

Newman v Mount Sinai Med. Ctr., Inc.
2018 NY Slip Op 33335(U)
December 21, 2018
Supreme Court, New York County
Docket Number: 151392/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

-----X
Aja Newman,

Plaintiff,

-against-

The Mount Sinai Medical Center, Inc.,
et. al.,

Defendants.
-----X

Index No.
151392/2016

Decision and
Order

Mot. Seq. 004

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

This is an action sounding in medical malpractice, which arises out of the sexual assault of Plaintiff Aja Newman ("Plaintiff") by David Newman ("Newman") during an emergency room presentation on January 11, 2016 and January 12, 2016. Plaintiff had sought treatment for her shoulder in the ER at The Mount Sinai Hospital where the records reflect she was treated by Newman, at that time an attending physician at the hospital.

The Department of Health and Human Services ("DOH") conducted an investigation into Plaintiff's complaint of sexual assault by Newman on January 22, 2016, and Mount Sinai's response to an earlier complaint of sexual assault in September 2015 by Newman on a different patient and rendered a "Statement of Deficiencies." The DOH decision indicates that the Chief Medical Officer of Mount Sinai was apprised of the findings.

Plaintiff brings an Order to Show Cause to compel defendants The Mount Sinai Medical Center, Inc., The Mount Sinai Hospital and Mount Hospital Health System (collectively, "Mount Sinai Defendants") to produce: (1) Chief Medical Officer Jeremy Boal for deposition and (2) Chief Medical Officer Vicki LoPachin ("Lopachin") for re-examination at a deposition. Plaintiff also requests that a special referee be present and make appropriate rulings at future depositions of Defendants' witnesses. Plaintiff also seeks to compel Mount Sinai Defendants to provide to Plaintiff the identities of staff #4 and staff #5 referred to in DOH report by name and

title with their last known addresses in order to aid Plaintiff in drafting a complaint for an action pursuant to CPLR §3102(c).

Relevant Background

On June 5, 2018, this Court ordered Plaintiff to designate a witness to be produced by Mount Sinai Defendants within two days. The deposition of this witness was to be conducted on July 6, 2018, as per this Court's order.

On July 31, 2018, Plaintiff moved by Order to Show Cause, for an order striking Mount Sinai Defendants' Answer and compelling discovery relating to a DOH "Statement of Deficiencies" as well as seeking to identify nonparty patients and "witnesses" to alleged events that did not involve Plaintiff. On August 14, 2018, Mount Sinai Defendants opposed Plaintiff's motion and cross-moved for a Protective Order precluding Plaintiff from questioning witnesses about the DOH document, and further vacating other demands made by Plaintiff. Mount Sinai Defendants asserted that documents and reports of the DOH are privileged under both Education Law §6527(3) and Public Health Law §2805-m.

By Order dated August 21, 2018, Plaintiff's motion and Defendants' cross motion were "resolved to the extent that Mount Sinai shall produce the Chief Medical Officer at Mount Sinai for deposition on or before 9/18/18. Deposition of CMO will be on general function of CMO and whether there are party statements referable to the case."

On September 18, 2018, Mount Sinai Defendants produced LoPachin for deposition. In January 2016, LoPachin was the Chief Medical Officer of The Mount Sinai Hospital and is currently the Chief Medical Officer of the Mount Sinai Health System. According to Plaintiff, Mount Sinai Defendants improperly limited the questions at LoPachin's deposition. According to Defendants, Plaintiff asked questions of LoPachin beyond the scope of the August 21, 2018 Court Order, and further sought privileged information.

On October 15, 2018, Plaintiff filed the instant Order to Show Cause. Mount Sinai Defendants opposed. On December 4, 2018, the return date of the Order to Show Cause, the parties were heard on the record.

Relevant Law

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.” CPLR §3103(a) provides that:

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

“Only when the plaintiff establishes that the knowledge of the proffered official is insufficient to produce testimonial and documentary evidence ‘material and necessary’ to the prosecution of the action, as provided in CPLR 3101(a), may the court grant a motion for the production of additional witnesses.” *Colicchio v. New York*, 181 A.D. 2d 528 (1st Dept 1992). “Further, a party seeking to depose additional witnesses must make a detailed showing of the necessity for taking such depositions.” (*Id.*).

As set forth by the Court in *Budassi v. Memorial Sloan-Kettering Cancer Center*, 2009 WL 2761059:

Public Health Law article 28 authorizes the Commissioner of Health ‘to inquire into the operation of hospitals’ (Public Health Law § 2803 [1] [a]) to determine their compliance with statutes and regulations governing the quality and adequacy of patient care (see Public Health Law § 2803 [1] [b]). Hospitals have a quality assurance committee which also processes grievances (Public Health Law § 2805-j [1] [d], [e]) and reports incidents of potential malpractice (see Public Health Law § 2805-1 [2] [a]); a hospital is required to cooperate with all DOH investigations or inquiries (see Public Health Law § 2803 [1] [d] [i]; [4]) and the law is clear that certain records,

documentation or committee actions required to be collected and maintained will remain confidential (see Public Health Law § 2805-m [2]). *Smith v. Delago*, 2 A.D.3d 1259, 1260 (3d Dep't 2003); see also Pub. Health Law §§ 2803, 2805-j, 2805-1, and 2805-m. Correspondingly, Education Law § 6527(3) sets forth, in pertinent part:

Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function ... nor any report required by the department of health pursuant to section twenty-eight hundred five-1 of the public health law described herein,..., 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. No person in attendance at a meeting when a medical or a quality assurance review ... was performed, .. , shall be required to testify as to what transpired thereat. The prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting.

Budassi v. Memorial Sloan-Kettering Cancer Center, 2009 WL 2761059.

Discussion

Plaintiff has failed to make a showing that she is entitled to the discovery she seeks in the Order to Show Cause.

Plaintiff has not shown a basis for a further examination of LoPachin. The Court Order of August 21, 2018 specifically limited the areas of inquiry to the “general function of CMO and whether there are party statements referable to the case.” Plaintiff was afforded the opportunity to ask questions relating to those areas

at LoPachin's deposition on September 18, 2018. The Court does not find that Defendants "obstructed" the questioning of LoPachin or that Plaintiff is entitled to a further deposition or re-examination of her on any subject areas including but not limited to her knowledge of the DOH report.

Plaintiff has failed to demonstrate a factual basis to depose CMO Jeremy Boal for deposition. LoPachin, the CMO of The Mount Sinai Hospital in January 2016 and the current CMO of the Mount Sinai Health System, has already been deposed. Additionally, there is no basis for Plaintiff's demand for a special referee at future depositions.

Lastly, Plaintiff's request pursuant to CPLR §3102(c) to compel Mount Sinai Defendants to provide to Plaintiff the identities of staff #4 and staff #5 referred to in the DOH statement by name and title with their last known addresses is denied.

Wherefore it is hereby

ORDERED that Plaintiff's Order to Show Cause is denied.

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

DATED: December 21, 2018


EILEEN A. RAKOWER, J.S.C.