

**Hirschfeld v Hogan**

2007 NY Slip Op 33814(U)

October 30, 2007

Supreme Court, Nassau County

Docket Number: 7580-06/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 25 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

**Index No. 017580/06**

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**SIDNEY HIRSCHFELD, Director,  
Mental Hygiene Legal Services,  
Second Judicial Department,**

**Motion Dated: 4/16/07  
8/03/07  
Motion Submitted: 8/23/07  
Motion Sequence: 001, 002**

**Plaintiff,**

**-against-**

**Plaintiff's Attorney:  
Felicia B. Rosen, Esq.  
170 Old Country Road  
Mineola, N.Y. 11501  
Tel. No.: (516) 746 - 4373**

**MICHAEL F. HOGAN, Ph.D.,  
Commissioner, New York State Office of  
Mental Health, in his Official Capacity, and  
DENNIS DUBEY, Ph.D., Executive Director  
Sagamore Children's Psychiatric Center,  
in his Official Capacity,**

**Defendants' Attorney:  
Dorothy Oehler Nese, Esq.  
Assistant Attorney General  
200 Old Country Road, Suite 460  
Mineola, N. Y. 11501  
Tel. No.: (516) 248 - 3302**

**Defendants.**

\_\_\_\_\_x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....XX
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Plaintiff moves this Court pursuant to CPLR § 3211(b) to strike the defenses interposed in defendants' answer, for summary judgment in favor of plaintiff pursuant to CPLR § 3212, and for injunctive relief pursuant to CPLR § 6301.

Defendants cross move to dismiss the complaint pursuant to CPLR § 3211(a)(3), (a)(5) and (a)(7) and to permanently enjoin plaintiff from utilizing Mental

Hygiene Law § 9.13 as a basis to effectuate the discharge of children under the age of sixteen from a state run in-patient facility.

In this action, the plaintiff director of Mental Hygiene Legal Service: Second Judicial Department (hereinafter "MHLS") seeks, *inter alia*, a judicial declaration that, pursuant to § 9.13(b) of the Mental Hygiene Law, a voluntary patient under the age of sixteen has the right to request release from a hospital facility such as defendant Sagamore Children's Psychiatric Center and that, pursuant to that provision, MHLS has the independent right to request the release of such a patient. Plaintiff's reading of the statute is, in part, at odds with the position of defendant New York State Office of Mental Health (hereinafter "OMH"), which is set forth by its counsel in a letter dated December 21, 2004. It reads, in pertinent part, as follows:

"[a]s to children under the age of sixteen, since they do not have the ability to sign themselves in, I do not believe that they have the legal ability to sign themselves out of the facility, and the parent or guardian's desire that the child be retained by the facility should be sufficient if an independent entity, a facility psychiatrist, agrees that the child continues to need hospitalization. MHLS can bring an action to have the child released, but it would be unlikely that a court would be persuaded that the parent(s) or guardian(s) wishes should be overruled if supported by the physician's testimony that the child needs hospitalization. The MHLS position, which appears to be that all children who have been voluntarily committed by their parents/guardians can challenge that commitment, raises issues concerning age and maturity."

Plaintiff MHLS also seeks to enjoin defendants OMH and Sagamore Children's Psychiatric Center, operated by OMH, from denying either a voluntary patient under the age of sixteen, or plaintiff MHLS, the right to request such release.

Defendants seek dismissal of the complaint contending that plaintiff not only lacks the legal capacity and standing to bring this suit but is collaterally estopped from litigating the issue of whether children under the age of sixteen may procure their own discharge from hospitalization pursuant to § 9.13(b) of the Mental Hygiene

Law on the grounds that MHLS raised the same arguments contained in the amended complaint, and in support of its motion for summary judgment, in two prior *habeas corpus* proceedings brought in Supreme Court, Suffolk County: *Mental Hygiene Legal Service o/b/o Camille H. v. Dubey* (Index No. 16383-05) and *Mental Hygiene Legal Service v Sagamore Children's Center o/b/o Andrea H.* (Index No. 029920-06).

As an initial matter, the Court notes that notwithstanding defendants' assertions to the contrary, plaintiff clearly has standing to litigate the legal question at issue herein by virtue of its mandate under the Mental Hygiene Law §§47.03(a) and (c), which provide that there must be a MHLS in each Judicial Department of the State whose duties include study and review of the admission and retention of all patients, including the willingness of the patient to remain in his or her status. MHLS was created specifically to represent individuals receiving care in state mental health system facilities as defined in Mental Hygiene Law § 1.03, including facilities such as defendant Sagamore Children's Psychiatric Center. Section 47.03(c) specifically empowers MHLS to "provide legal services and assistance to patients or residents \* \* \* related to the admission, retention, and care and treatment of such persons. . . ." (*Matter of Mental Hygiene Legal Serv. v. Maul*, 36 A.D.3d 1133, 1134, 827 N.Y.S.2d 777 (3d Dept., 2007), *lv to app den.* 8 N.Y.3d 812, 868 N.E.2d 234, 836 N.Y.S.2d 551 [2007]). Further, McKinney's 2007 New York Rules of Court § 694.2(a)(6)(ii) (22 NYCRR) requires that the Director of MHLS "ascertain that all requirements of law as to patients' admissions, treatment and discharge affecting patients' rights have been complied with."

The Court finds no merit in defendants' contention that the instant action is barred by the doctrines of either *res judicata* or collateral estoppel which, unlike the affirmative defense of standing, were admittedly not asserted in defendants' answer. Generally, defendants, such as those herein, who either fail to plead the defenses of *res judicata* or collateral estoppel in their answer, or to timely move to dismiss the complaint on those grounds, waive the right to assert the subject defense. (*Ouyang v. Jeng*, 260 A.D.2d 618, 619, 689 N.Y.S.2d 175 [2d Dept., 1999]). In any event, the defenses are not applicable under the facts at bar as the critical issue of whether a voluntarily hospitalized patient under the age of sixteen, or MHLS, may petition for release pursuant to § 9.13(b) of the Mental Hygiene Law was not previously decided

by the Suffolk County Supreme Court in either of the *habeas corpus* proceedings on which defendants rely.

*Res judicata*, or claim preclusion, is invoked to prevent a party, or one in privity with him, from relitigating a previously litigated action. This form of claim preclusion applies to all issues and theories of recovery applicable to the cause of action, whether or not they were actually litigated. Generally, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or even if seeking a different remedy. (*Matter of State of New York v. Seaport Manor A.C.F.*, 19 A.D.3d 609, 797 N.Y.S.2d 538 [2d Dept., 2005]). Moreover, the doctrine applies not only to the parties of record in the prior proceeding but also to those in privity with those parties. (*Id.*)

Collateral estoppel, or issue preclusion, is a corollary to the doctrine of *res judicata*. It bars relitigation of an issue (as distinguished from the action or claim), which was actually and necessarily previously raised and decided in a prior proceeding. (*Buechel v. Bain*, 97 N.Y.2d 295, 303, 766 N.E.2d 914, 740 N.Y.S.2d 252 (2001), *cert den.* 535 U.S. 1096, 122 S.Ct. 2293 [2002]). To invoke the preclusion doctrine of collateral estoppel the following elements must be established: (1) the identical issue was decided in the prior action and is decisive in the present action; and (2) the party to be precluded from re-litigating the issue had a full and fair opportunity to contest that very issue. (*Allied Chem. v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276, 528 N.E.2d 153, 532 N.Y.S.2d 230 (1988), *cert den.* 488 U.S. 1005, 109 S.Ct. 785 [1989]). The fundamental inquiry is whether litigation should be permitted in a particular case in light of fairness to the parties, conservation of resources of the Court and litigants and the societal interests in consistent and accurate results. (*Altegra Credit Co. v. Tin Chu*, 29 A.D.3d 718, 719, 816 N.Y.S.2d 140 [2d Dept., 2006]). Where the critical issue was not previously decided, however, neither *res judicata* nor collateral estoppel are applicable. (*Matter of New York Site Dev. Corp. v. New York State Dept. of Env'tl. Conservation*, 217 A.D.2d 699, 700, 630 N.Y.S.2d 335 [2d Dept., 1995]).

While Mr. Justice Loughlin noted in his August 18, 2005 opinion denying a writ of *habeas corpus* in *Matter of MHLS o/b/o Camille H.*, that, lacking the ability to sign in as a voluntary patient, a child under the age of sixteen cannot, on his or her

own application “issue a voluntary release application,” the writ was denied on the basis that Camille H. could not be released due to the order of the Family Court [J. Genchi, July 12, 2005] that provided that the patient was not to be released until further Order of the Court. In the *Matter of MHLS o/b/o Andrea H.*, the Court offered several rationales to support its denial of the writ of *habeas corpus* including, *inter alia*, the best interests of the child, Andrea H.’s history of mental illness, the need to prepare a safe discharge plan for her and the pending Family Court proceeding, in which the mother might regain custody of the child. Neither Court directly addressed the issue of whether the patient before it could herself, or through her MHLS counsel, petition for release. The two *habeas corpus* proceedings were brought to challenge the legality of the further retention of two particular individuals, Camille H. and Andrea H., for in patient care and treatment. Neither case dealt directly with the issue of statutory interpretation that is now before this Court. Nor did the Appellate Division, Second Department deal with the issue in its decision denying appeal in *Matter of Mental Hygiene Legal Serv. v. Dubey*, 31 A.D.3d 556, 817 N.Y.S.2d 529 (2d Dept., 2006).

It is fundamental that a Court, in interpreting a statute, should attempt to effectuate the intent of the legislature. (*Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 696 N.E.2d 978, 673 N.Y.S.2d 966 [1998]). Since the clearest indicator of such intent is the statutory language, the starting point in any analysis must always be the language itself, giving effect to the plain meaning thereof. (*Rosner v. Metropolitan Prop. & Liab. Ins. Co.*, 96 N.Y.2d 475, 479, 754 N.E.2d 760, 729 N.Y.S.2d 658 [2001]). In the absence of any controlling statutory definition, words of ordinary import are to be construed in accordance with their usual and commonly understood meaning. (*Matter of Village of Chestnut Ridge v. Howard*, 92 N.Y.2d 718, 723, 708 N.E.2d 988, 685 N.Y.S.2d 915 [1999]). Applying these fundamental principles here, in this Court’s view, the language of § 9.13(a) clearly states that a person under the age of sixteen is a “voluntary patient” notwithstanding the fact that the patient may be received by the hospital as such only upon application of the parent, legal guardian, or next of kin. The Statute specifically provides:

§ 9.13 Voluntary admissions:

(a) The director of any hospital may receive as a voluntary patient any suitable person in need of care and treatment, who voluntarily makes written application therefor. If the person is under sixteen years of age, the person may be received as a voluntary patient only on the application of the parent, legal guardian, or next-of-kin of such person, or, subject to the terms of any court order or any instrument executed pursuant to section three hundred eighty-four-a of the social services law, a social services official or authorized agency with care and custody of such person pursuant to the social services law, the director of the division for youth, acting in accordance with section five hundred nine of the executive law, or a person or entity having custody of the person pursuant to an order issued pursuant to section seven hundred fifty-six or one thousand fifty-five of the family court act.

With respect to release, the last paragraph of § 9.13(b) unequivocally states that, in the case of a patient under eighteen years of age, notice requesting release may be given “by the patient, by the person who made the application for his admission, by a person of equal or closer relationship, or by the mental hygiene legal service.” Nothing in the language suggests that a child under the age of sixteen is not a voluntary patient and is precluded from seeking his or her own release. To interpret the language at issue to mean that a child under the age of sixteen is not a voluntary patient, when it clearly includes such a child within the voluntary patient category, or to suggest, as defendants do, that it that it would be absurd or illogical for the legislature to invest a fourteen or fifteen year old, who lacks the maturity to make a decision as to the necessity of his or her own voluntary admission, with the legal capacity to seek discharge from treatment is, in this Court’s view, untenable. This conclusion is consistent with *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493 (1979), which found that voluntary hospitalizations, under a statutory scheme similar to that of New York State, met due process standards. Footnote 20 in that case makes reference to § 9.13 of New York’s Mental Hygiene Law with the parenthetical note “parent may admit, but child may obtain own release.”

Under the statute, any voluntarily committed patient may give written notice to the hospital director of his or her desire to leave whereupon the patient must

promptly be released, unless the director determines that “there are reasonable grounds for the belief that the patient may be in need of involuntary care and treatment.” In such a situation 14 NYCRR § 15.7 provides as follows:

“(a) If a voluntary patient requests his release and there are reasonable grounds for belief that the patient may be in need of involuntary care and treatment, the director may retain the patient for 72 hours.

(b) Before the expiration of such 72-hour period, the director shall cause the patient to be examined by two physicians, or one physician and one psychologist if the patient is a resident in a school, who shall report their findings and conclusions separately to the director, and he shall either release the patient or apply to a court for an order authorizing the involuntary retention of such patient. The reports and certificates of the two examining physicians, or physician and psychologist, shall be submitted to the court as part of any such application.”

While defendants argue that just as minors under the age of sixteen may not apply on their own behalf for voluntary admission to a mental health facility, so too, logically, minors under the age of sixteen, may not petition, on their own behalf, for discharge from such facility, the argument, along with defendants’ assertion that MHLS has no right to make such application on behalf of such a minor, flies in the face of a fair reading of the plain language of § 9.13(b), which affords every voluntary patient, regardless of age and the manner in which he or she was admitted, the right to request a release and set the review process in motion, to wit:

“[i]n the case of a patient under eighteen years of age, such notice requesting release of the patient may be given by the patient, by the person who made the application for his admission, by a person of equal or closer relationship, or by the mental hygiene legal service.”

Undoubtedly, as plaintiff contends, the voluntary admission of a child to a psychiatric hospital and, by extension continued retention of the child, must be accomplished through procedures, which pass constitutional muster. In fact, the voluntary, involuntary and emergency civil commitment standards embodied in §§ 9.13, 9.27 and 9.39 were found to meet the minimum requirements of substantive and procedural due process by the Federal Court in *Project Release v. Prevost*, 722 F.2d 960 (2d Cir., 1983), which pointed out the procedural safeguards contained in the statute that include the provision of MHLS counsel to the patient and an opportunity for medical and judicial review of a patient's commitment. The language employed in § 9.13(b) affords all voluntary patients [with no distinction made for those under sixteen years of age] the right to advise the hospital of his or her wish to leave. There is nothing illogical or absurd about such a proposition. The request serves only to trigger the hospital's obligation to examine the need for continuing care and treatment. It does not result in automatic release of the patient. It is the hospital Director and, in many cases, the Court who evaluates and ultimately determines whether a voluntary patient may be released, not the patient. Defendants' fear that MHLS might subvert the statute in such a manner as to disregard the best interests of the child, as well as the wishes of parents and legal guardians, in an effort to blindly advance the civil rights of minor children receiving in-patient services at mental health hospitals is without basis in fact.

The statute contains no language, and defendants point to none, to support their argument that the legislature never intended to afford minors under the age of sixteen the same degree of protection all other voluntary patients are afforded *vis a vis* the right to request release either personally or by their MHLS counsel.

Where, as here, no question of fact is raised, but only a question of law or statutory interpretation is presented on a motion to dismiss a declaratory judgment action, the Court may render a determination and declare the rights of the parties. (*Spilka v. Town of Inlet*, 8 A.D.3d 812, 813, 778 N.Y.S.2d 222 [3d Dept., 2004]).

Accordingly, plaintiff's motion for summary judgment is granted and it is hereby declared that a minor under the age of sixteen admitted to the hospital pursuant to Mental Hygiene Law § 9.13(a) is a voluntary patient. The voluntary patient and the patient's MHLS counsel, have the right to request the patient's

release from hospitalization. Defendants, therefore, are enjoined pursuant to CPLR § 6301 from taking any action to prevent either, the patient or MHLS, from seeking such release.

Defendants' cross motion to dismiss the complaint pursuant to CPLR § 3211(a)(3), (5) and (7), and to permanently enjoin plaintiff and MHLS from utilizing Mental Hygiene Law § 9.13 as a basis for attempting to effectuate the discharge from hospitalization of minors under the age of sixteen, is denied for the aforementioned reasons.

Further, it is

**ORDERED**, that pursuant to CPLR § 1019 Michael F. Hogan, Ph.D., is substituted in the caption for Sharon Carpinello and the caption is amended accordingly; and it is further

**ORDERED**, that all records of this proceeding shall be sealed by the County Clerk pursuant to Mental Hygiene Law §33.13 and §33.14(b), and 22 NYCRR §694.7, to protect the identities on non-party infants mentioned throughout the moving papers.

The foregoing constitutes the Order of this Court.

Dated: October 30, 2007  
Mineola, N.Y.

*Loren V. Murphy*  
ENTERED <sup>C.</sup>  
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NASSAU COUNTY  
COUNTY CLERK'S OFFICE