

**Murphy v 150 West 140th St. LLC**

2013 NY Slip Op 30048(U)

January 8, 2013

Sup Ct, New York County

Docket Number: 101895/09

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: \_\_\_\_\_  
Justice

PART 15

Index Number : 101895/2009  
MURPHY, CYNTHIA ARLENE  
VS.  
150 WEST 140TH STREET  
SEQUENCE NUMBER : 004  
VACATE STAY/ORDER/JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

JAN 14 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 1/8/13

  
HON. EILEEN A. RAKOWER J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
CYNTHIA ARLENE MURPHY, Individually and as  
Administratrix of The Estate of William Hubbard, Deceased,

Plaintiff,

Index No.  
101895/09

- against -

**DECISION  
and ORDER**

Mot. Seq.:04

150 WEST 140<sup>TH</sup> STREET LLC, WESTON UNITED  
COMMUNITY RENEWAL, INC., WESTON UNITED  
COMMUNITY RENEWAL HOUSING DEVELOPMENT  
FUND CORPORATION, WEST HARLEM GROUP  
ASSISTANCE, INCORPORATED, and WEST HARLEM  
RENAISSANCE HOMES II HOUSING DEVELOPMENT  
FUND COMPANY, INC.,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this negligence action to recover damages for injuries and for the wrongful death of Plaintiff's decedent William Hubbard ("Plaintiff's decedent" or "Mr. Hubbard"). Prior to Mr. Hubbard's death, Mr. Hubbard was living in an assisted living facility maintained by one or more of the Defendants. Mr. Hubbard was admitted to the facility in May 2006 and was placed with a roommate James Morehouse. Defendants state that upon being placed at the facility, Mr. Hubbard and Mr. Morehouse signed documents acknowledging their rights to privacy and the Notice of Privacy Practice of Weston United Community Renewal. On June 24, 2007, Mr. Morehouse, who reportedly suffered from schizophrenia, murdered Mr.

Hubbard by repeatedly striking him with a long blunt metal object.<sup>1</sup>

Plaintiff previously moved for an Order, pursuant to CPLR 4504, 3103, 3124, and 3126, seeking the following relief:

- (1) precluding defendants from offering any evidence on the issue of liability at trial, or in the alternative, compelling the defendant to appear for court ordered depositions within twenty (20) days;
- (2) holding that non party James Morehouse's medical records, mental and physical condition, psychiatric records, psychological records, and any records kept or exchanged by defendants are discoverable and are not subject to confidentiality or privilege;
- (3) stating that any witness produced by the defense be compelled to testify about all matters relating to Mr. Morehouse and the plaintiff's decedent, including but limited to, Mr. Morehouse's medical records, condition (both physical and mental), psychiatric treatment records, social work records, and all other records kept or maintained by defendants in this matter;
- (4) specifying that all non-party witnesses, including but not limited to Vanessa Marrow, Delby Nunez, Jamal Williams, Paul Bartley, and Michael Ealy be permitted to testify about all matters pertaining to James Morehouse and plaintiff decedent, both prior to and after the death of plaintiff's decedent (including but not limited to Mr. Morehouse's physical and mental condition, treatment records, prior incidents of violent behavior and/or bad acts, medical records, and agency files by defendants); and
- (5) holding that any rights relating to privilege or confidentiality regarding either Mr. Morehouse or plaintiff's decedent, as asserted by defendants or by a non party witness (which might prevent said witnesses from testifying at a deposition or at trial) shall not apply insofar as plaintiff has a right to depose said witnesses and elicit relevant testimony at deposition or at trial) shall not

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<sup>1</sup>On February 19, 2009, Mr. Morehouse pled guilty to murder in the second degree under New York County, Indictment #3441/01, and was sentenced to eighteen years in state prison to life.

[\* 4]

apply insofar as plaintiff has a right to depose said witnesses and elicit relevant testimony in an effort to prove its case and to prove notice.

By Order dated September 21, 2012, the Court, noting that Defendants had not submitted any opposition or moved for a protective order to Plaintiff's motion, granted Plaintiff's motion to the extent that Defendants were directed to produce all witnesses for depositions, and to the extent they no longer work for them, provide their last known address, or move for a protective order..

Defendants now move for an Order:

- (1) vacating the Court's Order dated September 21, 2012 on the grounds that the Order mistakenly stated that defendants did not respond to plaintiff's preclusion motion when in fact defendants did timely cross move for a protective order and did respond to plaintiff's motion;
- (2) granting defendants leave to reargue plaintiff's motion;
- (3) compelling plaintiff's counsel to return all records regarding any mental health or medical treatment of William Hubbard obtained from defendant, destroying any copies in their possession and precluding them from offering any such records into evidence at trial or using said records in any way in as much as those records are privileged to Mr. Hubbard and/or Mr. Hubbard's estate, or at least until such time as an authorization for those records have been provided for all counsel and the Court; and
- (4) a protective order pursuant to CPLR 3103 for Weston United entities inasmuch as plaintiff requests and demands records which contain any information regarding any mental health or medical treatment of Mr. Morehouse and Mr. Hubbard absent a Court Order or valid authorizations from each of those individuals or their estate, as well as a protective order keeping defendants from testifying in any manner about the medical treatment or mental health care of Mr. Morehouse or Mr. Hubbard or any records referencing same about their living situation as laid out in the Notice of Privacy of Weston United Community Renewal, absent a Court Order or valid authorizations from each of those individuals or their estate.

Plaintiff states that Defendants prevented a deposition on July 12, 2012 of one of Defendant's witnesses on the basis that defense counsel was concerned about the witness' ability to legally testify as to privileged or confidential matters regarding the medical condition of Mr. Morehouse and Mr. Hubbard. Plaintiff's counsel states that at the deposition, he had advised defense counsel "that copious amounts of documents had already been exchanged by the defendants, including what looks to be the entire file of both James Morehouse and William Hubbard." Both of the files contain "inter alia, countless psychiatric treatment records, case manager status reports, incident reports, medication monitoring reports, and other documents crucial to the plaintiff's case." Plaintiff's counsel also advised defense counsel that even if testimony could not be elicited concerning Mr. Morehouse's records, the defense witness then present could still be deposed on non-privileged matters. Plaintiff's counsel also advised defense counsel that testimony regarding Mr. Hubbard's treatments, complaints, and records was not privileged, and that he had power of attorney to waive any privilege on behalf of the estate pursuant to CPLR 4504(c). Plaintiff asserts that the requested records are relevant to establish that Defendants had knowledge of Mr. Morehouse's violent propensities.

Defendants assert that in preparing for the deposition of their insured, it came to Defendants' counsel's attention that prior handling counsel had exchanged sensitive mental health records with plaintiff regarding both Mr. Hubbard and Mr. Morehouse without a Court Order or authorizations from either party. As for plaintiff's counsel's statement that the Estate of Mr. Hubbard was willing to produce an authorization for Mr. Hubbard's medical and mental health records, Defendants represent that none has been forthcoming and none was attached to his motion. Furthermore, Defendants state that insofar as any of Mr. Hubbard's records discuss Mr. Morehouse, they must be redacted. Defendants also contend that at no time has plaintiff attempted to make Mr. Morehouse a party to the action or to secure an authorization from Mr. Morehouse for his records. Defendants state that only Mr. Morehouse can waive his privacy rights vis a vis his mental health records and other private information and that absent a signed authorization from Mr. Morehouse, the only alternative is a Court Order.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy

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which will assist preparation for trial by sharpening the issues and reducing delay and prolixity,” and that “[t]he test is one of usefulness and reason” (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

CPLR §3103(a) provides that “the court may . . . on motion of any party... make a protective order denying, limiting, conditioning or regulating the use of any disclosure device” in order to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice . . .”

“Generally, claimants are ‘not entitled to the medical information contained in [a resident-patient’s] clinical record absent a showing that the privilege [pursuant to CPLR 4504[a] ha[s] been waived . . . and absent a finding that the interests of justice significantly outweigh[ ] the need for and the right of the patient’s confidentiality.’” *Szmania v. State*, 82 A.D. 3d 1688 (App. Div. 4<sup>th</sup> Dept 2011) (citing *J.Z. v. South Oaks Hosp.*, 67 A.D. 3d 635-66 [2009]; Mental Hygiene Law 33.13[c]. Mental Health 33.13 requires facilities licensed or operated by the Office of the Mental Health or the Office of Mental Retardation and Developmental Disabilities to maintain a clinical record for each patient “on all matters relating to the admission, legal status, care and statement.” (Mental Hygiene Law 33.13[c][1]-[14]). “[A] facility may only disclose an individual’s clinical psychiatric records to an entity or person outside the facility under certain enumerated circumstances set forth in section 33.13(c), such as pursuant to a court order (33.13[c][1]) or with the patient’s consent (33.13[c][7]).” See e.g., *Midgett v. Beth Israel Med. Ctr.*, 30 Misc. 3d 224, 232 (Sup. Ct. N.Y. Cnty. 2010). Even with a waiver in certain cases, “disclosure of [ ] relevant medical and psychiatric files may not be ordered until there has been a finding pursuant to Mental Hygiene Law 33.13(c)(7) that disclosure will not reasonably be expected to be detrimental” to the individual or another individual. *Szmania v. State*, 82 A.D.3d 1688 (App. Div. 4<sup>th</sup> Dept 2011)(citation omitted).

“In certain cases where a party seeks the production of mental health records to establish a claim or defense, such that the interests of justice outweigh the need for confidentiality, the court may “order production of the records and . . . have an *in camera* review after a showing of reasonable likelihood that the records might contain material [that bears on the matter].” *Williams v. McGinnis*, No 04-CV-1005, 2006 WL 1317041, at \*14 (E.D.N.Y. May 15, 2006) (considering mental health records of non-party witness whose credibility was in question); *Szmania*, 82 A.D.3d at 1690, 919 N.Y.S.2d at 671 (ordering *in camera* review to determine applicability of records

\* 7]  
to asserted affirmative defense).

New York courts have determined that the “interests of justice” must be more compelling than the mere filing of a lawsuit against a defendant. (*Id*) (“There is no exception under section 33.13(c) for releasing a patient’s clinical mental health records without authorization or court order to attorneys retained to defend in conjunction with a lawsuit filed by that patient.”). Rather, the party seeking to compel the disclosure of the records must articulate that the records sought will bear on claims at issue in the pending action. *Szmania v. State*, 82 A.D.3d 1688 (App. Div. 4<sup>th</sup> Dept 2011).

Here, Defendants’ counsel inadvertently disclosed Mr. Hubbard and Mr. Morehouse’s privileged mental health records absent the required authorization or Court Order. Plaintiff’s counsel is directed to return the privileged documents to Defendants’ counsel, and Defendants’ counsel is directed to submit the records to the Court for *in camera* review with a privilege log to determine if the interests of justice significantly outweigh the need for and the right of the patient’s confidentiality. (Mental Hygiene Law 33.13[c]).

Wherefore, it is hereby,

ORDERED Defendants’ motion to vacate this court’s September 21, 2012 Order is granted; and it is further

ORDERED that Defendants’ cross motion for a protective order is granted inasmuch as Plaintiff requests and demands records or seeks testimony concerning any mental health or medical treatment of Mr. Morehouse and Mr. Hubbard absent valid authorizations or a Court Order; and it is further

ORDERED that Plaintiff’s counsel is directed to return all records regarding any mental health or medical information of James Morehouse and William Hubbard inadvertently disclosed by defendants’ counsel to defendants’ counsel, destroying any copies in their possession, within 3 days of service of a copy of this order with notice of entry; and it is further

ORDERED that Defendants are directed to submit a copy of the records inadvertently produced with a privilege log to the court for *in camera* inspection



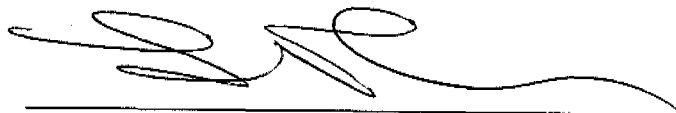
[\* 8]  
within 30 DAYS of service of a copy of this order with notice of entry; and it is further

ORDERED that both parties are reminded to appear for a compliance conference in Room 327, 80 Centre Street, on February 19, 2013, at 9:30am.

This constitutes the decision and Order of the Court. All other relief requested is denied.

Dated:

1/8/13



Eileen A. Rakower, J.S.C.

**FILED**

JAN 14 2013

COUNTY CLERKS OFFICE  
NEW YORK