Elysee v Roy
2015 NY Slip Op 31157(U)
June 29, 2015
Supreme Court, New York County
Docket Number: 805276/2012
Judge: Joan B. Lobis

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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FRANCINA ELYSEE, Administrator of the Estate of ISAAC ELYSEE, Deceased, and FRANCINA ELYSEE, Individually,

Plaintiff,

-against-

RAJASREE ROY, M.D., NORTH SHORE LONG ISLAND JEWISH MEDICAL CENTER, NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., JOSEPH GHASSIBI, M.D., ST. LUKE'S HOSPITAL, ST. LUKE'S ROOSEVELT HOSPITAL CENTER, ST. LUKE'S ROOSEVELT HOSPITAL CENTER FOUNDATION, INC., and CONTINUUM HEALTH PARTNERS, INC.,

Defendants.

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Index No. 805276/2012

Decision and Order

JOAN B. LOBIS, J.S.C.:

Plaintiffs move to strike the answers of defendants North Shore Long Island Jewish Medical Center, North Shore-Long Island Jewish Health System, Inc. (together, "North Shore"); and St. Luke's Hospital, St. Luke's Roosevelt Hospital Center, St. Luke's Roosevelt Hospital Center Foundation, Inc., and Continuum Health Partners, Inc. (together, "St. Luke's") for their failures to appear for depositions and provide discovery. St. Luke's cross-moves for a protective order, and North Shore opposes plaintiffs' motion. In subsequent conferences the parties resolved their deposition disputes so only the cross-motion and the portions of the motion and opposition that relate to the cross-motion remain. For the reasons below, the Court grants the motion to the extent of directing St. Luke's and North Shore to produce the contested documents for *in camera* review.

Defendant Dr. Roy treated plaintiff-decedent Isaac Elysee for sickle cell anemia at North Shore. Plaintiffs allege that on September 23, 2011 Dr. Roy and North Shore negligently administered a blood transfusion, using blood incompatible both with his blood type and antibody sensitivities. On September 28, Mr. Elysee went to St. Luke's Hospital for treatment of a hemolytic reaction, allegedly due to complications from the transfusion. During a new transfusion at St. Luke's, Mr. Elysee experienced cardiorespiratory arrest. He lapsed into a coma, and passed away on September 30, 2011. Plaintiffs commenced an action against North Shore in September 2012 and added Dr. Roy to the complaint the next month. In May 2013, plaintiffs commenced an action against Dr. Ghassibi and St. Luke's. Both lawsuits allege malpractice relating to the transfusion and care of Mr. Elysee. In September 2013 the Court granted plaintiffs' motion to consolidate.

Before the consolidation, on August 27, 2013, all parties appeared for a preliminary conference. As is relevant, the order directed North Shore to provide blood bank and laboratory records. In a January 14, 2014, compliance conference order, North Shore again was ordered to provide these records. On February 19, 2015, North Shore emailed plaintiffs, indicating that it would send all demanded discovery except for "any of the Department of Health records pertaining to any investigation [it] conducted." It further stated that it already had objected to this discovery. Plaintiffs served a discovery demand on North Shore on April 22, 2014. Among other things, plaintiffs sought "the original file maintained by the Long Island Jewish Blood Bank of the decedent," and the complete DOH "records pertaining to the investigation into Mr. Elysee's treatment at Long Island Jewish Medical Center." In May 13, 2014, July 29, 2014, and December 2, 2014, orders, North Shore was directed to respond to the April 22, 2014, demand. As for St. Luke's, plaintiffs' June 26, 2014, notice for discovery and inspection demanded "[a] complete

copy of all documents maintained by Dr. Mark Friedman in his folder pertaining to Isaac Elysee, including all correspondence, communication, summaries, reports, data and writings of any kind to the [FDA] and the [DOH]." In the July and December conference orders, St. Luke's was directed to respond the June 2014 demand.

Plaintiffs' current discovery motion states that North Shore has not responded to the April 2014 demand or complied with the May, July, and December orders to provide the discovery. St. Luke's, according to plaintiffs, has not provided discovery from the June 2014 notice for discovery and inspection and the December and July discovery orders. Plaintiffs attach copies of their December 10, 2014, letters to St. Luke's counsel and to North Shore's counsel seeking the discovery. Based on these repeated failures, plaintiffs state, it is appropriate to strike the answers.[1]

St. Luke's cross moves for a protective order. St. Luke's notes that it has produced hundreds of pages of responsive discovery from its blood bank file relating to Mr. Elysee. It states it generated the remainder of the documents – in particular, the documents Dr. Mark Friedman, director of the Blood Bank and Transfusion Service, prepared in connection with the mandatory DOH and FDA investigations; and the doctor's correspondence relating to the investigation – are privileged under Public Health Law §§ 2805-j, 2805-l, and 2805-m, Education Law § 6527, and 21 C.F.R. § 606.170. It contends that it has not waived the privilege. It states that it is willing to submit the documents to the Court for *in camera* review. In addition, St. Luke's provides the affidavit of Phyllis Dembo, its director of risk management. Ms. Dembo alleges that the root cause analysis and the transfusion event report are privileged under Public Health Law § 2805 and

[1] Plaintiffs also refer to deposition delays but, as stated, the parties have resolved this dispute.

Education Law § 6257. Public Health Law §§ 2805-j, 2805-l(a) and (e), and 2805-m establish a quality assurance committee which "maintains and collects information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients." Because St. Luke's prepared these materials for the quality assurance committee and forwarded them to the Department of Health ("DOH") as part of the mandatory incident reporting requirement, they are exempt from disclosure. Further, St. Luke's must report "adverse incidents" at its blood collection and transfusion facility to the Food & Drug Administration ("FDA"); and, accordingly, it sent the same materials to the FDA. St. Luke's claims this exempts the FDA file from disclosure as well. It claims that a contrary policy would "subvert the very intention of the Public Health Law and put a chill on future investigations by hospital risk managers."

