UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEELU PAL, M.D.,

Plaintiff,

-against-

NEW YORK UNIVERSITY,

Defendant.

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(REVISED)
MEMORANDUM
DECISION AND ORDER

06 Civ. 5892 (BSJ)(FM)

FRANK MAAS, United States Magistrate Judge.

I. Introduction

In this action, plaintiff Neelu Pal ("Pal") contends that the New York University School of Medicine, sued herein as New York University ("NYU"), induced her to accept a post-residency laparoscopic fellowship through fraudulent misrepresentations regarding the breadth of its program and, later, wrongly terminated her in retaliation for her "whistle blowing" about substandard conditions and patient care. (See Compl. ¶¶ 1, 26-30, 32-34).

NYU has moved for a protective order barring Pal from having any further contact with any patients of Dr. Christine Ren ("Ren"), director of the fellowship program, and Dr. George Fielding ("Fielding"), her partner in NYU's laparoscopic practice. Pal, in turn, has cross-moved for an order compelling NYU to provide further

responses to its discovery requests. For the reasons set forth below, NYU's motion for a protective order is granted, and Pal's cross-motion to compel is granted in part and denied in part.

II. Background

The following facts set forth in the complaint are presumed to be true for present purposes.

Pal is a foreign-trained doctor who completed two residency programs in the United States between 2000 and 2005. (Id. ¶ 6). In November 2004, she found a listing for the NYU fellowship on a website operated by the Fellowship Council, an organization that distributes information about fellowships and administers a fellowship matching program. (Id. ¶¶ 7, 8). The listing stated that the laparoscopic practice at NYU "performed a wide range of advanced laparoscopic procedures including colon resections, hernia repairs, gastric bypass procedures as well as bariatric ('weight loss') procedures such as gastric band insertions." (Id. ¶ 9). Before applying, Pal also interviewed with Ren and Fielding, who confirmed the "wide range of laparoscopic procedures" that she would learn to perform if accepted as a fellow. (Id. ¶ 10). Following these discussions, Pal ranked the NYU laparoscopic practice "very high" on her preference list and was selected by NYU for a fellowship that began in October 2006. (Id. ¶¶ 12, 13).

After arriving at NYU, Pal learned that the laparoscopic practice at its hospital in fact focused almost exclusively on bariatric procedures and thus would deny

her any "opportunity to develop experience or expertise in other types of laparoscopic procedures." (Id. ¶ 14). Pal also concluded that Ren and Fielding were not taking the time necessary to understand the medical histories of their patients, obtain the patients' informed consent prior to surgery, and ensure proper post-operative patient care. (Id. ¶¶ 16-17). She voiced these concerns to both Ren and Fielding. (Id. ¶ 19).

In January 2006, one of Fielding's patients died following surgery, and another patient suffered severe post-operative complications. (Id. ¶¶ 20-21). Having grown increasingly concerned about the welfare of Ren's and Fielding's patients, Pal placed telephone calls on or about January 21, 2006, to patients scheduled for surgery the following day. During the ensuing conversations, Pal "warn[ed] them of the risks of the surgery and . . . inform[ed] them that there had been a recent death." She also "encouraged the patients to request additional information" from Ren, Fielding, and NYU. (Id. ¶ 22).

On January 24, Pal met with Dr. Carol Bernstein ("Bernstein"), NYU's Director of Graduate Medical Education, to express her concern that inadequate services were being provided by Ren and Fielding. Later that day, Pal also summarized her concerns about Ren and Fielding in an e-mail to Bernstein. (See Docket No. 31). NYU suspended Pal the following day; she subsequently was terminated on February 21, 2006. (Compl. ¶¶ 23-24).

Pal filed this action on August 4, 2006. Since then, Pal has contacted at

least one former patient of Ren and Fielding who had bariatric surgery at NYU. Based on that conversation, NYU has moved for a protective order preventing Pal from contacting any additional patients of Ren, Fielding, or NYU. (Docket No. 21). NYU also objects to Pal's discovery requests seeking the medical records of that patient and other specified NYU patients. (Docket No. 29). In her cross-motion, Pal seeks to compel the production of these and other records. (Docket No. 24).

III. Discussion

A. Pal's Motion to Compel Discovery

1. Individual Patient Medical Records

Pal's Document Request Nos. 14 through 16, 19, 21, and 22 seek disclosure of the medical records of six named NYU patients (one per request). NYU objected to the production of these documents on the grounds that the requests were "overbroad, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence," and that the information sought was "privileged under the Health Insurance Portability and Accountability Act" of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936.

Because this case is founded on diversity jurisdiction and raises only state law claims, New York law ordinarily would govern any privilege issues. See Fed. R. Evid. 501; In re Application of Am. Tobacco Co., 880 F.2d 1520, 1527 (2d Cir. 1989). HIPAA, however, preempts "any contrary provisions of state law. 42 U.S.C. § 1320d-

7(a). Under HIPAA, health care providers are required to protect the confidentiality of a patient's health information. Nat'l Abortion Fed'n v. Ashcroft, No. 03 Civ. 8695 (RCC), 2004 WL 555701, at *3 (S.D.N.Y. Mar. 19, 2004). The regulations promulgated pursuant to HIPAA define "[p]rotected health information" as "individually identifiable health information . . . [t]ransmitted by electronic media; [m]aintained in electronic media; or [t]ransmitted or maintained in any other form or medium." 45 C.F.R. § 160.103.

HIPAA's preemption provision contains an exception applicable when a state has a law concerning individually identifiable health information more stringent than HIPAA's own requirements. EEOC v. Boston Mkt. Corp., No. 03-CV-3227 (LDW) (WDW) 2004 WL 3327264, at *3 (E.D.N.Y. Dec. 16, 2004); Crenshaw v. MONY Life Ins. Co., 318 F. Supp. 2d 1015, 1028 (S.D. Cal. 2004); Law v. Zuckerman, 307 F. Supp. 2d 705, 708-09 (D. Md. 2004). Under Section 264(c)(2) of HIPAA, a "state privacy standard is more stringent than a HIPAA requirement if the state law 'prohibits or restricts a use or disclosure in circumstances [under] which such use or disclosure would otherwise be permitted' under HIPAA." Boston Mkt. Corp., 2004 WL 3327264, at *3 (quoting Nat'l Abortion Fed'n, 2004 WL 555701, at *3) (alteration in original).

HIPAA permits the disclosure of "protected health information" without a patient's consent in a variety of circumstances. For example, protected health information may be disclosed in response to a court order, "provided that the covered entity discloses only the protected health information expressly authorized by such order."

45 C.F.R. § 164.512(e)(1)(i). Alternately, a health care provider may disclose such information "in response to a subpoena or discovery request if the health care provider receives adequate assurance that the individual whose records are requested has been given sufficient notice of the request, or if reasonable efforts have been made to secure a protective order." Nat'l Abortion Fed'n, 2004 WL 555701, at *2.

By comparison, under New York law, "a person authorized to practice medicine" is prohibited from disclosing "any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," "[u]nless the patient waives the privilege." N.Y. C.P.L.R. § 4504(a) (McKinney 2005) ("CPLR 4504(a)") (emphasis added).[1] "Because New York law requires patient consent before disclosure and HIPAA provides for certain exceptions to that rule, New York law is more stringent. Nat'l Abortion Fed'n, 2004 WL 555701, at *3. Accordingly, New York privilege law plainly governs the privilege questions in this diversity action.

Pal's memorandum of law in support of her motion to compel does not discuss in detail the statutes and case law applicable to the disclosure of confidential medical information in this case. Instead, Pal simply argues that the documents are

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[1] This restriction also extends to "medical corporation[s] . . . and the patients to whom they . . . render professional medical services." Id. Moreover, although the privilege belongs to the patient, it "may be asserted by the physician for the patient's protection where the patient has not waived his privilege." In re Application to Quash a Subpoena Duces Tecum in Grand Jury Proceedings, 56 N.Y.2d 348, 352 (1982).

relevant because they will help prove that her complaints were made in good faith. Pal also argues that the identity of the patients can be protected "at trial" by referring to them by pseudonyms. (Docket No. 25 ("Pl.'s Mem."), at 6).

What Pal overlooks is that her attorneys have already disclosed the identities of six NYU bariatric surgery patients to opposing counsel by serving the disputed document requests. Pal's counsel has also attached unredacted copies of her discovery requests and NYU's responses thereto to Pal's electronically-filed papers in support of her motion to compel. (See id.).[2] As a consequence, the names of the patients are now available to virtually anyone with PACER access.

Under CPLR 4504(a), "disclosure of the name and address of a nonparty patient who may have been a witness to an alleged act of negligence or malpractice does not violate the patient's privilege of confidentiality of treatment," provided that the requesting party is not seeking to identify the patient by reference to the medical treatment he [or she] received . . . and revelation of the patient's location in the hospital does not reveal the patient's medical status." Rabinowitz v. St. John's Episcopal Hosp., 808 N.Y.S.2d 280, 282 (2d Dep't 2005) (citations and internal quotation marks omitted). Here, however, it is precisely because the six named patients underwent bariatric surgery that Pal's counsel seeks their medical records. New York law is absolute in that regard. See, e.g., Gunn v. Sound Shore Med. Ctr. of Westchester, 772 N.Y.S.2d 714, 715 (2d

[2] On May 1, 2007, I entered a separate order directing the Clerk of the Court to place the relevant portion of that document under seal.

Dep't 2004) ("[S]ince disclosure of the patients' names will, in effect, reveal that they were undergoing treatment for cardiac-related conditions, such disclosure is prohibited under CPLR 4504(a)."). Accordingly, in the absence of a waiver – and here there has been none – the service and filing of Pal's document requests is, by itself, a violation of CPLR 4504(a). Pal consequently is not entitled to the records she seeks, regardless of their relevance.

Pal's motion to compel is therefore denied to the extent that she seeks the disclosure of specific patients' medical records.

2. Other Discovery Requests

Document Request No. 5 seeks the disclosure of any documents concerning communications between NYU and the other applicants for the fellowship awarded to Pal. In Document Request No. 6 and Interrogatory No. 4, Pal seeks information concerning applicants for the fellowship for the following year. NYU objects to these requests on the ground that any evidence regarding other applicants that Pal sought to introduce into evidence at trial to corroborate her claim that Ren and Fielding misrepresented the laparoscopic practice at NYU would constitute character evidence, the admission of which is precluded by Federal Rule of Evidence 404(b). In advancing this argument, NYU fails to take note of the numerous exceptions to that rule, which permit similar act evidence to be used to establish, inter alia, motive or absence of mistake. Moreover, as Pal correctly observes, the standard for pretrial disclosure differs from that

governing the admissibility of evidence at trial. See Fed. R. Civ. P. 26(b)(1) ("[R]elevant information need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). Pal consequently is entitled to the discovery she seeks concerning NYU's communications with other applicants for laparoscopic fellowships during the narrow time periods for which she seeks this information.

In Document Request No. 8, Pal seeks statistical data concerning the types of surgeries that Ren and Fielding performed during the limited period of time that she was employed as a fellow at NYU. NYU contends that it does not maintain any documents that compile this information and that any attempt to reconstruct it now would be unduly burdensome. NYU further objects that the surgeries that Ren and Fielding actually performed while Pal was a fellow shed no light on the truth of the statements that they made nearly one year earlier when they interviewed Pal.

Pal's rejoinder is that NYU indicated in response to Document Request No. 7 that it had no such records for calendar year 2004-05, but failed to make a similar representation in response to Document Request No. 8, which requested a similar summary for the following year. (Docket No. 36 ("Pl.'s Reply Mem.") at 2-3). Pal argues that NYU's response to Document Request No. 8 consequently was limited to a claim of privilege under HIPAA. (Id.). Nonetheless, if there are no summary "documents which set forth the numbers of different types of surgical procedures

performed by [Ren and Fielding] from September 1, 2005 until January 25, 2006," there is nothing for NYU to produce. Additionally, because the types of surgeries that NYU performed long after Ren and Fielding interviewed Pal are, at best, of marginal relevance, it plainly would be unduly burdensome for NYU to have to create the requested summary now. This aspect of Pal's motion to compel is therefore denied.

In Interrogatory Nos. 10 through 15, Pal seeks the identification of persons having knowledge of the medical treatment of the six patients for whom Pal requested the production of medical records. Presumably this request seeks information about the NYU personnel who treated the patients. The mere disclosure of the identities of these individuals does not appear to contravene either HIPAA or New York law. Accordingly, Pal is entitled to this information.

In Interrogatory No. 16, asks NYU to identify the patients whom Pal telephoned on January 21, 2006. If NYU were to answer this interrogatory, which seeks information that Pal herself presumably knows, it necessarily would have to disclose (or confirm) the names of patients who had bariatric surgery at its hospital. As noted earlier, CPLR 4504(a) bars NYU from doing so in the absence of a patient waiver. The motion to compel a response to Interrogatory No. 16 is consequently denied. (Of course, should NYU wish to call any of these patients as witnesses, it will have to identify them so that Pal may depose them.)

In Document Request Nos. 17 and 18, Pal seeks documentation concerning

the credentials and licensing of two fellows who preceded Pal in the laparoscopic surgery program. Pal contends that this information is relevant because she complained about the unlicensed status of these physicians prior to her termination. (Pl.'s Mem. at 6). NYU has objected to these requests on several grounds, including a claim of privilege under Sections 2805-j and 2805-k the New York Public Health Law ("PHL"). The first of these statutes requires a hospital to maintain a program of quality review; the second requires a hospital to review a doctor's prior history in deciding whether to grant the doctor professional privileges at its facilities. Additionally, PHL § 2805-m provides that the information collected pursuant to both statutes shall not be released other than to the New York State Department of Health or another hospital considering the employment of, or granting of privileges to, a doctor.

In her motion papers, Pal addresses only the privilege pertaining to NYU's credentialing investigation, contending that "[a]ny subsequent documents confirming that these two physicians were not properly licensed would not be privileged." (Pl.'s Reply Mem. at 4). Presumably, however, NYU's discovery that two of its physicians were not properly licensed would fall squarely within the type of periodic assurance and medical malpractice review that PHL § 2805-j insulates from discovery. Pal's application to compel a response to her discovery requests concerning her two predecessors is therefore denied. Nonetheless, NYU is directed to provide a privilege log with respect to any documents withheld on privilege grounds which are responsive to these requests.

In Document Request No. 24, Pal seeks "[a]ll communications between [her] and Dr. Carole Bernstein." In Document Request No. 25, Pal seeks "[a]ll communications among or between NYU's employees concerning [her], including but not limited to communications concerning [her] between Drs. Ren, Fielding, Bernstein and Riles." In Document Request No. 26, Pal seeks "[a]ll communications concerning [her] between NYU's employees, including but not limited to Dr. Riles and employees of the University of Medicine and Dentistry of New Jersey [where she completed a surgical residency]." NYU states that it has produced the documents responsive to these requests to the extent that they relate to Pal's claims. To the extent that Pal seeks additional documents her requests clearly are overbroad. For that reason, NYU's objections are sustained, and Pal's motion to compel further responses to these requests is denied.

B. NYU Motion for a Protective Order

NYU seeks an order preventing Pal from contacting any patients of Ren or Fielding or "NYU in general." (Docket No. 22 ("Def.'s Mem."), at 1). Rule 26(c) of the Federal Rules of Civil Procedure authorizes a district court to "'make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense' upon a showing by a movant for the order of good cause." Gambale v. Deutsche Bank AG, 377 F.3d 133, 142 (2d Cir. 2004) (quoting Fed. R. Civ. P. 26(c)); Thrower v. Pozzi, No. 99 Civ. 5871 (GBD), 2002 WL 91612, at *7 (S.D.N.Y. Jan. 24, 2002). A party establishes good cause when it "shows that disclosure will result

in a clearly defined, specific and serious injury." Conopco, Inc. v. Wein, No. 05 Civ. 9899 (RCC)(THK), 2007 WL 1040676, at *2 (S.D.N.Y. Apr. 4, 2007) (citation omitted). On the other hand, "[b]road allegations of harm, unsubstantiated by specific examples of articulated reasoning, do not satisfy the Rule 26(c) test." Id.

NYU argues that Pal's continuing contact with its patients violates the physician-patient privilege and HIPAA. (See Def.'s Mem. at 3-4). In support of its application, NYU has submitted a sworn affidavit in which Fielding states that one of his patients contacted him on the night of February 21, 2007, and informed him that he was "bewildered and upset" by a recent phone call from Pal. (See Docket No. 35 (Aff. of George Fielding, M.D., sworn to Mar. 29, 2007) ¶¶ 2-3). Fielding states further that the patient told him that he "did not want to get involved with any legal matters between Dr. Pal and NYU." (Id. ¶ 4). During this conversation, the patient also allegedly told Fielding that Pal had "spoken with his father in trying to reach him." (Id. ¶ 5). Pal's counsel, Jason L. Solotaroff, Esq., affirms, however, that he subsequently telephoned the only patient that Pal had contacted, and that the patient "denied stating concern about the call from Dr. Pal or requesting that NYU prevent Dr. Pal from calling him again." (Docket No. 28 (Affirm. of Jason L. Solotaroff, Esq., in Opp. to Def.'s Mot. for a Protective Order, dated Mar. 26, 2007) at 2).

Pal advances essentially two justifications for her actions. First, Pal suggests that she can prove the good faith element of her whistleblower claim by calling the "patients as witnesses to testify that they received improper patient care." (Docket

No. 28 (Pl.'s Opp.), at 3). Second, Pal alludes to "the important public interests served by whistleblower cases like this one." (Id. at 4). Nonetheless, even if Pal is correct that the six patients could bolster her claim that NYU's laparoscopic medical procedures were deficient, a patient's right to confidentiality is no less in the public interest than the exposure of medical malpractice.

The publication on the Internet of the names of NYU patients who have had bariatric surgery, even if inadvertent (as appears to be the case), raises a legitimate concern that their extensive privacy rights under New York law will not be sufficiently honored if the details of their medical treatment are disclosed to Pal and her counsel. On the other hand, it may be possible to craft procedures for seeking a waiver which afford the patients an opportunity to speak with Pal or her counsel if they wish to do so. Accordingly, the Court will conduct a conference on May 16, 2007, at 5 p.m., in Courtroom 20A, 500 Pearl Street, New York, New York, to entertain counsel's suggestions in this regard. In the interim, however, Pal and her counsel are instructed not to have any further contact with any patients of the NYU laparoscopy practice.

IV. Conclusion

As set forth above, Pal's motion to compel (Docket No. 24) is granted in part and denied in part. NYU is further directed to provide any further information required by this Memorandum Decision and Order within two weeks.

Additionally, NYU's motion for a protective order (Docket No. 21) is granted, and Pal and her attorneys are directed not to initiate any further contact with the

six bariatric surgery patients identified in Pal's discovery requests without the prior approval of the Court.

Dated: New York, New York
May 2, 2007

FRANK MAAS
United States Magistrate Judge

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