

Malaspina v Westchester Med. Ctr. Health Care Corp.
2021 NY Slip Op 33778(U)
November 15, 2021
Supreme Court, Westchester County
Docket Number: Index No. 68268/2019
Judge: Joan B. Lefkowitz
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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
PETER MALASPINA,

Plaintiff,

DECISION & ORDER

-against-

Index No. 68268/2019

Motion Seq. No. 2

WESTCHESTER MEDICAL CENTER HEALTH
CARE CORPORATION,

Defendant.
-----X

LEFKOWITZ, J.

The following papers were read on plaintiff's motion for an order pursuant to CPLR 3124 compelling defendant to provide certain documents demanded in plaintiff's notice for discovery and inspection dated November 30, 2020 and plaintiff's supplemental notice for discovery and inspection dated July 26, 2021, and for such further relief as the Court deems just and proper.

Notice of Motion - Affirmation in Support - Exhibits - Affirmation of Good Faith -
Memorandum of Law
Affirmation in Opposition - Exhibits
Affirmation in Reply

Upon the foregoing papers, this motion is determined as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained on August 8, 2018 when he was a patient on the fourth floor of defendant hospital being attended to by "Employee Doe." It is alleged that upon hearing gunshots, Employee Doe ran from plaintiff's hospital room, knocking over a pitcher of water and leaving the door to the room open. Plaintiff allegedly got out of bed to shut the door in an effort to protect himself and slipped on the spilled water, sustaining injuries. Plaintiff alleges defendant caused, allowed and permitted a dangerous and hazardous condition to remain and exist. It is alleged that defendant failed to develop, implement and update its plans and procedures for active shooter situations, and failed to adequately train its employees and agents in the proper procedures to be followed to provide for the security and protection of patients in active shooter situations (Plaintiff's Exhibit A).

Plaintiff served a notice for discovery and inspection dated November 30, 2020 and a supplemental notice for discovery and inspection dated July 26, 2021 seeking, in relevant part, the following documents:

- i. All documents received by defendant and/or Westchester Medical Center from any federal, state or local government agency or any national, state or local hospital association with respect to information, updates, suggested training and/or protocols concerning active shooters for the time period August 2015 to present (Plaintiff's Exhibit D, demand 11).
- ii. All documents with respect to the investigation by or on behalf of defendant and/or Westchester Medical Center with respect to the active shooter incident at the hospital on August 8, 2018, including but not limited to the incident report, any investigative reports prepared with respect to said incident, and photographs, films or recordings and any archived video referenced by Thomas Belfiore, Westchester Medical Center's Chief Security Officer, at his deposition on July 15, 2021 (Plaintiff's Exhibit G, demand 9).
- iii. All documents maintained by Chief Security Officer Belfiore with respect to the active shooter incident at Westchester Medical Center on August 8, 2018, as testified to by him at his deposition, including but not limited to notes and reports prepared by him with respect to his investigation of the incident, written briefings regarding same provided to him by other Westchester Medical Center personnel or the Westchester County Department of Public Safety ("County Police"), and a Power Point with respect to the incident (Plaintiff's Exhibit G, demand 10).
- iv. All documents received from T & M Protective Services with respect to its external review of the active shooter incident at Westchester Medical Center on August 8, 2018 (Plaintiff's Exhibit G, demand 11).

Defendant served a response dated July 19, 2021 objecting to the demand 11 in the initial notice for discovery and inspection, and providing the hospital's policy and procedure titled "Code Silver – Person with a Weapon/Hostage Response Plan" (Plaintiff's Exhibit F, p. 11). Defendant served an August 19, 2021 response to the supplemental notice for discovery and inspection, objecting to demands 9, 10 and 11 and asserting privileges pursuant to Education Law 6527(3) and Public Health Law 2805-1 (Plaintiff's Exhibit H). Defendant provided a handout used in 2018 for active shooter training (Plaintiff's Exhibit H, p.10). Defendant provided a privilege log and an affidavit of Chief Security Officer Belfiore in support of the privilege log (Plaintiff's Exhibits I, J). Defendant produced the video footage requested by plaintiff and plaintiff no longer seeks photographs or videos (Memorandum of Law in Support, p. 7). This matter was due to be certified as trial ready in August 2021, then in September 2021.

Plaintiff now seeks disclosure of the documents at issue, arguing defendant has failed to demonstrate the items sought were prepared for a quality assurance review of the incident or reporting to the Department of Health pursuant to statute. Plaintiff argues the documents at issue should be disclosed, or alternatively, produced for an in camera review by the Court for a determination as to whether the items are protected quality assurance material.

In opposition, defendant argues the documents at issue relate to Westchester Medical Center's response and post-incident investigation into an active shooter incident, determined to be a murder-suicide, on August 8, 2018. Defendant argues the documents sought are not relevant to plaintiff's alleged slip and fall, plaintiff improperly seeks documents related solely to the shooting, and the documents at issue are not relevant to defendant's training and preparedness for an active shooter incident. Defendant contends that documents related to the investigation, the incident report, the notes from interviews of Westchester Medical Center staff, and the Power Point sought are privileged pursuant to Education Law 6527(3) and Public Health Law 2805-l. Defendant argues the incident report was prepared by Security Officer Keisha McQueen, in part, to provide details of the active shooter incident to the hospital's Quality Assurance Department in order to assist them in their duties to investigate and report the incident (Affirmation in Opposition, p. 12; Plaintiff's Exhibit I, J). Defendant asserts that the incident was reported to the Department of Health (Plaintiff's Exhibit J, p. 2).

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD2d 1106 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Plaintiff demanded all documents received by defendant and/or Westchester Medical Center from any federal, state or local government agency or any national, state or local hospital association with respect to information, updates, suggested training and/or protocols concerning active shooters for the time period August 2015 to present (Plaintiff's Exhibit D, demand 11). On August 25, 2021, this Court issued a compliance conference order directing that "[d]efendant shall not be obligated to respond to plaintiff's demand for federal, state and local training materials regarding active shootings, etc.; said demand is overly broad" (Defendant's Exhibit D). Plaintiff did not timely move to modify or amend the order, and failed to serve a more specific or limited demand. Although plaintiff argues that defendant failed to timely object to this discovery demand in accordance with CPLR 3122(a)(1), this failure does not foreclose inquiry into the propriety of the information sought where the demand is palpably improper or seeks privileged material (*Olmann v Willoughby Rehabilitation & Health Care Ctr., LLC*, 186 AD3d 837 [2d Dept 2020]; *Accent Collections, Inc. v Cappelli Enterprises, Inc.*, 84 AD3d 1283 [2d Dept 2011]; *Holness v Chrysler Corp.*, 220 AD2d 721 [2d Dept 1995]). Here, the demand was properly

stricken in the compliance conference order, as it is overbroad, lacks specificity, seeks irrelevant material, and is palpably improper.

Plaintiff fails to demonstrate on this motion that the investigations after the active shooter incident, and the documentation and reporting related thereto, are material and necessary to plaintiff's allegations in this slip and fall matter. With respect to demands 9, 10 and 11 in plaintiff's supplemental notice for discovery and inspection, the following documents are not relevant to plaintiff's claims: documents related to the investigation by or on behalf of defendant with respect to the active shooter incident; the incident report prepared by Security Office Keisha McQueen; any investigative reports prepared related to the incident; notes and reports prepared by Chief Security Officer Belfiore related to his investigation of the incident; written briefings regarding the incident provided to Chief Security Officer Belfiore by Westchester Medical Center personnel, the Westchester County Department of Public Safety, or the Westchester County Police; the Power Point prepared by Chief Security Officer Belfiore and used during a presentation to the Westchester Medical Center Board of Directors; and documents received from T & M Protective Services with respect to its external review of the active shooter incident (Plaintiff's Exhibit G, demands 9, 10, 11). The demands for these items in plaintiff's supplemental notice for discovery and inspection are stricken as palpably improper.

Furthermore, defendant provided a detailed privilege log asserting that the incident report related to the murder-suicide incident on August 8, 2018, notes from interviews of Westchester Medical Center staff members conducted by Chief Security Officer Belfiore, and a Power Point regarding the incident are privileged pursuant to Education Law 6527(3) and Public Health Law 2805-l (Plaintiff's Exhibit I). A party seeking to assert the quality assurance privilege bears the burden of demonstrating that the documents demanded were prepared in accordance with the relevant statutes (*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]). The party 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 597 [2d Dept 2007]). Records generated by or at the behest of a quality assurance committee for quality assurance purposes are privileged. Documents simply duplicated by the quality assurance committee are not necessarily privileged (*Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]; *Marte v Brooklyn Hospital Center*, 9 AD3d 41 [2d Dept 2004])). "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" (*Logue v Velez*, 92 NY2d 13 [1998][internal quotations omitted]).

The Education Law and Public Health Law shield from disclosure the proceedings and records related to performing either a medical review or quality assurance review function, records related to participation in a medical malpractice prevention program, and any adverse event report required by the Department of Health pursuant to Public Health Law 2805-l (Education Law §6527[3]; Public Health Law §2805-m[2]; *Daly v Brunswick Nursing Home*, 95 AD3d 1262 [2d Dept 2012]; *Leardi v Lutheran Med. Ctr.*, 67 AD3d 651 [2d Dept 2009]). All hospitals are required to report certain adverse events to the Department of Health, including patient deaths in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards (Public Health Law §2805-l [1], [2])). Every hospital is required to maintain a medical malpractice prevention

program, including the establishment of a quality assurance committee with the responsibility to review the services rendered in the hospital, to insure that information gathered is utilized to review and revise hospital policies and procedures, and to maintain and collect information concerning incidents injurious to patients (Public Health Law §2805-j[1][a], [e]).

Defendant provided an affidavit from Chief Security Officer Belfiore stating the August 8, 2018 incident resulted in the death of a patient who was shot and killed by her husband, and he was advised that the incident was reported to the Department of Health. The incident report was provided to the Quality Assurance Department and was prepared in part to assist them in their duties to investigate and report the incident. The investigation conducted by Westchester Medical Center after the murder-suicide incident was a collaborative effort between security staff, risk management and quality assurance. "The purpose of the investigation was to gather information to be used to comply with the Department of Health requirements to report such incidents, and to ensure that the hospital's incident response policies and practices were complied with" (Plaintiff's Exhibit J, p. 2).

Defendant demonstrates that it has a quality assurance review process and the investigation into the murder-suicide incident was conducted in furtherance of a quality assurance function and to comply with Department of Health reporting requirements. With respect to demands 9 and 10 in plaintiff's supplemental notice for discovery and inspection, the following documents are privileged: the incident report prepared by Security Office Keisha McQueen, and notes from interviews prepared by Chief Security Officer Belfiore related to his investigation of the incident (Plaintiff's Exhibits G, I, J; Public Health Law §2805-l[1], [2][a], Public Health Law §2805-j[1][a], [e]). This Court finds these documents are protected from disclosure under Education Law 6527[3] and Public Health Law 2805-m[2].

Insofar as defendant asserts the Power Point is privileged pursuant to Education Law 6527 and Public Health Law 2805-l, there is insufficient information provided on this motion to determine whether the Power Point was prepared or presented for the purpose of performing a quality assurance function. However, as determined herein, plaintiff fails to demonstrate the Power Point is relevant to the allegations in this matter.¹

In view of the foregoing, it is

ORDERED that plaintiff's motion for an order compelling defendant to provide certain documents demanded in plaintiff's notice for discovery and inspection dated November 30, 2020 and plaintiff's supplemental notice for discovery and inspection dated July 26, 2021 is denied; and it is further

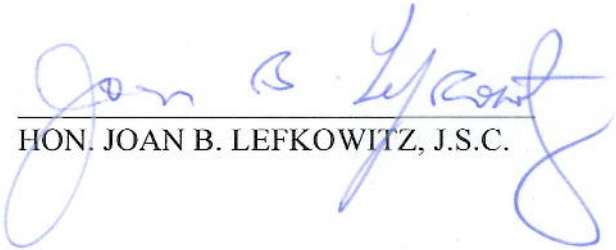
ORDERED that this action shall be certified as trial ready and a trial readiness order shall issue forthwith; and it is further

¹ In light of this determination, the Court declines to consider whether the Power Point is privileged under the Public Officers Law or the Public Authorities Law (Defendant's Affirmation in Opposition, p. 14-15).

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within seven (7) days. Defendant shall file proof of service on the NYSCEF website within five (5) days of service.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
November 15, 2021


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

TO: All Counsel via NYSCEF

cc: Compliance Conference Part Clerk