

Sirykissoon v Sturdivant
2024 NY Slip Op 35719(U)
October 11, 2024
Supreme Court, Bronx County
Docket Number: Index No. 806896/2021E
Judge: Michael A. Frishman
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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 34

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SHALINI SIRYKISSOON AND RICHARD
SIRYKISSOON,

Index No. 806896/2021E

Hon. Michael A. Frishman
Justice of the Supreme Court

Plaintiff(s),

- against -

ANGELA STURDIVANT, M.D., ROBIN RAIT, M.D.,
SAAD MOHAMMAD, M.D., SURESH KHANNA,
M.D., REBECCA KLEBAN, M.D., KAREN
SILVERMAN, R.N., “JOHN” ANASTA, RN (First Name
being fictitious and unknown), “JANE” MCFARLANE,
RN (First Name being fictitious and unknown), “MARY”
THIGPEN, RN (First Name being fictitious and
unknown), WHITE PLAINS HOSPITAL,
WESTCHESTER MEDICAL GROUP, P.C., and
WESTCHESTER ANESTHESIOLOGISTS, P.C.,

Defendant(s).

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The following papers numbered 144 – 180, 183 – 197, and 201 were read on this motion to compel
(Seq. No. 1)

Sequence No. 1	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	144 – 180
Cross Motion – Exhibits and Affidavits Annexed	183 – 194
Answering Affidavit and Exhibits, Memorandum of Law	195 – 197
Reply Affidavit	201

Upon deliberation of the application by plaintiffs, SHALINI SIRYKISSOON AND RICHARD SIRYKISSOON, by **NOTICE OF MOTION** and all the papers in connection therewith, for an Order compelling WHITE PLAINS HOSPITAL to provide discovery pursuant to CPLR §3124, is heretofore denied.¹

Upon deliberation of the application by defendant, WHITE PLAINS HOSPITAL (hereinafter “WPH”), by **NOTICE OF CROSS MOTION** and all the papers in connection therewith, for an Order: (1) for a protective order pursuant to CPLR §3103 and (2) denying plaintiff’s motion to compel in its entirety, is heretofore held in abeyance upon the furnishing of a privilege log and the MIDAS Report for in camera inspection.

¹ The Court reserves its decision regarding the MIDAS Report upon receipt of the privilege log and the MIDAS Report for in camera inspection.

CPLR 3101 provides for full disclosure of all evidence material and necessary in the prosecution or defense of an action (*Rodriguez v Ryder Truck Rental, Inc.*, 100 AD 2d 811, 811 [1st Dept 1984]). The words ‘material and necessary’ are, in our view, 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 (*Allen v Crowell-Collier Publ. Co.*, 21 NY 2d 403, 406 [1968]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is “material and necessary” – i.e., relevant – regardless of whether discovery is sought from another party (*see* CPLR § 3101[a][1]) or a nonparty (CPLR § 3101 [a][4]) (*Forman v Henkin*, 30 NY 3d 656, 661 [2018]). The statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise (*id.*).

The right to disclosure, although broad, is not unlimited. CPLR 3103 itself “establishes three categories of protect materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney’s work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship” (*id.* at 661-662). The burden of establishing a right to protection under these provisions is with the party asserting it – “the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity” (*id.* at 662). When resolving a discovery dispute, the court must balance the need for the discovery against any undue burden placed upon the opposing party and litigants are protected from “unnecessarily onerous application of the discovery statutes” (*id.* at 665), and “discovery determinations are discretionary” (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 747 [2000] when determining whether information sought is “material and necessary” to the action (*Allen v Cromwell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968])).

In Plaintiffs’ Notice for Discovery of Electronic Medical Records (EMR), Records, and Audit Trail dated August 30, 2021, plaintiff demanded copies of the audit tracking with regard to Mrs. Sirkisson’s EMR. WPH objected to the demand stating it was not sufficiently tailored to lead to the discovery of information material and necessary to the prosecution of this matter and not proportional to the needs of this case. Plaintiffs also demanded copies of the oral, recorded (audio or videotape) and/or written statements taken of or from any of the parties herein, including the defendants, their agents, servants, and/or employees and any and all statements by the individually named defendants herein to the Quality Assurance Committee or other meeting(s) held by or at defendants with respect to services rendered to plaintiff in their Demand for Statements and Witness Identification dated August 30, 2021. In Plaintiffs’ Demand for Rules and Regulations dated August 30, 2021, plaintiffs sought copies of the hospital’s Rules, Regulations, Practices, Procedures, Protocols, Bylaw, Guidelines, Manuals, Criteria and/or order sets specific patient transfers from August 1, 2020 through the present. Plaintiffs served a Demand for Incident Reports seeking copies of any and all incident reports, occurrence reports, event report, unusual event report, accident report, safety report, security report and/or any other similar report relating to plaintiff.

Plaintiffs later demanded in their Notice of Discovery and Inspection dated March 15, 2022 copies of the rules, regulations, protocols, guidelines, exit writes, discharge instructions and/or pathways in effect at WPH for the departments that were involved in the care and treatment of Mrs. Sirkisson from August 27, 2020 through August 30, 2020. WPH in their February 28, 2023 Supplemental Response to Demand for Rules and Regulations objected to each demand as being

overly broad and unduly burdensome. However, WPH did provide plaintiffs with a copy of the protocol concerning AMA which was in effect at the time and the Patient Safety Occurrence Reporting Protocol.

On May 25, 2023 plaintiffs served Post Deposition Discovery Demands seeking the incident, accident, or adverse event report in the MIDAS system or any other system at WPH in 2020 for Mrs. Sirykissoon, a screenshot or printout of the table of contents or indices for the rules, regulations, protocols, guidelines, exit writes, discharge instructions and/or pathways in effect at WPH for the departments that were involved in the care and treatment of Mrs. Sirykissoon from August 27, 2020 through August 30, 2020; the application, document, or report that RN Thigpen filed as a report of her alleged leg injury during the attempted transfer of Mrs. Sirykissoon from the operating room table to the recovery room stretcher on August 27, 2020; the application, document, or report that RN Thigpen filed with any of the following entities as a result of her alleged leg injury during the attempted transfer of Mrs. Sirykissoon from the operating room table to the recovery room stretcher on August 27, 2020: the WPH Human Resources Department, Worker's Compensation, Occupational Hazard, or Occupational Safety and Health Administration; and the WPH audit trail for Mrs. Sirykissoon from August 27, 2020 through September 29, 2020. WPH served their Response to Plaintiff's Post-Deposition Discovery Demands on June 23, 2023 objecting to the demands for the MIDAS Report and the document filed by Nurse Thigpen stating the plaintiffs are seeking privileged materials protected by the Quality Assurance Privilege, Public Health Law §2805, Education Law §6527, and HIPAA. WPH further states these demands are not reasonably calculated to lead to the discovery of admissible evidence. WPH objects to the production of the audit trail stating the demand calls for information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Defendant has cross-moved for a protective order pursuant to CPLR § 3103 asserting the materials plaintiff has demanded are privileged and protected from discovery under the Quality Assurance Privilege and HIPAA. WPH argues plaintiffs have requested materials that are irrelevant to the instant action and will not be admissible at the time of trial. "While courts have the authority to oversee disclosure, by design the process often can be managed by the parties without judicial intervention" (*Forman v Henkin*, 30 NY 3d 656, 662 [2018]). However, CPLR § 3103(a) states "the court at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

In support of their cross motion for a protective order, defendants have attached to their motion papers an affidavit of Myrna Cuevas, R.N., J.D., Senior Director of Risk Management in the Department of Quality Resource Management for WPH. Ms. Cuevas states MIDAS occurrence reports are created, gathered, received, reviewed, utilized and/or generated by and at the behest of the Quality Assurance Department in order to improve the quality of care at WPH in accordance with WPH's standard procedure (affirmation of defendant's counsel, exhibit A, aff of Myrna Cuevas, R.N., J.D. ¶5). She also states when an adverse event or occurrence took place at WPH it was reported by the M.D. or staff through the MIDAS RDE (remote data entry) system as the behest of the Quality Assurance Department with the goal of improving the quality of patient care (affirmation of defendant's counsel, exhibit A, aff of Myrna Cuevas, R.N., J.D. ¶8). Ms. Cuevas further states these MIDAS Occurrence Reports are and were confidential communications and not subject to release to

anyone including the patient (affirmation of defendant's counsel, exhibit A, aff of Myrna Cuevas, R.N., J.D. ¶8).

Counsel for WPH has provided plaintiff with the protocol titled "Transferring to and from the OR table" so plaintiffs' request to compel rules and regulations in effect at WPH from August 27, 2020 through August 30, 2020 regarding transferring a patient to and from the OR table to a Gurney/stretchers is rendered moot.

Plaintiffs request the audit trail from August 27, 2020 to September 29, 2020. They argue the audit trail is relevant, material, and necessary because it is crucial in determining information such as how many times Mrs. Sirykissoon's chart was accessed, when it was accessed, who accessed it, and whether any edits were made to any of the notes in her chart related to the incident. They further argue the audit trail will show if anyone accessed her chart between the time the procedure ended and the time she was transferred to the recovery room. Moving defendant argues plaintiff has not demonstrated the relevance of the audit trail nor does this matter fall into the category of cases where the production of an audit trail is compelled. Plaintiff relies on *Vargas v Lee*, 170 AD 3d 1073 [2d Dept 2019], however, the Second Department determined the audit trail should be disclosed in that case because the audit trail was relevant to the allegation that defendants failed to timely and properly diagnose and treat plaintiff's medical complications following his foot surgery. Plaintiffs' argument that the audit trail will show how many times the chart was accessed, when it was accessed, who accessed it, and whether any edits were made is not a sufficient basis for plaintiffs to obtain the audit trails, therefore that portion of plaintiffs' motion is denied.

In regards to the remaining demands, defense counsel asserts that these documents are privileged material. The New York State Education Law shields from disclosure 'the proceedings [and] the records relating to performance of a medical or quality assurance review function or participation in a medical and dental malpractice prevention program (*Logue v Velez*, 92 NY 2d 13, 16 [1998], see Education Law § 6527[3]). Public Health Law § 2805-j specifically requires every hospital to 'maintain a coordinated program for the identification and prevention of medical ***malpractice' (*id.* at 17, see Public Health Law § 2805-j[1]). Public Health Law § 2805-m confers complete confidentiality on information gathered by a hospital in accordance with Public Health Law §§ 2805-j and 2805-k, expressly exempting it from disclosure under CPLR article 31 (*id.*). Under HIPAA, the Privacy Rule forbids an organization subject to its requirements (a "covered entity") from using or disclosing an individual's health information ("protected health information") except as mandated or permitted by its provisions (*Arons v Jutkowitz*, 9 NY 3d 393, 413 [2007]; 45 CFR 164.502[a]).

Plaintiff is seeking the production of the MIDAS Report and the Occupational Hazard/Incident Report filed by Ms. Thigpen. WPH argues they have proven the MIDAS Report is protected from disclosure under the Quality Assurance Privilege pursuant to the Public Health Law and the Education Law. WPH provided an affidavit from the Senior Director of Risk Management that details WPH's process following an adverse incident or occurrence. However, counsel for defendant in her affirmation states the MIDAS Occurrence Report was specifically created by Dr. Mohammad, a named defendant, as per his testimony (affirmation of defendant's counsel at 9). It is therefore not possible on this record to assess the accuracy of the hospital's certification that no party statements relating to [the alleged malpractice] exist within any quality assurance materials (*Newman v Mount Sinai Medical Center*, 205 AD3d 548, 549 [1st Dept 2022]). Additionally, WPH shall prepare a privilege log identifying all materials claimed to be protected by the quality assurance privilege and

submit the documents for in camera review (*id.*). The Court reserves its decision on the portion of plaintiffs' motion seeking the MIDAS Report following the in camera inspection of the MIDAS Report and privilege log.

As for the Occupational Hazard/Incident Report filed by Ms. Thigpen, plaintiffs argue the report is the only contemporaneous account regarding the subject incident and Ms. Thigpen waived her privilege. The Privacy Rule generally provides that a covered entity may not use or disclose an individual's protected health information to third parties without a valid authorization, except as otherwise permitted or mandated under the Rule (45 CFR 164.508[a]; *Arons* at 413). The Privacy Rule also permits covered entities to use or disclose protected health information without authorization pursuant to a court or administrative order so long as only the protected health information covered by the order is disclosed (45 CFR 164.512[e][1][i]; or in response to a subpoena, discovery request or other lawful process if the entity has received satisfactory assurances that the party seeking the disclosure has made reasonable efforts to ensure that the individual has been given notice of the request, or has made reasonable efforts to secure a qualified protective order from a court or administrative tribunal (45 CFR 164.512[e][1][ii]; *Arons* at 414). While this litigation exception may appear to be tailored for those situations in which the protected health information is not being sought from a party to the proceedings, HHS has declared that "[t]he provisions in [section 164.512(e)] are not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information" (65 Fed. Reg. 82462, 82530; *Arons* at 414.)

Although Ms. Thigpen is a party to the action, she has not put her medical condition at issue. Furthermore, she has not consented to the production of her protected health information. Moreover, the mere fact that the privilege presents an obstacle to plaintiffs' discovery of legally pertinent information that would assist them in proving their claim is not, as the dissent seems to suggest, evidence that the privilege is not properly recognized in this case (*Dillenbeck v Hess*, 73 NY2d 278, 289 [1989]). Plaintiffs may not effect a waiver of the privilege for the simple reason that the privilege is not theirs to waive but rather belongs to the patient (*id.*; Richardson, Evidence § 434[Prince 10th ed.]). Therefore, the portion of plaintiffs' motion seeking the Occupational Hazard/Incident Report filed by Ms. Thigpen is denied.

[this portion of the decision is intentionally left blank]

Accordingly, it is hereby

ORDERED that the motion by plaintiffs, SHALINI SIRYKISSOON AND RICHARD SIRYKISSOON, compelling WHITE PLAINS HOSPITAL to provide the Occupational Hazard/Incident Report and the audit trail pursuant to CPLR §3124, is heretofore denied; and it is further

ORDERED that the motion by defendant, WHITE PLAINS HOSPITAL, (1) for a protective order pursuant to CPLR §3103 and (2) denying plaintiff's motion to compel in its entirety, is heretofore held in abeyance upon the furnishing of a privilege log and the MIDAS Report for in camera inspection; and it is further

ORDERED that WHITE PLAINS HOSPITAL furnish the privilege log and the MIDAS Report to the Court within twenty-one (21) days of this Order; and it is further

ORDERED that moving defendant serve a copy of this Order with Notice of Entry upon all parties within twenty (20) days of its entry.

This constitutes the Decision and Order of the Court.

Dated: 10/16/24

Hon. 

MICHAEL A. FRISHMAN, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☐ GRANTED | ☒ DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER | ☐ SUBMIT ORDER |