

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-00636

Susan Haviland v. Meadows at East Mountain The

ENTRY REGARDING MOTION

Title: Motion to Compel Production of Residents records (Motion: 11)
Filer: James G. Levins, III
Filed Date: July 18, 2023

The motion is GRANTED. See specific terms below.

In this action Plaintiff Susan Haviland, as Executrix of her mother's estate, alleges that Defendant, The Meadows at East Mountain, a senior assisted living facility, failed to prevent one of its former residents, Patrick Washam, from sexually assaulting Ms. Haviland's mother, Hazel C. Adams, when Ms. Adams was also a resident at The Meadows. Ms. Adams is now deceased, and Ms. Haviland brings suit in her capacity as the fiduciary of Ms. Adams' estate.

On February 7, 2023, Plaintiff served Defendant with a request for production of the following records regarding Mr. Washam, including, *inter alia*:

- a. Resident Notes;
- b. Incident Reports;
- c. Care Plans;
- d. Resident Assessments;
- e. Records concerning the assessment or implementation of a behavioral management program to protect against Mr. Washam's conduct; and
- f. Electronically-stored information regarding any of the above records.

The request encompassed the time frame between the date of Mr. Washam's application to become a resident at The Meadows and July 17, 2019. Plaintiff further sought production of records pertaining to another former resident, identified only by her initials, "P.B.," on grounds that Mr. Washam had also assaulted or touched P.B. without her consent.¹

¹ Plaintiff has recently clarified that, as to P.B., she seeks production of "only information pertaining to Patrick Washam and . . . not . . . P.B.'s physician or medical treatment

Defendant declined to produce these records, and on July 18, 2023, Plaintiff moved for an order compelling production which Defendant opposed on several grounds. On August 23, 2023, the court ruled that the records were relevant, and scheduled oral argument on the motion to obtain more information about the nature and content of the records to determine applicability of Defendant's claim of privilege. At argument, Plaintiff's counsel described the records more specifically and relied on a particular section of HIPAA regulations (regulations of the federal Health Insurance Portability and Accountability Act of 1996) as authority for obtaining the records without notice to Mr. Washam or P.B, neither of whom have waived the privilege. Specifically, Plaintiff argued that production of the records may be authorized under a qualified protective order that comports with the provisions of 45 C.F.R. § 164.512(e)(ii).

The provision cited by Plaintiff merely permits disclosure by a covered entity under circumstances not satisfied here. Plaintiff seeks a court order without having met those requirements. The applicable provision is therefore 45 C.F.R. § 164.512(e)(i), which allows disclosure only upon a court order. Therefore, it is incumbent on this court to determine whether a court order is warranted under state law.

Defendant objects to providing any of the requested records on the basis of patient privilege. Plaintiff argues that "[m]any of the requested records are not privileged," since the privilege only applies to records or information obtained by a physician or nurse that was needed for the performance of their duties of care and treatment of a patient. Pl.'s Mem. In Support of Order Compelling Production (filed Jul. 19, 2023), at 1, 5-6 (citing *State v. Sweet*, 142 Vt. 238, 240 (1982) and 12 V.S.A. § 1612).

In opposing the motion, Defendant argues that 12 V.S.A. § 1612 "covers any information acquired in attending the patient." Def.'s Suppl. Opp'n to Pl.'s Mot. to Compel Resident Records (filed Sept. 25, 2023), at 2 (arguing a distinction between the definition of "health information" as provided under 45 C.F.R. § 160.103 and the scope of the privilege under state law). Defendant claims that the records sought by Plaintiff are "admittedly" privileged as healthcare records. Def.'s Opp'n to Pl.'s Mot. to Compel (filed Aug. 2, 2023), at 10; *see also id.* at 11, but, as noted, Plaintiff does not concede or admit that all of the records at issue are subject to the patient's privilege.

There are two sources of a patient's privilege under state law.

information." Pl.'s Decl. Regarding Request for Patrick Washam's and P.B.'s The Meadows Records (filed Sept. 25, 2023) (last page of filing).

12 V.S.A. §1612 is entitled “Patient’s privilege.” Section (a) defines the privilege:

(a) **Confidential information privileged.** Unless the patient waives the privilege or unless the privilege is waived by a express provision of law a person *authorized to practice medicine, chiropractic, or dentistry*, a *registered professional or licensed practical nurse*, or a *mental health professional* as defined in 18 V.S.A. Sec. 7101(13) shall not be allowed to disclose any information *acquired in attending a patient in a professional capacity*, including joint or group counselling sessions, and which was necessary to enable the provider to act in that capacity.
(Emphasis added.)

