Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE TIMOTHY J. FLAHERTY IAS PART 35
Justice

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In the Matter of the Application of
John Gupta, as Chief Executive Officer at
St. John's Episcopal Hospital, South
Shore Division

Petitioner,

Index No.: 32970-09

Motion Dated:
December 11, 2009

- against-

Sequence No.: 1

For an Order Authorizing the Medical
Treatment of RAISA STRIZH, a Patient
at St. John's Episcopal Hospital, South
Shore Division

Cal. No.:

Respondent.

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The following papers numbered 1 to 4 read on this motion by petitioner against respondent.

	Papers Numbered
Order to Show Cause, Affirmation, Exhibits.....	1-4

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Petitioner St. John's Episcopal Hospital, South Shore Division [the hospital] moves, by order to show cause dated December 9, 2009, for an order directing the hospital, its physicians, surgeons, nurses and other designated employees and agents to perform and render such medical treatment as may be necessary and appropriate to preserve the health and well being of Raisa Strizh, a patient at the hospital.

Petitioner further moves, pursuant to the Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the HIPAA Privacy Regulations (45 CFR Parts 160 and 164) to seal all Court records, to prohibit disclosure of any health records except as may be necessary for this proceeding and, upon the conclusion of the proceeding, to destroy any identifiable health records of Raisa Strizh.

The Court appointed Mental Hygiene Legal Services to advocate on behalf of the patient. In addition the Court appointed a guardian ad litem to report to the Court his view as to what course would be in the best interests of the patient.

The privacy portions of the application are unopposed and are accordingly, granted in all respects. For the purpose of adjudicating the remainder of the application the Court convened at the hospital on December 10, 2009 to conduct an evidentiary hearing in the presence of the patient, the attorneys, the guardian ad litem and Brian Starling, the patient's son.

Initially, at the direction of the Court the patient's attorney and the guardian ad litem attempted to speak with her privately but they reported her to be unresponsive.

The proceeding then commenced at the bedside of the patient in the presence of the attorneys and Mr. Starling. The patient remained huddled in her bed in a semi fetal position. The Court told the patient that the hearing was taking place because the hospital wanted to place a PEG into her stomach to nourish her and that everyone present was concerned for her health. Her attorney, the guardian ad litem and her son also attempted to communicate with her. Then, at the direction of the Court, the patient was left alone with her son who was asked to attempt to communicate with her. To all of these inquiries the patient was completely unresponsive and virtually motionless.

The hearing then reconvened in a conference room where, testimony was taken from two treating physicians, Dr. Roy DeBeer, a gastroenterologist and Dr. Harsha Reddy, a psychiatrist. In addition, the patient's son was permitted to ask questions and also gave sworn testimony. I make the following findings of fact and conclusions of law.

The patient was admitted to the psychiatric ward of the hospital on November 17, 2009. On November 27, 2009 she was transferred to the medicine ward. The patient was suffering from failure to thrive, weight loss, severe major depression, borderline bradycardia [slow heart rate] and borderline sick sinus syndrome.

The patient has intermittently permitted the hospital to

medicate and feed her through a peripheral intervenous infusion [PPN]. She has permitted hydration. She has refused to eat regular food since three days before being transferred to the medical ward. Verbal communication was "very rare" although she has stated to other hospital personal that she did not want or need feeding.

Her present medical condition is stable. She weighs 94 pounds. Her estimated normal weight is 120 pounds. Her failure to thrive is impacting upon her ability to perform normal life functions and address her personal hygiene. A blood work up indicated that her levels remain normal. If she continues to refuse to eat her condition will become dangerous and ultimately, she will die.

Death could occur within weeks, or perhaps a month. But she is also at risk, particularly in light of her low heart rate, of suffering a sudden change of condition.

To prevent this the patient must receive nutrition. Dr. DeBeers proposes performing a percutaneous endoscopic gastrostomy [PEG] which is the insertion of a feeding tube into her stomach, an operation which would take approximately 20 minutes. The patient would be sedated and given a local anesthetic. If she resisted the sedation would be increased, creating an additional risk to the patient. On rare occasions the operation presents a risk of perforation, bleeding or sudden death. Once the necessity is over, a second procedure would be performed to remove the PEG.

An alternative approach would be the placement of a nasogastric tube. The nasogastric tube can be uncomfortable to the patient. A second alternative would be to use a total parenteral nutrition intravenously [TPN]. Each of these procedures are more intrusive than the PPN presently being used.

Prolonged use of an IV runs a risk of infection or vascular damage of a kind that is treatable. Dr. DeBeer acknowledged that the PPN was a viable treatment and that were the patient to consent to the PPN but not the PEG that it would be the general practice to accommodate the patient's wishes. Under these circumstances, he further acknowledged that the use of the PPN was a less restrictive method, that is, less imposition upon the patient.

Dr. Harsha Reddy, a psychiatrist treating the patient at the hospital diagnosed her as suffering from major depression with psychotic features. He drew this conclusion from the fact that she is not eating and also that is withdrawn, has psychomotor retardation and has shut herself off from the world with what e characterized as having catatonic features. He was able to verbally communicate with her on only one occasion, December 1,

2009, when he told her that although she did not want to eat, she wanted to be helped and did not want to die. The depression has been going on for approximately six months and is worsening. In his view the depression is clouding her judgment. He believes that she does not understand her medical condition.

Dr,. Reddy has prescribed an antidepressant pill called Mirtazapine and other anti-psychotic drugs, such as Zyprexa, none of which she has taken. He has not attempted to inject the drugs because she has been refusing medication and did not want to violate her rights. These drugs could be introduced intravenously. His treatment plan would be first to get her to be nutritionally sufficient and then to administer drugs.

It is well settled that a competent adult has the right to determine the course of her medical treatment and may even decline lifesaving measures [Matter of Fosmire v Nicoleau, 75 NY2d 218, 221 (1990); Schloendorff v Society of New York Hospital, 211 125, 129 (1914)(Cardozo, J.)]. Accordingly, the threshold question for the Court is whether the patient, a 61 year old female, is competent, that is, "whether the patient has made a decision to decline the medical treatment, is fully aware of the consequences and alternatives, and is competent to make the choice" [Fosmire, supra at 225].

Having personally viewed the patient in what appears to be her normal fetal, catatonic state, having unsuccessfully attempted to communicate with her and having heard the unrebutted testimony of two treating physicians and the patient's son, all of whom agree that some intervention is medically necessary, the Court concludes that at the present time she lacks the necessary mental capacity and that, if left to her own devices, will eventually die. Her refusals to submit to treatment and the limited communication she has had with both the medical staff, the attorneys and her own son combine to persuade the Court that they are the product of a serious state of depression rather than a rational election to refuse medical treatment.

In determining whether to grant the hospital's application in its entirety, to wit, to direct them to surgically insert a PEG into the patient's stomach, the Court is mindful of the holding of Rivers v Katz, 67 NY2d 485, 497 (1986) wherein the Court cautioned that even upon a finding of incompetence, "the proposed treatment [must be] narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments" [insert added][emphasis added].

The hospital has presented four different treatments, the PEG, the nasogastric tube, the TPN and the PPN. Although they have expressed a preference for the PEG it appears to the Court that of the four choices, this is the most intrusive, requiring a surgical procedure, a sedative and a local anesthetic. The PPN, which is already in the patient, appears to be the least intrusive. Moreover, it appears to the Court that any of the choices will maintain the patient in her presently stable condition. Finally, the Court finds significant the fact that, at least intermittently, the patient has been amenable to being nourished through the PPN.

Accordingly, the Court holds that the motion is granted to the extent that the hospital may, in the exercise of sound medical judgment, continue to nourish the patient through the use of the PPN. Should any of the parties deem it medically necessary the parties are free to re-apply to this Court for further relief.

Dated: December 23, 2009

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Timothy J. Flaherty, J.S.C.