

Savage v Kredentser
2017 NY Slip Op 33241(U)
April 12, 2017
Supreme Court, Albany County
Docket Number: 900156-2015
Judge: Gerald William Connolly
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ESTATE OF JOYCE SAVAGE, HOWARD ALVIN
SAVAGE, INDIVIDUALLY AND AS THE ESTATE
REPRESENTATIVE,

DECISION AND ORDER

Index No.: 900156-2015
RJI No.: 01-15-117128

Plaintiffs,

-against-

DR. DANIEL C. KREDETSER, WOMEN'S
CANCER CARE ASSOCIATES, LLC, ST. PETER'S
HOSPITAL CENTER OF THE CITY OF ALBANY,
INC., ST. PETER'S NURSING AND REHABILITATION
CENTER, INC. and JOHN DOES 1 THROUGH 50,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Denise L. Savage, Esq.
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Connolly, J.:

Defendants Dr. Daniel C. Kredentser and Women's Cancer Center Associates, LLC (collectively, the Kredentser Defendants) in this medical malpractice action seek an order pursuant to CPLR §3103 granting a Protective Order with respect to the documents demanded in Plaintiffs' Combined Discovery Demand numbered 20, 21, 26, 40, 41, 64 and 130 on the grounds that they are statutorily protected from disclosure. Plaintiffs have opposed the application and cross-moved for sanctions, costs, expenses and fees. Oral argument was held in this matter on November 3, 2016. Via Decision and Order dated January 9, 2017, the Court directed, *inter alia*, that such motion be stayed until an *in camera* review of any and all documents responsive to such discovery demands were provided to the Court for determination of the applicability of asserted privilege(s). The Court directed that the St. Peters' Defendants submit a privilege log to the Court with respect to such discovery demands and any and all responsive documents, along with an affidavit of a party with knowledge addressing the applicability of such asserted privileges. The Court's January 9, 2017 Decision and Order is incorporated herein.

The St. Peters' Defendants have, *inter alia*, submitted a Fifth Supplemental Response to Plaintiff's Combined Discovery Demands which provides with respect to the plaintiff's discovery demands numbered 20, 21, 26, 40, 41, 64 and 130 as follows:

As to demand 20, which seeks "[a]ll records pertaining to reviews, complaints and any other reports concerning the physician Defendants in this Action" (Pl. Discovery Demands, ¶20) the St. Peters' Defendants assert that documents responsive to such demand are identified in the privilege log and submitted for *in camera* review and are exempt from disclosure pursuant to Education Law

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§6527(3) and Public Health Law §2805-m(a).

As to demand 21, which seeks “[a]ll records filed with the Office of Professional Medical Conduct, the Office of Health Management Systems or any other agency, or for internal purposes, pertaining to the voluntary or involuntary resignation or withdrawal of association or of privileges with a Hospital of any of the physician Defendants and/or the denial, suspension, restriction, termination or curtailment of training of any physician, registered physician’s assistant or registered specialist’s assistance or nurse license/registered by the New York State Department of Education, who treated or were connected or involved in the treatment of the Deceased”, such defendants assert that documents that may be responsive to such demand are identified in the privilege log and submitted for in camera review and are exempt from disclosure pursuant to Education Law §6527(3) and Public Health Law §2805-m(a).

The New York Public Health Law shields from disclosure “information required to be collected and maintained pursuant to sections 2805-j and 2805-k of this article, reports required to be submitted pursuant to 2805-l of this article and any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter ...” (Public Health Law 2805-m(1)). Public Health Law §2805-j requires that every hospital maintain a coordinated program for the identification and prevention of medical ... malpractice. Such program must include, *inter alia*, the periodic review and the review as otherwise warranted in specific instances and circumstances of the credentials, physical and mental capacity and competence in delivering health care services of all persons employed or associated with the hospital (2805-j(c)). Public Health Law 2805-k provides, *inter alia*, that prior to granting or renewing professional privileges or association

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of any physician or hiring a physician, a hospital shall request from the physician certain information including, inter alia, the name of any hospital with or at which the physician has or had any association, employment, privileges or practice; reasons for discontinuation; any pending professional medical misconduct proceedings and the substance of the allegations; and documentation of course work and training as mandated by the Public Health Law and Education Law. Information must be requested from any hospital or facility with or at which such physician had or has privileges, was associated, or was employed. Public Health Law §2805-l further provides that all hospitals shall be required to report events defined as an “adverse event” to the necessary entity. Education Law §6527(3) further provides, in relevant part, that “[n]either 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 program ... 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”.

Education Law §6527(3) and Public Health Law §2805-m “safeguard information collected as part of a medical review committee’s periodic assessment of physicians’ credentials and competence in order to encourage frank and objective discussion during the credentialing process” ... Public Health Law §2805-m confers complete confidentiality on information gathered by a hospital in accordance with Public Health Law §§2805-j and 2805-k, expressly exempting it from disclosure under CPLR article 31.” (*Stalker v Abraham*, 69 AD3d 1172, 1173 [3d Dept 2010] [internal citations and quotations omitted]; *see also, Logue v Velez*, 92 NY2d 13, 17). The party objecting to disclosure bears the burden of establishing that the material sought is privileged (*see*

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generally, Stalker, supra; Fernekes v Catskill Regional Medical Ctr., 75 AD3d 959 [3d Dept 2010]; Ross v Northern Westchester Hospital Ass'n, 43 AD3d 1135 [2nd Dept 2007]).

With respect to plaintiffs demands pursuant to Items 20 and 21, the St. Peters' Defendants have submitted, *inter alia*, a one page undated Report that lists patient complaints/grievance's pertaining to Dr. Kredentser, which has not been disclosed. Such report is not referred to in the affidavit of Dr. Hanks, the Chief Medical Officer for St. Peter's Health Partners Acute Care Albany, which discusses Dr. Kredentser's credentialing file (which includes 355 documents submitted *in camera*), and such defendants only conclusorily assert that such document is privileged pursuant to Education Law §6527(3) and Public Health Law §2085-j. As the party invoking a privilege, the St. Peters' Defendants bear the burden of demonstrating that such submission was prepared in accordance with the statutes they invoke to prevent disclosure and is therefore privileged. There is no submitted affidavit which in any way addresses such document, that the document was prepared in accordance with a relevant statute, that the hospital has a review procedure and that the information was obtained or maintained in accordance with that review procedure (*see generally, Stalker, supra*). Accordingly, the Court will direct the St. Peters' Defendants to submit an affidavit of its client addressing such one page undated "Report" within twenty (20) days of the date of this Decision and Order or such document will be subject to disclosure.

With further respect to such discovery demands, the St. Peters' Defendants have also submitted 355 documents contained within Dr. Kredentser's credentialing file, which credentialing file has not been disclosed. The St. Peters Defendants have submitted the Affidavit of Dr. Hanks in which he avers, *inter alia*, that he is in charge of St. Peter's credentialing file, which was at all

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times made and kept pursuant to the Public Health Law, that a credentialing committee exists for the purpose of reviewing the credentials and competency of physicians prior to granting or renewing professional privileges, that the credentialing files are generated and maintained pursuant to Public Health Law §§2805-j(b) and (c) and 2805-k, that the credentialing department obtains various documents for review prior to making a determination as to whether privileges should be granted including, *inter alia*, physician application information, prior complaints made against a physician, records pertaining to professional medical conduct matters, prior lawsuit information, documents relating to any pending professional medical conduct proceeding, information pertaining to a malpractice action, any finding of professional misconduct, investigations of the Department of Health, incident reports, letters of recommendation from other institutions and colleagues, delineation of privilege forms, diplomas, certifications, insurance coverage information, license information, searches conducted by the office of medical professions, and materials relating to completion of Continuing Medical Education courses.

Dr. Hanks further averred that upon receipt of the necessary documentation, the Hospital will determine whether a physician's privileges should be granted and that Dr. Kredentser's credentialing file is maintained for the "purpose of assessing his competence for renewing privileges every two (2) years in order for the Hospital to maintain an active program to prevent medical malpractice, as required by the Public Health Law". Based upon the Court's *in camera* review of the 355 documents submitted, the Court will grant a protective order against disclosure of the contents of such credentialing file to the extent that such documents are not located outside of such credentialing file. Such determination is based upon the St. Peters' Defendants showing that it has a review procedure

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and the credentialing file is maintained for the purpose of assessing Dr. Kredentser's competence for renewing privileges, and, upon *in camera* review, their demonstration that the documents included in the credentialing file consist of the documents Dr. Hanks noted would be obtained for review prior to making a determination as to whether a physician's request for privileges should be granted (*see generally, Stalker v Abraham*, 69 AD3d 1172 [3d Dept 2010]).

It is to be noted however, that the Court is not granting a protective order as to each document located within the credentialing file within the possession of the St. Peters' Defendants, to the extent they were created and/or maintained outside of the credentialing file, as Dr. Hank's affidavit solely addressed such 355 documents in the privilege log to the extent they are maintained within the credentialing file (*c.f. Bluth v Albany Med. Ctr.*, 132 AD3d 1131 [3d Dept 2015]; *see generally, Gabriels v Vassar Bros. Hosp.*, 135 AD3d 903 [2nd Dept 2016]). There has been no demonstration via affidavit of a representative of the St. Peters' Defendants as to whether certain documents contained in the credentialing file were created or maintained outside of the credentialing process and whether (and on what basis) they are subject to a privilege, such as the quality assurance privilege (*see Bluth, supra*). It would appear from the Court's *in camera* review that a number of such submitted documents may have been generated for purposes unrelated to Dr. Kredentser's credentialing file, some of which may be subject to other privileges, however, the documents alone do not evidence the right to such privileges, and the St. Peters' Defendants have not demonstrated any entitlement to a privileges.

As to demand 26, seeking a copy of all reports under 10 NYCRR §405.8 concerning the deceased and any documents relating to any investigations in connection therewith, the St. Peters'

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Defendants assert that they are not in possession of any documents responsive to such demand and, accordingly, no protective order need be issued with respect to such demand.

As to demand 40, seeking transcripts of interviews of the defendants' employees and representatives by the State Department of Health of and concerning the deceased, the St. Peters' Defendants assert that they are not in possession of any documents responsive to such demand and, accordingly, no protective order need be issued with respect to such demand.

As to demand 41, seeking retrospective investigation reports conducted by physicians employed by or associated with the defendant hospital of or concerning the deceased, the St. Peters' Defendants assert that they are not in possession of any documents responsive to such demand other than the November 25, 2011 Report of the Department of Public Safety and Quality Improvement which has already been addressed by the Court.

As to demand 64, seeking a full and complete copy of any and all statements, testimony or documentation, in writing or other form, made by the physician defendants, to any hospital peer review or credentialing committee regarding the treatment provided to the deceased during her admissions, the St. Peters' Defendants assert that they are not in possession of any documents responsive to such demand. Upon *in camera* review, Document 223 is responsive to such demand, and is not entitled to protection via a protective order as it is subject to the exception to the immunity provided by Education Law §6527(3) and Public Health Law §2805-m(2) as such document is a statement to the credentialing committee concerning the plaintiffs' case (*see Logue v Velez*, 92 NY2d 13 [1998]; *Swartzenberg v Trivedi*, 189 AD2d 151, 153 [4th Dept 1993]). Such document, however, should be redacted to the extent it includes reference to an unrelated matter as noted by item "2".

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As to demand 130, the St. Peters' Defendants assert that the personnel files for three nurses were previously provided, however as defendant Dr. Kredentser is not and was not an employee of St. Peter's Hospital, the answering defendants assert that they are not in possession, custody, or control of his personnel file. Additionally, as to the other physician, as such physician was a resident at Albany Medical Center and not an employee of St. Peter's Hospital, the answering defendants are not in possession, custody or control of his personnel file. Accordingly, no protective order need be issued with respect to such demand.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED that the motion of the Kredentser Defendants for a protective order is granted solely with respect to the 355 documents, except for document 223, constituting Dr. Kredentser's credentialing file provided that such documents are not otherwise subject to disclosure due to their creation or maintenance by the St. Peters' Defendants for purposes unrelated to such credentialing file; and it is further

ORDERED that document 223 be disclosed in redacted form (as discussed in the Decision and Order herein) to plaintiffs within twenty (20) days of the date of this Decision and Order; and it is further

ORDERED that the St. Peters' Defendants are directed to submit an affidavit of a representative of such defendants addressing such one page undated "Report" and the applicability of any asserted exemption with respect thereto, within twenty (20) days of the date of this Decision

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and Order; and it is further

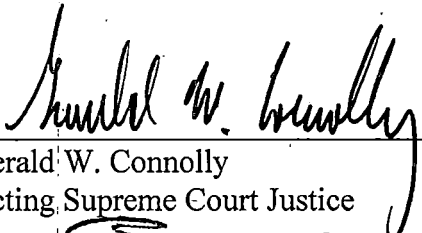
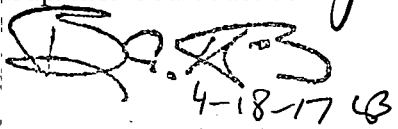
ORDERED that with respect to the one page undated "report", such portion of the Kredentser Defendants' motion is stayed pending such further submissions; and it is

ORDERED that remaining portion of the Kredentser Defendants' motion that has not been granted or stayed, is otherwise denied.

This shall constitute the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the Kredentser Defendants. The below referenced original papers are being retained by chambers. A copy of the Decision and Order is being transferred to the Albany County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER

Dated: April 12, 2017
Albany, New York


Gerald W. Connolly
Acting Supreme Court Justice


Papers Considered:

1. Order to Show Cause dated September 16, 2016; Attorney Affidavit of M. McFarland, Esq. dated September 13, 2016; accompanying exhibits A-F; Memorandum of Law dated September 13, 2017
2. Notice of D. Savage, Esq.'s Affirmation in Support of Motion Against Dr. Daniel C. Kredentser and Women's Cancer Care Associates for Sanctions under CPLR 3125, Plaintiffs' Costs, Expenses and Fees Under 22 NYCRR 130-1.1, and Opposition to Any Proposed Stay of This Court's September 7, 2016 Ruling dated September 14, 2016; Affirmation of D. Savage, Esq. dated September 14, 2016 with accompanying exhibits 1-4;
3. Affidavit in Response to Co-Defendants' Order to Show Cause for a Protective Order of A. Kuryluk, Esq. dated October 12, 2016 with accompanying affidavit of Dr. Steven Hanks dated September 30, 2016;
4. Attorney Affidavit of M. McFarland, Esq. dated October 7, 2016 with accompanying exhibits A-B which include the Affidavits of Dr. Kredentser dated October 6, 2016

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- and Tammy Sweet dated October 6, 2016; Memorandum of Law dated October 7, 2016;
5. Denise L. Savage's Affirmation in reply dated October 21, 2016;
 6. Reply Affidavit of M. McFarland, Esq. dated October 27, 2016 with accompanying exhibit A;
 7. Court Order of September 22, 2016;
 8. Decision and Order of October 19, 2016;
 9. Decision and Order of January 9, 2017;
 10. Letter from the St. Peters' Defendants' Counsel dated February 10, 2017; Fifth Supplemental Response to Plaintiff's Combined Discovery Demands dated February 10, 2017 with accompanying privilege log; Affidavit of Dr. Hanks dated February 3, 2017; *In Camera* Review of Dr. Kredentser's Credentialing File and One Page Report Listing Patient Complaints/Grievances.