Mcalwee v Westchester Health Assoc., PLLC
2016 NY Slip Op 33096(U)
September 20, 2016
Supreme Court, Westchester County
Docket Number: 52047/15
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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MARY V. MCALWEE,

Plaintiff,

-against-

WESTCHESTER HEALTH ASSOCIATES, PLLC, ANNE S. NEGRIN, M.D., and WILLIAM B. DIECK, M.D., individually and in their capacity as staff doctors of WESTCHESTER HEALTH ASSOCIATES,

Defendants.

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DECISION & ORDER

Index No. 52047/15
Motion Date: July 18, 2016

Seq. No. 2

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order pursuant to CPLR 3101(a) & (f), 3107, 3120 and 3124 compelling defendant Westchester Health Associates PLLC ("WHA") to comply with plaintiff's Notices of Discovery & Inspection and produce certain demanded discovery.

Order to Show Cause - Affirmation in Support - Exhibits 1-14
Affirmation in Opposition on behalf of Defendant Dieck
Affirmation in Partial Opposition on behalf of Defendant Negrin
- Exhibit A
Affirmation in Opposition on behalf of Westchester Health Associates
- Exhibits A-D

Upon the foregoing papers and the proceedings held on July 18, 2016, this motion is determined as follows:

This medical malpractice action arises out of two eye surgeries performed by defendant Anne S. Negrin, M.D. ("Dr. Negrin") upon plaintiff, which plaintiff alleges were negligently performed and resulted in a loss of vision. Plaintiff alleges that Dr. Negrin negligently performed the two surgeries and that defendants WHA and Dr. Dieck, who shared the WHA ophthalmology office with Dr. Negrin, negligently supervised Dr. Negrin.

Plaintiff specifically alleges in the complaint that Dr. Negrin departed from common and accepted medical practice in dealing with certain complications which occurred during the

surgeries and committed surgical errors "without the assistance or supervision from WHA or Dr. Dieck" (Affirmation of Plaintiff ["Affm of Plaintiff"] at ¶ 5). Plaintiff also alleges that Dr. Negrin's operative report after the first surgery fails to note the details of the changed surgical procedure due to the complication which arose. Plaintiff alleges Dr. Negrin's operative report after the second surgery fails to mention any complications. Finally, plaintiff alleges that after the two surgeries, plaintiff was sent to an "outside" corneal specialist, who found that the intraocular lens which Dr. Negrin attempted to implant was not secured, that the corneal endothelium was damaged, and there was a change in the normal round anatomical shape of the eye to an oval shape (Affm of Plaintiff ¶ 10).

Plaintiff now seeks an order compelling WHA to produce the following document discovery: (1) the personnel file of defendant Anne S. Negrin, M.D. ("Dr. Negrin") after an in camera review by this court; (2) documents, correspondence and papers by which Dr. Negrin's employment was caused to be terminated pursuant to paragraph 8 of her Employment Agreement or any other circumstance; (3) contract of employment for defendant William B. Dieck, M.D. ("Dr. Dieck"); (4) its medical malpractice insurance in effect for the period of July 5, 2012 to November 12, 2012; (5) cataract surgery educational materials and pamphlets which Dr. Negrin testified she provided to plaintiff prior to the first surgery. Plaintiff also contends that she is entitled to the deposition of Nancy Behren, M.D., WHA's Chief Medical Officer.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Deposition of WHA's Chief Medical Officer

Plaintiff contends that the deposition testimony of Dr. Nancy Behren ("Dr. Behren"), WHA's Chief Medical Officer, would be material and relevant to the issues in the action. In support of this contention, plaintiff relies upon the testimony of Dr. Dieck, who plaintiff contends testified that there was a custom and practice in 2012 to have WHA's Chief Medical Officer review a patient's treatment where there had been multiple complications, and WHA's Chief Medical Officer was Dr. Behren. Accordingly, plaintiff contends that Dr. Behren's

testimony regarding the multiple complications would be relevant and material to the issues in this action. Plaintiff further contends that her testimony would likely bear on the nature and extent of WHA's knowledge of any action or inaction during Dr. Negrin's treatment, which Dr. Negrin testified she discussed with Dr. Dieck, although Dr. Dieck denies any knowledge of plaintiff or her treatment.

Defendants correctly contend that plaintiff has failed to demonstrate that Dr. Behren possesses relevant information bearing on the claims in this action. As argued by WHA, plaintiff incorrectly contends that Dr. Dieck testified that it was the custom of the WHA Chief Medical Officer to review a patient's treatment where there have been multiple complications. Dr. Dieck, instead, testified as follows: "If a case or a patient's treatment ... was brought to Westchester Health Associates, probably through some sort of proceeding, the chief medical officer would review the conditions of the case ..." (Ex. 9 to Affm of Plaintiff at 36, line 13-17). Additionally, in response to plaintiff's counsel's question as to whether there was a system in place in 2012 to review multiple procedures which resulted in multiple complications, Dr. Dieck responded "No" (*id.* at 38, lines 9-16; 40, line 2).

Moreover, as argued by defendants, there is no evidence that Dr. Behren treated plaintiff or was otherwise involved in plaintiff's care. Notably, defendants submitted proof that Dr. Behren is not an ophthalmologist.

In view of the foregoing, plaintiff has not established that Dr. Behren may possess information which is relevant and material to the issues in this action, or may lead to relevant information. That branch of plaintiff's motion seeking an order compelling WHA to produce Dr. Behren for a deposition, therefore, is denied with leave to renew upon new evidence that Dr. Behren possesses personal knowledge regarding the issues in this action.

This court, therefore, need not reach WHA's remaining contentions with respect to plaintiff's demand for Dr. Behren's deposition.[1]

Personnel File of Dr. Negrin

Plaintiff asserts that, after an in camera review by the court, she is entitled to the personnel file of Dr. Negrin in light of Dr. Negrin's "'resignation' after her multiple surgical errors." Plaintiff contends that the file may contain information material and relevant to WHA's "supervisory responsibilities and its liability for the acts of its three-day-a-week part-time employee, DR. NEGRIN" (Order to Show Cause at ¶ [A][1]). Plaintiff further contends that, based upon the foregoing, that Dr. Negrin's personnel file will likely yield information material and relevant to the issues of plaintiff's treatment and her competency. Plaintiff asserts that the

[1] Although WHA refers to the affidavit of Dr. Behren as indicating that she has no knowledge regarding this case, except that which is privileged by the Education Law and Public Health Law, said affidavit was not annexed in opposition to the present motion.

exemption from disclosure of quality assurance reviews under Education Law § 6527 (3) and Public Health Law § 2805-m is not an automatic protection from disclosure.

Plaintiff relies upon *Gurbuzurk v Jamron* (2016 NY Slip Op 30920[U] [Sup Ct, NY County 2016]). In *Gurbuzurk*, plaintiff sought to compel the production of the personnel file of defendant anesthesiologist and defendants cross-moved to protect the file from disclosure on the ground that it was protected from disclosure under Education Law § 6527(3) and Public Health Law §2805-m, which exempt quality assurance reviews from disclosure.

The *Gurbuzurk* court recognized that the foregoing statutes exempt a hospital from disclosing information gathered in connection with quality review assurance and programs to identify and prevent malpractice, but also noted that the party opposing the disclosure has a burden to show that a review of the procedure exists pursuant to which it obtained the evidence in question. Additionally, the court in *Gurbuzurk* held that an in camera review is necessary, if the party seeking disclosure shows that some of the information in the files sought, such as records duplicated by the committee in connection with its review, may not be privileged under the statutes.

The *Gurbuzurk* court held that plaintiff's original demand for the entire personnel file of defendant anesthesiologist was overbroad, but the plaintiff had limited the scope of the demand to only those documents in the file which defendant surgeon had considered in determining that defendant anesthesiologist was competent to oversee plaintiff's decedent's anesthesia during surgery. This limited demand, the *Gurbuzurk* determined may be relevant to the issues relating to defendant surgeon's notice of and liability for defendant anesthesiologist alleged lack of competence. Moreover, the *Gurbuzurk* court held that defendants failed to show that the responsive materials were protected from disclosure since they only asserted a blanket exclusion applied. Accordingly, the *Gurbuzurk* court directed defendants to produce the demanded portion of the personnel file with a privilege log for any materials withheld under the statutes.

WHA opposes that branch of the motion seeking to compel the production of Dr. Negrin's personnel file. WHA argues that whether there were complaints regarding Dr. Negrin's competency and whether her employment was terminated by means other than her resignation, are not issues in this action. WHA asserts that the only allegation relating to Dr. Negrin's employment is the allegation in the Bill of Particulars that Dr. Negrin was acting in the scope of her employment and was negligently assigned to plaintiff's surgery.

WHA contends that there is nothing in the record that suggests that WHA questioned Dr. Negrin's competency or had any reason to question her competency. WHA notes that Dr. Negrin did not leave her employment with WHA until two years after plaintiff's surgeries. WHA argues that Dr. Negrin is, and was at the time of plaintiff's treatment, a board certified ophthalmologist, who graduated from an accredited medical school and was licensed to practice medicine in New York State. (Credentialing documents annexed as Exhibit D to WHA's Affirmation.) WHA further argues that there is no deposition testimony "by a qualified person" that Dr. Negrin was

not competent to render the subject treatment. WHA, therefore, asserts that plaintiff's contention that her personnel file will indicate she is unqualified or WHA had a reason to believe that she was unqualified are based on speculation. This, WHA argues, is insufficient to establish that anything in her personnel file would be at issue. WHA further asserts that plaintiff does not allege negligent hiring.

Additionally, WHA contends that plaintiff's allegation that Dr. Negrin's personnel file will indicate that her employment was terminated by any means other than her own resignation is speculative and is contradicted by the record. WHA notes that Dr. Dieck testified that Dr. Negrin left WHA's employ to spend more time with family. WHA also relies upon Dr. Negrin's letter to her patients which indicated the same (Plaintiff's Ex. 7). WHA further notes that plaintiff's counsel did not question Dr. Negrin regarding her resignation, but now claims it is a central issue in this case.

WHA asserts that, in any event, even if there was something in her personnel file that indicated a suspicion over her competence, such material would be protected under Public Health Law § 2805-m and Education Law § 6527 (3). WHA asserts that there is an exception to the privilege with respect to statements of a party whose actions are the subject of the quality assurance or malpractice prevention review, but the exception only applies to statements of natural persons and not corporate entities like WHA. WHA contends that plaintiff is seeking documents that may reflect WHA's supposed trepidations regarding Dr. Negrin, not statements from individual parties.

Education Law § 6527 (3),which is referred to as the "quality assurance privilege," shields from disclosure "records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program [and] any report required by the department of health pursuant to section twenty-eight hundred five-l of the public health law" (Education Law § 6527 [3]). Public Health Law § 2805-l (1) requires all hospitals, which is defined therein a any general hospital or diagnostic or treatment center, to report certain adverse events described in § 2805-l (2) to the Department of Health.

Public Health Law § 2805-m provides, inter alia, that the information collected and maintained pursuant to Public Health Law § 2805-k[2] and reports required by Public Health Law § 2805-l and incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the chapter, shall be kept confidential (Public Health Law § 2805-m [1]).

