C M v NYU Hosps. Ctr.
2018 NY Slip Op 30120(U)
January 18, 2018
Supreme Court, New York County
Docket Number: 805292/14
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

----------x

C M , an infant by his Mother and Natural Guardian KENDRA MALHEIRO, and KENDRA MALHEIRO, individually,

Plaintiff,

-against-

NYU HOSPITALS CENTER, PRATAP MADLY, M.D., YANG KIM, M.D., MARTHA C. CAPRIC, M.D., YIN STEIN, M.D., and STEVEN BOCK, R.N.,

Defendants.

Index No. 805292/14

----------x

Joan A. Madden, J.

In this medical malpractice action, plaintiffs move for an order compelling defendant NYU Hospitals Center ("the Hospital") to produce documents and to provide a substantive response to their motion to admit. The Hospital opposes the motion.

Background

This action arises out of allegations that the infant plaintiff suffered permanent injuries as a result of contracting a Salmonella infection from another infant while a patient in the Hospital's neonatal unit ("NICU"). It is alleged that although the Hospital was aware that the infant was infected, it failed to remove the infant from the NICU.

Oral argument on the motion and a status conference were held on September 14, 2017. Certain aspects of the motion were resolved at the status conference by so- ordered stipulation dated September 14, 2017.[1] The remaining issues concern plaintiffs' motion to compel the

[1]Specifically, with respect to plaintiffs' Notice of Discovery and Inspection dated February 23, 2015 (which the stipulation erroneously indicates is dated on February 13, 2015), the parties agreed that the Hospital would compile documents and provide a privilege log for in camera inspection as to request nos. 1 and 2; provide a further response to request no. 6; and that the response to request nos. 3 and 5 was sufficient. As for plaintiffs' Notice of Discovery and Inspection dated March 21, 2016, the responses were deemed sufficient and plaintiffs agreed to provide further specification as to requests nos. 1 and 4.

Hospital to respond to request no. 4 of plaintiffs' Notice of Discovery and Inspection dated February 23, 2015 (hereinafter "the D & I"), and to plaintiffs' Notice to Admit dated March 21, 2016 (hereafter "Notice to Admit").

Request no. 4 of the D & I seeks "[a]ll documentation, memos, reports, emails and/or logs indicating when defendant hospital was aware that a cord blood bank was positive for Salmonella." The Hospital objected to the request on the ground that it "[p]ertains to medical care and testing concerning an unnamed, non-party infant-patient. As such HIPAA (i.e. the Federal Health Insurance Portability and Accountability Act of 1996) prevents the defendants from providing any such information to the plaintiffs in this case."

As for the Notice to Admit, plaintiff requests admissions as to the following items: 1) Baby Davis was infected with salmonella while he was in the NICU from July 2, 2013 through July 12, 2013; 2) There was a broken refrigerator in the NICU in July 2013; 3) A mortality and morbidity conference was held in the case of the infected plaintiff; 4) An incident report was filled out related to the infant plaintiff; 5) Baby Davis and (the infant plaintiff) were across from each other in the NICU from (redacted date) to July 12, 2013; 6) Baby Davis was born on July 2, 2013; 7) On July 3, 2013, NYU was informed of a positive salmonella specimen in the cord blood of Baby Davis; 8) Stool of Baby Davis was tested for the presence of salmonella; 9) Stool sample of Baby Davis was tested positive for salmonella on (redacted), 2013.

The Hospital denied items nos. 2 and 3. As for item no. 4, the Hospital denied "in the form alleged, admit that the matter was throughly reviewed internally, the results of which are privileged pursuant to New York's Public Health and Education Law." With respect to the remaining items, that is nos. 1, and 5 though 9, the Hospital objected on the ground that the

"admission seeks a violation of HIPAA protections of a non-party patient...."[2]

In their motion to compel, plaintiffs argue that documents and admissions sought are relevant and discoverable as the information relates to the incidence and spread of infection, citing Lang v. Abbott Laboratories, 59 AD2d 734 (2d Dept 1977). In addition, plaintiffs point out that while HIPAA's privacy rule protects identifiable patient information, it permits the redaction of information, also known as di-identification, to make its production HIPAA-compliant, citing, *inter alia*, Caminiti v. Extel West 57th Street, LLC, 139 AD3d 482, 484 (1st Dept 2016)(denying protective order as to email communications sent by medic before receipt of HIPAA authorization noting that "the emails did not contain any information that reasonably could be used to identify decedent); 45 C.F.R. §§ 164.502(d); 164.514(a)(b). Accordingly, plaintiffs argue that HIPAA does not preclude the Hospital from responding to the request if the information identifying the infected infant and other nonparty patients is redacted.

In opposition, with respect to request no. 4 of the D&I, the Hospital argues that the plaintiffs' request for "all" information regarding when the Hospital knew that the cord blood was infected is overly broad and seeks substantive information about nonparty patients, and therefore raises HIPAA concerns, citing *inter alia*, Brandes v. North Shore Univ. Hosp, 1 AD3d 551 (2d Dept 2003)(holding that plaintiff was not entitled information regarding diagnoses, treatments, and medical and surgical procedures listed on operating room log for nonparty patients). The Hospital also argues that the broad request would result in the disclosure of materials protected by the attorney-client and/or work product privileges and/or protected by

[2]The Hospital also objected on the ground of attorney-client privilege but abandoned that objection in its opposition papers insofar as it applies to the Notice to Admit.

Education Law § 6527 and Public Health Law § 2805, regarding quality assurance review.

With respect to the Notice to Admit, the Hospital argues that it properly objected to the six items on the ground that to answer the questions would breach the confidentiality required of HIPAA. The Hospital also argues that the majority of the statements in the Notice to Admit improperly seek "ultimate or conclusory facts" needed to establish plaintiffs' prima facie case and/or which are probative of the issue of the Hospital's alleged negligence.

Discussion

In general, relevant information regarding nonparty patients is discoverable.[3] See e.g. Shirinova v. New York City Health and Hospitals Corp., 34 AD3d 442, 443 (2d Dept 2006)(holding that the trial court erred in denying plaintiffs' motion for the issuance of a subpoena for the production of hospital records of nonparties which revealed information related to the times of surgeries and doctors performing such surgeries which was relevant to allegations that defendant doctor falsified records to state that he had examined plaintiff post-operatively); Holiday v. Harrows, Inc., 91 AD2d 1062, 1063 (2d Dept 1983)(plaintiff was entitled to so called "time data" information emergency room records of 34 nonparty patients as "such information concerning the treatment of the other patients is both material and necessary to the plaintiff's attempt to establish the over-all quality of emergency room care which the decedent received"); Rogers v. NYU Hospital, 8 Misc3d 730 (Sup Ct NY Co. 2005)(HIPAA did not preclude the disclosure of nonparty patient's name who witnessed plaintiff's accident as such disclosure would not reveal confidential information regarding the nonparty's medical condition).

[3]Notably, the Hospital does not argue that the disclosure of the information would reveal confidential information regarding the nonparty patient's diagnosis and treatment and thus would be privileged under CPLR 4504(a).

Here, the information sought by plaintiff is potentially relevant to whether and when the Hospital knew about the infection which allegedly caused the infant plaintiff's injuries.

With regard to the Hospital's argument that HIPAA precludes the disclosure of the information sought by plaintiffs, the court notes that HIPAA prohibits any person from "(1) us [ing] or caus[ing] to be used a unique health identifier;" "(2) obtain [ing] individually identifiable health information relating to an individual"; or "(3) disclos[ing] individually identifiable health information to another person.[4]" See 42 USC 1320d-2. While the privacy provisions of HIPAA prohibit the Hospital from disclosing individually identifiable health information regarding the nonparty patients, request no. 4 of the D&I, which seeks documents relating to when the Hospital was aware that a cord blood bank was positive for infection does not specifically request identifiable information protected by HIPAA. Moreover, to the extent that disclosure of these documents may incidentally contain identifiable health information of nonparty patients, compliance with HIPAA can be accomplished by the redaction of such information. See Chapman v. Health and Hospitals Corporations, 7 Misc3d 933, 938 (Sup Ct NY Co. 2005)("Health information may be 'de-identified,' that is, stripped of identifying material such as name, address, telephone number, social security number, date of birth, etc., such that its

