there were eight (8) additional complaints that had not been included in the one page document of complaints that was previously submitted to the Court for *in camera* review. Ms. Ryan avers that it is her understanding that such unintentional failure was due to an oversight on the part of the hospital staff member responsible for retrieving the patient complaints pertaining to Dr. Kredentser due to a staffing transition and that the person running the report on patient complaints had not been fully trained on how to navigate the database.

Ms. Ryan asserts that all of the complaints were at all times created and maintained pursuant to both the Public Health and Education Law, and are accordingly immune from disclosure. She asserts that St. Peter's Hospital has a Patient Safety and Quality Improvement Program as required by Public Health Law §2805-j to foster the improvement of the quality of care rendered to future patients, and that one of the ways the program achieves improvements is by conducting internal investigations concerning issues that pertain to physicians practicing within the hospital, which includes investigations of patient complaints. Pursuant to Public Health Law 2805-j St. Peter's is required to have a procedure in place for the prompt investigation and resolution of patient complaints and Ms. Ryan avers that once a patient complaint is investigated, the hospital is required to collect and maintain the information as part of the hospital's medical quality assessment and review process. Ms. Ryan submitted a copy of St. Peter's Hospital's Safety and Quality Improvement Committee's policy regarding such process which includes the referral of a patient complaint/grievance to a quality assurance specialist and/or executive director and such

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complaint/grievance is entered into the hospital database for tracking and trending purposes and is reviewed by the Safety and Quality Improvement Committee.

Ms. Ryan avers that the patient complaints pertaining to Dr. Kredentser were created pursuant to such program. She avers that all but one of the handwritten complaint forms were retrieved and submitted for *in camera* review. She avers that each complaint form states that the document constitutes Quality Assurance Material and that its confidentiality and discoverability is protected by Education Law §6527 and Public Health Law §2805-m.

Based upon the record, the undated Reports that list patient complaints/grievances pertaining to Dr. Kredentser along with the patient complaint forms attached as Exhibit C to Ms. Ryan's affidavit are protected based upon the demonstration by affidavit of Ms. Ryan that such records related to performance of a medical or quality assurance review function/participation in a medical malpractice prevention program. Such affidavit also demonstrates that a review procedure was in place and that the requested documents were prepared in accordance with such procedure. Accordingly, such documents are protected (*see Savage, supra*)².

Based upon such *in camera* review however, with respect to the patient complaint form of November 11, 2015, such form refers to an e-mail received; and with respect to the patient complaint form of October 12, such form relates to a patient letter and a response letter from defendant hospital. Such materials have not been addressed by affidavit and accordingly, the Court directs the

²It is noted that with respect to one of the patient complaints identified in undated report that the complaint form from 2004 could not be located and accordingly could not be submitted for review.

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St. Peters' Defendants to disclose such documents, redacted as otherwise required by law (including, *inter alia*, all personally identifying patient information), to the plaintiff and co-defendants within twenty (20) days of the date of the instant Decision and Order (*see Savage, supra*).

The Court, by separate order, is sealing all records submitted for *in camera* review.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED that the motion of the Kredentser Defendants for a protective order is granted as to the two undated Reports that list patient complaints/grievances (the first listing 5 and the second listing 13) pertaining to Dr. Kredentser along with the patient complaint forms attached as Exhibit C to Ms. Ryan's affidavit; and it is further

ORDERED that St. Peters' Defendants disclose such e-mail referenced in the November 11, 2015 complaint form submitted as part of Exhibit C to Ms. Ryan's affidavit and letters to the Court referenced in the October 12-13, 2015 complaint form submitted as part of Exhibit C to Ms. Ryan's affidavit, redacted as otherwise required by law (including, *inter alia*, all personally identifying patient information), to the plaintiffs and co-defendants within twenty (20) days of the date of this Decision and Order.

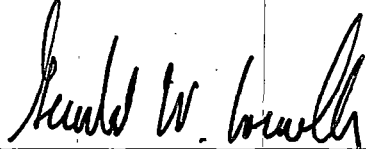
This shall constitute the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the Kredentser Defendants. The below referenced original papers and a copy of the Decision and Order is being transferred to the Albany County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220.

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Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER.

Dated: August 21, 2017
Albany, New York


Gerald W. Connolly
Acting Supreme Court Justice


8/29/17

Papers Considered

1. Order to Show Cause dated September 16, 2016; Attorney Affidavit of M. McFarland, Esq. dated September 13, 2016; accompanying exhibits A-F; Memorandum of Law dated September 13, 2017
2. Notice of D. Savage, Esq.'s Affirmation in Support of Motion Against Dr. Daniel C. Kredentser and Women's Cancer Care Associates for Sanctions under CPLR 3125, Plaintiffs' Costs, Expenses and Fees Under 22 NYCRR 130-1.1, and Opposition to Any Proposed Stay of This Court's September 7, 2016 Ruling dated September 14, 2016; Affirmation of D. Savage, Esq. dated September 14, 2016 with accompanying exhibits 1-4;
3. Affidavit in Response to Co-Defendants' Order to Show Cause for a Protective Order of A. Kuryluk, Esq. dated October 12, 2016 with accompanying affidavit of Dr. Steven Hanks dated September 30, 2016;
4. Attorney Affidavit of M. McFarland, Esq. dated October 7, 2016 with accompanying exhibits A-B which include the Affidavits of Dr. Kredentser dated October 6, 2016 and Tammy Sweet dated October 6, 2016; Memorandum of Law dated October 7, 2016;
5. Denise L. Savage's Affirmation in reply dated October 21, 2016;
6. Reply Affidavit of M. McFarland, Esq. dated October 27, 2016 with accompanying exhibit A;
7. Decision and Order of January 9, 2017;
8. Decision and Order or April 12, 2017;
9. Letter from the St. Peters' Defendants' Counsel dated February 10, 2017; Fifth Supplemental Response to Plaintiff's Combined Discovery Demands dated February 10, 2017 with accompanying privilege log; Affidavit of Dr. Hanks dated February 3, 2017; *In Camera* Review of Dr. Kredentser's Credentialing File and One Page Report Listing Patient Complaints/Grievances;
10. Affidavit of Ms. Ryan dated May 11, 2017 with accompanying exhibits A-C; Sixth Supplemental Response to Plaintiff's Combined Discovery Demands dated May 12,

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- 2017 with accompanying privilege log; Affidavit of Service dated May 12, 2017;
11. Letter from plaintiffs' counsel dated May 18, 2017;
 12. Letter from the Kredentser defendants' counsel dated June 1, 2017;
 13. Letter from St. Peters' defendants' counsel dated June 2, 2017.