

Siegel v Snyder

2018 NY Slip Op 34097(U)

July 16, 2018

Supreme Court, Nassau County

Docket Number: 6612/16

Judge: Denise L. Sher

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

LINDA SIEGEL, AS THE TESTATRIX OF THE ESTATE
OF MICHAEL SIEGEL, DECEASED,

Plaintiff,

- against -

BRIAN SNYDER, M.D., NICHOLAS STRIPOLI, PA,
FARINA SIAL, P.A., NEUROLOGICAL SURGERY P.C.,
KENNETH BECKER, M.D., KENNETH B. BECKER,
M.D., P.C., MATTHEW LURIN, M.D., MARK
WASHBURN, M.D., ISLAND MEDICAL EMERGENCY
SERVICES, P.C., JEREMY BOSWORTH, M.D., STACEY
FUNT, M.D., RADIOLOGICAL ASSOCIATES OF LONG
ISLAND, P.C., SOUTH NASSAU COMMUNITIES
HOSPITAL and AUDREY RILEY,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 6612/16
Motion Seq. No.: 02
Motion Date: 05/08/18

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmations and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants Radiological Associates of Long Island, P.C. ("RALI") and South Nassau
Communities Hospital ("SNCH") move for an order permitting *in camera* inspection of
un-redacted hospital peer review committee meeting minutes, and permitting the submission

under seal of proposed redacted peer review committee meeting minutes; and move, pursuant to CPLR §§ 3101 and 3101(b), based upon the privilege set forth in Education Law § 6527(3) and Public Health Law § 2805-m, for an order limiting plaintiff's combined demands dated November 23, 2016, protecting defendant SNCH's peer review committee meeting minutes from disclosure and limiting or conditioning plaintiff's notice for discovery inspection to include only the portions of the peer review committee meeting minutes that constitute statements made in attendance at such a meeting by any natural person who is an individually named defendant concerning the care and treatment of plaintiff's decedent, the subject matter of which was reviewed at such meeting, and move for an order finding, after *in camera* inspection of the un-redacted peer review committee meeting minutes, that the proposed redaction which has been submitted under seal as an exhibit to this motion constitutes the party-statement exception to the quality assurance privilege previously described. Plaintiff opposes the motion.

Plaintiff commenced the instant medical malpractice action with the filing of a Summons and Verified Complaint on or about September 13, 2016. *See* Defendants RALI and SNCH's Affirmation in Support Exhibit D. Issue was joined by defendants RALI and SNCH on or about October 31, 2016. *See* Defendants RALI and SNCH's Affirmation in Support Exhibit E.

Counsel for defendants RALI and SNCH submits, in pertinent part, that, "[t]he instant motion arises out of plaintiff's demand for the peer review committee meeting minutes referable to quality assurance, peer review, and malpractice prevention activities taken by South Nassau Communities Hospital referable to the care and treatment rendered to plaintiff's decedent. During a compliance conference in court on August 22, 2017, plaintiff's counsel acknowledged that plaintiff's demand for the peer review materials would only call for statements made by named

defendants who were in attendance at such a meeting discussing the care and treatment of plaintiff's decedent. The question remains as to judicial approval of the redaction.... The instant motion seeks a protective order against any of plaintiff's demands for instance, plaintiff's demand for negative outcome and incident reports contained in plaintiff's combined demands dated November 23, 2016, and demand for reports prepared pursuant to Public Health Law § 2805, and demand for any communication regarding the decedent between or amongst defendants as encompassed by plaintiff's combined demands dated November 23, 2016.... The Hospital's initial response and objection to said demand dated July 31, 2017, raises the privilege.... In this case the demand for which a protective order is sought, the scope of which was modified by the terms of the discussion at the compliance conference as set forth in the affirmation of good faith. Plaintiff's counsel has agreed to limit the demand to include only the party-statements contained in the peer review committee meeting concerning the care and treatment of plaintiff's decedent. Since very little, if anything, fits that narrow exception to the privilege, *in camera* inspection is requested to verify what can and cannot be disclosed."

In support of the motion, defendants RALI and SNCH submit the affidavit of Christine Parks ("Parks"), former Director of Performance Improvement of defendant SNCH. *See* Defendants RALI and SNCH's Affirmation in Support Exhibit A. Parks states, in pertinent part, that, "[t]his affidavit is submitted in support of a motion for a protective order seeking *in camera* inspection to preserve the privilege attendant to certain Peer Review Committee minutes. The Court is respectfully asked to consider this affidavit to serve to authenticate the minutes and to lay a foundation for the proposed retraction. In my role as Director of Performance Improvement, I personally attended Peer Review Committee meetings at which the care and treatment of

Michael Siegel, admit date November 6, 2015, ..., was reviewed for purposes of quality assurance review and medical malpractice prevention. Specifically, Trauma Peer Review Committee meetings were conducted on December 21, 2015, with follow up meetings on January 8, 2016 and February 22, 2016.... In accordance with Education Law Section 6527(3) and as part of the activities mandated under Public Health Law Section 2805-j for medical malpractice prevention and quality assurance review, the Trauma Peer Review committee convenes (*sic*) to present and discuss the care and treatment of Michael Siegel commencing on November 6, 2015. Mr. Siegel's case was selected for presentation at the Trauma Peer Review Committee because it was a trauma team case which involved a mortality. The Trauma Peer Review Committee minutes were written by a person in attendance at the meeting, and the minutes were engendered and used for the privileged purpose specifically reflecting the activities and discussions, as well as recommendations and follow up by the Peer Review Committee. Thus, not only were these documents engendered at the behest of the Committee and used by the Committee, but these minutes were actually created by the committee. The cloak of confidentiality is essential for candid and open discussion for the purposes of the committee which seeks to ensure the proper delivery of services, and the maintenance and improvement in quality of care, and thus confidentiality is essential to encourage thorough and candid peer review in order for the committee to serve its purpose of improving the quality of care. Thus, a review procedure was in place, did take place for this particular patient, and the requested documents for which our protective order is sought, were prepared in accordance with the peer-review and malpractice prevention activities. Thus, the documents were engendered and used in the course of a formal proceeding and were obtained or maintained in accordance with that review procedure.... The proposed redacted minutes submitted as Exhibit 'C' to the within motion constitute a good faith

effort to distinguish, and to disclose as permitted by law, of (*sic*) statements made by any person in attendance at such a meeting who is a party to an action or proceeding in the subject matter of which was reviewed at such a meeting. Of the individually named defendants in the caption of this lawsuit, only two were in attendance at the Peer Review Committee meetings. Kenneth Becker, M.D. attended as Chair of this Committee in his capacity as Trauma Medical Director, and Matthew Lurin, M.D., in his capacity as Assistant Director of the Emergency Department, attended the same three Trauma Peer Review Committee Meetings held on December 21, 2015, January 18, 2016, and February 22, 2016. Those names are revealed in the proposed redacted minutes.... There were no statements in the minutes attributed to Matthew Lurin, M.D. on the subject matter reviewed at the meeting which is the subject of this lawsuit, namely the care and treatment of Michael Siegel.... First, the redacted portions of the minutes reflect only discussion of the committee and do not contain statements that are attributed to any individual person so they do not meet the party-statement exception to the privilege. Second, there were general discussion for proposals of possible changes or reinforcements of existing policy going forward for other patients, not referable to the prior treatment provided to Michael Siegel, again in the context of the purpose of the meeting for peer-review and malpractice prevention.... The follow up meetings, in this case on January 18, 2016 and February 22, 2016, did not include any investigation or discussion of whether or not the care and treatment of the plaintiff's decedent, Michael Siegel, conformed with existing protocols and procedures at the time of treatment and only dealt with corrective action about other patients going forward." *See* Defendants RALI and SNCH's Affirmation in Support Exhibits A and C.

In opposition to the motion, counsel for plaintiff argues, in pertinent part, that, "[p]laintiff has no objection to an *in camera* review by this Court of any document (*sic*) that

defendants claim are privileged. However, what is objected to is the submission of a severely redacted copy of what is represented to by the Trauma Peer Review Committee Meeting Minutes. Plaintiff objects to the failure to exchange a proper privilege log which is specific as to the types of documents that are claim to be protected so that plaintiff can address the type of document and why it should not be kept privileged. Plaintiff is not seeking at this point in time the substance of the documents but rather the identification of same. The attempt to substitute the self-serving affidavit of Christine Parks does not meet the requirement that SNCH meet its burden of proof that the documentation of the investigation of the care of the decedent is protected by statute.... [T]he documentation of the investigation of this care (*sic*) is not limited meeting (*sic*) to any one meeting. It is claimed that what occurred not only was as a result of the medical malpractice of the defendants named and SNCH employees, but also an institutional failure regarding the manner in which patients were accepted, the provision of essential medical services to the patients accepted, the provision of essential medical services to the patients accepted and policies and procedures including those for contacting health care providers, the authority of a remotely located radiologist to refuse a repeat C/T scan and other such institutional issues.”

Counsel for plaintiff further argues that, “[t]he PHL specifically has an exception in that the ‘prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting.’ It does not state that this exception only applies to the parties’ statements regarding the *care and treatment* of the patient at issue, as claimed by defendants herein. It should include any statement regarding the party’s knowledge of the fact (*sic*) relevant to the care of the patient. In this case it would include the refusal of radiology to do a timely repeat C/T, the failure to be able to reach the NSPC physician’s assistants and the failure

of SNYDER, or his substitute physician, to see the decedent in a timely manner.... There is no question that the burden to establish that there is an entitlement to the statutory privilege is that of SNCH. [citation omitted]. A privilege log is one of the very necessary requirements in establishing this entitlement so that the parties and the Court can have some understanding as to what is being sought to be hidden from the plaintiff and other defendants.... Only with the privilege log can the plaintiff address what is being kept from her.... [A]ll of the information that may have been obtained in the retrospective investigation of the care of MICHAEL SIEGEL, may have been used for a dual purpose. A retrospective investigation of the facts of the care of MICHAEL SIEGEL should not be immune from disclosure. Such an investigation of this case surely would have been performed and be more than a discussion at a Trauma Peer Review Committee Meeting. The issue of duality of purpose is now clearly before this Court. Since the principle of discovery is one of liberal disclosure, in order to impede that goal, the defendants must prove that the documents are privileged. The failure of SNCH to provide the plaintiff a detailed privilege log prevents plaintiff from addressing same. As a result, she is deprived of a full and fair opportunity to address the categories when presenting her arguments before this Court for consideration when doing an *in camera* review. Ms. Park's affidavit is far too simplistic in its description of the documents contained therein, despite its length, to meet this purpose. She claims in a conclusory manner that the care of the decedent was reviewed for purposes of quality assurance and medical malpractice prevention. This can be claimed in any retrospective investigation of care. She does not say that this was part of a preexisting quality assurance program where the decedent's case was chosen at random or on some pre-existing formula for choosing cases to be reviewed other than a mortality. She does not say that all mortalities are reviewed. The far more likely reason is the sequence of events that have been

described herein. The list of the persons in attendance should not be secret. The general description of the documents generated, without the contents therein, should be identified in a privilege log which is specific enough to identify the type of information in that particular document without revealing the substance of same.”

Counsel for plaintiff adds that, “[a]s to the named party exemption of both statutes, the plaintiff is not seeking any non-party statements that are part of the Trauma Peer Review Committee proceedings, which is the only such alleged protected action in this case, except those that may refer to the statements of parties. Plaintiff is seeking the statements either in writing or verbal and recorded, referable to those who are named parties to this case. SNCH states that these are limited to BECKER and LURIN, although LURIN denies same and identifies another such venue where emergency care is reviewed. It is respectfully submitted that this unnamed third party described by BECKER as ‘trauma attending’ who was present at the meeting for the purpose of presenting the fact (*sic*) of the case must be identified, and in its review, this Court must determine the source of this person’s presentation of facts. To seek to prevent disclosure of such statements by hiding them behind the presentation of a third party will only thwart the very purpose of the exception, which is to prevent protection of the disclosure of the statements of those committing malpractice and causing harm.... To summarize the plaintiff’s position, it is respectfully submitted that plaintiff has no objection to an *in camera* review of the alleged one and only, reports (*sic*), documentation or recitation of an investigation of the care or lack thereof rendered to the decedent. However, there is the need for a further inquiry as to whether, in fact, the Trauma Peer Review Committee was the only venue in which there was an investigation of the facts at issue. LURIN has clearly indicated that there were other such meetings held, in general, regarding Emergency Room issues. Surely, the circumstances in this case would result in

such a discussion or meeting. Further the affidavit of Ms. Parks in no way substitutes for a proper privilege log, one with a sufficient description of the contents therein, not the substance of same, so that plaintiff could address the documents to this Court for consideration in making the Court's inspection of same. All persons in attendance should be identified. Their statements, if not parties, are not discoverable but surely their identities should be. BECKER already testified as to the fact that neurosurgeon Onesti or his alternate, Dr. Dawson, would attend such meetings. Plaintiff does not seek the remedial measures that were undertaken thereafter although BECKER has already testified to some if not all of same."

