

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18887
C/kmg

_____AD3d_____

Argued - March 13, 2008

ROBERT A. LIFSON, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
CHERYL E. CHAMBERS, JJ.

2006-11295

DECISION & ORDER

Sidney Hirschfeld, Director, Mental Hygiene Legal Service, etc., appellant, v Mitchell Teller, etc., et al., respondents.

(Index No. 9849/03)

Mental Hygiene Legal Service, Mineola, N.Y. (Sidney Hirschfeld, pro se, Lisa Volpe, and Dennis B. Feld of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, Lake Success, N.Y. (Sarah C. Lichtenstein of counsel), for respondents.

In an action, inter alia, for a judgment declaring that the Mental Hygiene Legal Service has the right of access to the mentally ill residents of neurobiological units of Woodmere Rehabilitation and Health Care Center, Inc., Brookhaven Rehabilitation and Health Care Center, LLC, Meadow Park Rehabilitation and Health Care Center, LLC, New Surfside Nursing Home, LLC, and Golden Gate Rehabilitation and Health Care Center, LLC, the plaintiff appeals from an order of the Supreme Court, Nassau County (Robbins, J.), dated November 8, 2006, which denied his motion for summary judgment and granted the defendants' cross motion for summary judgment.

ORDERED that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Nassau County, for, inter alia, entry of a judgment declaring that the Mental Hygiene Legal Service does not have the right of access to the mentally ill residents of neurobiological units of Woodmere Rehabilitation and Health Care Center, Inc., Brookhaven Rehabilitation and Health Care Center, LLC, Meadow Park Rehabilitation and Health Care Center, LLC, New Surfside Nursing Home, LLC, and Golden Gate Rehabilitation and Health Care Center, LLC.

April 15, 2008

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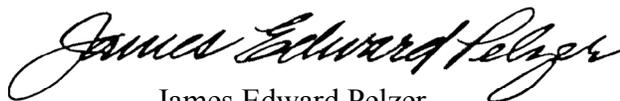
Sidney Hirschfeld, the Director of Mental Hygiene Legal Service (hereinafter MHLS), commenced this action to gain access for MHLS to mentally ill residents of neurobiological units of the defendant nursing homes. Mental Hygiene Law § 47.01(a) provides that MHLS “shall provide legal assistance to patients or residents of a facility as defined in section 1.03 of this chapter, or any other place or facility which is required to have an operating certificate” issued by the Office of Mental Health (hereinafter OMH). In the present case OMH has already determined that the defendant nursing homes are not required to obtain OMH operating certificates. A court may not substitute its judgment for that of the agency (*see Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363; *Flaherty v McCall*, 262 AD2d 890). MHLS failed to raise a question of fact in response to this prima facie showing of entitlement to judgment as a matter of law that its statutory mandate does not encompass the defendant nursing homes. Therefore the Supreme Court properly granted the defendants’ cross motion for summary judgment.

The parties’ remaining contentions need not be reached in light of our determination.

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Nassau County, for, inter alia, the entry of an appropriate judgment (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

LIFSON, J.P., FLORIO, ANGIOLILLO and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court