

**Newman v Mount Sinai Med. Ctr., Inc.**

2019 NY Slip Op 32457(U)

August 21, 2019

Supreme Court, New York County

Docket Number: 151392/2016

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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AJA NEWMAN,

Plaintiff,

Index No.  
151392/2016

**Decision and  
Order**

Mot. Seq. #005

- against -

THE MOUNT SINAI MEDICAL CENTER, INC.,  
THE MOUNT SINAI HOSPITAL, MOUNT SINAI  
HEALTH SYSTEM, DAVID NEWMAN, M.D.,  
ANDREW LAPSLEY, P.A., ANDY S. JAGODA, M.D.,  
XIAO HAN, M.D., LEILANI HARAYO, R.N.,  
SELENA N. HUNTER, R.N., TREMAINE REID, R.N.,  
and JOHN DOES 1-10, all the official capacity and  
individual capacities,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Aja Newman (“Plaintiff”), seeks by Order to Show Cause an order from this Court compelling Defendants The Mount Sinai Medical Center, Inc., The Mount Sinai Hospital, and Mount Sinai Health System (collectively hereinafter “Mount Sinai”) to provide the items requested in Plaintiff’s Notices for Discovery and Inspection dated August 9, 2017, November 20, 2017, and October 12, 2018 (Exhibits C, D, and E). Mount Sinai opposes this motion. Mount Sinai argues that Plaintiff seeks to litigate previously litigated issues and compel the production of documents that are nonexistent.

Plaintiff served Mount Sinai with three requests for discovery of all documents related to the sexual assaults, dated August 9, 2017 (Exhibit C), November 20, 2017 (Exhibit D), and October 12, 2018 (Exhibit E). The discovery demands requested incident reports pertaining to Defendant David Newman, M.D. (“Dr. Newman”); statements of the parties; information concerning witnesses to the incidents; and Mount Sinai’s correspondence with insurance companies and

governmental agencies concerning the incidents. Plaintiff alleges that Respondents' response to these demands have been "substantially deficient."

Plaintiff's motion focuses on his demand for statements of the parties involved in this case: Dr. Newman; Andrew Lapsley, P.A., who was allegedly immediately informed of the assault by Plaintiff; Dr. Andy S. Jagoda, who was present with Dr. Newman shortly before the assault and is believed by Plaintiff to be Dr. Newman's supervisor; and unnamed individuals who were in the Emergency Room during Dr. Newman's shift and attended to Plaintiff, who allegedly inquired about the Plaintiff's over-drugged state. Plaintiff argues that statements from these parties are necessary for any reasonable investigation to take place.

Plaintiff then contends that if there are no party statements, as Mount Sinai's counsel advised at a previous court conference, then this is proof of Mount Sinai's lack of concern to investigate the sexual assault. Plaintiff asserts that either no investigation occurred and therefore the quality assurance privilege does not apply, or an investigation occurred and party statements must exist and be discoverable. Plaintiff argues that even if the quality assurance privilege applies, Plaintiff claims that the party statements are still discoverable, since the quality assurance privilege is not intended to protect persons whose conduct is under review.

Mount Sinai contends that Plaintiff's demands from Exhibit C and D were resolved in previous motions and no appeals were taken. Mount Sinai argues that Plaintiff then attempted to repackage the same demands as listed above in the October 2018 demand (Exhibit E). Mount Sinai also argues that Plaintiff makes no new arguments regarding these demands, so these demands should be considered moot in order to prevent continuous litigation of the same issues. Mount Sinai also contends that they have produced responses to some of the demands including Dr. Newman's personnel file and credentialing files.

Mount Sinai agrees with Plaintiff that it cannot withhold discoverable party statements, but asserts that there are no such recorded party statements in its possession to produce. Mount Sinai states that despite the lack of recorded statements, Mount Sinai had a quality assurance review function in place after the Plaintiff's assault and its investigation is confidential and protected under the applicable Education and Public Health Laws.

The parties were heard on the record on June 25, 2019. The Court received the transcript from that oral argument on July 25, 2019.

### Legal Standard

New York Education law excludes “the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program [and] any report required by the department of health” from discovery. N.Y. Educ. Law § 6527 (3). There is an exception for “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.” *Id.*; Public Health Law § 2805-m (2). This statute affords hospitals a wide berth of protection regarding any documents produced for the purpose of preventing medical malpractice. In order to invoke quality assurance privilege, “[a] hospital is required, at a minimum, 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.” *Kivlehan v. Waltner*, 36 A.D.3d 597, 599 (N.Y. App. Div. 2d 2007); citing *Bush v Dolan*, 149 A.D.2d 799, 800–801 (1989).

A party “cannot produce that which it does not possess and over which it has no control.” (*Samello v Intershoe Inc.*, 78 AD2d 796 [1st Dept 1980].)

### Discussion

The discovery demands that Plaintiff seeks in this motion which relate to Mount Sinai’s investigation of Dr. Newman in connection with Plaintiff and previous patients has already been resolved in previous decisions of the Court. In those decisions, the Court has held that Mount Sinai’s investigation of these incidents is confidential and protected under the applicable Education and Public Health Laws.


As for Plaintiff’s demand for party statements, Mount Sinai agrees with Plaintiff that it cannot withhold discoverable party statements, but Mount Sinai’s attorney asserts that there are no such recorded party statements in its possession to produce. Plaintiff argues that to the extent that there are no recorded statements, Mount Sinai should be compelled to produce an affidavit from “an appropriate Mount Sinai official with knowledge who is responsible to keep such records.” The Court agrees and Plaintiff is directed to produce such an affidavit within 15 days.

Wherefore it is hereby

ORDERED that Plaintiff's motion to compel is granted only to the extent that Defendants The Mount Sinai Medical Center, Inc., The Mount Sinai Hospital, and Mount Sinai Health System shall produce an affidavit from an individual with personal knowledge attesting to whether Defendants have recorded party statements.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: AUGUST 21, 2019



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Eileen A. Rakower, J.S.C.