

Schaus v Yasgur

2019 NY Slip Op 34591(U)

June 5, 2019

Supreme Court, Westchester County

Docket Number: Index No. 53490/2017

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
NANCY SCHAUS,

Plaintiff,

-against-

DAVID YASGUR, M.D., CHARLES ELKIN, M.D.,
KURT VOELLMICKE, M.D., JOHN MICHAEL
ABRAHAMS, M.D., MARSHAL D. PERIS, M.D.,
CAREMOUNT MEDICAL, P.C., MOUNT KISCO
MEDICAL GROUP, P.C., NORTHERN WESTCHESTER
HOSPITAL CENTER,

Defendants.

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LEFKOWITZ, J.

DECISION AND ORDER

Index No.: 53490/2017
Order Date: June 3, 2019
Seq. No.: 1

The following papers were read on this motion by plaintiff seeking an order compelling defendant Northern Westchester Hospital Center (“Hospital”) to produce further responses to items 7, 8, and 10 of plaintiff’s notice for discovery and inspection dated February 5, 2019:

Order to Show Cause; Affirmation in Support with Exhibits A-C
Affirmation in Opposition with Exhibits A-B; Affidavit in Opposition by Kate O’Keefe, R.N.

Upon the foregoing papers and the proceedings held on June 3, 2019, this motion is determined as follows:

Plaintiff commenced this action seeking damages for injuries suffered as the result of defendants’ alleged medical malpractice occurring from October 16, 2014 through November 5, 2014. Plaintiff alleges, inter alia, that defendants failed to manage a T11-12 vertebral fracture which led to paralysis.

On the present motion plaintiff is seeking to compel further responses to items 7, 8 and 10 of plaintiff’s notice for discovery and inspection dated February 5, 2019:

7. The Anesthesia Record/logs for all surgical procedures performed by Dr. Krishn M. Sharma on October 20, 2014 (patient info should be redacted except for Nancy Schaus).

8. Copies of all incident reports, memoranda, statements and interviews related to the care and treatment provided to Nancy Schaus during her October 15, 2014 admission to defendant Northern Westchester Hospital. In the event that defendant objects pursuant to the Education or Public Health Law of the State of New York plaintiff hereby demands that a privilege log be provided.

10. Any policies, procedures, internal memoranda regarding the occurrence [sic] a "Sentinel Event" and the reporting of same.

In its responses dated March 6, 2019 the Hospital objected to these demands as follows:

7. Objection. Defendant objects as overbroad and burdensome and not calculated to lead to discoverable materials. This demand also violates the privacy rights of patients not involved in this lawsuit.

8. Objection. Defendant objects to plaintiff's demand as it seeks materials that are confidential under the Education Law and Public Health Law. Notwithstanding said objection, defendant is not in possession of any statements taken of the defendants herein.

10. Objection. Defendant objects to this demand as overbroad and vague.

Plaintiff argues that demand number 7 is not overbroad or unduly burdensome as it seeks only the procedures performed on October 20, 2014. Plaintiff contends that this information will indicate when each surgery was performed by defendant Marshal D. Peris, M.D. ("Peris) and non-party Krishn M. Sharma, M.D. ("Sharma"). Plaintiff argues that this information will help to establish the timeline of events on October 20, 2014 and is relevant to issues of diagnosis, treatment, and causation.

With respect to demand number 8, plaintiff argues that at a minimum the Hospital must provide a privilege log. Plaintiff also argues that all records duplicated or used by a quality assurance committee are not necessarily privileged and that it is the Hospital's burden to show that it has a review procedure and that the information for which it is seeking to assert the privilege was obtained or maintained in accordance with that review procedure. Additionally, plaintiff notes the deposition testimony of Amanda Schwartz, R.N. ("Schwartz") who testified that she provided a statement to someone on the Hospital's Quality Assurance Committee (the "Committee").

Lastly, with respect to demand number 10, plaintiff states that as an alternative to providing a full response, plaintiff would accept the table of contents for the Hospital's policies and procedures manual after the review of which plaintiff would have the option to make a more specific request.

The Hospital objects to demand number 7 arguing that plaintiff has failed to demonstrate that the information it seeks is material and necessary. The Hospital argues that plaintiff has failed to explain why the surgery schedule of Sharma, a non-party, is relevant. However, without waiving its objections, the Hospital has provided the surgical records for Sharma with patient names redacted.

With respect to the remaining demands, the Hospital maintains that these items are protected as part of its quality assurance review program established pursuant to Public Health Law (“PHL”)§ 2805-j and PHL § 2805-l. The Hospital asserts that the Quality Assurance Report (the “Report”) is shielded from disclosure pursuant to Education Law § 6527 (3) and PHL § 2805-m. The Hospital contends that the Report was generated solely for quality assurance purposes and was intended purely for internal review by the Committee. The Hospital objects to producing its “sentinel event” policy arguing that such request is essentially seeking the Hospital’s Quality Assurance policies and procedures. The Hospital further argues that any such policy is irrelevant to plaintiff’s claims as it does not impact on the care and treatment provided to plaintiff but only relates to the Hospital’s quality assurance procedures and investigations, which it asserts are fully privileged pursuant to the Public Health Law and Education Law.

Additionally, the Hospital includes a privilege log which identifies two documents: document number 1 is identified as an undated “Quality Assurance Summary of Investigation,” Medical Record No. MN00266289, FN#: 0005279826, which is four pages in length and was prepared by the Hospital’s Quality Management Department (the “Department”); and document number 2 identified as “Northern Westchester Hospital Patient Care Services Sentinel and Adverse Event Management,” effective January 2010, revised March 2012, which is six pages in length and was also prepared by the Department. Both documents are claimed to be privileged pursuant to the Public Health Law and Education Law.

The Hospital also submits the affidavit of Kate O’Keefe, the Hospital’s Vice President of Quality Management (“O’Keefe”). O’Keefe states that the Department was established in order to comply with the statutory requirements of the Public Health Law. She states that the Department collects and maintains information relating to treatment procedures and protocols, which information is used to establish and/or improve policies and procedures related to patient care. O’Keefe asserts that the overall goal of the Department is to improve the quality of patient care and Hospital services in accordance with statutory requirements.

O’Keefe states that as a member of the Committee, her duties include investigating all incidents and accidents that could affect the quality of care provided to patients. She states that the purpose of the investigations that she conducts as a member of the Committee is to identify any deficiencies in care, which would then be discussed only at the Committee meetings, in order to devise a plan of correction (if appropriate) and to prevent any further recurrence.

O’Keefe avers that she has reviewed the file maintained by the Hospital pertaining to the internal investigation that was conducted concerning plaintiff. She states that after her office completed the Quality Assurance investigation into this incident the Report was prepared. She

states that the Report was prepared in conjunction with the Hospital's Quality Management program which was created to comply with the Hospital's statutory obligations pursuant to Education Law §6527(3) and PHL §§2805-j and 2805-l. She avers that the Report does not include any interviews or statements taken from anyone involved in plaintiff's care and that the report does not include any other documents. She further avers that the report is four pages long and is largely a summary of the care provided to plaintiff. She states that the Report was reviewed by the Committee to address any quality of care issues that were identified, for the purposes of improving patient care. O'Keefe states that her results were shared solely with the Committee members. She states that the investigation was performed with the understanding and expectation that it would be kept strictly confidential and would not be subject to disclosure in a medical malpractice lawsuit pursuant to PHL §2805-m and Education Law §6527(3). She states the Report was prepared by her in her capacity as a member of the Committee and that the Report is filed separately from plaintiff's medical records as information to be used for quality assurance purposes only. O'Keefe states that the "sentinel event" policy is part of the Hospital's Quality Assurance policy.

It is axiomatic that under CPLR 3101(a)(1), there must be full disclosure of all matters "material and necessary" in the prosecution or defense of an action. The phrase "material and necessary" is interpreted liberally to require disclosure, on request, of any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Matter of Kapon*, 23 NY3d 32 [2014], *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Trial courts have broad discretion to supervise discovery and enter appropriate remedies to ensure the fair and efficient conduct of discovery (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). The test is one of usefulness and reason (*see quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]), and courts have articulated the "material and necessary" standard to include not only relevant evidence but also discovery of matters "reasonably calculated to lead to the discovery information bearing on the claims" (*see Redmond v Hanypsiak*, 153 AD3d 1374 [2d Dept 2017]; *Matter of Harriman Estates at Aquebogue, LLC v Town of Riverhead*, 151 AD3d 854 [2nd Dept 2017]; *D'Alessandro v Nassau Health Care Corp.*, 137 AD3d 1195 [2d Dept 2016]).

Generally, proceedings and records relating to performance of a medical or quality assurance review function are protected from disclosure, and the party seeking to invoke such privilege bears the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes (*see Education Law 6527[3]*); *Kneisel v QPH, Inc.*, 124 AD3d 729 [2d Dept 2015]; *Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]; *Daly v Brunswick Nursing Home, Inc.*, 95 AD3d 1262 [2d Dept 2012]; *Estate of Mirco Teta v Mercy Med. Ctr.*, 60 AD3d 624 [2d Dept 2009]; *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41 [2d Dept 2003]). The purpose of the discovery exclusion is to 'enhance the objectivity of the review process' and to assure that medical review committees may frankly and objectively analyze the quality of health services rendered' by hospitals (*see Logue v Velez*, 92 NY2d at 17, *quoting Mem of Assembly Rules Comm.*, Bill Jacket, L 1971, ch 990 at 6). The privilege attaches to the proceedings and

work product of a hospital's quality assurance committee (*see Park Assocs. v N.Y. State Attorney General*, 99 NY2d 434 [2003]).

PHL§ 2805-j requires each hospital to maintain a coordinated program for the identification and prevention of, inter alia, medical malpractice, including the establishment of a quality assurance committee (PHL § 2805-j [1]). Moreover, PHL § 2805-m provides, inter alia, that information collected and maintained pursuant to PHL§ 2805-j and any incident reporting requirements shall be kept confidential (PHL§ 2805-m [1]).

The party seeking to assert the privilege of quality assurance bears the burden of demonstrating that the information and documents demanded were obtained or prepared in accordance with the relevant statutes (*see Daly v Brunswick Nursing Home*, 95 AD3d 1262 [2d Dept 2012]; *Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]; *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41 [2d Dept 2004]). In order to assert the quality assurance privilege, a hospital is required to demonstrate that it has a review procedure and the information claimed to be privileged was obtained or maintained in accordance with the review procedure (*Kivlehan v Waltner*, 36 AD3d at 597).

At oral argument plaintiff stated that although the Hospital has provided documents responsive to demand number 7, those responses are incomplete. With respect to demand number 8, the Hospital contends that the only document responsive to this demand is the Report. While the Hospital has provided an affidavit attesting to the existence of the Hospital's Quality Assurance program and that the Report was created in accordance with that program, an in camera review of the Report is necessary to ensure that it is subject to the statutory privilege.

With respect to demand number 10, the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), a national accreditation system for monitoring healthcare quality, defines a sentinel event as: "[a]n unexpected occurrence involving death or serious physical or psychological injury, or the risk thereof. Serious injury specifically includes loss of limb or function" (Joint Commission on Accreditation of Healthcare Organizations, Comprehensive Accreditation Manual for Hospitals, p. 73 [2004]). The Hospital's objections with respect to this demand focus on the production of its policies and procedures for the reporting of a sentinel event on the grounds of privilege and relevance. It is unclear whether the Hospital possesses documents in addition to its policies and procedures which are responsive to this demand. While some of the documents responsive to this demand may be privileged under Education Law § 6527(3) (*see Zion v New York Hosp.*, 183 AD2d 386, 388 [1st Dept 1992]), it is unclear that the privilege would extend to all of the documents responsive to this demand. Accordingly, an in camera review of these documents is appropriate to determine relevance and the applicability of privilege.

Accordingly, it is hereby:

ORDERED that plaintiff's motion is granted to the extent that: insofar as plaintiff contends that the responses proffered with respect to demand number 7 are inadequate, on or before June 17, 2019, plaintiff shall file to NYSCEF an affirmation/affidavit detailing in what

respect these responses are inadequate and what further information plaintiff seeks in this regard, as well as explaining the relevance of the additional information sought; with respect to demands number 8 and 10 defendant Northern Westchester Hospital Center is directed to provide the Quality Assurance Report identified on its privilege log as "Quality Assurance Summary of Investigation," Medical Record No. MN00266289, FN#: 0005279826, and all documents responsive to demand number 10 of plaintiff's notice for discovery and inspection dated February 5, 2019, including but not limited to the document which appears on the privilege log as "Northern Westchester Hospital Patient Care Services Sentinel and Adverse Event Management" to the Office of the Clerk for the Compliance Part, 8th Floor, for an in camera review by June 17, 2019; and it is further

ORDERED that the parties shall appear for a conference in the Compliance Conference Part in Courtroom 800, on July 19, 2019, at 9:30 A.M.; and it is further

ORDERED that plaintiff shall serve a copy of this Decision and Order with notice of entry upon all parties within three days thereof.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

June 5, 2019



HON. JOAN B. LEFKOWITZ, J.S.C.

Service upon all counsel via NYSCEF

cc: Compliance Part Clerk