[4]Individually identifiable health information is defined as: "any information, including demographic information collected from an individual, that (A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and—(i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual." See 45 C.F.R. 160.103.

disclosure under limited circumstances will not run afoul of HIPAA"); 45 C.F.R. §§ 164.502(d)[5]; 164.514(a)(b)[6].

---

[5]45 C.F.R. §§ 164.502(d), entitled Standard: Uses and disclosures of de-identified protected health information, provides, in relevant part, that:

> (1) Uses and disclosures to create de-identified information. A covered entity may use protected health information to create information that is not individually identifiable health information...whether or not the de-identified information is to be used by the covered entity.
>
> (2) Uses and disclosures of de-identified information. Health information that meets the standard and implementation specifications for de-identification under § 164.514(a) and (b) is considered not to be individually identifiable health information, i.e., de-identified. The requirements of this subpart do not apply to information that has been de-identified in accordance with the applicable requirements of § 164.514...

[6]45 C.F.R. 164.514(a)(b) provides, in part,

a) Standard: de-identification of protected health information. Health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information....

> (b) Implementation specifications: requirements for de-identification of protected health information. A covered entity may determine that health information is not individually identifiable health information only if:
>
> (1) A person with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable:
>
> (i) Applying such principles and methods, determines that the risk is very small that the information could be used, alone or in combination with other reasonably available information, by an anticipated recipient to identify an individual who is a subject of the information; or
>
> (ii) Documents the methods and results of the analysis that justify such determination; or

With regard to the Hospital's argument that the request no. 4 is overly broad, such argument is without merit. While the request seeks "all" information, it is sufficiently specific as the documents sought are limited to those relating to infected cord blood during a discrete period of time, that is in or around July 2013 period when salmonella infection was present in the NICU and the infant plaintiff was infected . See Mendelowitz v. Xerox Corp., 169 AD2d 300, 304 (1st Dept 1991)(use of the term "all" is acceptable "where the use of these phrases may relate to specific subject matter and thus does not impede a ready identification of the particular thing(s) produced").

As for the Hospital's argument that the documents sought in connection with the request

---

(2)(i) The following identifiers of the individual or of relatives, employers, or household members of the individual, are removed:

(A) Names;
(B) All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if, according to the current publicly available data from the Bureau of the Census:....
D) Telephone numbers;
(E) Fax numbers;
(F) Electronic mail addresses;
(G) Social security numbers;
(H) Medical record numbers;
(I) Health plan beneficiary numbers;
(J) Account numbers;
(K) Certificate/license numbers;
(L) Vehicle identifiers and serial numbers, including license plate numbers;
(M) Device identifiers and serial numbers;
(N) Web Universal Resource Locators (URLs);
(O) Internet Protocol (IP) address numbers....

(ii) The covered entity does not have actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information.

may be protected by the attorney-client or work product privileges, the court notes that "[b]ecause of the strong public policy favoring full disclosure, the burden of proving each element of a privilege rests the party asserting it." Spectrum Systems Intern'l Corp. v. Chemical Bank, 157 AD2d 444, 447 (1st Dept 1990), aff'd as modified, 78 NY2d 371 (1991). "In order to raise a valid claim of [attorney-client] privilege, the party seeking to withhold the information must show that it was a 'confidential communication' made between the attorney and the client in the context of legal advice or services." Bertalo's Restaurant Inc. v Exchange Ins. Co., 240 AD2d 452, 454 (2d Dept), lv. dismissed 91 NY2d 848 (1997) . In addition, to be shielded from discovery based on the work-product privilege, it must be shown that the materials in issue are "uniquely the products of a lawyer's learning or professional skills." Aetna Cas and Surety Co. v. Certain Underwriters at Lloyd's, 263 AD2d 367, 368 (1st Dept 1999), lv dismissed, 94 NY2d 875 (2000)(citations omitted).

Here, the Hospital's blanket statement that the documents sought may be protected by the attorney-client and/or work product privileges is insufficient to met its burden of demonstrating that these privileges apply here. That said, however, to the extent that the Hospital claims that specific documents are subject to the attorney-client and/or work product privileges, the Hospital shall submit such documents for in-camera inspection specifying the basis for such protection in a privilege log and an affirmation of counsel.

As for the Hospital's position that the documents may be protected as relating to quality assurance review under Education Law § 6527 (3), and the Public Health Law § 2805, the court notes that "the Education Law exempts from disclosure 'records relating to performance of a medical or a quality assurance review function' [while]... the privilege afforded under the Public

Health Law is intended to protect "against disclosure of materials relating to quality assurance activities [which] apply to hospital malpractice prevention programs and incident reporting." Orner v. Mount Sinai Hosp., 305 AD2d 307, 308 (1st Dept 2003). Moreover, it is well established that these statutes are narrowly applied. Id. In addition, the party seeking to invoke these statutes "has the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes." See Kneisel v. QPH Inc., 124 AD3d 729, 730 (2d Dept 2015). Here, while the Hospital has not met this burden, any specific documents which the Hospital claims are subject to protection as quality assurance documents, shall be submitted for in-camera inspection specifying the basis for such protection in a privilege log and an affirmation of counsel.

Accordingly, plaintiffs' motion to compel is granted to the extent that the Hospital shall be required, as directed below, to respond to request no. 4 of the D&I, and redact any identifiable health information regarding the nonparty patients. With respect to specific documents that the Hospital claims are subject to an attorney-client and/or work product privileges and/or statutorily protected as quality review materials, the Hospital, shall submit such documents for in-camera inspection, together with a privilege log and an affirmation of counsel setting forth the basis for such privilege(s) and/or protection.

As for the Notice to Admit, as a preliminary matter, contrary to the Hospital's position, the admissions sought are proper as they relate to "clear cut factual matters about which one would reasonably anticipate no disagreement." See Risucci v. Homayoon, 122 AD2d 260, 261 (2d Dept 1986), citing CPLR 3123(a); see also, Villa v. New York City Housing Authority, 107 AD2d 619, 620-621 (1st Dept 1985); compare DeSilva by DeSilva, 236 AD2d 508, 509 (2d Dept

1997)(notice to admit improper when admissions were "hotly contested by the parties, and go to the heart of the matters involved in [the] case").

Next, for the reasons stated above, with the exception of item no. 6, which seeks Baby Davis' date of birth, the admissions sought do not violate HIPAA as they do not seek any individually identifiable health care information. Accordingly, the Hospital is not required to answer item no. 6 of the Notice to Admit, but shall respond to item nos. 1,5, and 7-9.

Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion to compel is granted to the extent set forth herein; and it is further

ORDERED that on or before February 5, 2018, the Hospital is directed to (i) respond to request no. 4 of the D&I, and redact any identifiable health information regarding the nonparty patients Hospital, (ii) submit for in-camera inspection any documents responsive to request no. 4 of the D&I which the Hospital claims are subject to attorney-client and/or work product privileges and/or are statutorily protected as quality review materials, together with a privilege log and an affirmation of counsel setting forth the basis for such privilege(s) ; and (iii) respond to item nos. 1,5, and 7-9 of the Notice to Admit; and it is further

ORDERED that a further status conference shall be held in Part 11, room 351, 60 Centre Street, on February 22, 2018 at noon.

DATED: January 18, 2018

J.S.C.
HON. JOAN A. MADDEN
J.S.C.