

**Storey v Beth Israel Med. Ctr.**

2007 NY Slip Op 30579(U)

March 7, 2007

Supreme Court, Queens County

Docket Number: 0016687/2001

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA Part 13  
Justice

DEREK M. STOREY x Index  
Number 16687 2001

Motion  
Date December 6, 2006

BETH ISRAEL MEDICAL CENTER Motion  
Cal. Number 33

DEREK M. STOREY x  
The following papers numbered 1 to 13 read on this motion by defendant Beth Israel Medical Center for an order granting summary judgment dismissing the complaint. Plaintiff Derek M. Storey cross-moves for an order granting summary judgment in his favor and setting the matter down for an inquest as to damages.

	<u>Papers Numbered</u>
Order to Show Cause - Affirmations-Affidavit	
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Upon the foregoing papers it is ordered that these motions are determined as follows:

Plaintiff Derek M. Storey, then a New York City Police Officer, alleges that he sustained physical injuries on April 27, 1999, when in the course of his duties he was stabbed by Robert Collins at the premises of Evelyn L. Frey located at 178-06 119th Road, Jamaica, New York. Mr. Collins lives with his aunt and his brother at said premises.

On March 3, 1999 Robert Collins was transported by ambulance

by EMS and the Police Department to Queens Hospital Center, after he had acted aggressively toward his aunt and brother. Mr. Storey was not involved in this incident. Mr. Collins was transferred and admitted to Beth Israel Medical Center on March 3, 1999, at which time he was diagnosed with, among other things, Chronic Paranoid Schizophrenia(CPS), marijuana dependency, and non-compliance with his Haldol medication. On March 9, 1999, Beth Israel successfully petitioned the Mental Health Court located at Bellevue Hospital to involuntary detain Mr. Collins', despite his objections and expressed desire to leave the hospital. On March 16, 1999, Beth Israel successfully petitioned the Mental Health Court located at Bellevue Hospital to administer, among other things, Haldol, a psychotropic medication commonly used to treat patients with CPS. Mr. Collins was discharged from Beth Israel on April 6, 1999, and was given a follow-up appointment with Dr. Fedak for April 26, 1999 at 3:00 P.M. Dr. Fedak, an attending psychiatrist, had treated Mr. Collins during his hospitalization at Beth Israel, and due to his vacation schedule he was unable to see Mr. Collins prior to April 26, 1999. At the time of his discharge Mr. Collins was given a month's supply of Haldol and was instructed to take the medication twice a day, by mouth, he was referred to Narcotics Anonymous and Alcoholics Anonymous for his history of drug abuse, and he was given a letter of referral in order to obtain SSI and Medicaid benefits.

On April 8, 1999, two days after his discharge a Beth Israel nurse, Pat Murphy, contacted Mr. Collins and offered him an earlier follow-up appointment for April 9, 1999. Mr. Collins rejected this offer, saying he did not need it. On April 14, 1999, Ms. Murphy contacted Mr. Collins and offered him a follow-up appointment prior to April 26, 1999. Mr. Collins, however, refused this offer, stating that he did not want to see another physician prior to seeing Dr. Fedak, that he was "fine," and that he was taking his medication. On April 21, 1999, Ms. Murphy again spoke with Mr. Collins, who told her that he would keep his appointment with Dr. Fedak on April 26, 1999. Mr. Collins failed to keep his appointment on April 26, 1999. On April 27, 1999 the police were called to his residence for a domestic disturbance at which time he slashed the plaintiff in the face with a knife. Plaintiff was taken to Jamaica Hospital for treatment of his facial lacerations and Mr. Collins was arrested and charged with assault in the first degree.

Plaintiff, in his amended complaint, alleges in his first cause of action that prior to April 27, 1999 Robert Collins had

displayed "a vicious propensity to attack police officers with assorted weapons including edged weapons," that Collins was a patient at defendant Beth Israel from March 3, 1999 to April 6, 1999 and that the hospital had a duty of "providing and delivering services pursuant to a written service plan for the said Robert Collins in a manner sufficient to protect Robert Collins and those persons whom he might encounter, and that the defendant owed such a duty to the plaintiff," that the plaintiff was stabbed or cut on April 27, 1999 while lawfully on the premises of Evelyn Frey; that the defendant breached the duties "owed to the plaintiff of providing services and/or care to Robert Collins sufficiently to protect persons whom he encountered including police officers and plaintiff herein"; that the defendant negligently executed the mandates of Collins' service plan, failed to provide him with a safe place to live, failed to provide him with sufficient medication, sufficient supervision, sufficient counseling and help, and permitted him to be ill and without care for an unreasonable length of time after having due notice thereof; and failing to warn members of the New York City Police Department of the existence of such dangers, and of the discharge of Robert Collins. It is also alleged that the defendant had prior written notice and constructive notice of Collins' propensity to attack police officers. The second cause of action alleges that plaintiff's injuries were caused by defendant's failure to comply with, and violated the provisions of Mental Hygiene Law § 20.15(g) and (h); that the defendant negligently maintained its Mental Health Department and Psychiatric Unit as regards the care provided to Robert Collins at the time of his release from the hospital; that the hospital failed to provide for the safety of persons on the property of Evelyn Frey; that the hospital permitted a mentally-ill person to be harbored and remain in a place where he did not receive the treatment called for by his service plan; and that it failed to warn members of the police force including plaintiff of the existence of dangers the police would experience in its encounter with Robert Collins.

It is well settled that absent a violation of a statutory or regulatory provision, the "fireman's rule" bars police officers from recovering damages from his or her employer or co-employee for injuries stemming from negligence which creates hazardous conditions that a police officer may encounter during the execution of police functions (Cooper v The City of New York, 81 NY2d 584 [1993]; Williams v City of New York, 304 AD2d 562[2003]; Flynn v City of New York, 258 AD2d 129 [1999]). However, General Obligations Law § 11-106, permits police officers to assert a

cause of action for on-duty injuries caused by the negligence of any person or entity other than that police officer's employer or a co-employee.

Plaintiff, in his cross motion, asserts that this is an action to recover damages for statutory negligence under General Municipal Law § 205-e, based on alleged violations of Mental Hygiene Law § 29.15(g) and (h), and that this is not a claim for medical malpractice. It is also asserted that Beth Israel negligently discharged Robert Collins and that the discharge plan violated the Mental Hygiene Law. Plaintiff's first cause of action, however, makes no reference to either the General Municipal Law or the Mental Hygiene Law, and only alleges an action for negligence based upon the discharge plan provided to Mr. Collins, and an alleged failure to warn the police department, including plaintiff, of Collins' alleged dangerous propensity to attack police officers.

To prevail on a claim of negligence under New York law, a plaintiff must prove (1) a duty owed by the defendant to the plaintiff to use reasonable care, (2) breach of that duty by the defendant, and (3) injury to the plaintiff (Pulka v Edelman, 40 NY2d 781 [1976]; see also Eiseman v New York, 70 NY2d 175 [1987]). The question of whether a defendant owes a duty to a plaintiff or the public at large is a question of law for the court (Purdy v County of Westchester, 72 NY2d 1 [1988]).

"A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter a defendant can exercise such control" (D'Amico v Christie, 71 NY2d 76 [1987]). A physician's or hospital's duty of care is ordinarily owed to one's patient (Purdy v Public Adm'r of County of Westchester, *supra*). The duty owed to third parties by a psychiatrist or mental health practitioner is somewhat different than that owed by a physician. A psychiatrist or mental health practitioner has the same general duty to exercise "professional judgment" and treat patients using a "proper medical foundation" (Bell v New York City Health & Hosps. Corp., 90 AD2d 270 [1982]; see also Smith v Fishkill Health-Related Ctr., 169 AD2d 309, 572 [1991]). In the case of mental health practitioners, however, in certain circumstances this duty is owed not only to patients and the narrow category of individuals the physician could expect to be affected by the treatment, but to the outside public as well (see Winters v New York City Health & Hospitals Corp., 223 AD2d 405 [1996]; see also Schrempf v State of New York, 66 NY2d 289 [1985]).

"Whether to release an institutionalized patient involves a risk of error" (see Fiederlein v City of N.Y. Health & Hosps. Corp., 80 AD2d 821, affd 56 NY2d 573). A psychiatrist "is not required to achieve success in every case" (Schrempf v State of New York, 66 NY2d 289, 295). Should a psychiatrist fail to predict that a patient will harm himself or herself, if released, the psychiatrist cannot be held liable for a mere error in professional judgment (see Weinreb v Rice, 266 AD2d 454). Even if other psychiatrists disagree with a decision to release a patient, such "disagreement represents, at most, a difference of opinion among physicians, which is not sufficient to sustain a prima facie case of malpractice" (Darren v Safier, 207 AD2d 473, 474 ). Were this not the rule, every judgment made by a psychiatrist would be subjected to the second guess of a jury, few releases would ever be made, and the hope of recovery and rehabilitation of a vast number of patients would be impeded and frustrated (see Topel v Long Is. Jewish Med. Ctr., 55 NY2d 682; Bell v New York City Health & Hosps. Corp., 90 AD2d 270, 280; Taig v State of New York , 19 AD2d 182, 183 ). However, a psychiatrist may be held liable if a decision to release a patient was less than a professional medical determination. A decision is not insulated by the medical judgment rule if it is not based upon a careful examination (see Bell v New York City Health & Hosps. Corp., supra, at 282; Seibert v Fink, 280 AD2d 661 [2001]). The same standards apply, where as here, a hospital releases a psychiatric patient who causes harm to a third person (see Wagshall v Wagshall, 148 AD2d 445 [1989]).

Here, defendant hospital's decision to release Mr. Collins, was a considered medical judgment, the product of a careful examination for which it cannot be held liable (see Haynesworth v New York City Health & Hosps. Corp., 195 AD2d 424, 425 [1993]; Bell v New York City Health & Hosps. Corp., supra, at 280). There is no evidence that Beth Israel's decision to release Mr. Collins was something less than a professional medical determination. The medical records establish that once Mr. Collins resumed taking Haldol, he made a steady improvement in his ability to manage his CPS symptomatology. He became less demonstratively angry, was more cooperative and responsive to his treatment plan, and although there were isolated incidents when he was irritable or angry, and non-cooperative, he steadily improved and at the time of discharge there was no evidence that he posed an acute threat of substantial harm to himself or others.

Plaintiff, however, claims that the decision to release Mr. Collins was improper, and the discharge plan was inadequate because the initial follow-up out-patient appointment with the treating psychiatrist was not scheduled until April 26, 1999. Plaintiff, in support of this claim, has not presented an affidavit from an expert and seeks to rely solely on the testimony of the non-party witness, Dr. Arnold Winston. Dr. Winston, the Chairman of Beth Israel's Psychiatric Department, testified that based upon his review of the medical record and his own knowledge and experience in treating patients with CPS, Mr. Collins' discharge was medically appropriate, but that it would have been better if Mr. Collins was seen by a psychiatrist earlier than April 26, 1999. Although Dr. Winston stated that the follow-up date of April 26 was inappropriate, he stated that it was appropriate to offer Mr. Collins the earlier appointments with another psychiatrist. He further stated that none of these appointment dates were relevant as Mr. Collins rejected the earlier dates, and failed to keep the appointment on the later date.

Defendant's expert, Dr. Paul Nassar, states in an affidavit that it is his opinion, within a reasonable degree of medical certainty, that Beth Israel acted within accepted standards of medical care in the treatment rendered to Mr. Collins, and that it properly complied with all of the requirements of Section 29.15(g) and (h) of the Mental Hygiene Law upon discharging Mr. Collins from the hospital on April 6, 1999. Dr. Nassar opined, within a reasonable degree of medical certainty, that based upon his examination of the medical records, the pleadings and Dr. Winston's testimony, the April 26 follow-up date was appropriate for this patient as it was the first available date he could see Dr. Fedak. He further stated that given the fact that Mr. Collins failed to keep the appointment with Dr. Fedak, it would be pure speculation as to whether he would have appeared for an earlier follow-up appointment.

Although Dr. Winston and Dr. Nassar offer somewhat different opinions about the appropriateness of the April 26, 1999 follow-up appointment, they do not disagree as to the appropriateness of the discharge. The court, therefore, finds that even if Beth Israel had made an error of judgment as regards the initial date of the follow-up appointment, no basis exists for the imposition of liability as regards the discharge (see Schrempf v State of New York, supra, at 296-297; Schoelkopf v St. Vincent's Hosp. & Medical Ctr., 222 AD2d 311, 311-312 [1995]; Adams v Elgart, 213 AD2d 436 [1995]; Davitt v State of New York,

157 AD2d 703 [1990]; Bell v New York City Health & Hosps. Corp., supra).

Plaintiff's present claim that Mr. Collins merely placated the physicians in order to be discharged, is speculative at best, and is not supported by the medical record or Dr. Winston's testimony. Dr. Winston stated that most patients with CPS lack the insight into their disease so as to be able to fool a physician and gain their release, and that this did not occur here. Dr. Nassar, in his affidavit, offers a similar opinion as to Mr. Collins' inability to successfully feign compliance and gain his release from the hospital.

Plaintiff's present claim that Mr. Collins was released from the hospital due to a lack of insurance and not because it was medically appropriate, was not set alleged in the complaint or bill of particulars and is wholly unsubstantiated. Although Mr. Collins' insurance benefits had been exhausted at the time of the discharge, Dr. Winston testified that the hospital would never have discharged him for this reason and that it would have applied for Medicaid and SSI benefits on his behalf if it was necessary for him to remain an inpatient. Dr. Winston also testified that at the time of the discharge, Mr. Collins was provided with a letter of referral from the hospital to assist him in his applications for Medicaid and SSI benefits.

To the extent that plaintiff asserts that Mr. Collins was a violent felon, the court finds that although it is undisputed that Mr. Collins had several felony convictions and had been imprisoned, there is no evidence that he had been identified as a violent felony offender. Contrary to plaintiff's counsel's assertions, there is also no evidence that Beth Israel had any prior written or oral notice of Collins' alleged vicious propensities towards police officers. Beth Israel, thus, had no duty to warn the plaintiff, a person who had no prior contact with Collins, or police officers in general as to his release, as there is no evidence that Mr. Collins had acted violently towards police officers, or threatened to do so either while in the hospital or upon his release (see generally Adams v Elgart, supra).

Turning now to plaintiff's second cause of action, although the amended complaint and bill of particulars make no reference to General Municipal Law § 205-e, plaintiff asserts that this is an action for statutory negligence and alleges that the defendant violated Mental Hygiene Law § 29.15(g) and (h). In order "to

make out a claim under section 205-e, a plaintiff must [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [police officer] was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm" (Williams v City of New York, 2 NY3d 352, 363 [2004], quoting Giuffrida v Citibank Corp., 100 NY2d 72, 79 [2003]; Campangna v Arleo, 25 AD3d 528 [2006]).

Section 29.15(g) of the Mental Hygiene Law provides that:  
"A written service plan prepared pursuant to this section shall include, but shall not be limited to, the following:

1. a statement of the patient's need, if any, for supervision, medication, aftercare services, and assistance in finding employment following discharge or conditional release, and
2. a specific recommendation of the type of residence in which the patient is to live and a listing of the services available to the patient in such residence.
3. A listing of organizations, facilities, including those of the department, and individuals who are available to provide services in accordance with the identified needs of the patient.
4. The notification of the appropriate school district and the committee on special education regarding the proposed discharge or release of a patient under twenty- one years of age, consistent with all applicable federal and state laws relating to confidentiality of such information.
5. an evaluation of the patient's need and potential eligibility for public benefits following discharge or conditional release, including public assistance, medicaid, and supplemental security income.

An inpatient facility operated or licensed by the office of mental health shall provide reasonable and appropriate assistance to the patient, in cooperation with local social services districts, in applying for benefits identified in the written service plan pursuant to paragraph five of this subdivision, prior

to discharge or conditional release.

Subdivision (h) provides in pertinent part that:

"It shall also be the responsibility of the director of any department facility from which a client or patient has been discharged or conditionally released, in collaboration, when appropriate, with appropriate social services officials and directors of local governmental units, to prepare, to cause to be implemented, and to monitor a comprehensive program designed:

1. to determine whether the residence in which such client or patient is living, is adequate and appropriate for the needs of such patient or client;
2. to verify that such patient or client is receiving the services specified in such patient's or client's written service plan; and
3. to recommend, and to take steps to assure the provision of, any additional services..."

Plaintiff's conclusory assertion that the written service plan that Beth Israel provided to Mr. Collins was deficient in that it failed to provide any means to supervise Mr. Collins after his discharge, to ensure that he took his medication, to provide for aftercare services and to assist him in finding appropriate employment, is without merit. In compliance with Section 29.15(g) and (f) of the Mental Hygiene Law, the discharge plan thoroughly described Mr. Collins' psychiatric history, his treatment and progress at Beth Israel, the need to take Haldol and other medication, the need to stop using illegal drugs, and provided for a follow-up visit at Beth Israel as an out-patient. Mr. Collins was given a month's supply of Haldol and instructed to take it twice a day by mouth. The provisions of Sections 29.15(g) and (f) of the Mental Hygiene Law recognize that a discharged patient is no longer under the exclusive control of the health care facility. Thus, a health care facility is not required to provide an out-patient with the same level of supervision that an in-patient receives. In conformity with the statutory provisions, and as part of the aftercare services, Mr. Collins was contacted several times by Nurse Pat Murphy, at which time he stated that was taking his medications and declined offers to see a psychiatrist, other than Dr. Fedak, at an earlier

date. The subject statutory provisions do not require that an in-patient facility provide a discharged patient with an initial follow-up appointment within any set time period. In addition, these provisions do not require that the in-patient facility ensure that the discharged patient continue to take his or her medication, as such a requirement would be impracticable and unenforceable.

The court further finds that the evidence presented establishes that the social worker who handled Mr. Collins' case noted that he was returning home to his family, and there is no indication that at the time of discharge he did not want to return home or wanted to live elsewhere. In addition, there is nothing in the medical records which indicate that the discharge of Mr. Collins to his family and home were inappropriate in any manner. Finally, at the time of his discharge, Mr. Collins was 46 years old, and there is no indication that he needed or requested assistance in finding employment. Furthermore, there is no evidence that a lack of assistance in obtaining employment played any role in the injuries sustained by the plaintiff.

In view of the foregoing, the court finds that defendant has established that it is entitled to summary judgment and the plaintiff has failed to raise any triable issues of fact, or established that he can prevail on either cause of action. Therefore, defendant's motion for summary judgment dismissing the complaint is granted, and plaintiff's cross motion for summary judgment on the issue of liability is denied.

Dated: March 7, 2007

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