

**Cabreja v "John/Jane Doe Physicians"**

2021 NY Slip Op 31081(U)

January 4, 2021

Supreme Court, Bronx County

Docket Number: 29676/17

Judge: Joseph E. Capella

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This opinion is uncorrected and not selected for official publication.

**NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART 23**

Case Disposed   
Settle Order   
Schedule Appearance

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

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**LUZ CABREJA, as Administratrix for the Estate of  
MARIA CABREJA,**

Index #: 29676/17  
**DECISION/ORDER**

Plaintiff,

Present:  
**Hon. Joseph E. Capella**  
J.S.C.

- against -

**“JOHN/JANE DOE PHYSICIANS,” individually and as an employees/agents of BAY PARK CENTER FOR NURSING AND REHABILITATION, (said names being fictitious and indiscernible from the medical records), “JOHN/JANE DOE R.N.S,” individually and as an employees/agents of BAY PARK CENTER FOR NURSING AND REHABILITATION, (said names being fictitious and indiscernible from the medical records), “JOHN/JANE DOE medical clinicians,” individually and as an employees/agents of BAY PARK CENTER FOR NURSING AND REHABILITATION, (said names being fictitious and indiscernible from the medical records), “JOHN/JANE DOE security officers,” individually and as an employees/agents of BAY PARK CENTER FOR NURSING AND REHABILITATION, (said names being fictitious and indiscernible from the medical records), “JOHN/JANE DOE medical administrators,” individually and as an employees/agents of BAY PARK CENTER FOR NURSING AND REHABILITATION, (said names being fictitious and indiscernible from the medical records), BAY PARK CENTER FOR NURSING AND REHABILITATION, “JOHN/JANE DOE Physicians, R.N.S, Medical Clinicians, Nursing Home Personnel and Administrators,” individually and as employees/agents of MOSHOLU PARKWAY NURSING AND REHABILITATION CENTER, LLC (said names being fictitious and indiscernible from the medical records), and MOSHOLU PARKWAY NURSING AND REHABILITATION CENTER, LLC ,**

Defendants.

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The following papers numbered 1 to 5 read on this motion submitted on August 17, 2020.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
CROSS MOTION AND EXHIBITS	2
REPLY AFFIDAVIT AND EXHIBITS	3 - 5

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS GRANTED AND CROSS MOTION DENIED AS FOLLOWS:

According to the complaint, on or about January 11 and 12, 2017, the decedent, Maria Cabreja, who at the time was 63 years old and suffering from Alzheimer's Disease, was sexually assaulted while she was a resident at defendant, Bay Park Center For Nursing and Rehabilitation (Bay Park). The sexual assault was allegedly committed by a fellow Bay Park resident.<sup>1</sup> The claims against the defendants relate to general negligence, negligent supervision and security. On December 4, 2017, some two months after commencing this action against Bay Park, Maria Cabreja died and her daughter, Luz Cabreja, was named Administrator. In August 2018, Bay Park filed a third-party complaint against Mosholu Parkway Nursing and Rehabilitation Center, LLC (Mosholu). The third-party complaint alleges, *inter alia*, that in January 2017, the fellow resident was transferred from Mosholu to Bay Park. It goes on to allege that at that time, Mosholu failed to disclose to Bay Park that in December 2016, said fellow resident was involved in an incident of inappropriate sexual conduct while a resident at Mosholu. The third-party

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<sup>1</sup> Although the parties know the identity of the fellow resident, this individual's name shall not be disclosed in this decision. Instead this individual shall merely be referred to as the fellow resident.

complaint further alleges that Mosholu's failure to disclose this incident prevented Bay Park from properly determining whether it could meet the individual needs of the fellow resident while simultaneously protect the health, safety and rights of others.

By notice of motion dated May 4, 2020, plaintiff seeks to compel the defendants to provide (1) the complete chart properly redacted for HIPAA-protected or other privileged information of the fellow resident, (2) incident reports involving the fellow resident and the defendants' personnel, contract employees, and staff properly redacted for HIPAA-protected or other privileged information, (3) documents referring to the fellow resident as being uncooperative, violent, loud, and/or disruptive properly redacted for HIPAA-protected or other privileged information, and (4) privilege log for any documents or information withheld for assertions of privilege. Both Mosholu and Bay Park oppose plaintiff's motion, but only Mosholu cross moved for a protective order barring disclosure of Mosholu's records pertaining to the fellow resident.

According to Mosholu, disclosure of these records would violate the Health Insurance Portability and Accountability Act (HIPAA) of 1996, CPLR § 4504(a) and Public Health Law §§ 2803-c and 2805, and as such they are seeking a protective order (CPLR § 3103(a)). Mosholu is a nursing and rehabilitation center that provides, *inter alia*, medical and skilled nursing care, and the facility is covered under both statutes. Under HIPAA, protected health information is broadly defined as any individually identifiable health information created by a health care provider relating to the physical or

mental health of an individual. (*Gunn v Sound Shores*, 5 AD3d 435 [2<sup>nd</sup> Dept 2004].) In addition to HIPAA, Mosholu argues that the fellow resident's medical and health records are also privileged under CPLR § 4504(a), which is a physician-patient privilege rule, and Public Health Law 2803-c, which is explicitly addressed to nursing homes and entitles every patient to a right of privacy in treatment and care. It is Mosholu's position that they are prohibited from disclosing any of the requested records absent a waiver of these privileges by the fellow resident.

Lastly, Mosholu also alleges that these records are privileged pursuant to Public Health Law § 2805, which shields from disclosure the records of a medical or quality assurance proceeding or malpractice prevention program. (*Logue v Velez*, 92 NY2d 13 [1998].) Unlike the blanket privilege associated with HIPAA, CPLR § 4504(a) and Public Health Law § 2803-c, the records associated with Public Health Law § 2805 must be part of a medical or quality assurance proceeding or malpractice prevention program. In shielding such records, it is believed that the objectivity of the review process would be 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 [4<sup>th</sup> Dept 1985].) In other words, it is designed to encourage thorough and candid peer review of physicians and/or nurses, and ultimately improve the quality of medical care. Here, however, there is no affidavit submitted from someone with personal knowledge alleging 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 Mosholu's attorney in very conclusory terms, which is insufficient to establish a privilege under Public Health Law § 2805.

As previously mentioned, Bay Park's third-party complaint alleges, *inter alia*, that Mosholu knew about the fellow resident's prior physical and/or inappropriate sexual conduct. It also goes on to allege that Mosholu reported this conduct to the NYS Department of Health, but did not report this to Bay Park. This would appear to support plaintiff's argument that it does not matter to her what the fellow resident's medical condition is, but only whether this resident posed a threat to others around him and whether Mosholu and/or Bay Park knew about this threat. A balance must be made between plaintiff's entitlement to full disclosure of all matter material and necessary needed to assist her in preparing for trial (CPLR 3101(a)), and the fellow resident's protected health information (HIPAA, CPLR § 4504(a) and Public Health Law § 2803-c).

In a similar action entitled *Moore v St. John's*, (89 AD2d 618 [2<sup>nd</sup> Dept 1982]), plaintiff was a patient at defendant-hospital when she was assaulted by another patient. The Second Department determined that plaintiff was entitled to inspect the assailant's hospital records to determine whether the hospital had knowledge of the other patient's violent propensity and whether the hospital did enough to ensure the safety of its other patients. It recognized that although all medical information in the records was privileged, plaintiff was entitled to any nonmedical information in the hospital's records,

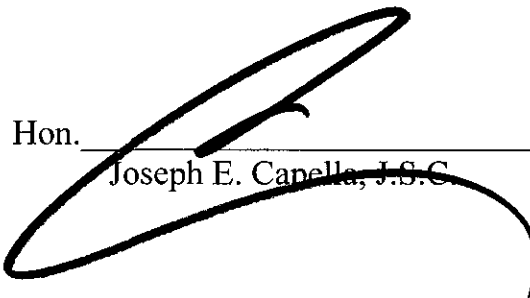
particularly information that relates to any prior assaults or similar violent behavior in order to aid plaintiff in establishing knowledge on the part of defendant.

In *Mayer v Albany*, (37 AD2d 1011 [3<sup>rd</sup> Dept 1971]), while visiting her father in the defendant-hospital's psychiatric ward, plaintiff was assaulted by another patient. Plaintiff, who claimed that the hospital failed to properly supervise dangerous patients, sought disclosure of those records pertaining to the assailant's propensities. The Third Department held that plaintiff was entitled to all nonmedical data pertaining to prior assaults or attempted assaults by the patient, including the time, place and surrounding circumstances, together with the date the information came within the knowledge of defendant. The Third Department also stated that plaintiff was entitled to know the length and number of times the patient was confined to defendant's institution.

These decisions reflect a fair balance between plaintiff's entitlement to full disclosure (CPLR 3101(a)), and the fellow resident's protected health information. Based on the aforementioned, the Court is satisfied that plaintiff is entitled to all nonmedical information regarding disruptive behavior by the fellow resident. Therefore, plaintiff's motion is granted and Mosholu's cross motion is denied. Defendants are ordered to provide plaintiff with all records and/or reports regarding any prior assault or violent or disruptive behavior by the fellow resident, including the date, time, location and surrounding circumstances, except that any medical information shall be redacted. Defendants shall prepare a privilege log for any information withheld and/or redacted.

Plaintiff is directed to serve a copy of this decision with notice of entry by first class mail upon all sides within 25 days of receipt of copy of same. This constitutes the decision and order of this court.

1/4/21  
Dated

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