North Shore opposes the motion. It notes that, first of all, it responded to the April 22, 2014, notice of discovery and inspection in February 2015. The only exception, it states, is that it refused to provide documents prepared for the DOH investigation. It includes a copy of its February 19, 2015, email which indicates that North Shore provided some responsive discovery but objected to the items still in dispute.

In reply, plaintiffs argue that that they seek the government reports and not the root cause analysis and the transfusion event reports, and that these are neither confidential nor privileged. They contend that neither St. Luke's nor North Shore has provided support for the contention that in a medical malpractice litigation, the reports of governmental entities are privileged under either Public Health Law § 2805-j or 21 C.F.R. § 606.170. Therefore, they argue, the cross-motion should be denied and both St. Luke's and North Shore should provide the

discovery in dispute. In the alternative, they seek an *in camera* review of the materials. They reiterate their argument that sanctions are appropriate.

CPLR § 3101 permits "full disclosure of all matter material and necessary in the prosecution or defense of an action . . . ." Privileged material, however, is not discoverable and, under CPLR § 3103(a), a court may grant, sua sponte, or a party may move for a protective order. Parties that seek the benefit of the privilege have "the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes." Kivlehan v. Waltner, 36 A.D.3d 597, 597 (2nd Dep't 2007).

St. Luke's and North Shore rely on several sections in support of their argument that the disputed documents are not discoverable. CPLR § 2805 exempts information gathered in connection with a medical or quality assurance review. See Megrelishvili v. Our Lady of Mercy Medical Center, 291 A.D.2d 18, 25 (1st Dep't 2002). Section 2805-j states that hospitals must establish quality assurance committees. Section 2805-l provides guidelines for the reporting of "adverse events," including the death of a patient, and discusses the procedure that hospitals should follow. Section 2805-m(2) states that, with certain specified exceptions, "none of the records, documentation or committee actions or records required [under the mandatory reporting sections] nor any incident reporting requirements imposed . . . shall be subject to disclosure . . . ." Education Law § 6257 provides that in connection with civil actions, "[n]either the proceedings relating to performance of a medical or a quality assurance review function or participation in a medical . . . 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 . . . shall be subject to disclosure." The

purpose of the exemption is "to promote the quality of care through self-review without fear of legal reprisal . . . enhance the objectivity of the review process and . . . assure that medical review committees may frankly and objectively analyze the quality of health services rendered by hospitals." Katherine F. ex. rel. Perez v. State, 94 N.Y.2d 200, 205 (1999)(citations and internal quotation marks omitted). The mere fact that documents are in a quality assurance file, however, does not render them privileged. Spradley v. Pergament Home Ctrs., 261 A.D.2d 391, 392 (2nd Dep't 1999). *In camera* review "is a proper method to ascertain the nature of the records and the assertion of relevance to the issues in this litigation, as well as the basis for the claim of privilege." Colacicco v. Cicoria, 167 Misc. 2nd 831, 834 (Sup. Ct. N.Y. County 1996); see Daly v. Brunswick Nursing Home, Inc., 95 A.D.3d 1262, 1263 (2nd Dep't 2012).

Here, St. Luke's and North Shore have articulated a legitimate objection to the discovery. It is unclear, however, whether the withheld documents all fall within the articulated exemptions. This is especially true with respect to the FDA records, as St. Luke's papers suggest that it withheld the entire file. As the Court has noted, courts often conduct *in camera* reviews to examine the allegedly privileged materials. E.g., Sonsini v. Memorial Hosp. for Cancer and Diabetes, 262 A.D.2d 185, 187 (1st Dep't 1999). Neither plaintiffs nor St. Luke's object to *in camera* consideration by the Court. Under these circumstances, a review by the Court is the most prudent course of action.

Plaintiffs' argument that their goal was not to get the root cause analysis and the transfusion event reports but the government agencies' final reports is not reflective of their

discovery demands and, moreover, was not raised until the reply papers. Therefore, there was no opportunity to respond to the argument. Thus, it is not properly before the Court at this time.

The Court denies plaintiffs' request for discovery sanctions. Here, as depositions have been held, plaintiffs no longer seek sanctions on this basis. As this formed a critical basis for the request to strike the answers, the Court shall not grant this severe sanction. A court may strike the answer as a penalty if it determines there has been willful, contumacious, or bad faith noncompliance. See Ayala v. Lincoln Medical & Mental Health Center, 92 A.D.3d 542, 542 (1st Dep't 2012)(affirming trial court decision to impose lesser penalty). Moreover, lesser sanctions are not proper in this matter. St. Luke's and North Shore did not willfully withhold the disputed discovery but articulated a good faith basis for their refusal and provided those documents to which they had no objection. Therefore, there is no basis for sanctioning them. See Commerce & Industry Co. v. Lib-Com, Ltd., 266 A.D.2d 142, 144-45 (1st Dep't 1999).

Accordingly, it is

ORDERED that the motion to compel is granted to the extent provided in this order; and it is further

ORDERED that the request for sanctions is denied; and it is further

ORDERED that St. Luke's and North Shore are directed to submit to the Court for *in camera* inspection documents that are responsive to the notices to produce but in dispute,

together with a privilege log identifying the nature and contents of the documents, who prepared the documents and the nature of the claimed privilege, to the extent provided in this order, within 30 days of the date of this order; and it is further

ORDERED that the status conference currently scheduled for August 11, 2015, is adjourned to September 15, 2015.

Dated: June 29 2015

ENTER:

JOAN B. LOBIS, J.S.C.