Klein v Crystal Run Health Group, LLC
2018 NY Slip Op 33881(U)
October 15, 2018
Supreme Court, Orange County
Docket Number: EF006943-2017
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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MICAH KLEIN and JESSICA KLEIN,

Plaintiffs,

-against-

CRYSTAL RUN HEALTH GROUP, LLC d/b/a CRYSTAL RUN HEALTHCARE, CRYSTAL RUN HEALTHCARE LLP d/b/a CRYSTAL RUN HEALTHCARE, "JANE DOE", a fictitious name,[1] and RIAZ RAHMAN, M.D.,

Defendants.

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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, on all parties.

Index No. EF006943-2017

Motion Date: August 6, 2018

The following papers numbered 1 to 6 were read on Defendants' motion for a protective order, and Plaintiffs' cross-motion for an order compelling disclosure:

Notice of Motion - Affirmation / Exhibits - Affidavit / Exhibits 1-3

Notice of Cross Motion / Exhibits 4-5

Affirmation in Reply and Opposition to Cross Motion / Exhibits 6

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

This is a medical malpractice action arising out of care and treatment provided by defendants Riaz Rahman, M.D. and Daisy Rodriguez, M.A., providers affiliated with defendant

[1]By letter dated February 19, 2018, Defendants' attorney stipulated to substitute Daisy Rodriguez, M.A. in place of "Jane Doe." The substitution is "so ordered", and the caption of this action is deemed amended accordingly.

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Crystal Run Healthcare, to plaintiff Micah Klein on February 7, 2017. During the course of a routine physical examination involving *inter alia* the drawing of blood, Mr. Klein was left alone on a chair in the examination room, whereupon he evidently passed out, fell to the floor and sustained injury. At issue here is Plaintiffs' demand for disclosure of an Occurrence Report dated February 7, 2017, prepared by one Dawn Woods, RN, and an Occurrence/Complaint Investigation Report, also dated February 7, 2017, prepared by one Sonia Ramos.

Defendants move for a protective order, asserting that both reports are privileged under Education Law §6527(3). Plaintiffs cross move for an order compelling disclosure, asserting that (1) Defendants failed to establish the applicability of the privilege, (2) the privilege was waived by transmission of the documents to Defendants' general liability insurance carrier, and (3) the exception to the privilege for statements made by parties to this action applies, and mandates disclosure of the reports to the extent that they contain statements by defendant Riaz Rahman, M.D. or defendant Daisy Rodriguez, M.A.

A. Education Law §6527(3)

Education Law §6527(3) provides in pertinent part:

> Neither the proceedings nor the records relating to performance of a medical or quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the Department of Health pursuant to §2805-*l* of the Public Health Law described herein, including the investigation of an incident reported pursuant to §29.29 of the Mental Hygiene Law, shall be subject to disclosure under Article 31 of the Civil Practice Law and Rules. No person in attendance at a meeting when a medical or a quality assurance review or a medical and dental malpractice prevention program or an incident reporting function described herein was performed, including the investigation of an incident reported pursuant to §29.29 of the Mental Hygiene Law, 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.

B. Defendants Established *Prima Facie* That The Reports Are Privileged From Disclosure Under Education Law §6527(3)

In *Katherine F. ex rel. Perez v. State of New York*, 94 NY2d 200 (1999), the Court of Appeals held that Education Law §6527(3) exempts "records relating to medical review and quality assurance functions" from disclosure. *Katherine F.*, 94 NY2d at 204. *See also, Klinger v. Mashioff*, 50 AD3d 746, 747 (2d Dept. 2008).

The party seeking to invoke the Education Law §6527(3) privilege "has the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes." *Kneisel v. QPH, Inc.*, 124 AD3d 729, 730 (2d Dept. 2015); *Daly v. Brunswick Nursing Home, Inc.*, 95 AD3d 1262, 1263 (2d Dept. 2012); *Ross v. Northern Westchester Hospital*, 43 AD3d 1135, 1136 (2d Dept. 2007); *Kivlehan v. Waltner*, 36 AD3d 597, 598 (2d Dept. 2007); *Marte v. Brooklyn Hospital Center*, 9 AD3d 41, 46 (2d Dept. 2004). In order to invoke the "medical review and quality assurance" privilege, "[a] hospital is required, at a minimum, to show that it has a review procedure and that information for which the for which the exemption is claimed was obtained or maintained in accordance with the review procedure (*Bush v. Dolan*, 149 AD2d 799, 800-801...)." *Kivlehan v. Waltner, supra*, 36 AD3d at 599. "Records generated at the behest of a quality assurance committee for quality assurance purposes, including compilations, studies or comparisons derived from multiple records, should be privileged, whereas records simply duplicated by the committee are not necessarily privileged." *Marte v. Brooklyn Hospital Center, supra*, 9 AD3d at 48. *See also, Kivlehan v. Waltner, supra*, 36 AD3d at 59.

Via the affidavit of its Quality and Safety Specialist, Dawn Keeler, and supporting documentary evidence, defendant Crystal Run Healthcare established that (1) Crystal Run has a

quality assurance review committee, and (2) that both the Occurrence Report and the Occurrence / Complaint Investigation Report were generated pursuant to its written quality assurance review Policy Statements, and forwarded to Ms. Keeler for use in assessing potential safety issues and developing the agenda for quarterly Quality and Patient Safety meetings attended by upper level management within the practice.

Defendants thereby established *prima facie* that the reports are privileged from disclosure under Education Law §6527(3) as "records relating to performance of a medical or quality assurance review function."

C. The Education Law §6527(3) Privilege Was Not Waived By Crystal Run's Disclosure Of The Occurrence Report To Its Insurance Carrier

The Crystal Run Policy Statement concerning Occurrence Reporting (but not the Policy Statement concerning the follow-up investigation process) indicates that Occurrence Reports are designed not only to support Crystal Run's "quality improvement / risk management program", but also to "comply with the practice insurance carrier requirements." Ms. Keeler forwarded the Occurrence Report to Crystal Run's insurance carrier. Plaintiffs contend that this disclosure waived the Education Law §6527(3) privilege.

A waiver of the privilege may be found if the party asserting the privilege transmits a privileged document to a "disinterested third party." *See, Fernekes v. Catskill Regional Med. Ctr.*, 75 AD3d 959 (4th Dept. 2010); *Little v. Hicks,* 236 AD2d 794 (4th Dept. 1997). Inasmuch as Crystal Run's own insurance carrier is not a "disinterested third party", the Court finds no basis in the record for any waiver of the Education Law §6527(3) privilege.

D. Statements By Defendants Rahman And Rodriguez In The Occurrence/Complaint Investigation Report Are Not Privileged And Must Be Disclosed

Once again, Education Law §6527(3) provides:

> ...No person in attendance at a meeting when a medical or a quality assurance review or a medical and dental malpractice prevention program or an incident reporting function described herein was performed, including the investigation of an incident reported pursuant to §29.29 of the Mental Hygiene Law, 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.

In *Logue v. Velez,* 92 NY2d 13 (1998), the Court of Appeals stated that "[t]he evident purpose of this provision is to permit discovery of statements given by a physician or other health professional in the course of a hospital's review of the facts and circumstances of an earlier incident which had given rise to a malpractice action." *Id.*, at 18-19 (emphasis added). For this proposition, the *Logue* Court cited *Swartzenberg v. Trivedi,* 189 AD2d 151 (4th Dept.), *appeal dismissed* 82 NY2d 749 (1993).

In *Swartenberg*, the question was "whether a letter written by a physician to a medical quality assurance review committee is immune from disclosure pursuant to Education Law §6527(3)." *Id.*, 189 AD2d at 152. Holding, that the letter was subject to disclosure, the *Swartenberg* Court wrote:

> The purpose of Education Law §6527(3) is to encourage peer review of physicians by guaranteeing confidentiality to those persons performing the review function [cit.om.]. The statute, however, was not intended to extend protection to persons, like Trivedi, whose conduct is the subject of review [cit.om.].
>
> Moreover, granting immunity from disclosure to a letter from a physician under review would subvert the exception to the immunity provided by Education Law §6527(3). If Trivedi had appeared at a medical or quality assurance review meeting and made the statement embodied in his letter, that statement would be subject to disclosure [cit.om.].

> Indeed, as Supreme Court noted in its memorandum decision, Trivedi's letter directly responded "in a narrative manner relating to the care in question and specifically addresses the members of the ad hoc quality assurance committee". The statutory exception to immunity from disclosure would be rendered meaningless if it could be avoided merely by submitting a written statement instead of appearing personally and making the same statement before a review committee.
>
> Trivedi is a party to this action, and his letter, the functional equivalent of a statement, is not immune from disclosure under Education Law §6527(3).

Id., 189 AD2d at 153-154 (emphasis added).

Thus, "statements made by a doctor to his employer-hospital concerning the subject matter of a malpractice action and pursuant to the hospital's quality-control inquiry into the incident underlying that action" fall outside the scope of the privilege for proceedings and records "relating to performance of a medical or quality assurance review function" and must be disclosed. *See, Jousma v. Kolli,* 149 AD3d 1520 1521 (4th Dept. 2017). The Second Department has twice concurred that such statements, whether embodied in an incident report (*see, Santero v. Kotwal,* 4 AD3d 464, 465 [2d Dept. 2004]) or a quality control review investigation (*see, vanBergen v. Long Beach Med. Ctr.,* 277 AD2d 374, 374-375 [2d Dept. 2000]), are not privileged and must be disclosed..[2]

In view of the foregoing, statements made by Riaz Rahman, M.D. and Daisy Rodriguez, M.A., parties to this action, concerning the subject matter of Plaintiffs' medical malpractice

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[2]The *Swartenberg* Court noted that "[a] hypertechnical reading of the statute" might suggest that statements such as those involved in *Swartzenberg* (and, for that matter, in *Santero* and *vanBergen)* are immune from disclosure (*id.,* 189 AD2d at 153). *Swartzenberg* and its Second Department progeny plainly teach that such a technical reading of the statute is to be avoided. Without adverting to any of this authority, the Court in *Phillips v. City of New York,* 54 Misc.3d 294 (Sup. Ct. Bronx Co. 2016), indulged such just a literal reading of the statute in denying disclosure of party statements of the very type which the Second Department ordered disclosed in *Santero* and *vanBergen, supra. Id.,* at 296-297. *Phillips* is not good law, and this Court declines to follow it.

action, pursuant to Crystal Run's quality control inquiry and contained in the Occurrence / Complaint Investigation Report are not privileged under Education Law §6527(3) and must be disclosed in this litigation. *See, Logue v. Velez, supra*; *Swartzenberg v. Trivedi, supra*; *Jousma v. Kolli, supra*; *Santero v. Kotwal, supra; vanBergen v. Long Beach Med. Ctr., supra.*

The Occurrence Report dated February 7, 2017, prepared by Dawn Woods, RN, and the Occurrence/Complaint Investigation Report, also dated February 7, 2017, prepared by Sonia Ramos, have been submitted *in camera* for this Court's review. Based on the circumstances surrounding the underlying incident, it appears that Dr. Rahman and Medical Assistant Rodriguez, party Defendants herein, were the only persons, besides plaintiff Micah Klein himself, who were present in the examination room at any time material to Plaintiffs' complaint. It therefore appears that (1) the very brief account of the matter set forth in the Occurrence Report (at Box "B") necessarily reflects or embodies statements made by Dr. Rahman and/or Medical Assistant Rodriguez; and (2) the more substantial account of the matter set forth in the "Brief Summary of Occurrence" in the Occurrence/Complaint Investigation Report, except for the 11th, 13th, 23rd and 24th sentences therein, necessarily reflects or embodies statements made by Dr. Rahman and/or Medical Assistant Rodriguez. Consequently, those portions of the Occurrence Report and the Occurrence/Complaint Investigation Report are subject to disclosure.

It is therefore

ORDERED, that Defendants' motion for a protective order is granted and Plaintiff's motion to compel disclosure is denied except to the extent indicated hereinbelow, and it is further

ORDERED, that Defendants' motion for a protective order is denied and Plaintiff's motion to compel disclosure is granted with respect to (1) the matter contained in "Box B" of the Occurrence Report dated February 7, 2017, and (2) the matter contained in the "Brief Summary

of Occurrence" in the Occurrence/Complaint Investigation Report dated February 7, 2017, except for the 11th, 13th, 23rd and 24th sentences therein, and it is further

ORDERED, that within seven (7) days of the date of this Order, the Defendants' attorney shall submit to this Court for *in camera* review and approval for disclosure to Plaintiffs copies of the aforesaid Occurrence Report and the Occurrence/Complaint Investigation Report, redacted in compliance with the terms of this Order.

The foregoing constitutes the decision and order of the court.

Dated: October 15, 2018
Goshen, New York

ENTER

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE