

London v Mount Sinai Hosp.

2023 NY Slip Op 32542(U)

July 24, 2023

Supreme Court, New York County

Docket Number: Index No. 805333/2021

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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AMY MYERS LONDON, as Executor of the Estate of Ronald London, and AMY MYERS LONDON, individually,

Plaintiff,

INDEX NO. 805333/2021

MOTION DATE 05/05/2023

MOTION SEQ. NO. 001

- v -

THE MOUNT SINAI HOSPITAL and MOUNT SINAI HOSPITALS GROUP, INC.,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for DISCOVERY-STRIKE PLEADINGS/X-MOTION FOR PROTECTIVE ORDER

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, and wrongful death, the plaintiff moves pursuant to CPLR 3126 to strike the defendants' answer for their failure to produce medical records that are stored in their EPIC electronic healthcare records storage system, or, in the alternative, to provide a proper Jackson affidavit (Jackson v City of New York, 185 AD2d 768 [1st Dept 1992]) describing the particulars of any search that they undertook to locate those records. The plaintiff also seeks the imposition of sanctions for frivolous litigation conduct. The defendants oppose the motion, and cross-move pursuant to CPLR 3103 for a protective order enjoining the plaintiff from engaging in further discovery regarding the production and exchange of "hand-off" notes, an audit trail, audit log, or any similar metadata. The plaintiff's motion is granted to the extent that the defendants shall conduct and complete a further, diligent search for relevant "hand-off" notes and shall produce them within 30 days of the entry of this order, as described herein, or, if they cannot be located, shall provide a proper Jackson affidavit as

described herein, produce the complete EPIC electronic chart referable to the hospitalization of the plaintiff's decedent, and produce audit trails and metadata with respect to that electronic chart. The plaintiff's motion is otherwise denied. The defendants' cross motion is denied.

In a status conference order dated December 14, 2022, this court directed that, on or before January 20, 2023, the defendants were required to respond to the plaintiff's December 6, 2022 demand to produce those portions of their medical records that contained "hand-off" forms with respect to the hospitalization of the plaintiff's decedent and other portions of the records contained in the defendants' electronic EPIC records storage system. Alternatively, the defendants were directed to provide a *Jackson* affidavit if those records could not be located. Hand-off notes are written notes generated by nurses or physicians at a hospital that indicate when that nurse or physician was completing his or her shift, and thus was "handing off" the patient to the nurse or physician who was responsible for the next shift. On January 31, 2023, the defendants emailed the plaintiff the affidavit of Raymond Cosner, their Vice President of Health Information Management, who asserted that Mount Sinai Hospital "utilizes an electronic medical record ('EMR') system, called 'EPIC,'" explaining that "[p]roviders, enter information into the patient's chart via the EMR, which is then stored on a server." Cosner also averred that "hand off" notes are not maintained as part of the "legal medical record." The defendants did not produce the hand-off notes at that juncture, not did they specifically allege that Cosner's affidavit was a proper *Jackson* affidavit.

A proper *Jackson* affidavit here required a person with knowledge of the defendants' record-keeping protocols, such as Cosner, to undertake a diligent for those hand-off notes, and to explain in the affidavit what that search entailed (if any such search were indeed undertaken), what paper or electronic records were searched, how those paper or electronic records were accessed and searched, who conducted the search, how long the search took to undertake, and the results thereof. Cosner's simple statement that hand-off notes were not included in the defendants' EPIC system as part of the "legal medical record," without more, is insufficient to

satisfy the defendants' burden of undertaking a diligent search for those records or providing a full explanation of the nature and extent of the search. Cosner did not assert that there were no hand-off notes to be found in the entirety of the EPIC electronic records, only that they were not part of the "legal medical record." Nor did he assert that there were no hand-off notes that were maintained in paper form as part of the complete medical record.

The court notes that, in support of her motion, the plaintiff submitted portions of the defendants' deposition transcripts that indicated that hand-off notes were indeed generated in the course of her decedent's hospitalization, as well as the expert affidavit of Saira Pasha, an attorney who also has extensive experience managing records systems for medical facilities. Pasha explained that "[t]he handoff report is a templated tool in Epic to assist providers with communicating pertinent information at the time of transfer of care or discharge." She further averred that

"[t]he handoff document is part of the patient's Epic chart, also known as the patient's electronic medical record. Either the report itself or the data components of this document can be reproduced easily.

"There is significantly more information contained in the patient's Epic chart than has been produced.

"The defendant institution has limited production of medical records to documents it decided is part of the 'legal medical record.' This does not represent all of a patient's medical records created in the system.

"In the healthcare setting, 'legal medical record' refers to a subset of records from the patient's electronic record that an institution decides it will produce in response to a formal attorney's request for a patient's medical records. 'Legal medical record' does not include all the records/data from a patient's chart. I have seen significant variance in what institutions will designate as part of their legal medical record set, even between institutions in the same jurisdiction."

Pasha asserted that the defendants did not expressly state that all of the patient's electronic medical records from the EPIC system had been produced. She further noted that Mount Sinai physician's assistant Ryan Hope testified at his deposition that the hand-off sign-out form is "kept in like a separate tab within the patient's chart, but it's not an official part of the patient's

chart,” but that he also acknowledged that the report nonetheless part of the patient’s chart and accessible through a specific tab. As she explained it, by using the qualifier “official,” it appeared that “Hope is also acknowledging that some parts of the electronic medical record are not produced in response to a legal request for medical records “

With respect to whether the production of an audit trail or metadata was warranted, Pasha opined that such production “would be the best way to review all of the pertinent medical records that were created for this patient and identify not only what has not been produced, but also if any notes were deleted or modified before production. It takes seconds to minutes to generate a patient’s Epic audit trail in Excel format.”

In opposition to the plaintiff’s motion, the defendants submitted an attorney’s affirmation. The also provided the expert affirmation of Mahima Vijayaraghavan, M.D., who asserted that hand-off notes are not considered part of a “legal medical record” and, hence, need not be produced in the course of discovery. Nonetheless, she averred that she “personally conducted a search for any ‘hand off’ documentation within Mr. London’s chart on February 17, 2023” and that “[n]o ‘hand off’ documentation *in alignment with clinician’s workflows* were located *within the electronic chart* that is maintained by Mount Sinai Hospital” (emphasis added). In support of their cross motion, the defendants’ attorney averred that production of an audit trail or metadata was unnecessary and burdensome and that, accordingly, they should be granted a protective order preventing disclosure not only of such metadata, but also of any further disclosure of hand-off documents.

CPLR 3126 authorizes the court to sanction only a party who “*refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed*” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998] [emphasis added]). A party’s failure to satisfy its discovery obligations, particularly after a series of court orders has been issued, “may constitute the dilatory and obstructive, and thus contumacious, conduct” (*id.* at 489; see *CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v*

Ryder TRS, Inc., 13 AD3d 170 [1st Dept 2004]). “[T]he drastic remedy of striking an answer is not appropriate where there is no clear showing that the failure to comply with discovery demands was willful or contumacious” (*Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784, 785 [2d Dept 2008]). This court already has determined that production of hand-off documentation and the remainder of the decedent’s EPIC electronic record file is material and necessary to the prosecution of the action (see CPLR 3101[a]). While the defendants’ responses to the plaintiff’s demand for hand-off documentation may have been deficient and cursory, it did not constitute a “willful” failure to make disclosure in accordance with this court’s order, as that term is understood in the context of discovery disputes. Rather, the dispute here revolves around a difference of opinion as to whether a defendant is obligated only to produce a patient’s “legal medical file” or the entirety of a patient’s chart where a plaintiff demands it in discovery. Hence, the court declines to strike the defendants’ answer or to impose sanctions upon them for frivolous litigation conduct.

Nonetheless, the court concludes that the defendants must provide the entirety of the decedent’s paper and electronic charts here, including the hand-off documents and forms, inasmuch as they were requested by the plaintiff and ordered by the court. It is clear from the parties’ submissions that the hand-off documents were indeed generated and maintained in some form, whether in paper form or electronically in the EPIC system. Hence, the plaintiff’s motion must be granted at least to the extent that the defendants shall be required to conduct and complete a further, diligent search for relevant “hand-off” notes and shall produce them within 30 days of the entry of this order if they exist and are locatable, or, if they cannot be located, they shall provide a proper *Jackson* affidavit that describes what their search entailed, what paper or electronic records were searched, how those paper or electronic records were accessed and searched, who conducted the search, how long the search took to undertake, and the results thereof. The search shall include a search of all paper and electronic records and charts, and shall not be limited only to that hand-off documentation that was “in alignment with

clinicians' workflows." In addition, the defendants shall produce the complete EPIC electronic chart referable to the hospitalization of the plaintiff's decedent, as set forth in the December 14, 2022 status conference order.

To the extent that the plaintiff seeks an "audit trail" or other metadata referable to her decedent's medical and hospital charts and records, the court concludes that, under the circumstances presented here, that information is indeed material, relevant, and necessary to the prosecution of this action, as the plaintiff has shown, "beyond mere conjecture, that there is relevant information to be gleaned from metadata and audit trails which cannot be obtained from other sources, including the medical records and deposition testimony" (*Punter v New York City Health and Hosps. Corp.*, 2019 NY Slip Op 31065[U], *7, 2019 NY Misc LEXIS 1906, *16 [Sup Ct., N.Y. County, Apr. 12, 2019] [Silver, J.], *affd* 191 AD3d 563 [1st Dept 2021]; see *Vargas v Lee*, 170 AD3d 1073, 1076 [2d Dept 2019]; see generally *Dennehy v Harlem Hosp. Cent.*, 2018 NY Slip Op 32496[U], 2018 NY Misc LEXIS 4370, *13 [Sup Ct, N.Y. County, Oct. 2, 2018]; *Czyz v Scherl*, 2017 NY Slip Op 31465[U], 2017 NY Misc LEXIS 2651, *8 [Sup Ct, N.Y. County, Jul. 10, 2017] [Shulman, J.]; *Aguilar v Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 FRD 350, 354 [SD NY 2008]).

"[A]n audit trail generally shows the sequence of events related to the use of a patient's electronic medical records; i.e., who accessed the records, when and where the records were accessed, and changes made to the records (see *Gilbert v Highland Hosp.*, 52 Misc 3d 555, 557 [Sup Ct, Monroe County 2016]; see also *Matter of Irwin v Onondaga County Resource Recovery Agency*, 72 AD3d 314, 320 [2010]). Hospitals are required to maintain audit trails under federal and state law (see 45 CFR 164.312[b]; 10 NYCRR 405.10[c][4][v]). As argued by the plaintiff [], the requested audit trail was relevant to the allegations of negligence that underlie this medical malpractice action in that the audit trail would provide, or was reasonably likely to lead to, information bearing directly on the . . . care that was provided to [her decedent]"

(*Vargas v Lee*, 170 AD3d at 1076-1077). The plaintiff has demonstrated, to the court's satisfaction, that the production of an audit trail or metadata here would likely lead to the discovery of relevant and admissible evidence, specifically, whether and when *any* hand-off

document was generated electronically and whether any such document was entered or removed from the electronic record.

CPLR 3103(a) allows the court, on its own motion or on motion of any party, to make a protective order denying, limiting, conditioning, or regulating the use of any disclosure device. Inasmuch as the court is granting those branches of the plaintiff's motion that seek production of the very items for which the defendants seek a protective order, the defendants' cross motion must be denied.

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that, within 30 days of the entry of this order, the defendants are directed to (a) conduct and complete a further, diligent search for relevant "hand-off" notes, and either produce the hand-off notes by that date if they exist and are locatable, or, if they cannot be located, provide a proper *Jackson* affidavit that describes what their search entailed, what paper or electronic records were searched, how those paper or electronic records were accessed and searched, who conducted the search, how long the search took to undertake, and the results thereof, which search shall include a search of all paper and electronic records and charts, and shall not be limited only to such hand-off documentation that was "in alignment with clinicians' workflows," (b) produce the complete EPIC electronic chart referable to the hospitalization of the plaintiff's decedent, and (c) produce audit trails, audit logs, and metadata of the EPIC electronic records referable to the hospitalization of the plaintiff's decedent, and the plaintiff's motion is otherwise denied; and it is further,

ORDERED that the defendants' cross motion is denied.

This constitutes the Decision and Order of the court.

7/24/2023

DATE


JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE