

Montesanto v Our Lady of Consolation

2018 NY Slip Op 34057(U)

October 31, 2018

Supreme Court, Suffolk County

Docket Number: 15-610456

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

INDEX No. 15-610456

CAL. No. 18-001170T

ORIGINAL

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice Supreme Court

MOTION DATE 2-15-18
ADJ. DATE 2-15-18
Mot. Seq. # 001 - MG

-----X
CHRISTINE MONTESANTO, as Administratrix
of the ESTATE OF ROSALIA CHMIL,

Plaintiff,

- against -

OUR LADY OF CONSOLATION,

Defendant.
-----X

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Upon the following papers numbered 1 to 16 read on this motion dismiss: Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13-16; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Christine Montesanto, as administratrix of the estate of Rosalia Chmil, for, inter alia, an order compelling defendant Our Lady of Consolation to comply with a demand for discovery is granted.

Plaintiff Christine Montesanto, as administratrix of the estate of Rosalia Chmil, commenced this action to recover damages for negligence. By her complaint, plaintiff alleges, among other things, that the decedent Rosalia Chmil sustained severe personal injuries after she fell out of bed when she was a resident at the nursing facility operated by defendant Our Lady of Consolation.

On October 26, 2017, plaintiff served a notice for discovery and inspection demanding "all incident report(s) and/or investigation summary reports(s) prepared by the defendant regarding the fall sustained by Rosalia Chmil (as per the deposition testimony of Theresa Rosenthal.)" According to the Court's computerized records, a compliance conference was conducted in this action on December 14, 2017, and a note of issue and certificate of readiness were filed on January 17, 2018. At the compliance

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conference, plaintiff and defendant entered into a so-order stipulation stating that the case would be certified at the conference, that non-party examinations before trial were to be completed within 60 days, and that plaintiff, within 60 days, was to make a motion to compel disclosure of the incident report. On January 12, 2018, plaintiff served the instant motion.

Plaintiff now moves for an order compelling defendant to comply with her demand for discovery dated October 26, 2017. Plaintiff contends that she is entitled to the incident report at issue, since 10 NYCRR § 455.30 (f) requires nursing homes to maintain accident and incident records involving the behavior of a resident, and that, since the records are compelled by regulatory mandate and are not expressly related to quality assurance, they are not prevented, statutorily, from disclosure. Plaintiff further alleges that the records privilege provided by Public Health Law § 2805-1 does not apply to defendant, since it is a nursing home and not a general hospital. Attached in support of plaintiff's motion papers are an affirmation of counsel, a copy of the demand for discovery at issue, the so-ordered stipulation dated December 14, 2017, and a copy of the pleadings.

Defendant opposes the motion, arguing that its answer should not be stricken, because it has not willfully and contumaciously failed to comply with plaintiff's discovery demands, and that it properly and timely claimed privileges associated with the incident report related to plaintiff's decedent, Rosalia Chmil. Defendant asserts that it already has prepared and exchanged a privilege log regarding plaintiff's decedent, pursuant to the recommendations of *Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 757 NYS2d 507 (2003). Defendant further asserts that the specific items maintained by it and listed on the privilege log are exempt from disclosure, since they are not specifically mandated to be produced or maintained by state law, and that the documents were generated in connection with a medical review and quality assurance function. In opposition to the motion, defendant submits a copy of the privilege log.

A trial court has broad discretion to oversee discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice (*see* CPLR 3103 (a); *Andon v 302-304 Mott St Assocs.*, 94 NY2d 740, 709 NYS2d 873 [2000]; *Roug Kang Wang v Chien Tsang-Lin*, 94 AD3d 850, 941 NYS2d 717 [2d Dept 2012]; *Congel v Malfitano*, 84 AD3d 1145, 924 NYS2d 129 [2d Dept 2011]). Moreover, it is well settled that actions should be resolved on the merits whenever possible (*Careccia v Metro. Suburban Bus. Auth.*, 18 AD3d 793, 793, 796 NYS2d 678 [2d Dept 2005], *quoting Cruzatti v St. Mary's Hosp.*, 193 AD2d 579, 580, 597 NYS2d 457 [2d Dept 1993]; *see O'Connor v Syracuse Univ.*, 66 AD3d 1187, 887 NYS2d 353 [3d Dept 2009], *lv denied* 14 NY3d 766, 898 NYS2d 92 [2010]). CPLR 3101 (a) states, in pertinent part, that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof (*see Cirale v 80 Pine Street Corp.*, 35 NY2d 113, 359 NYS2d 1 [1974]; *Conte v Count of Nassau*, 87 AD3d 558, 929 NYS2d 741 [2d Dept 2011]). This provision has been liberally construed to provide disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). However, unlimited disclosure is not permitted (*see Spohn-Konen v Town of Brookhaven*, 74 AD3d 1049, 902 NYS2d 391 [2d Dept 2010]; *Harris v Pathmark Stores, Inc.*, 48

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AD3d 631, 851 NYS2d 875 [2d Dept 2008]; *Silcox v City of New York*, 233 AD2d 494, 650 NYS2d 305 [2d Dept 1996]).

Public Health Law § 2805-j requires hospitals, nursing homes, and other healthcare-related entities to establish a program “for the identification and prevention of medical, dental and podiatric malpractice.” As part of such program, hospitals and nursing homes must establish a quality assurance committee, the responsibilities of which include reviewing services provided to patients in order to improve the quality of care provided by the hospital or nursing home (Public Health Law § 2805-j [1]; see *Logue v Velez*, 92 NY2d 13, 677 NYS2d 6 [1998]). A New York State Department of Health regulation also requires nursing homes to establish and maintain a quality assessment and assurance program (see 10 NYCRR 415.27; *Robertson v Brookdale Hosp. Med. Ctr.*, 153 AD3d 743, 59 NYS3d 485 [2d Dept 2017]). Significantly, Public Health Law § 2805-m and Education Law § 6527 (3) both protect from disclosure documents that were created “by or at the behest of a quality assurance committee for quality assurance purposes” (*Matter of Subpoena Duces Tecum to Jane Done*, 99 NY2d 434, 441, 757 NYS2d 507 [2003]; see (*Katherine F. v State of New York*, 94 NY2d 200, 204, 702 NYS2d 231 [1999]; *Daly v Brunswick Nursing Home, Inc.*, 95 AD3d 1262, 945 NYS2d 181 [2d Dept 2012])). However, “it is the burden of the entity seeking to invoke the privilege to establish that the documents sought were prepared in accordance the relevant statutes” (see *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41, 46, 779 NYS2d 82 [2d Dept 2004]; see *Kneisel v QPH, Inc.*, 124 AD3d 729, 2 NYS3d 195 [2d Dept 2015]; *LaPierre v Jewish Bd. of Family & Children Servs., Inc.*, 47 AD3d 896, 850 NYS2d 595 [2d Dept 2008]). The party asserting the privilege is required to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure (see *Kivlehan v Waltner*, 36 AD3d 597, 599, 827 NYS2d 290 [2d Dept 2007]). Records that are duplicated or used by a quality assurance committee are not necessarily privileged (see *Marte v Brooklyn Hosp. Ctr.*, *supra*).

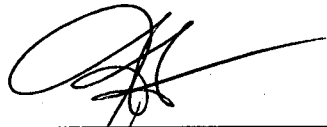
Here, plaintiff has demonstrated that the requested documents were not prepared in accordance with the relevant statutes’ quality assurance exemption provision (see *Ross v Northern Westchester Hosp. Assn.*, 43 AD3d 1135, 842 NYS2d 543 [2d Dept 2007]). Instead, plaintiff has shown that the reports at issue were prepared according to the regulatory mandate that nursing homes prepare and maintain a record of all accident and incidents involving a patient’s behavior (see 10 NYCRR 415.30 [f]; *Clement v Kateri Residence*, 60 AD3d 527, 875 NYS2d 66 [1st Dept 2009]; *Kneisel v QPH, Inc.*, *surpa*). Moreover, plaintiff’s demands are not overly broad or unduly burdensome, since defendant is compelled by statute and regulation to maintain and collect such information (see 10 NYCRR 415.30 [f]; 10 NYCRR 415.27 [c] [3]; *Simmons v Northern Manhattan Nursing Home, Inc.*, 52 AD3d 351, 860 NYS2d 512 [1st Dept 2008]).

Furthermore, defendant, as the party seeking to invoke the privilege, has the burden of demonstrating that the sought after documents were prepared in accordance with the relevant statutes has failed to do so (see *Lopez v Augustin*, 69 AD3d 683, 891 NYS2d 654 [2d Dept 2010]), and the evidence submitted by defendant in opposition failed to make a showing as to why the privilege attached (see *Stephen v State of New York*, 117 AD3d 820, 985 NYS2d 698 [2d Dept 2014]). Despite the fact that it submitted a privilege log to assist the Court in determining whether the requested items are privileged,

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defendant has failed to support its boilerplate claim of privilege with the complete set of documents sought to be protected for the Court's in camera review (see *Matter of Subpoena Duces Tecum to Jane Done, supra*; cf. *Abraha v Adams*, 148 AD3d 1730, 51 NYS3d 754 [4th Dept 2017]). In addition, defendant has not submitted any evidence showing that the documents it is claiming are privileged were obtained or maintained according to its review procedure or that it even has a review procedure (see *Kivlehan v Waltner, supra*; *Bush v Dolan*, 149 AD2d 799, 540 NYS2d 21 [2d Dept 1989]). Defendant merely states that the documents were produced as part of an "investigation into the circumstances regarding plaintiff's decedent's fall pursuant to its review procedure and as required under the Public Health Law" (cf. *Stalker v Abraham*, 69 AD3d 1172, 897 NYS2d 250 [3d Dept 2010]). Lastly, the Court notes that a party's failure to timely produce information within its possession or control precludes that party "from later offering proof regarding that information at trial" (*Corriel v Volkswagen of Am.*, 127 AD2d 729, 731, 512 NYS2d 126 [2d Dept 1987]; see *Vaz v New York City Tr. Auth.*, 85 AD3d 902, 925 NYS2d 587 [2d Dept 2011]; *Sagiv v Gamache*, 26 AD3d 368, 810 NYS2d 481 [2d Dept 2006]). Accordingly, plaintiff's motion for an order compelling defendant to produce the incident report and associated documents related to plaintiff's decedent's accident is granted.

Dated: 10/31/18



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION