

Cone v El-Hamamsy

2024 NY Slip Op 31919(U)

May 24, 2024

Supreme Court, New York County

Docket Number: Index No. 805380/2021

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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HOPE S. CONE, as Executor of the Estate of DAVID A. PERSING, deceased, and HOPE S. CONE, individually,

Plaintiff,

INDEX NO. 805380/2021

MOTION DATE 04/08/2024

MOTION SEQ. NO. 001

- v -

ISMAIL EL-HAMAMSY, JOHN ANTHONY VULLO, LYLE C. NOLASCO, ELBERT EUGENE WILLIAMS III, KAYLA SUHKYUNG YOU, DAVID G. FALLOON, JEAN-MARY EMMANUEL DEFAY, and THE MOUNT SINAI HOSPITAL,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 39, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISCOVERY.

In this action, inter alia, to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3124 to compel the defendants to produce complete copies of the videos and photographs of the plaintiff's decedent in their possession, all oral and written statements made by the individual defendants and their representatives in connection with any morbidity and mortality review, quality assurance evaluation, or other hospital review of the relevant incident regarding the decedent, including transcripts, minutes, synopses, written correspondence, submissions, and notes, and any materials prepared for any morbidity and mortality or quality assurance meeting regarding the decedent that already had been shared with the plaintiff. The defendants oppose the motion. The motion is granted to the extent that, on or before July 12, 2024, the defendants shall produce complete copies of the videos and photographs of the plaintiff's decedent in the defendants' possession, and any materials prepared for any morbidity and mortality or quality assurance meetings regarding the decedent that already had been willfully and intentionally shared with the plaintiff. On or before that date, the defendants also

shall submit to the court, for in camera inspection, any documents responsive to the plaintiff's demand with respect to which they are claiming an exemption from disclosure on the grounds that they are privileged as quality assurance review materials, along with an accompanying privilege log.

CPLR 3101(i), provides, in relevant part, that,

“[i]n addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a [party]. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use”

(see *Tran v New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383, 387 [2003]). “[T]he ‘full disclosure’ required by [CPLR 3101(i)] is simply the disclosure normally required by the CPLR for relevant, nonprivileged materials” (*Zegarelli v Hughes*, 3 NY3d 64, 66 [2004]; see *Ferjuste v 437 BMW, LLC*, 219 AD3d 1308, 1309 [2d Dept 2023]). Hence, the defendants are obligated to produce complete copies of the videos and photographs of the plaintiff's decedent in their possession.

Public Health Law § 2805-j(1) provides, in pertinent part, that “[e]very hospital shall maintain a coordinated program for the identification and prevention of medical . . . malpractice.” Such a program must include at least, among other things, the “establishment of a quality assurance committee with the responsibility to review the services rendered in the hospital in order to improve the quality of medical . . . care of patients and to prevent medical . . . malpractice” (Public Health Law § 2805-j[1][a]). Education Law § 6527(3) exempts certain records from CPLR article 31 disclosure. It provides that,

“[n]either the proceedings nor the records relating to performance of a medical or Quality Assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to section twenty-eight hundred five-1 of the public health law described herein, including the investigation of an incident reported pursuant to section 29.29 of the mental hygiene law, shall be subject to disclosure under article thirty-one of the civil practice law and rules.”

That statute also shields from disclosure the testimony of any person in attendance at such a meeting as to what transpired when a medical or quality assurance review function or medical

malpractice prevention program was performed (see *Logue v Velez*, 92 NY2d 13, 16-17 [1998]; *Hernandez v City of New York*, 207 AD3d 450, 453 [2d Dept 2022]; *Siegel v Snyder*, 202 AD3d 125, 136-137 [2d Dept 2021]).

“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. By guaranteeing confidentiality to quality review and malpractice prevention procedures, this provision is designed to encourage thorough and candid peer review of physicians, and thereby improve the quality of medical care”

(*Logue v Velez*, 92 NY2d at 17 [citation and internal quotation marks omitted]; see *Hernandez v City of New York*, 207 AD3d at 453; *vanBergen v Long Beach Med. Ctr.*, 277 AD2d 374, 374 [2d Dept 2000]). Public Health Law § 2805-m(2) affords similar protection from disclosure for “records, documentation or committee actions or records” generated pursuant to Public Health Law § 2805-j (see *Siegel v Snyder*, 202 AD3d at 137).

The Court of Appeals has recognized a statutory exception to confidentiality, as otherwise required in both Education Law § 6527(3) and Public Health Law § 2805-m(2), for “statements made by any person in attendance at such a meeting *who is a party to an action or proceeding* the subject matter of which was reviewed at such meeting” (Education Law § 6527[3]; Public Health Law § 2805-m[2]; see *Logue v Velez*, 92 NY2d at 16 [emphasis added]). The Court concluded that these exceptions necessarily “permit discovery of statements given by a physician or other health professional in the course of a hospital’s review of the facts and circumstances of *an earlier incident which had given rise to a malpractice action*” (*Logue v Velez*, 92 NY2d at 19 [emphasis added]).

“It is the burden of the entity seeking to invoke the privilege to establish that the documents sought were prepared in accordance with the relevant statutes” (*Marte v Brooklyn Hosp. Center*, 9 AD 3d 41, 46 [2d Dept 2004], citing *Orner v Mt. Sinai Hosp.*, 305 AD2d 307 [1st Dept 2003]). The Appellate Division, First Department, has suggested that this burden can only be satisfied by a particularized showing in evidentiary form, such as an affidavit from an

individual with personal knowledge, that the report was prepared at the behest of the quality assurance committee for their purposes and actually utilized by them for their purposes (see *Clement v Kateri Residence*, 60 AD3d 527, 527-528 [1st Dept 2009]).

The plaintiff here expressly has limited her request to quality assurance documents consisting of party statements relevant to the incident involving her decedent, and any medical response thereto. Those party statements would fall within the exception to the quality assurance exemption. Nonetheless, the defendants contend that some of the documents containing such statements, such as emails, include information exempt from disclosure. The court agrees with the plaintiff that the appropriate procedure for ascertaining whether the responsive documents in the defendants' possession are, in fact, subject to the quality assurance exemption from disclosure would be for the defendants to submit the disputed documents to the court for in camera review, along with a privilege log (see *Bluth v Albany Med. Ctr.*, 132 AD3d 1131, 1132 [3d Dept 2015]).

To the extent that the defendants already had willfully and intentionally shared certain allegedly exempt materials with the plaintiff, they have waived the claim of privilege with respect to those materials (see *Nga Le v Stea*, 286 AD2d 939, 939-940 [4th Dept. 2001]; cf. *Estate of Savage v Kredentser*, 150 AD3d 1452, 1454 [3d Dept 2017] [inadvertent disclosure of quality assurance review materials to plaintiff did not constitute a waiver of the privilege]).

Accordingly, it is,

ORDERED that the plaintiff's motion is granted to the extent that on or before July 12, 2024, the defendants shall (a) provide her with complete copies of the videos and photographs of her decedent in the defendants' possession and any materials prepared for any morbidity and mortality or quality assurance meetings regarding the decedent that already had been willfully and intentionally shared with her, and (b) submit to the court, for in camera inspection, any documents responsive to the plaintiff's demand with respect to which they are claiming an

exemption from disclosure on the grounds that they are privileged as quality assurance review materials, along with an accompanying privilege log, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

5/24/2024

DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE