

**Pujols v Corwin**

2023 NY Slip Op 34982(U)

April 19, 2023

Supreme Court, Bronx County

Docket Number: Index No. 21048/2020E

Judge: Alicia Gerez

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19A

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DEYANIRA PUJOLS and KENNETH P. SILVERMAN,
ESQ. AS TRUSTEE AND SUCCESSOR IN INTEREST
TO SANTIAGO RODRIGUEZ DEL CARMEN,

Index No. 21048/2020E

Hon. ALICIA GEREZ,
Acting Justice of the Supreme Court

Plaintiffs,

- against -

ANDREW CORWIN, M.D., WAQARUN RASHID,
M.D., KODE EDEALE, M.D., CARMEN SULTANA,
M.D., JOHN KOULOS, M.D., and NEW YORK CITY
HEALTH & HOSPITALS CORPORATION,

Defendants

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The following papers numbered 56 to 77 were read on these motions (Seq. No. 001) FOR
PROTECTIVE ORDER noticed on February 9, 2023 and duly submitted as Nos. on the
Motion Calendar of \_\_\_\_\_

Table with 2 columns: Sequence No., NYSCEF Doc. Nos.
Rows include: Notice of Motion – Exhibits and Affidavits Annexed (56 - 69), Cross Motion – Exhibits and Affidavits Annexed, Answering Affidavit and Exhibits, Memorandum of Law (70 - 75), Reply Affidavit (76 - 77)

The instant motion is decided in accordance with the annexed memorandum decision.

Dated: 4/19/23

Hon. Alicia Gerez
ALICIA GEREZ, A.J.S.C.

- 1. CHECK ONE..... [ ] CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS..... [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE..... [ ] SETTLE ORDER [ ] SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X

DEYANIRA PUJOLS and KENNETH P.  
SILVERMAN, ESQ. AS TRUSTEE AND  
SUCCESSOR IN INTEREST TO SANTIAGO  
RODRIGUEZ DEL CARMEN,

DECISION and ORDER  
Index No. 21048/2020E

Plaintiffs,

- against -

ANDREW CORWIN, M.D., WAQARUN RASHID,  
M.D., KODE EDEALE, M.D., CARMEN  
SULTANA, M.D., JOHN KOULOS, M.D., and NEW  
YORK CITY HEALTH & HOSPITALS  
CORPORATION,

Defendants

-----X

**HON. ALICIA GEREZ**

Defendants move for a protective order pursuant to CPLR § 3103(a), and to vacate the December 1, 2022, Compliance Conference Order of this Court pursuant to CPLR § 5015(a)(4). Upon review of the papers, together with the opposition submitted thereto; review of the Court file; and upon due deliberation, the motion is decided as follows.

**FACTS OF THE CASE**

On or about November 19, 2018, plaintiff allegedly suffered injuries to her right uterine artery, left upper and lower extremities, and to her vagina as a result of childbirth via cesarean section (hereinafter “C-Section”) and bilateral tubal ligation performed by defendants.

This medical malpractice action commenced on January 22, 2020, with the filing of the Summons and Complaint. Upon completion of the depositions, plaintiff served post-deposition demands. Defendants responded to those demands on or about September 30, 2022. In an October 2022 good faith letter, plaintiff’s counsel objected to defendants’ responses and requested defendants withdraw their objections. After parties failed to address the situation on their own, a pre-motion

conference was held before this Court. A Compliance Conference Order was generated from the December 1, 2022, conference and uploaded to NYSCEF on December 14, 2022, which ordered defendants to provide certain items of discovery and for the Note of Issue to be filed.

Defendants now move for a protective order pursuant to CPLR § 3103(a) and seek to vacate the December 1, 2022, Compliance Conference Order pursuant to CPLR § 5015(a)(4).

### ANALYSIS

CPLR § 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” “Material and necessary” should be construed liberally by the trial courts, who have broad discretion to determine whether the discovery sought fits within these two words (*Forman v Henkin*, 30 NY3d 656, 661 [2018]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 403 [1st Dept 2018]).

Even with broad discretion, though, the trial courts do not have unlimited discretion, nor does it mean that all disclosure is mandated. One party’s need for discovery must be weighed against any special burden to the opposing party (*M.P. by Fabiana P. v Jewish Bd. of Fam. & Children's Servs.*, 211 AD3d 584 [1st Dept 2022]).

A protective order is a tool used to limit certain discovery from being disclosed or exchanged. Pursuant to CPLR § 3103(a), the court may issue a protective order denying disclosure to prevent “unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.” The party seeking the protective order has the burden to demonstrate that the discovery is either irrelevant or that it will not lead to legitimate discovery (*Liberty*, 164 AD3d at 403; *Rosen v MHM Realty, LLC*, 166 AD3D 428 [1st Dept 2018]). If met, the burden then shifts to the party seeking the discovery to demonstrate that said items are material and necessary for the action (*Liberty*, 164 AD3d at 403).

Here, defendants are seeking a protective order for the discovery they were directed to produce in the December 1, 2022, Compliance Conference Order (Gerez, J. [December 1, 2022]). Defendants must first meet the burden to deny disclosure before plaintiff has the burden to demonstrate that the discovery is material and necessary.

#### Table of Contents for the OB-GYN Resident Manual

Item number 1 of the December 1, 2022, Compliance Conference Order directs defendants to “provide the Table of Contents of the OBGYN Resident manual from the appropriate period.” Defendants argue that they have provided sufficient documentation to the plaintiff and that it would be an unreasonable annoyance to produce the resident manual. Providing the table of contents, defendants argue, would “lead to subsequent discovery requests from plaintiffs.”

Defendants’ concerns are mere speculations. While a production of 100 pages covering a wide range of topics would be overbroad, as defendants argue, that is not what this Court ordered defendants to produce. The December 1, 2022, Order directs defendants to produce the “Table of Contents of the OBGYN Resident Manual from the appropriate period.” The table of contents is less than 100 pages and may enable plaintiff to make a more tailored request for the appropriate pages from the manual, if needed.

Additionally, plaintiff has demonstrated that the table of contents is material and necessary. On page 11 of the Verified Bill of Particulars, plaintiff alleges that defendants did not “adhere to the hospital’s own rules, regulations, protocols, and standards or practice.” One of the named defendants, Waqarun Rashid, M.D. (hereinafter “Dr. Rashid”), was an OB-GYN resident at the time of the alleged malpractice. The information sought from the OB-GYN Resident manual is therefore relevant to the action.

Therefore, the request for a protective order, with respect to item number 1 of the December 1, 2022 Compliance Conference Order, is denied.

Table of Contents for the Nursing Department

Item number 5 of the December 1, 2022, Order directs defendants to “provide the requested nursing department table of contents from the 1/31/22 demand.”

Defendants argue that plaintiff is not entitled to the nursing department’s table of contents and requests that a protective order be issued instead. Defendants contend that this case pertains only to OB-GYN care and treatment, and that treatment rendered by the nursing department is not an issue in this case. Defendants also argue that the request is overly broad.

However, plaintiff names several nurses in her Verified Bill of Particular alleging they failed to adhere to hospital rules and policies. As such, plaintiff is entitled to those rules and regulations.

Additionally, the Court directed defendants to produce the table of contents for the nursing department only. Defendants have not demonstrated how providing this item would result in unreasonable annoyance, expense, embarrassment, disadvantage, or prejudice.

Therefore, defendants’ request for a protective order, regarding item number 5 of the December 1, 2022, Compliance Conference Order, is denied and the Order is hereby amended to reflect that defendants are to produce the table of contents for the OB-GYN nursing department from November 2018.

Authorization for the Transcription of Defendant Andrew Corwin, M.D.’s (hereinafter “Dr. Corwin”) C-Section Report

Item number 2 of the December 1, 2022, Order directs defendants to provide “authorizations for the transcription company relating to Dr. Corwin’s 11/19/18 C-section and bilateral tubal ligation procedure.”

Defendants are seeking a protective order denying authorizations for the original audio file relating to the transcription of Dr. Corwin's C-section report. They argue that the plaintiff is in possession of the final signed report, and that there are no claims of transcription errors in her Verified Bill of Particulars. Defendants also argue that the hospital does not have the authority to release the patient's medical information contained in transcription.

Defendants failed to demonstrate how providing the authorization would be burdensome. Moreover, Dr. Corwin testified that he was certain that he made changes correcting the report in this case. Due to this discrepancy, plaintiff is entitled to compare the audio file that was transcribed and the final report generated.

Therefore, defendants' request for a protective order, as it relates to item number 2 of the December 1, 2022, Compliance Conference Order, is denied.

#### Delivery Logs

Item number 3 of the December 1, 2022, Compliance Conference Order directs defendants to provide redacted birth delivery logs from November 19, 2018.

Defendants argue that, under CPLR §4504(a) the delivery log is confidential and producing it would disclose private health information. They also argue that the documents are irrelevant and that the request is overly broad.

The December Order directed defendants to provide *redacted* birth logs to prevent the disclosure of privileged information. Additionally, this Court is not persuaded by defendants' argument that finding and redacting the delivery logs would be unreasonably annoying.

Assuming, *arguendo*, that defendants demonstrated producing the logs is unreasonably annoying, the information is still relevant. In her Verified Bill of Particulars plaintiff claims that defendants failed "to supervise medical staff, agents, servants, employees, personnel, nurses, interns,

residents, students, consultants, and all those rendering services to the [p]laintiff.” As such, knowing whether Dr. Corwin was present in the delivery room to supervise Dr. Rashid is relevant in this matter (see e.g. *Parise v Good Samaritan Hosp.*, 36 AD3d 678, 680 [2d Dept 2007]).

Therefore, defendants’ request for a protective order of item number 3 of the December 1, 2022, Compliance Conference Order is denied.

#### Dr. Rashid’s Annual Evaluation

Item number 4 of the December 1, 2022, Compliance Conference Order directs defendant to “provide Dr. Rashid’s Annual Evaluation as requested for an *in-camera* inspection.”

Defendants argue that the evaluation is not subject to discovery pursuant to Education Law § 6527(3) and Public Health Law § 2805-m. These statutes protect records relating to performance of a medical or quality assurance review function or to a medical malpractice program from disclosure. For a hospital to claim statutory privilege, they must, at minimum, show that a review procedure is in place and that the exempt information was obtained or maintained in accordance with that procedure (*Bamberg-Taylor v Strauch*, 181 AD3d 432 [1st Dept 2020]; *Orner v Mount Sinai Hosp.*, 305 AD2d 307 [1st Dept 2003]). Defendants failed to meet their burden; instead, they claimed the evaluation is privileged information without any supporting information on a review procedure or how the information was obtained.

Defendants also claim that the demand for the evaluation is overly broad and irrelevant, and that “there is no certainty that the care Dr. Rashid rendered to plaintiff is even mentioned.” Plaintiff seeks the evaluation records to determine whether her care was referenced and to evaluate Dr. Rashid’s “surgical acumen to participate in Ms. Pujols’ cesarean section and bilateral tubal ligation.” Dr. Corwin testified that the level of a resident’s involvement is based upon that resident’s ability. Thus, an evaluation could shed some light into Dr. Rashid’s ability at the time of the event. To ensure

its relevance however, the December 1, 2022, Order directed disclosure by way of an *in-camera* inspection of the evaluation as a safeguard.

Defendants further claim that the evaluation may contain privileged information regarding treatment to other patients. To the extent that it does, defendants are directed to redact any privileged information regarding other patients when providing it *in camera*.

Therefore, defendants' request for a protective order for item number 4 of the December 1, 2022, Compliance Conference Order is denied, and defendants are directed to provide a redacted copy of Dr. Rashid's annual evaluation for an *in-camera* review.

#### Statement regarding Compliance with 45 CFR 60.2

Item number 6 of the December 1, 2022, Order directs defendants to "provide a sworn statement stating whether or not they did or [did] not comply with 45 CFR 60.2."

Defendants argue that the request is improper, irrelevant, and unduly burdensome. Yet, defendants do not elaborate on how production would be burdensome or improper.

In terms of its relevance, pursuant to 45 CFR 60.18, information reported under 45 CFR 60.7, 60.8, and 60.12 may be obtained by an attorney who has filed a medical malpractice action and who requests information regarding a specific health care practitioner who is also named in the action. Before the information is disclosed, though, the party seeking the information must provide evidence that the hospital failed to request information from the National Practitioner Data Bank, (45 CFR 60.18[a][v]).

Plaintiff's October 6, 2022, letter specifies that they are seeking a sworn statement regarding Dr. Corwin, Dr. Rashid, Kode Edeale, M.D., Carmen Sultana, M.D., and John Koulos, M.D., all of the personally named defendants in this action. Further, on page 11 of the Verified Bill of Particulars, plaintiff alleges defendants "negligent[ly] and carelessly fail[ed] to provide the Plaintiff with

experienced, qualified, and competent staff...including co-defendants Andrew Corwin, M.D., Waqarun Rashid, M.D., Kode Edeale, M.D., Carmen Sultana, M.D., [and] John Koulos, M.D.” Plaintiff is entitled to the information obtained under 45 CFR 60 and is performing her due diligence by requesting a statement from defendants.

Therefore, defendant’s request for a protective order of the requested sworn statement under 45 CFR 60 is denied.

#### Request to Vacate the Order

Defendants request that this Court vacate the Compliance Conference Order dated December 1, 2022, pursuant to CPLR §5015(a)(4).

CPLR §5015(a)(4) allows the court to vacate a judgment for lack of jurisdiction. Defendants claim that complying with the December Order would leave them “substantially prejudiced.” Defendants argue that they have “turned over all documents requested by plaintiff” and claim that this will result in “additional requests from plaintiff that will increase the burden on [d]efendants to produce voluminous, irrelevant documents.”

Defendants failed to establish how this Court lacked the requisite jurisdiction to render the Order.

Additionally, defendants failed to demonstrate substantial prejudice in providing additional, relevant discovery. Plaintiff’s requests are relevant to the allegations made in her Verified Bill of Particulars and to the depositions that have been held.

Therefore, defendant’s request to have the Compliance Conference Order vacated is denied.

The remaining arguments were found to be unavailing.

Therefore, it is hereby,

ORDERED that defendants' motion for a protective order and to vacate the December 1, 2022, Compliance Conference Order is DENIED in part as outlined below, and it is further

ORDERED that Defendants are directed to provide items # 1, 2, 3 and 6 of the December 1, 2022, Compliance Conference Order on or before May 26, 2023, and it is further

ORDERED, that item # 4 of the December 1, 2022, Compliance Conference Order will be amended to read "Defendant to provide Dr. Rashid's Annual Evaluation, with redacted privileged information regarding other patients, for an *in-camera* inspection on or before May 5, 2023". and it is further

ORDERED that item #5 of the December 1, 2022, Compliance Conference Order will be amended to read "Defendant to provide OB-GYN nursing department table of contents from the appropriate period on or before May 5, 2023," and it is further

ORDERED that the parties will appear for a Compliance Conference on June 8, 2023, at 11:00AM in person in room 600.

This is the Decision of the Court

Dated: 4/19/23

ENTER

  
Hon. Alicia Gerez, A.J.S.C.