In reply to the opposition, counsel for defendants RALI and SNCH submits, in pertinent part, that, "[a]s discussed in the main affirmation in support of this motion ... the modern accepted practice of *in camera* inspection eclipses the need for a privilege log, particularly in the instant case where (1) the documents are described in detail in the quality assurance officer's affidavit and (2) it is now clear from the proposed redacted minutes ... that have been exchange (*sic*) with the parties exactly what the dates and format of the documents are.... [I]n the instant matter there is no need for a privilege log since the documents have certainly been identified.... Counsel's expectations about who would or would not be present at such a meeting have no basis other than hopeful speculation. By listing the titles or roles held by two of the physicians in attendance at the peer review committee meeting, Parks had no obligation in her affidavit to suggest that the doctors were or were not witnesses to the plaintiff's treatment. Plaintiff also argues based on Dr. Becker's testimony that another trauma attending would present the case and plaintiff's counsel would love to find out who that was - but since it (*sic*) was not a named defendant in this action plaintiff is not entitled to know who else was there or what they said. To conduct such an inquiry, at a hearing plaintiff wants with Ms. Parks, would violate the very letter

and spirit of the evidentiary privilege. Similarly plaintiff's speculation that the case was presented in another venue is belied by Dr. Lurin's testimony - the very testimony upon which plaintiff relies - that the case was never presented to the Emergency Department peer review." See Defendants RALI and SNCH's Reply Affirmation Exhibit G.

New York State Education Law § 6527(3) states, in pertinent part, "[n]either the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical or dental malpractice prevention program nor any report required by the department of public health pursuant to section twenty-eight hundred five-1 of the public health law described herein,...., shall be subject to disclosure under article thirty-one of the civil practice laws and rules except as hereinafter provided or as provided by any other provision of law."

The "quality assurance privilege" shields from disclosure certain records and reports generated by a hospital in performing either medical malpractice *or* quality assurance review (emphasis added)." See *Leardi v. Lutheran Medical Center*, 67 A.D. 3d 651, 888 N.Y.S.2d 168 (2d Dept. 2009). New York State Education Law § 6527(3) actually confers confidentiality on three categories of documents: records relating to the performance of medical review and quality assurance functions, records reflecting "participation in a medical and dental malpractice prevention program" and reports required by the New York State Department of Health... pursuant to Public Health Law § 2805-1. See *id.*; *Katherine F. v. State of New York*, 94 N.Y.2d 200, 702 N.Y.S.2d 231 (1999).

Pursuant to New York State Public Health Law § 2805-m(2), "... The Prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was

reviewed at such meeting.”

The branch of defendants RALI and SNCH’s motion for an order permitting *in camera* inspection of un-redacted hospital peer review committee meeting minutes, and permitting the submission under seal of proposed redacted peer review committee meeting minutes, is hereby **GRANTED**.

Based upon the *in camera* review of said un-redacted hospital peer review committee meeting minutes, the Court is left with several questions. None of the information listed in the “Hospital Course” and “Peer Review Committee Discussion” sections of the minutes are attributed to any particular individual, leaving the submission by defendants RALI and SNCH quite vague. The Court cannot determine who provided specific statements and/or information when all of the statements and/or information contained in the minutes are attributed to the “committee.” How is the Court to determine if certain statements are privileged when there is no indication as to who specifically made said statements? The Court is not satisfied with the representation that the statements in the peer review committee discussion were made by “committee.” It is evident that someone who was present at the meeting, who may or may not be a party defendant, made a conclusion upon which the committee agreed. The Court needs to know the specific identity of the individuals who reached the conclusions that were then agreed to by the committee. It has been represented that minutes were taken at said meeting and, typically when minutes are taken the individuals who were speaking/made specific remarks are noted. Said information is necessary for the Court to make a ruling with respect to the privilege of the statements made at the meeting. Basically, the Court needs to know specifically who said what at the hospital peer review committee meeting before it can rule on the admissibility of the information in the minutes.

Therefore, the branches of defendants RALI and SNCH's motion, pursuant to CPLR §§ 3101 and 3101(b), based upon the privilege set forth in Education Law § 6527(3) and Public Health Law § 2805-m, for an order limiting plaintiff's combined demands dated November 23, 2016, protecting defendant SNCH's peer review committee meeting minutes from disclosure and limiting or conditioning plaintiff's notice for discovery inspection to include only the portions of the peer review committee meeting minutes that constitute statements made in attendance at such a meeting by any natural person who is an individually named defendant concerning the care and treatment of plaintiff's decedent, the subject matter of which was reviewed at such meeting, and for an order finding, after *in camera* inspection of the un-redacted peer review committee meeting minutes, that the proposed redaction which has been submitted under seal as an exhibit to this motion constitutes the party-statement exception to the quality assurance privilege previously described, are hereby **DENIED with leave to renew** upon the submission of the above described information of which the Court is in need to conduct a further *in camera* review.

All parties shall appear for a Certification Conference in IAS Part 32, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on August 21, 2018, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
July 16, 2018

ENTERED

JUL 18 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE