

Browder v Amsterdam Nursing Home Corp. (1992)
2019 NY Slip Op 30848(U)
March 28, 2019
Supreme Court, New York County
Docket Number: 153700/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 153700/2017

JILLIAN BROWDER,

MOTION SEQ. NO. 001

Plaintiff,

- v -

AMSTERDAM NURSING HOME CORPORATION (1992) a/k/a
AMSTERDAM NURSING HOME,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to

COMPEL DISCOVERY

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this negligence action, Jillian Browder (“Browder”), as administrator of the estate of decedent Eileen Ramirez (“Ramirez”) moves, pursuant to CPLR 3124, to compel the production of an accident report from defendant Amsterdam Nursing Home Corporation (1992) a/k/a Amsterdam Nursing Home (“Amsterdam Nursing Home”). Defendant opposes the motion. After reviewing the motion papers, as well as the relevant statutes and caselaw, it is ordered that the motion is **granted**.

The instant action arises out of an accident at defendant’s nursing facility. Decedent Ramirez had entered the facility for short-term care after having sustained injuries due to a fall at her home. (Doc. 31 at 2.) On the second day of her stay at the nursing home, and after apparently having rung the facility’s call bell and getting no response, decedent fell unattended in the

bathroom.¹ (*Id.*) Browder thereafter commenced this action on April 19, 2017 by filing a summons and complaint. (Doc. 32.) In the complaint, plaintiff alleges, *inter alia*, causes of action for negligence and gross negligence. (*Id.* at 7, 13.) Defendant filed its answer on June 1, 2017. (Doc. 33.)

Browder now moves, pursuant to CPLR 3.124, to compel the production of an accident report from Amsterdam Nursing Home. In support of the motion, plaintiff argues that the accident report is not privileged material pursuant to 10 NYCRR 415.30(f), which provides:

The nursing home shall maintain information necessary to permit the production of the following records immediately upon request and any other records required by the provisions of this Chapter:

(f) an accident and incident record which shall include a clear description of every accident and any other incident involving behavior of a resident or staff member that poses a threat to a resident or staff member, the resident's version of the accident or incident unless the resident objects or is unable to give a report due to his/her medical condition, names of individuals involved and a description of medical and other services provided, by whom such are provided, and the steps taken to prevent recurrence .

...

(Doc. 31 at 3–5.)

In opposition, defendant maintains that the record being sought is a quality assurance report, which is privileged material pursuant to New York Public Health Law § 2805-m and Education Law § 6527(3). (Doc. 41 at 2.) Defendant further requests an “in-camera inspection . . . in order [for this Court] to assess the documentation and make the determination as to whether or not the report is discoverable.” (*Id.*)

¹ A letter from plaintiff's counsel to defendant's counsel regarding discovery indicates that the accident occurred on October 17, 2016. (Doc. 36.)

Contrary to defendant's assertion, Public Health Law § 2805-m is inapplicable herein, since the language of that statute clearly reflects that it pertains to hospitals and not nursing homes. (See Public Health Law § 2805[1].) (See *In re Subpoena Duces Tecum to Jane Doe, Esq.*, 293 AD2d 231, 232 [4th Dept 2002] (“Nursing home facilities do not come within the definition of the term “[g]eneral hospital” set forth in Public Health Law § 2801[10] Thus, documents generated by the quality assurance committee of nursing home facilities are not afforded the privilege set forth in Public Health Law § 2805-m[1].”))

Second, although defendant correctly contends that quality assurance reports are privileged under Education Law § 6527(3), after reviewing the material at issue, this Court concludes that the documentation sought qualifies as a discoverable incident report. The front page of the report states that it is an incident report. Indeed, the nursing home's policy states that “Accident[s] and Incidents involving residents of [Amsterdam Nursing Home] that occur on or outside the premises, will be reported on the Accident/Incident form and reviewed in an effort to prevent or decrease recurrence.” (Doc. 39 at 2.) The document at issue was therefore one that was prepared as a matter of routine course pursuant to the nursing home's policy. (See *Clement v Kateri Residence*, 60 AD3d 527, 527 [1st Dept 2009] (holding that an incident report, although utilized by a nursing home's quality assurance committee, was discoverable because it was a document routinely prepared and maintained pursuant to 10 NYCRR 415.15 and 415.30); see also *Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 440 [2003] (stating that requirements imposed on nursing homes pursuant to 10 NYCRR 415.30 have no express relationship to quality assurance procedures).) Given the nursing home's policy of preparing incident reports, the record at issue is discoverable under 10 NYCRR 415.30(f).

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff Jillian Browder's motion to compel defendant Amsterdam Nursing Home Corporation (1992) a/k/a Amsterdam Nursing Home to provide the requested discovery is granted; and it is further

ORDERED that, within 30 days of the date of service of this order with notice of entry, defendant shall furnish plaintiff with all of the Accident/Incident reports relating to the underlying accident of the decedent Eileen Ramirez which occurred on October 17, 2016; and it is further

ORDERED that, within 30 days of the uploading of this order to NYSCEF, plaintiff's counsel is directed to serve a copy of this order, with notice of entry, on all other parties; and it is further

ORDERED that all counsel shall appear for a previously scheduled status conference in this matter on May 7, 2019 at 80 Centre Street, Room 280, at 2:15 PM; and it is further

ORDERED that this constitutes the decision and order of this Court.

3/28/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE