

<b>Damelio v NYU Langone Med. Ctr.</b>
2017 NY Slip Op 31181(U)
May 24, 2017
Supreme Court, New York County
Docket Number: 805022/2015
Judge: Joan B. Lobis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X

EDWARD DAMELIO and GERALDINE DAMELIO

Plaintiffs,

Index No. 805022/2015

-against-

**Decision and Order**

NYU LANGONE MEDICAL CENTER,  
NYU-HOSPITAL FOR JOINT DISEASES,  
ROMAN J. KOPINETS, RN,  
ILUMINADA ABALOS, RN,  
MATTHEW TEICHER, MD,  
GHISLAINE M ISIDORE, MD,  
MILAD NAZEMZADEH, MD,  
CHIBUIKEM PHILIP AKAMNONU, MD,  
MADISON AVENUE ORTHOPAEDIC ASSOCIATES, P.C.  
YONG H. KIM, MD, and AFSHIN RAZI, MD,

Defendants.

-----X

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

Plaintiffs bring this motion seeking to strike defendants' answers for failure to comply with discovery orders or, alternatively, compelling defendants to comply with outstanding discovery demands. Defendants oppose the motion and cross-move for a protective order. In the underlying action for medical malpractice plaintiff alleges that due to defendants' negligence during cervical fusion surgery he suffered a right testicular infarction which necessitated removal of the injured testicle and led to erectile dysfunction. During the course of discovery plaintiff demanded that defendant NYU Langone Medical Center and NYU-Hospital for Joint Diseases

(NYU) produce a complete transcript or synopsis of all peer review committee meetings concerning plaintiff's care for in camera inspection. Defendants argued that the information is privileged and irrelevant. Plaintiff also demanded any incident reports concerning plaintiff's care, copies of any statements made by defendants during defendants' quality control or assurance and peer review process concerning plaintiff's treatment, copies of any minutes of peer review meetings related to plaintiff's treatment, copies of any programs, seminars, and case reviews made of plaintiff's medical case history, and documents concerning other presentations of plaintiff's case made by defendants. Defendants argued that these demands were overbroad, unduly burdensome, and contain confidential and privileged information.

On February 9, 2016 the Court ordered defendants to provide all of the defendant doctors' statements within thirty days. Defendants responded that they are not aware of or in possession of any such statements. On June 14, 2016 the Court again ordered defendants to provide the information or an affidavit of actual search for the documents. Defendants again responded that they are not in possession of any statements and objected to the request for incident reports as confidential. Plaintiffs now bring this motion, asking that defendants be directed to provide any and all statements given by any of the named defendants or an affidavit that no such documents exist and that all other demanded documents be provided to the Court for an in camera inspection to determine whether they are privileged. For the reasons below, the Court grants the motion solely to the extent of directing defendants to turn over party statements including those contained in any incident reports. Any portions of the incident reports that do not contain party statements need not be turned over.

Plaintiffs argue that any statements by defendants are discoverable and that the burden is on defendants to establish that the other documents they have withheld are privileged. Plaintiffs argue that defendants have not shown that the documents sought were prepared in accordance with the relevant statutes necessary to invoke the privileges of Education Law Section 6527, which permits nondisclosure of documents generated solely at the behest of a quality assurance committee. They contend that at his deposition, Roman Kopinets, RN testified that there was a team meeting after the surgery to discuss the “unusual” swollen testicle. They argue that the team meeting clearly was not held at the behest of a quality assurance committee, so any documents that may have been generated from it are discoverable. Plaintiffs argue that the Court should direct defendants to provide a further response or to submit all relevant documents to the Court for in camera inspection because it is impossible to determine whether any documents exist based on defendants’ responses.

Defendants oppose the motion and cross-move for a protective order against the disclosure of privileged information. Defendants state that plaintiffs do not specifically identify the allegedly outstanding discovery they seek. They claim that they have responded to every demand and Court order with the exception of one affidavit regarding incident reports, which they provide in connection with this motion. They allege that the incident reports at issue are privileged under the Patient Safety and Quality Improvement Act of 2005 (the Act) and, alternatively, under New York Education and Public Health Laws as materials related to the hospitals’ quality assurance and medical malpractice prevention programs. They state that the Act authorized the creation of PSOs for the reporting of various adverse events. They assert that information collected for the purpose reporting to the PSO, and subsequently reported to the PSO, is federally protected

“patient safety work product” and may not be disclosed in a civil malpractice law suit. They contend that they are not in possession of any party statements except for those in the incident reports. Moreover, they contend that unlike the privilege that exists under New York State law, the federal privilege does not include an exception for party disclosure. Though defendant Kopinets prepared the fact section of one of the incident reports, they add, a non-party prepared the deliberation and analysis section so even if party statements are discoverable, that report is at least partially protected. Defendants state that, additionally, the motion must be denied because plaintiffs seek discovery sanctions without providing an affirmation of good faith.

In support of their cross-motion defendants submit the affidavit of Marcia Murphy, Esq., BSN, MA, the Senior Director of Patient Safety and Risk Management for NYU. Ms. Murphy avers the hospital does not maintain any recorded minutes of meetings conducted under quality assurance programs, including peer review, and that all incident reports are privileged because they were prepared for the exclusive purpose of submitting to a federally certified PSO. She states that NYU is not in possession of any statements by the individually named physicians except for the incident reports the hospital prepared expressly for the PSO.

In opposition to the cross-motion and further support of the motion, plaintiffs argue that Public Health and Education Laws contain exceptions to the privilege for party statements and contend that defendants have not argued that the Federal Patient Safety and Quality Improvement Act preempts New York State law. They state that they demanded production of statements by defendant Kopinets which have not been provided but clearly exist. They contend that incident reports may be discoverable because party statements could have been labeled as incident reports

and submitted solely to a PSO to circumvent any quality assurance review and get around the statutory exemption, and that there is no prejudice to defendants if they are required to submit the documents to the Court for determination of discoverability. They argue that their failure to include an affirmation of good faith is insignificant because it is clear from the record that they tried to reach an accommodation with defendants but that the attempts were futile. They state that they are “still seeking responsive demands to any and all discovery previously sought, and they are not limited to those specified in this Court’s compliance conference Orders.”

In reply, defendants argue that the incident reports are expressly protected from disclosure under the Patient Safety Act, and that plaintiff does not address this argument in its opposition. Defendants state that federal statutes preempt state discovery rules. Defendants contend that plaintiff has not argued that Ms. Murphy’s affirmation does not demonstrate that the reports at issue constitute Patient Safety Work Product.

Initially, the Court finds that plaintiffs’ failure to provide a good faith affirmation is not fatal to their motion. It is clear from Court conferences on this issue that additional attempts to reach an accommodation with defendants would be futile. Next, although plaintiffs broadly move for “all discovery previously sought,” the Court cannot rule on anything not specifically laid out in this motion. Through the affidavit of Ms. Murphy, a party with personal knowledge of the hospital’s practices with respect to the internal reporting of patient safety events, defendants establish that they do not possess any responsive documents except for incident reports. Ms. Murphy further demonstrates that the incident reports were prepared solely for the purpose of

reporting to a PSO for quality assurance review and therefore avails it of the protections under Education Law Section 6527 and Public Health Law Section 2805-m.


The final issue is whether the Act preempts state law under which party statements are discoverable. The Court finds that it does not. Under 42 U.S.C. 299b-21(7)(A), patient safety work product includes oral statements assembled for reporting to a PSO that are reported to a PSO. However, under 42 U.S.C. 299b-21(B)(iii)(I), “[n]othing in [the definition of patient safety work product] shall be construed to limit . . . the discoverability . . . of information . . . in a . . . civil . . . proceeding. . . .” The Court concludes that patient safety work product does not include party statements because they are clearly discoverable in a civil proceeding under state law. The Court does not need to conduct in camera review of the documents in question. The Court has considered the remainder of the parties’ arguments and they do not change the outcome.

Therefore, it is

ORDERED that the motion is granted solely to the extent of directing defendants to turn over party statements including those contained in any incident reports. Any portions of the incident reports that do not contain party statements need not be turned over. The Clerk of the Court is directed to enter judgment accordingly.

Dated: *May 24*, 2017

ENTER:

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.