SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 17**
BETTY HARDY, as Administratrix of the Estate of MICHAEL HURD, and BETTY HARDY, Individually,	**INDEX # 24389/09**
Plaintiff,	**Motion Seq. 3**
	Motion Date 12.12.11
-against-	**Submit Date 1.3.12**
MERCY MEDICAL CENTER, NASSAU EXTENDED CARE CENTER, WOODBURY NURSING HOME and HEMPSTEAD PARK NURSING HOME,	
Defendants.	
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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2

Motion by defendant, Nassau Extended Care Center, for an order of this court granting reargument of this court's order dated September 26, 2011, pursuant to CPLR §2221, and upon reargument, reversing that decision, is **GRANTED IN PART.**

The instant motion arises from an underlying medical malpractice action where Michael Hurd, the decedent, was alleged to have sustained decubitus ulcers and a tearing/splitting of the

penis while he was an inpatient/resident in defendants' facilities. The plaintiffs, Betty Hardy, as Administratrix of the Estate of Michael Hurd, and Betty Hardy, Individually, moved this Court in December 2010, to compel the defendant to comply with its notice for discovery and inspection demands. This court, granted plaintiffs' motion on September 26, 2011 (Brown, J.).

Decedent, Michael Hurd, was treated as an inpatient at the defendant's facility during the time period January 1, 2005 through June 7, 2008. According to plaintiffs, decedent did not present with decubitis ulcers upon admission; however, he developed this condition while under the defendants' care. Defendant avers that the decedent presented with severe medical issues upon admission.

On December 1, 2010, plaintiffs commenced a malpractice action against all named defendants and served discovery demands upon the moving defendant on December 6, 2010. The plaintiffs set forth 37 itemized demands.

The defendant largely responded to each demand by contending that the requests were overly broad, vague, burdensome and/or privileged, palpably improper, and irrelevant[1]. The plaintiffs argued that only three of the defendant's responses were acceptable, while reiterating their request for the remaining demands. Defendant then issued a supplemental response which plaintiffs deemed to be incomplete, causing the filing of their motion to compel discovery. This court granted the plaintiffs' motion on September 26, 2011, and the defendant now seeks a re-argument of that decision.

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[1]It is noted that defendants' inadvertently omitted a response to plaintiffs' demand #4 in their Response to Notice for Discovery and Inspection.

The crux of the defendant's argument is that the September 2011 order gave "little or no direction" and it failed to deal with the individual issues and concerns of each discovery request. This court also regards defendant's statement somewhat noteworthy; ". . . it is imperative that the Court provide a ruling that deals with these issues individually so [defendant] can ascertain how best to proceed with the case and at the very least so that there is a clear appellate record for the *Appellate Court* to understand the Court's reasoning with the current decision ." (Emphasis added; see Notice of Motion, ¶8).

In order to set forth the position of the parties, the outstanding discovery demands are presented in full with the corresponding objections by the defendant and the plaintiff's opposition to such objections:

Demand #13: Shift to Shift reports and notes, during plaintiff's decedent's entire stay at defendant's facility;
Demand #30: All vVisitor Sign In Logs pertaining to plaintiff's decedent for plaintiff's entire stay at defendant's facility:
Demand #31: All complaints by family or anyone concerning staffing, ulcer care or nutrition of residents who were at defendant's facility, for plaintiff's decedent's entire stay at facility:
Demand #32: All responses by defendant to any of the above complaints.

According to plaintiffs, defendant agreed to comply with the Demands #13, #30, #31, #32, but had not done so as of the date of their underlying motion. However, as to Demand #30, defendant contends that it is not in possession of any such visitor log for the time period requested and even if such log existed, it is not relevant to the underlying malpractice issue. As to Demands #31 and #32, defendant argues that requests regarding complaints are statutorily precluded under PHL §2805-j.

Demand #2: Full color copies of every MDS relating to plaintiff's decedent.

Demand #21: Defendants' *policies, procedures, protocols, manuals and guidelines in effect for plaintiff's decedent's entire stay at defendant's facility*, for doctors, nurses, CNA's, aides dieticians, therapists concerning the following issues:

- decubiti, bedsores, pressure sores, pressure ulcers,ulcer care, prevention of ulcers, ulcer risk assessments, ulcer care planning, tracking of ulcers, ulcer reporting, turning and positioning, keeping a resident dry and clean, ulcer rounds
- incontinence
- nutrition and dieticians
- hydration
- supervision of patients and observation of patients
- MDS assessments
- RAP guidelines for RAP Problem Areas:
  - Pressure Ulcers
  - Urinary Incontinence and Indwelling Catheter
  - Nutritional Status
- CNA activities, chores, duties and job description and expectations
- Nurse activities, chores, duties and job descriptions and expectations

As to Demand #2, defendants only agreed to provide black and white copies, and regarding Demand # 21, plaintiffs contend that defendants provided a partial response only as to wound management, skin integrity, and pressure ulcer policies in the supplemental response.

Demand #5: All Care Plans regarding plaintiff's decedent;
Demand #6: All Assessments regarding plaintiff's decedent;
Demand #7: All RAP (Resident Assessment Protocol) notes and sheets for plaintiff's decedent;
Demand #8: Wound Care Notes including Skin Assessment Forms and Wound Round Notes regarding plaintiff's decedent;
Demand #9: Notes, minutes and reports of the ulcer committee and/or ulcer rounds after each ulcer"

Defendants' response is that the items sought "would be" in the plaintiff's decedent's charts, and plaintiffs' response is that plaintiffs may not be in full possession of complete chart or the contents therein.

Demand #11: All photographs of the defendant's facility and/or rooms in which the plaintiff's decedent resided, taken by, or on behalf of, the defendants.
Demand #14: Medicaid cost reports and bills sent for payment by the defendant;
Demand #15: Medicare cost reports and bills sent for payment by defendant;
Demand #17: The names (and last known addresses if no longer employed) of all Doctors, Registered Nurses, Licensed Practical Nurses, Certified Nurses's Assistant, Dieticians, and other healthcare providers who treated plaintiff's decedent while a resident at defendant's facility;
Demand #18: The names (and last known addresses if no longer employed) of the Administrator(s), Medical Director(s), Director(s) of Nursing, and Assistant Director(s) of Nursing during plaintiff decedent's entire stay at defendant's facility;
Demand #19: A coded sheet for the signatures and handwriting of all care givers of plaintiff's decedent;
Demand #20: Personnel files of all care givers who treated decedent, including all evaluations, background checks, recommendations, commendation letters, letters of discipline, letters of critique;
Demand #25: Daily staffing records for plaintiff's entire stay at the defendant facility;
Demand #27: Staffing sheets for plaintiff's decedent's entire stay at defendant's facility, including assignments and attendance records;
Demand #28: Payroll records during plaintiff's decedent's entire stay at defendant's facility.
Demand #29: Schedule sheets during the plaintiff's decedent's entire stay at defendant's facility;
Demand #33: Census Condition Reports for plaintiff's decedent's entire stay at defendant's facility.

Defendant objected to the foregoing demands on the basis that they are vague, overly broad, unduly burdensome, irrelevant, and palpably improper, and in some cases, bordering on harassment. The crux of plaintiffs' argument is that the decedent's condition was caused by neglect which resulted from poor and/or lack of adequate personnel in the defendant facility during the time of the decedent plaintiff's stay. As such, any information regarding personnel and staffing is relevant and therefore discoverable. Defendant cites Education Law 6527 (3) as a basis for its objection to Demand #20.

It is well known and accepted that pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (*see generally Allen v. Crowell–Collier Publishing Co.,* 21 N.Y.2d 403 [1968]). It is equally well settled that "unlimited disclosure is not permitted" (*LaPierre v. Jewish Bd. of Family & Children Servs.,* 47 A.D.3d 896, 896 [2008]). Further, "information which is privileged is not subject to disclosure no matter how strong the showing of need or relevancy" (*Lilly v. Turecki,* 112 A.D.2d 788, 789 [1985]; *Matter of Love Canal,* 92 A.D.2d 416, 422 [1983]).

CPLR §3103(a), in pertinent part, provides that the court may at any time, on its own initiative, or on motion of any party or of any person from 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. It is also noted that, the court has broad discretion in limiting or regulating the use of disclosure devices (*see Brignola v. PeiFei Lee, M.D., P.C.*, 192 A.D.2d 1008 [3d Dept. 1993]).

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The key words are "material and necessary." In the leading case, *Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]), the New York Court of Appeals interpreted the New York CPLR phrase "material and necessary" to mean nothing more or less than "relevant," saying that the phrase must 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.* [emphasis added]" (*Id. at 406; see Friel v. Papa,* 87A.D.3d 1108 [2nd Dept 2011).

As to defendant's objections to Demands #31 and #32, under PHL §2805-j. the statute provides in relevant part:

> "j) For the purposes of this section, the term "*hospital*" shall have the same meaning as is set forth in subdivision ten of section twenty-eight hundred one of this article,
> Any person who, in good faith and without malice, provides information to further the purposes of the medical . . . malpractice prevention program or who, in good faith and without malice, participates on the quality assurance committee shall not be subject to an action for civil damages or other relief as a result of such activity . . ."

Further, subdivision ten of section twenty-eight hundred one of this article, sets forth the following definition:

> "*General hospital*" means a hospital engaged in providing medical or medical and surgical services primarily to in-patients by or under the supervision of a physician on a twenty-four hour basis with provisions for admission or treatment of persons in need of emergency care and with an organized medical staff and nursing service, including facilities providing services relating to particular diseases, injuries, conditions or deformities. *The term general hospital shall not include a residential health care facility, public health center, diagnostic center, treatment center, out-patient lodge, dispensary and laboratory or central service facility serving more than one institution* . . . [emphasis added]"

Based on the record and the foregoing definition, the defendant facility, Nassau Extended Care Center, is not a hospital. As such, PHL §2805-j does not apply to the instant case; however, the issue may be reviewed under Education Law §6527(3). In furtherance of judicial economy, this court will consider its applicability to the foregoing demands, as well as Demand #20 requesting the production of personnel records of all caregivers of the decedent plaintiff. Education Law § 6527(3) provides in pertinent part:

> "Neither the proceedings nor the records relating to performance of a medical or a 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-l of the public health law described herein . . . shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law. No person in attendance at a meeting when a medical or a quality assurance review or a medical . . . malpractice prevention program or an incident reporting function described herein was performed, . . . shall be required to testify as to what transpired thereat . . ."

It is apparent that the Education Law § 6527(3) exempts certain categories of documents from disclosure: records relating to medical review and quality assurance functions and records reflecting participation in a medical malpractice prevention program. In sum, the quality assurance privilege shields from disclosure certain records and reports generated by a facility in performing either a medical malpractice or quality assurance review (*see Leardi v Lutheran Med. Ctr.*, 67 AD3d 651 [2nd Dept. 2009]). While Demands # 31 and 32 are clearly quality assurance inquiries, the productions of documents under Demand # 5, 6, 7, 8, 9, and 20, may very well reveal similar information.

Generally, plaintiffs' demands as to, *inter alia,* personnel information regarding each employee who had contact with plaintiff while he was in defendant's residence, staff medical policies, and system-wide operational materials such as contracts, licenses, and by-laws, are material and necessary and are not overly broad or unduly burdensome, "*inasmuch defendant is compelled by statute and regulation to maintain and continuously collect such information" and the same has not been prepared for quality assurance purposes* [emphasis added](*see Clement v. Kateri Residence,* 60 AD3d 527 [1st Dept. 2009]).

Certain nonmedical portions of the hospital record of a nonparty patient may be discoverable by a plaintiff in a particular action. However, personnel records could be read to include a myriad of irrelevant items such as salary and vacation schedules, employee medical records, requests for changes in duty rosters and assignments. Here, the defendant should not be required to shoulder the burden of establishing privilege until the requested documents have been specifically designated (*see Conway v. Bayley Seton Hosp.*104 AD2d 1018 [2nd Dept 1984]).

The purpose of the discovery exclusion is to "enhance the objectivity of the review process" and to assure that medical review committees analyze and assess the quality of health services rendered by medical institutions. 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 (*see Logue v Velez*, 92 N.Y.2d 13 [1998] citing Mem. of Assembly Rules Comm., Bill Jacket, L. 1971, ch. 990, at 6).

In order to assert the privilege, "a *[medical facility] is required, at a minimum, to show that it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure [emphasis added]"* (*see Kivlehan v Waltner*, 36 A.D.3d 597, [2nd Dept. 2007]); *Stalker v. Abraham*, 69 A.D.3d 1172 [3rd Dept. 2010]). The defendant may not be able to assert the privilege regarding these demands as it has not averred, in its opposition papers to the underlying motion or in its motion in chief, that the records sought were maintained for quality assurance purposes (*see Kivlehan v. Waltner,* supra; *Marte v. Brooklyn Hosp. Ctr.*, 9 A.D.3d 41).

Notwithstanding the foregoing, this court acknowledges that it is impossible, based on the record, to determine whether the documents demanded, or any portions thereof, are privileged as argued by defendants or discoverable as argued by plaintiffs. This court will therefore apply guidelines set forth in similar cases, *Sonsini v. Memorial Hosp. for Cancer and Diseases* (262 A.D.2d 185 [1st Dept. 1999]) and *Chardavoyne v. Cohen* (56 A.D.3d 508 [2nd Dept 2008]).

Accordingly, the documents under Demands #5,6,7, 8, 9, 20, 31 and 33, must be produced for an in camera inspection by this court (*see Lakshmanan v. North Shore Univ. Hosp.*, 202 A.D.2d 398 [2nd Dept 1994], *Muir v. Calabro*, 217 A.D.2d 538 [2nd Dept 1995]) to enable it to determine which of the documents, or portions thereof, if any, are entitled to the statutory privileges and, furthermore, whether they are "material and necessary" to the prosecution of this action under CPLR 3101(a).

To facilitate this in camera review, defendants are directed to compile a privilege log that specifies the nature of the contents of the documents, who prepared the records, and the specific request or procedure made pursuant to the Quality Assurance Program that defendants allege forms the basis for the claimed privilege or they shall be precluded from claiming said privilege as to the unspecified document(s).

This court could very well vacate the entire items demanded requesting personnel records without prejudice, and direct plaintiffs to issue a new notice of discovery, properly limited in accordance herewith, concerning personnel records kept by defendant (*see Conway v. Bayley Seton Hosp.*,104 A.D.2d 1018 , supra). The court, in its discretion, has elected to impose limitations and conditions upon the plaintiffs' demands. Further, the court has determined that Demand # 28 requesting payroll records, is hereby vacated. The plaintiff's rationale and/or

theory that administration has underpaid its staff while diverting funds for their own use, is specious and hardly relevant to the issue at bar.

Finally, in order to protect the identity of other patients, as required pursuant to HIPAA, defendant is directed to redact the names of all patients other than plaintiff that appear in any document, to protect other patients' identities and privacy (*see Marte,* 9 A.D.3d at 47; *Gunn v Sound Shore Med. Ctr. of Westchester*, 5 A.D.3d 435 [2nd Dept. 2004]).

As to Demands #14, and #15, requesting Medicaid and Medicare cost reports of bills paid on behalf of plaintiff, the statute cited by plaintiffs, 42 USC 1395i-3(g)(5)(A) may require public disclosure but it does not mandate that defendant provide the same through discovery. Plaintiff can employ the provisions of FOIL regardless of the availability of discovery through some other means. The fact that plaintiffs may obtain such disclosure under the CPLR, does not preclude it from seeking FOIL relief (*see Farbman v. N.Y.C. Health & Hospital Corp.*, 62 N.Y.2d 75 [1984]). Although the plaintiff avers that these documents are material and necessary in determining the quality of care received by the defendant plaintiff, this court directs the plaintiff to pursue this request under FOIL in that such request does not meet the criteria of usefulness and reason.

As to Demand #21, the request for color copies of every MDS relating to decedent, requiring defendant to bear the cost of producing color copies imposes an undue burden on it. Further, black and white copies have already been provided, notwithstanding the possible privilege issues under Education Law § 6527(3). It is noted that plaintiffs have not stated why color copies are material and necessary. However, the cost of production is borne by the party requesting the production, and plaintiffs are required to make arrangements to make color copies

and bear the cost of doing so (*see Waltzer v. Tradescape & Co., L.L.C.*, 31 A.D.3d 302 [1st Dept. 2006], *Response Personnel, Inc. v. Aschenbrenner*, 77 A.D.3d 518 [1st Dept 2010]).

The defendant is directed to comply with the following requests, which include modifications set by this Court: Demand #11, all photographs of the defendant's facility and/or rooms in which the plaintiff's decedent resided, taken by, or on behalf of, the defendants; Demand # 17, The names . . . of all Doctors, Registered Nurses, Licensed Practical Nurses, Certified Nurses's Assistant, Dieticians, and other healthcare providers who treated plaintiff's decedent while a resident at defendant's facility; Demand #25, Daily Staffing records for plaintiff's decedent's entire stay at the defendant facility, *limited to the particular unit(s) where plaintiff decedent resided*; Demand #27, Staffing sheets for plaintiff's decedent's entire stay at defendant's facility, including assignments and attendance records, *limited to the particular unit(s) where plaintiff decedent resided*; Demand #29, Census Condition Reports for plaintiff's decedent's entire stay at defendant's facility, *limited to the particular unit(s) where plaintiff decedent resided*; and Demand #13, Shift to Shift reports and notes, during plaintiff's decedent's entire stay at defendant's facility, *limited to the particular unit(s) where plaintiff decedent resided.*

Demand # 19, requesting a coded sheet for the signatures and handwriting of all care givers of plaintiff's decedent, and Demand #30, requesting visitor sign-in sheets pertaining to plaintiff's decedent, shall be provided to the extent that such documents exist. If such visitor log contains information regarding visitors that do not pertain to the plaintiff's decedent, the same shall be redacted.

Accordingly, the defendant's motion for reargument is granted to the extent that the court's order dated September 26, 2011, is modified as set forth herein. The matter is set down for a conference on April 13, 2011 to set a date for the in camera inspection.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
March 15, 2012

ENTER:

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