V.R.E. 503 (e) defines the patient’s privilege as follows:

(b) **General rule of privilege.** A patient has a privilege to refuse to disclose and to prevent any other person, including a person present to further the interest of the patient in the consultation, examination or interview, from disclosing confidential communications *made for the purpose of diagnosis or treatment of his physical, mental, dental, or emotional condition*, including alcohol or drug addiction, *among himself, his physician, dentist, nurse, or mental health professional, and persons who are participating in diagnosis or treatment under the direction of a physician, dentist, nurse, or mental health professional*, including members of the patient’s family.
(Emphasis added.)

Under both provisions, the communications must have been made (a) by or to a specified professional (b) acting in a professional capacity (c) for purposes of diagnosis and/or treatment. The notes of staff in an assisted living facility about events of daily life do not meet these requirements, as not everything that happens in a living facility is for the purpose of diagnosis or treatment. However it is likely that some of the records may contain privileged material.

Plaintiff correctly points out that Defendant bears the burden of establishing that records withheld fall within the confines of the patient’s privilege. *See State v. Springer*, 139 Vt. 471, 474 (1981). Defendant has made only a broad generalization that *all* of the records requested are covered by the patient privilege.

The court concludes that Defendant has not properly established that each responsive record in its possession that has been withheld from the discovery request is subject to a patient’s privilege under state law. The Meadows is not a hospital, and Defendant has not proven that each of the withheld records was created by a licensed physician or nurse (or other medical professional expressly covered under the statute) while attending to Mr. Washam or P.B. Even if that showing had been made, that would not completely satisfy Defendant’s burden, since the party claiming the patient’s privilege must also show that the records were “necessary to enable” the physician, nurse, or other covered professional “to act in th[eir] professional capacity.” *State v. Raymond*, 139 Vt. 464, 470 (1981); *see also Springer*, 139 Vt. at 474-75 (patient’s privilege

requires proof that “the information gathered [by the health professional] was necessary for the care and treatment of the patient”).

Rule 26(b)(6) of the Vermont Rules of Civil Procedure provides as follows:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . , the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged . . . , will enable other parties to assess the applicability of the privilege[.]

Vt. R. Civ. P. 26(b)(6)(A).² Pursuant to that rule, a court may order the party claiming the privilege to provide a privilege log of sufficient detail to demonstrate fulfillment of all the requirements for application of the privilege. *See Consumer Fin. Protection Bureau v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 185 (2d Cir. 2023) (“As this Court has long recognized, the proper way to address claims of privilege in response to a[n administrative subpoena] is for the objecting party to submit a privilege log.”); *Alcon v. Spicer*, 113 P.3d 735, 742 (Colo. 2005) (en banc) (construing state rule identical to Fed. R. Civ. P. 26(b)(5)) (use of privilege log “offers a workable solution to, and the best allocation of burdens in, discovery disputes involving claims of privilege for medical records”).

In particular, “[t]he standard for testing the adequacy of the privilege log is whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege that is claimed.” *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 648 (S.D.N.Y. 2019), *aff’d*, 2020 WL 5037573 (S.D.N.Y. Aug. 26, 2020) (quoting, without internal quotation marks or citation, *In re Methyl Tertiary Butyl Ether (“MBTE”) Prods. Liab. Litig.*, 274 F.R.D. 106, 112 (S.D.N.Y. 2011)).

Accordingly, the court hereby grants the Motion to Compel as to all the documents requested, but Defendant may redact the specific passages that meet the standards of the privilege pursuant to 12 V.S.A. §1612 and V.R.E. 503 (e). As to any redacted portion, Defendant shall provide a privilege log that sufficiently explains the basis for the privilege as to that portion of the record. A general assertion of “patient privilege” is not enough. The Motion is also granted on the same terms as to the records of P.B. to the extent such records relate to Mr. Washam’s conduct or Defendant’s knowledge and/or response to his conduct.

² That rule is substantially the same as Federal Rule of Civil Procedure 26(b)(5)(A), which was originally adopted by a 1993 amendment. *See* Vt. R. Civ. P. 26, Reporter’s Notes to 2009 Amendment. As indicated in the 1993 notes of the Federal Advisory Committee, this amendment was to place the initial burden on the party claiming the privilege and mitigate the need for in camera review.

The documents requested (with redactions as appropriate) and the privilege logs must be served on Plaintiff's counsel within 21 days of this entry order. Any objection to the invocation of privilege as to any redacted passages must be filed within 14 days after receipt of the privilege log.

Electronically signed September 27, 2023 pursuant to V.R.E.F. 9 (d).

A handwritten signature in black ink that reads "Mary Miles Teachout". The signature is written in a cursive, flowing style.

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned