

Gibbs v Kings Harbor Health Servs., LLC

2019 NY Slip Op 34921(U)

March 5, 2019

Supreme Court, Bronx County

Docket Number: Index No. 23705/15

Judge: Joseph E. Capella

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.

NEW YORK SUPREME COURT - COUNT OF BRONX
PART 23

Case Disposed
Settle Order
Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index #: 23705/15

-----X
MARY GIBBS, Individually and as the Daughter and
proposed Guardian Ad Litem of Henry Gibbs, et al

DECISION/ORDER

Plaintiffs,

Present:

- against -

Hon. Joseph E. Capella
J.S.C.

KINGS HARBOR HEALTH SERVICES, LLC,

Defendant.

-----X
The following papers numbered 1 to 4 read on this motion, noticed on November 19, 2018, on
the Motion Calendar of _____.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION, CROSS MOTION, AFFIDAVITS & EXHIBITS	1, 2
ANSWERING AFFIDAVIT AND EXHIBITS	4
MEMO OF LAW	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THIS MOTION IS
DECIDED AS FOLLOWS:

This nursing home “proposed” class action suit involves the care and treatment provided to the plaintiffs and their fellow nursing home patients during their admission at defendant’s facility. On May 10, 2018, the Appellate Division, First Department modified an earlier decision by Justice Green, which denied plaintiffs’ motion for class certification, so as to allow pre-class certification discovery and upon completion of same, allow renewal of plaintiffs request for class certification. On September 21, 2018, plaintiffs served upon defendant a second “more tailored” pre-certification request for information and production of documents,¹ and a proposed HIPAA-qualified protective order to govern the exchange of confidential documents and information. In response, the

¹ The Court finds that this second “more tailored” pre-certification request essentially superceded and replaced plaintiffs’ earlier request.

defendant seeks by notice of motion to strike plaintiffs' request for information and production of documents, and HIPAA-qualified protective order, and also seeks a protective order. (CPLR § 3103(a).) According to defendant, the request is, *inter alia*, overbroad, vague and unduly burdensome, and much of the discovery sought is privileged pursuant to Education/Public Health Law. In opposition, the plaintiffs cross-moved to compel defendant to produce the documents and information being sought (CPLR 3124), and for the entry of a HIPAA-qualified protective order.

The plaintiffs' complaint alleges in sum and substance that defendant fails to provide appropriate care for its residents, and that conditions at the facility were unsafe and violated numerous laws, rules and regulations. A review of plaintiffs' request dated September 21, 2018, reveals that most of the first eight items sought information and documents that are relevant in that they seek opinions and/or statement regarding the operation of the facility. The items sought include opinion surveys (#1), complaints (#2 & 3), resident council meeting documents (#4), minutes of the governing body (#5), investigations by prosecutors and/or regulators (#6), and documents related to in-house investigations (#8). The Court is satisfied that the aforementioned may produce evidence that will assist plaintiffs' class certification (CPLR 3101(a)); however, request #7, which seeks statements from *any person pertaining to the claims in this litigation*, is overly broad.

Requests 9 through 11 seek information and documents that are relevant to determine staffing levels at the facility. The items sought include the persons who worked at the facility (#9), their hours (#10), and reports concerning payroll (#11). Requests 13 through 18 likewise appear relevant to this action in that they seek government documents concerning services/conditions/incidents at the facility (#13), policies and/or procedures relating to admission, care, services, training and supervision (#14), Minimum Data Set/Patient Review Instrument (#15), policies relating to retention/destruction of records (#16), organization charts (#17), and declaration sheets

(#18). On the other had, it is unclear what relevance there is to the requested computer software user manual(s) for program(s) that involved staffing (#12), when the raw data itself is being provided. Therefore, based on the aforementioned, only request numbers 7 and 12 are stricken. In addition, as some of the information and documents requested may contain protected health information (CPLR 3103(a)), the plaintiffs are directed to submit to the Court a HIPAA-qualified protective order that is in accordance with the one annexed to plaintiffs' cross-motion.

The defendant also alleges that the information sought is privileged pursuant to the New York State Education Law (§ 6527(3)) and Public Health Law (§ 2805). These laws shield from disclosure the records of a medical or quality assurance proceeding or malpractice prevention program. (*Logue v Velez*, 92 NY2d 13 [1998].) And in doing so it is believed that the objectivity of the review process is enhanced, and the medical review committee(s) may frankly and objectively analyze the quality of the health services rendered. (*Lilly v Turecki*, 112 AD2d 788 [4th Dept 1985].) In other words, it is designed to encourage thorough and candid peer review of physicians, and ultimately improve the quality of medical care. Here, it is not abundantly clear on its face that the information sought is privileged. In addition, there is no affidavit submitted from someone at the facility (with personal knowledge) in support of defendant's motion to suggest that the requested information is part of a medical or quality assurance proceeding or malpractice prevention program. Instead, the allegation that this information is privileged is made solely by defendant's attorney in very conclusory terms, and as such, the defendant has not met its burden of establishing a privilege. Therefore, based on the aforementioned, the defendant's motion is granted only to the extent of striking request numbers 7 and 12, and plaintiffs' cross-motion to compel defendant to produce the requested information (less numbers 7 and 12), and for the entry of a HIPAA-qualified protective order is granted accordingly.

Plaintiffs are directed to serve a copy of this decision/order with notice of entry by

first class mail upon defendant within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

3/5/19

Dated

Hon. _____

Joseph E. Capella, J.S.C.