The party seeking to assert the privilege of quality assurance bears the burden of demonstrating that the documents demanded were prepared in accordance with the relevant statute (*Kneisel v QPH, Inc.*, 124 AD3d 195 [2d Dept 2015]; *Kivlehan v Waltner*, 36 AD3d 597,

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[2] Public Health Law § 2805-k requires a hospital or other facility approved by Article 28 ("Hospitals" as defined in the chapter 28 of the Public Health Law) to conduct an investigation prior to granting or renewing privileges of a physician

598 [2d Dept 2007]; *Marte v Brooklyn Hosp. Ctr.*, 9 AD3d 41, 46 [2d Dept 2004]). In order to assert the quality assurance review privilege a hospital is required "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" (*Kivlehan v Waltner,* 36 AD3d at 598).

WHA failed to meet its burden of establishing that Dr. Negrin's personnel file is protected from discovery pursuant to the quality assurance privilege. WHA failed to submit evidentiary proof that it had a quality assurance review procedure, or that such a review was conducted with respect to Dr. Negrin, or that the documents contained in Dr. Negrin's personnel file were all gathered pursuant to such a review.

Despite the foregoing finding, that branch of plaintiff's motion seeking an order compelling WHA to produce Dr. Negrin's personnel file must, in any event, be denied since the demand is overbroad. Notably, the demand is not limited to relevant documents in the personnel file, such as documents regarding her competence or alleged incompetence. Moreover, WHA correctly contends that there is no evidence on this motion record that Dr. Negrin's employment was terminated. Rather, the record only contains evidence that Dr. Negrin resigned in order to spend more time with her family.

Documents, Correspondence and Papers by Which Dr. Negrin's Employment Was Caused to be "Terminated"

Plaintiff contends that the demanded documents should be produced since there are a number of contingencies in Dr. Negrin's Employment Agreement which would constitute "cause" for termination of her employment, and such documents would provide relevant and material information as to WHA's knowledge and responsibility for its employee, Dr. Negrin.

Insofar as WHA has already produced a copy of Dr. Negrin's Employment Agreement and there is no evidence in the record that Dr. Negrin's employment was terminated pursuant to any provisions of the Employment Agreement or otherwise, that branch of plaintiff's motion seeking the demanded documents regarding Dr. Negrin's alleged "termination" is denied.

Dr. Dieck's Employment Contract

Plaintiff asserts that Dr. Dieck's employment contract effective for the period of July 5, 2012 through November 11, 2012 is relevant with respect to his supervision of Dr. Negrin. Plaintiff argues that Dr. Dieck's employment contract is relevant in light of the fact that Dr. Negrin worked part-time (3 days a week), was subject to "supervision," Dr. Dieck was the only full-time employee in the ophthalmology office, he and Dr. Negrin were the only doctors in the office, Dr. Dieck was senior to Dr. Negrin, and Dr. Dieck was a member of the supervisory group. Accordingly, plaintiff contends that WHA and Dr. Dieck should be compelled to produce Dr. Dieck's employment contract.

Plaintiff specifically relies upon certain language in Dr. Negrin's employment agreement as follows: That she "shall report to and be subject to the supervision of the Executive Committee of the Group ... and the officers of the Group" (Plaintiff's Ex. 6 at ¶ 1[a]). (The agreement defines WHA as the "Group.") That WHA may terminate Dr. Negrin for "cause" (*id.* at ¶ 8[b]) or "without cause" (*id.* at ¶ 8[d]).

Plaintiff, however, recognizes that Dr. Dieck testified that he had no supervisory capacity over Dr. Negrin, and did not have possession of his WHA employment agreement. WHA has not produced Dr. Dieck's employment agreement and has only produced a redacted two-page "notice of promotion" to "member" of WHA dated August 15, 2010 (Plaintiff's Ex. 12). Plaintiff contends that the notice of promotion does not contain the terms and conditions of Dr. Dieck's employment and is an insufficient response to the demand for disclosure. Plaintiff argues that the terms and conditions of Dr. Dieck's employment, including whether he had a supervisory or managerial role with respect to Dr. Negrin, are material and relevant.

Further, plaintiff contends that WHA should be directed to produce Dr. Dieck's employment agreement to plaintiff in light of the "discrepancies" in Dr. Dieck's deposition testimony regarding his recollection of the facts, his supervisory role and his knowledge. Plaintiff notes that although Dr. Negrin testified that she spoke to Dr. Dieck about plaintiff's case and the complications shortly after the first surgery, Dr. Dieck could not remember the conversation or plaintiff. Plaintiff further notes that Dr. Negrin testified that she spoke to Dr. Dieck about plaintiff's complications in case plaintiff came into the office on a day that Dr. Negrin was not working. Plaintiff also relies upon Dr. Dieck's testimony that he had no recollection of renewing two prescriptions for plaintiff, or discussing Dr. Negrin's performance as a doctor with anyone at WHA prior to July 1, 2014.

Defendants WHA and Dr. Dieck oppose that branch of plaintiff's motion.

Dr. Dieck contends that the demand for his employment agreement is a fishing expedition. Dr. Dieck asserts that the single purported conversation between him and Dr. Negrin does not equate to "supervision." Dr. Dieck further argues that plaintiff failed to establish how long the conversation was or where it took place, namely in a formal setting or while passing in the hallway.

WHA asserts that Dr. Dieck's employment agreement is not relevant since he never treated plaintiff, and has no recollection of any conversations with Dr. Negrin regarding plaintiff's care. Moreover, WHA contends that there is no evidence that any conversation between Dr. Dieck and Dr. Negrin was in a "supervisory context."

Moreover, WHA asserts that Dr. Dieck's employment agreement contains sensitive business information regarding WHA since Dr. Dieck is a member of WHA and his conditions of employment are governed by WHA's operating agreement. WHA further contends that the employment agreement does not directly speak to any supervisory responsibilities.

In the event this court directs disclosure of the employment agreement, WHA requests that the court first require plaintiff to review the table of contents and identify which sections plaintiff seeks disclosed and the court then conduct an in camera review of those sections.

Contrary to plaintiff's contention, the record does not contain sufficient evidence of any supervision on the part of Dr. Dieck over Dr. Negrin. The "notice of promotion" sent to Dr. Dieck by WHA, as argued by WHA at oral argument, does not specifically state that he was promoted to the Executive Committee of WHA, as argued by plaintiff. Rather the "notice of promotion" states that he was promoted to "Member" of the Group, which was defined as WHA. Moreover, Dr. Negrin testified that she had the conversation with Dr. Dieck regarding plaintiff's case and complications in the event plaintiff came into the office on a day that Dr. Negrin was not working. Finally, Dr. Dieck testified at his deposition that he did not supervise Dr. Negrin.

Accordingly, that branch of plaintiff's motion seeking an order compelling WHA to produce a copy of Dr. Dieck's employment agreement is denied.

WHA's Medical Malpractice Insurance Policy

Plaintiff contends that she is entitled to WHA's medical malpractice insurance policy in effect for the period of July 5, 2012 through November 12, 2012 pursuant to CPLR 3101 (f).

WHA contends that plaintiff is only entitled to WHA's insurance policy limits and its effective periods, which have already been produced. WHA disputes plaintiff's contention that CPLR 3101 (f) requires the production of its entire insurance policy, and argues that the statute only requires disclosure of the insurance policy's existence and the pertinent contents.

CPLR 3101(f) provides that "[a] party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse any payments made to satisfy the judgment." The case law on whether CPLR 3101(f) requires the production of the actual insurance policy or the disclosure of the policy's existence and pertinent contents, such as policy limits, has been inconsistent.

However, it is not disputed that the purpose of the statute is "to accelerate settlement of claims by affording the plaintiff knowledge of the limits of defendant's liability policies ... [thus] allowing the parties to enter into realistic negotiations, thereby maximizing efforts at settlement" (*Russo v Rochford*,123 Misc 2d 55, 68 [Sup Ct, Queens County 1984]; *see Spotlight Co., Inc. v Imperial Equities Co.*, 107 Misc 2d 124 [App Term 1st Dept 1981]; *Freidman v Fayenson* (41 Misc 3d 1236 [A] [Sup Ct, NY County 2013]; *Bolton v Weil, Gotshal & Manges LLP* (14 Misc 3d 1220[A] [Sup Ct, NY County 2005]; Siegel, NY Prac., § 344 at 569 [5th ed]). Notably, the memorandum of the bill provides: "The purpose of the bill is to permit the plaintiff in an action to obtain information regarding the policy of insurance as to coverage and limits of liability" (1975 NY Leg Annual at 65).

In view of the purpose of CPLR 3101(f), the Appellate Term, First Department in *Spotlight Co.* (107 Misc 2d 124) held that the section was intended to apply only where the plaintiff seeks to discover the terms of defendant's liability insurance, not where defendant seeks plaintiff's first party policy. Moreover, the *Spotlight* court further held that CPLR 3101(f) carved out only a limited exception to New York's long-standing view that insurance policies are not subject to discovery.

In *Bolton* (14 Misc 3d 1220[A]), the court held that CPLR 3101(f) requires defendants "to provide a certified or true copy of the insurance policies demanded by the plaintiff." However, in *Russo v Rochford* (123 Misc 2d at 68-69), which was relied upon by the court in *Bolton*, the court held that defendant's excess insurer could fulfill its obligation under CPLR 3101(f) by producing either a certified or true copy of the insurance policy covering defendant on the date of the subject accident, or a sworn statement by an employee of the excess insurer that a search was undertaken to confirm the existence of the policy and its available coverage and reporting the results of the investigation.

In *Hernandez v Jones* (84 Misc2d 805 [Sup Ct, Queens County 1975]), the court recognized the dispute as to the method and procedure to be followed in complying with the directive that the contents of an insurance policy be disclosed. The *Hernandez* court further noted that the plaintiff in a personal injury action is primarily interested in the existence of liability insurance, the name of the insurance company and the policy limits. The court then held that the following would satisfy CPLR 3101(f), if the parties did not agree that plaintiff will accept a certified or true copy of the policies or a statement under oath as to the insurance limits of the policies: "(1) a confrontation on notice to the parties and their attorneys wherein the policy or policies may be exhibited for inspection; or (2) a certified or true copy of the policy to be submitted to the demanding party; or (3) the demanding party to be furnished a statement under oath containing such information as he may require addressed to the existence and contents of the subject insurance policy" (*id.* at 806).

More recently, however, the court in *Freidman v Fayenson* (41 Misc 3d 1236 [A]) held that "CPLR 3101(f), according to the plain language, permits a party to obtain a copy of another party's insurance policy, if the coverage provided under the policy 'may' be used to 'satisfy part or all of the judgment which may be entered' against the insured" (*id.* at *2, *quoting* CPLR 3101[f]). The *Friedman* court recognized that the court in *Peterson v Long* (136 Misc 2d 725 [Sup Ct, Cattaraugus County 1987]) held that a plaintiff's entitlement under CPLR 3101(f) to coverage limits is "a matter of statutory right" (*id.* at 730). However, the *Friedman* court also noted that, in interpreting any statute, the court must "heed the intention of the legislature, as reflected in the plaint language of the text" (*Freidman*, 41 Misc 3d 1236 [A] at *2, quoting *UMG Recs., Inc. v Escape Media Group, Inc.*, 107 AD3d 51, 57 [1st Dept 2013]). The *Friedman* court further noted that it is well settled that if words in a statute "'have a definite meaning, there is no room for construction and the courts have no right to add to or take away from that meaning'" (*Freidman*, 41 Misc3d 1236 [A] at *2, quoting *UMG Recs.*, 107 AD3d at 57, quoting *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). The *Freidman* court then held

that the language of the statute was unambiguous in that it permits a plaintiff to discover the existence of the "contents" of defendant's insurance policy.

This court notes that the relevant definition of "contents" is "the topics or matter treated in a written work" (Webster Ninth New Collegiate Dictionary at 238). When considering the definition of "contents" in light of the purpose of CPLR 3101(f) to accelerate settlement by providing plaintiff with the knowledge of defendant's liability policy limits, this court cannot agree with plaintiff that defendant WHA is required to produce a copy of its medical malpractice insurance policy. Rather, this court concludes that defendant WHA, pursuant to CPLR 3101(f), is only obligated to provide an affidavit as to the existence of the policy and the policy limits for the time period at issue, or, alternatively, a copy of the declaration page of the policy which sets forth the policy limits for the time period at issue. Although WHA has asserted that it has already provided plaintiff with the policy limits and the effective period for its medical malpractice insurance policy, it is not clear from the record whether the information was contained within an affidavit or provided in the form of the declaration page.

In view of the foregoing, that branch of plaintiff's motion seeking an order compelling WHA to produce a copy of its medical malpractice policy is granted only to the extent that, on or before September 30, 2016, WHA shall serve an affidavit acknowledging that it had a medical malpractice insurance policy in effect during the relevant time period of December 29-30, 2010 and stating the policy/coverage limits in effect for that time period, or a copy of the declaration page of its policy in effect during the relevant time period, which sets forth the policy limits.

Cataract Eye Surgery Educational Materials and Pamphlets

Plaintiff contends that the materials which Dr. Negrin testified that she provided to plaintiff is likely to contain representations and information which is material and relevant to issues of liability and damages. Plaintiff, however, does not specify why the demanded materials are relevant and material.

Defendants do not oppose this branch of the motion in their opposition papers.

Although plaintiff does not specifically assert why the demanded educational material is relevant and material to the issues in this action, this court notes that plaintiff alleges a cause of action for lack of informed consent. Moreover, the record contains Dr. Negrin's deposition testimony that she provided plaintiff with educational materials regarding cataract eye surgery, plaintiff is entitled to those materials. In view of the foregoing, the materials provided to plaintiff by Dr. Negrin are relevant as to the issue of plaintiff's informed consent to the surgeries.

That branch of the motion seeking disclosure by WHA of the educational materials and pamphlets regarding cataract eye surgery provided to plaintiff by Dr. Negrin is therefore granted to the extent that WHA shall produce the demanded materials and pamphlets on or before September 30, 2016, or if materials and pamphlets cannot be located, WHA shall serve an affidavit regarding the details of the search undertaken to locate the demanded documents,

information regarding the titles and publishers of the documents, if known by WHA, and setting forth whether the documents are in the possession of any third-parties.

In view of the foregoing, it is

ORDERED that plaintiff's motion seeking an order compelling defendant WHA to produce certain demanded document discovery is denied except to the extent that defendant WHA shall, on or before September 30, 2016:

(1) produce any educational materials and pamphlets provided to plaintiff by Dr. Negrin regarding cataract surgery, or if the demanded materials and pamphlets cannot be located, WHA shall serve an affidavit setting forth the following: the details of the search undertaken to locate the demanded documents; information regarding the titles and publishers of the documents, if known by WHA; and setting forth whether the documents are in the possession of any third-parties; and

(2) shall serve an affidavit acknowledging that it had a medical malpractice insurance policy in effect during the relevant time period of December 29-30, 2010 and stating the policy limits in effect for that time period, or a copy of the declaration page of its policy in effect during the relevant time period, which sets forth the policy/coverage limits; and it is further

ORDERED that the branch of the plaintiff's motion seeking an order compelling WHA to produce Dr. Nancy Behren, M.D., WHA's Chief Medical Officer, for a deposition is denied with leave to renew upon new evidence that Dr. Behren possesses personal knowledge regarding the issues in this action.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
September 20, 2016

HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

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