

Dennehy v Harlem Hosp. Cent.
2018 NY Slip Op 32496(U)
October 2, 2018
Supreme Court, New York County
Docket Number: 805381/2017
Judge: George J. Silver
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER PART 10
Justice

SUSAN DENNEHY as ADMINISTRATOR OF
THE ESTATE OF WAI CHI LAM, and
CHUNG KIU KWOK,

MOTION INDEX NO. 805381/2017

Plaintiffs,

MOTION DATE
MOTION SEQ. NO. 002

- v -

THE HARLEM HOSPITAL CENTER, THE NEW
YORK CITY HEALTH AND HOSPITALS
CORPORATION, THE NEW YORK CITY HEALTH
AND HOSPITALS CORPORATION'S HARLEM
HOSPITAL CENTER, HARLEM MEDICAL
ASSOCIATES, P.C., PHYSICIAN AFFILIATE GROUP
OF NEW YORK, P.C., JOHN CLARK, M.D.,
ALVIN ADELL, M.D., THOMAS BYRNE, M.D.,
LEAGUE AHMED, M.D., and BRIAN DONALDSON, M.D.,

Defendants.

Cross-Motion: Yes No

Plaintiffs SUSAN DENNEHY as ADMINISTRATOR OF THE ESTATE OF WAI CHI LAM ("Mrs. Lam"), and CHUNG KIU KWOK (collectively "plaintiffs") move, pursuant to CPLR §§ 3124 and 3126, to strike defendants' answers for failure to respond to plaintiffs' discovery demand and failure to comply with the court's directives. In the alternative, plaintiffs move for an order to preclude defendants from testifying or offering evidence at trial, and/or a conditional order to compel defendants to comply with plaintiffs' discovery demands and the court's directives.

Defendants THE HARLEM HOSPITAL CENTER, THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("NYCHHC"), THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION'S HARLEM HOSPITAL CENTER, HARLEM MEDICAL

ASSOCIATES, P.C., PHYSICIAN AFFILIATE GROUP OF NEW YORK, P.C., JOHN CLARK, M.D. (“Dr. Clark”), ALVIN ADELL, M.D., THOMAS BYRNE, M.D., LEAGUE AHMED, M.D., and BRIAN DONALDSON, M.D. (collectively “defendants”) oppose plaintiffs’ motion, and cross-move, pursuant to CPLR § 3103, for a protective order with respect to “all audit trails” and “all computerized/electronic medical records.”

BACKGROUND AND ARGUMENT

This medical malpractice action involves the death of Mrs. Lam, who was admitted to Harlem Hospital for a retained placenta following the delivery of her second child at home. After unsuccessful attempts to manually remove the placenta, a dilatation and curettage procedure (“D & C procedure”) was performed in the labor and delivery unit. Towards the end of the procedure, Mrs. Lam’s blood pressure dropped, and her heart rate increased. It was suspected that Mrs. Lam had internal bleeding/hemorrhaging, and emergent rapid blood transfusion was commenced. However, the source and cause of the bleeding were not identified. During and following the D & C procedure, Mrs. Lam’s condition worsened, and extensive blood was administered, followed by blood transfusions throughout the day. Five hours later, Mrs. Lam was brought to the operating room (“OR”) for an exploratory procedure to ascertain the cause of her worsening condition and to obtain the source and etiology of her blood loss. During the second procedure, Mrs. Lam arrested and coded, and after multiple resuscitations, she succumbed to the bleeding.

Plaintiffs allege that defendants brought Mrs. Lam from the OR and eventually transferred her to the Intensive Care Unit (“ICU”) instead of keeping her in the OR or bringing her into surgery as soon as possible. Plaintiffs also aver that while internal bleeding was suspected, defendants allowed Mrs. Lam’s condition to worsen. Plaintiffs also fault defendants for failing to ascertain the cause of Mrs. Lam’s internal bleeding, and subsequently diagnosing and treating it. Plaintiffs

further assert that a vascular surgical consult was never sought nor received, and that a vascular surgeon was not involved in Mrs. Lam's care and treatment for at least nine hours, and not until late into the second procedure that immediately preceded her death.

Plaintiffs commenced this action with the filing of the Summons and Complaint on October 17, 2017. Thereafter, the various defendants filed answers on November 6, 2017, November 16, 2017, and January 8, 2018. On February 5, 2018, plaintiffs served each defendant with a bill of particulars. Plaintiffs also served defendants with demands for bills of particulars as to affirmative defenses and combined discovery demands, including demands for records, logs, curriculum vitae, and hospital policy and procedures. On February 13, 2018, a preliminary conference was held. Per the preliminary conference order that followed, the parties were directed to exchange discovery, including responses to plaintiffs' combined demands and demands for bills of particulars on or before March 15, 2018. On May 1, 2018, defendants responded to plaintiffs' combined demands.¹

Plaintiffs argue that although they sought defendants' compliance with the court's directives via communications on April 19, 2018, May 1, 2018, and May 7, 2018, defendants have withheld and/or refused to provide the discovery requested by plaintiffs and ordered by the court. Plaintiffs contend that defendants have provided only one set of incomplete hospital records and boilerplate objections to their demands. Plaintiff also asserts that defendants' willful and contumacious conduct is an overt effort to impede and frustrate the progression of this action, thereby prejudicing plaintiffs.

In their opposition and cross-motion, defendants argue that plaintiffs' motion should be denied since independent of the audit trails and metadata, defendants have substantially complied

¹ At this time, it appears that depositions are outstanding. Plaintiffs inform the court that the discovery requested herein is required prior to defendants' depositions ordered to commence on June 7, 2018, except for one defendant, who has been deposed. The parties have also stipulated on April 2, 2018 to adjourn the deposition of Chung Kiu Kwok until after the completion of defendants' and non-party depositions.

with all discovery demands. Defendants also seek a protective order with respect to plaintiffs' demands for "log and recordings regarding all supplements, amendments additions and revisions made to the medical records," on the ground that plaintiffs' demand is baseless, vague, improper, overly broad, immaterial, potentially seeks confidential and privileged information, and is not reasonably calculated to lead to admissible evidence. Defendants also assert that plaintiffs' demand is made without any limitation or indication as to what issue such "discovery" might bear upon in this case. Defendants further maintain that because plaintiffs request this information from the time of Mrs. Lam's death to the present, it implicates attorney-client work product, Quality Assurance information, and other potentially privileged information as it may include the times that Mrs. Lam's medical records were accessed by hospital risk management or defense counsel.

In reply, plaintiffs reiterate that Mrs. Lam's medical records and death report, Dr. Brian Donaldson's ("Dr. Donaldson") curriculum vitae, and the employment contracts for the individually named defendants are relevant and essential. Plaintiffs also oppose defendants' application for a protective order. Plaintiffs argue that because this case is premised on defendants' failure to properly and timely diagnose and treat Mrs. Lam, and because the hospital records exchanged by defendants are missing entries and show significant gaps in time, the audit log would reveal the timing of Mrs. Lam's treatment, which providers made the entries, and when the records were accessed and by which providers. Specifically, plaintiffs highlight that the testimony of attending physician Dr. Clark demonstrates the need for the audit trails since Dr. Clark acknowledges the difficulties that the records pose in terms of showing when a patient has been seen by an individual physician. Plaintiffs also assert that the audit trails are essential since Dr. Clark cannot point to any chart entries confirming the times he undertook certain actions in the emergency room when he evaluated Mrs. Lam. Plaintiffs further argue they would be prejudiced

if defendants were permitted to withhold this discovery, and that defendants would not be prejudiced in producing a record that confirms who made and viewed Mrs. Lam's entries, especially since the record spans for only ten hours. Lastly, plaintiffs contend that defendants' motion for a protective order should be denied since defendants were served with their demand over five months ago in February, but failed to object until after plaintiffs filed the instant motion.

In reply to plaintiffs' opposition and in further support of their cross-motion seeking a protective order as to all audit trails related to Mrs. Lam, defendants argue that plaintiffs have not established that the audit trails and metadata are material and necessary to the prosecution of their case. Defendants contend that an audit trail would not add anything to the detailed medical records and extensive deposition of Dr. Clark. Namely, defendants point out that Dr. Clark testified that he came to the Emergency Department ("ED") prior to 12:57 p.m. on August 1, 2016, that he attempted an unsuccessful manual extraction of the still retained placenta in the ED, and that he delivered the placenta in the obstetrical OR by performing a D & C procedure. Defendants also highlight that Dr. Clark testified that he accompanied Mrs. Lam with other medical providers to the ICU because she was hypotensive in the obstetrical OR at 5:24 p.m. While there, he further emphasizes that Mrs. Lam was treated until hemodynamic instability caused her to be taken directly to the OR for an exploratory laparotomy at 8:01 p.m. Defendants also note that the timing of these events and the presence of all personnel are documented in the medical records, and in Dr. Clark's notes.

In addition, defendants argue that neither Dr. Clark's testimony nor the records suggest that Dr. Clark revised the notations of other medical personnel, that Dr. Clark's notes were improperly or erroneously altered, or that Dr. Clark's treatment of Mrs. Lam as set forth in the medical charts would be compromised or contradicted by any audit information or metadata.

Defendants also argue that the audit trails would not implicate any issue in the case beyond what the medical records already provide or the information elicited at defendants' deposition. Defendants further maintain that plaintiffs can properly address and resolve these issues at the depositions of the four remaining defendants. Finally, defendants contend that plaintiffs' February 5, 2018 demand did not specifically request audit trails or metadata, and because such demand was not specifically made until plaintiffs filed the instant motion, defendants' application for a protective order is timely.

DISCUSSION

CPLR § 3101 mandates "full disclosure of all matters that are material and necessary." Parties to an action are entitled to reasonable discovery "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Fell v. Presbyterian Hosp. in City of New York at Columbia-Presbyterian Med. Ctr.*, 98 A.D.2d 624, 625 [1st Dept. 1983]). CPLR § 3124 allows a party to compel disclosure when a person has failed to comply with a request, notice, interrogatory, demand, question or order. CPLR § 3126 gives courts the discretion to impose penalties including dismissal, upon parties who willfully fail to disclose information which the court orders to be disclosed. "A court may, inter alia, issue an order 'striking out pleadings or ... rendering a judgment by default' as a sanction against a party who 'refuses to obey an order for disclosure or wilfully [sic] fails to disclose information which the court finds ought to have been disclosed'" (*Argo v. Queens Surface Corp.*, 58 A.D.3d 656, 656 [2d Dept. 2009]).

"However, the principle of 'full disclosure' does not give a party the right to uncontrolled and unfettered disclosure, and the trial courts have 'broad power to regulate discovery to prevent abuse'" (*McAlwee v. Westchester Health Assocs., PLLC*, 163 A.D.3d 547, 547 [2d Dept. 2018])

[citations omitted]; *see also Gateway Title & Abstract, Inc. v. Your Home Funding, Inc.*, 40 A.D.3d 919, 919 [2d Dept. 2007] [“The drastic remedy of striking the defendants’ answer was not warranted because, among other things, there was no clear showing that the defendants’ failure to timely answer the plaintiff’s first set of interrogatories was willful and contumacious.”)].

A. *Insurance Information*

As defendants have advised that “all defendants were indemnified by NYCHHC, which is a self-insured entity,” and that “the other defendants are being defended and indemnified by it pursuant to General Municipal Law 50-k,” plaintiffs’ request for insurance information is denied.

B. *Medical Records*

Pursuant to the court’s February 13, 2018 preliminary conference order, defendants are directed to provide Mrs. Lam’s medical records, including the handwritten notes of medical staff, radiology films, billing invoices, pathology reports, slides, and complete forms submitted to the Medical Examiner’s office within 30 days of this order.

C. *Curriculum Vitae*

Per defendants’ agreement, defendants are directed to provide the curriculum vitae for Dr. Donaldson within 30 days of this order.

D. *Hospital Rules and Regulations*

Pursuant to the court’s February 13, 2018 preliminary conference order, defendants are directed to provide hospital rules and regulations as specified in plaintiffs’ combined demands within 30 days of this order, to the extent not previously provided.

E. *Responses to Plaintiffs’ Demand for Bills of Particulars as to Affirmative Defenses*

As defendants have indicated that they served bills of particulars as to affirmative defenses for all defendants either on May 9, 2018 or subsequent to the filing of plaintiffs' motion, plaintiffs' request is moot.

F. *Responses to Plaintiffs' Combined Demands Dated February 5, 2018*

- a. True copies of the log and recordings regarding all supplements, amendments additions and revisions made to the medical records following the plaintiff's death including - the changes made, the identity of those staff/employees/physicians making said changes, the time and date that said changes were made, and the log reflecting all those who have accessed the plaintiffs records following her death up until the present time

As a preliminary procedural matter, the court rejects plaintiffs' argument that defendants' application for a protective order should be denied as untimely. Plaintiffs' assertion that defendants did not object to their demand until after plaintiffs filed the instant motion² is incorrect as defendants' May 1, 2018 response specifically objects to "the log and recordings regarding all changed and revisions' made to the records following the decedent's death [as] unduly burdensome and palpably improper and to the extent it seeks privileged and confidential information. Notwithstanding said objections and without waiver of same, defendants provided plaintiff a copy of the decedent's medical records from NYC Health + Hospitals/Harlem on February 16, 2017. An additional copy of the decedent's medical records and the non-party infant's medical records from NYC Health + Hospitals/Harlem will follow under separate cover." Moreover, in light of New York's public policy in favor of resolving cases on the merits, the court turns to the substance of plaintiffs' request (*see e.g., Stark v. Marine Power & Light Co.*, 99 A.D.2d 753, 754 [2d Dept. 1984]; *Robles v. Grace Episcopal Church*, 192 A.D.2d 515, 515 [2d Dept. 1993]).

Here, plaintiffs have not established a sufficient basis to obtain the audit trails or metadata for Mrs. Lam's medical record. While plaintiffs argue that this information will provide essential

² Plaintiffs' motion is dated May 16, 2018.

discovery that is absent from defendants' medical records, plaintiffs have not laid a proper foundation in support of the belief that there are entries and notations missing from Mrs. Lam's medical records and Dr. Clark's notes, or that there is information contained within the metadata of Mrs. Lam's records that would account for any "significant gap" in time in Mrs. Lam's treatment at Harlem Hospital on August 1, 2016. Plaintiffs have also failed to allege or demonstrate that Dr. Clark or any other medical personnel revised, deleted, or doctored Mrs. Lam's medical data, or that any notations or entries, or lack thereof, differs from or contradicts the information contained in the medical records previously provided to plaintiffs or elicited at defendants' depositions (*Vargas v Lee*, No. 507923/13, 2015 WL 3857323 [Sup. Ct. June 18, 2015]).

Moreover, plaintiffs' argument that the audit trails would reveal the providers who made and accessed the entries and the timing of the entries is insufficient to grant plaintiffs' request as that information can be ascertained from Mrs. Lam's medical records or defendants' deposition. Similarly, plaintiffs' argument that Dr. Clark cannot point to any chart entries confirming the time he undertook certain actions to treat Mrs. Lam is an issue of credibility to be determined by a jury at trial.

However, to the extent that such information may be relevant to defendants' alleged failure to timely diagnose and treat Mrs. Lam, plaintiffs' request may be material and germane to the issue of liability in this case. Furthermore, plaintiffs' request may not be overly broad or unduly burdensome since the records requested reference a relatively short, finite period of time. Moreover, defendants' concern that the audit trails may implicate attorney-client work product or other confidential privileges can be resolved through a redaction of logs and entries that contain such information (*Gilbert v. Highland Hosp.*, 52 Misc. 3d 555, 559 [N.Y. Sup. Ct. 2016]). Taken together, and in light of all relevant facts and circumstances, defendants are directed to submit the

audit trails or metadata for Mrs. Lam's August 1, 2016 medical records for an *in camera* inspection by the court within 30 days of this order.

- b. True copies of the records, logs, time sheets denoting the individual defendant's schedule, shift, hours, as well as time of arrival and departure from the Hospital on the date of occurrence August 1, 2016.

As defendants have indicated that they previously exchanged all schedules for the Anesthesiology, Ob/Gyn, and Surgery Service, which provide staffing information for all individually named defendants, plaintiffs' request is moot.

- c. True copies of the practice agreement/contract/agreement for services/delineation of privileges between the defendant institutions and entities, as well as with the individual physicians and true copies of the contracts/agreements by and between the New York City Health and Hospital's Corporation, Harlem Medical Center and Harlem Medical Associates and the Physician's Affiliate Group.

Based on defendants' representation that "each named provider in this lawsuit falls within the purview of New York General Municipal Law 50-k, i.e., they are statutory employees being defended and indemnified by [NYCHHC]," plaintiffs' request for contracts and agreements is denied since the nature of the relationship, employment status, and contracted duties and responsibilities between the parties is irrelevant and unnecessary. Likewise, plaintiffs' negligent hiring, retention, supervision, and training claim is moot since the parties are defended and indemnified by NYCHHC.

- d. True copies of all reports and statements generated with regard to any death/mortality reporting pursuant to the death of Wai Chi Lam to any local or state government agency including the medical examiner's office

As defendants have advised that they were not presently aware of any responsive documents in their possession other than what may be contained in the medical records previously provided to plaintiffs on or about February 16, 2017, plaintiffs' request is moot. However, to the

extent that defendants have agreed to provide such documents to plaintiffs if they become known, defendants are directed to provide the same where applicable.

- e. True copies of any statements made by any of the individual defendants named herein at any peer review conference/meetings/ investigations and reviews pursuant to the care and treatment of the plaintiff

As defendants' have indicated that "there are no statements made by any defendants at any peer review conferences or meeting," plaintiffs' request is moot.

Consequently, it is hereby

ORDERED that plaintiffs' application to strike defendants' answer is denied; and it is further

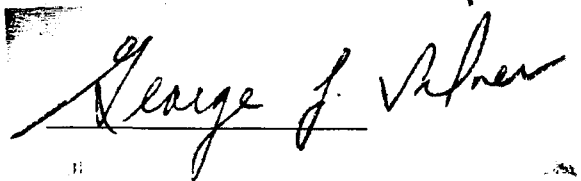
ORDERED that plaintiffs' application to preclude defendants from offering evidence at trial is denied; and it is further

ORDERED that plaintiffs' application to compel defendants to produce outstanding discovery is granted to the extent previously indicated; and it is further

ORDERED that the parties are directed to appear for a compliance conference on November 13, 2018 at 111 Centre Street, Room 1227 (Part 10) New York, New York 10013 to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Date: October 2, 2018



GEORGE J. SILVER