John F. v Carrion

2010 NY Slip Op 30195(U)

January 25, 2010

Supreme Court, New York County

Docket Number: 407117/07

Judge: Milton A. Tingling

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SCANNED ON 1/28/2010

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING J.S.C.
Justice

PART 44

F, John

INDEX NO. 407117/07

MOTION DATE 4/15/09

- v -

MOTION SEQ. NO. 004

Carrion, Gladys

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED JAN 28 2010 NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiff, John F, by his parent, Margarita F, on behalf of himself and all others similarly situated, brings this Motion for Summary Judgment to enjoin Defendant, Gladys Carrion, in her official capacity as Commissioner of the New York State Office of Children and Family Services, ("OCFS"), from shackling children without first conducting a behavioral evaluation. Plaintiff also seeks to enjoin Defendant from joining the hand and foot of a child that is in restraints. Lastly, Plaintiff seeks a declaratory judgment to declare Defendants current practice with regards to shackling youth and joining the hand and foot of subject children to be violative of Title 9, New York Code, Rules and Regulations ("9 N.Y.C.R.R.") §168.3.

The facts of this case are undisputed. Plaintiff was placed in the custody of Defendant for twelve (12) months on December 8, 2006 by Judge Larabee of the New York County Family Court ("NYCFC"). *Plaintiff's Amended Complaint, Class Action* ¶ 38. Plaintiff was a resident of OCFS' Tryon Residential Center ("Tryon"). *Id* .at ¶ 39. Tryon and other OCFS facilities use a three (3) tier system of behavior: Orientation, Adjustment and Transition, where children graduate from one level to the next upon exhibiting good behavior. *Id.* at ¶ 41. Plaintiff began residing at Tryon in May of 2007, graduated to Adjustment in August of 2007 and reached Transition on October 25, 2007. *Id.* at ¶ 42.

Dated: 1/19/10

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Plaintiff's twelve (12) month placement was set to expire on November 28, 2007 but OCFS filed a petition on September 20, 2007 to extend his placement. *Id.* at ¶ 43. November 1, 2007 was the first court proceeding in New York County Family Court regarding the extension. *Id.* At 4:00 am that day, Plaintiff was placed in handcuffs, footcuffs and a belly restraint. *Id.* at ¶ 45. A metal restraint box was placed over the chain linking his handcuffs to one another which prevented Plaintiff from separating his hands father than the width of the metal box. *Id.* Prior to him being shackled and transported, Plaintiff was not assessed for mood or mental state. *Id.* at ¶ 46.

The distance from Tryon to NYCFC is approximately 200 miles. *Id.* at ¶44. Plaintiff was also accompanied by two (2) male OCFS staff members. *Id.* at ¶ 46. Upon his arrival at NYCFC, Plaintiff was in OCFS boys' uniform, shackled and brought through the front public entrance. *Id.* at ¶ 48. He was taken in a public elevator to the waiting area of Judge Larabee's courtroom and remained there until his case was called at 12:45pm. *Id.* at ¶ 50. His matter was adjourned and Plaintiff returned to Tryon where his shackles were finally removed at 6:15pm; totaling approximately fifteen (15) hours of restraint. *Id.* at ¶ 54.

Plaintiff's motion for Summary Judgment is now before the Court. To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor and he must do so by a tender of evidentiary proof in admissible form. To defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (NY Ct. of App. 1980).

Title 9, New York Code, Rules and Regulations ("9 N.Y.C.R.R.") §168.3: Use of Physical and Medical Restraints governs the case at hand. Specifically subsection (a) and (a)(2) where it states:

> "(a) Physical Restraints: Permissible physical restraints, consisting solely of handcuffs and footcuffs, shall be used only in cases where a child is uncontrollable and constitutes serious and evident danger to himself and others. They shall be removed as soon as the child is controllable. Use of physical restraints shall be prohibited beyond one-half hour unless a child is being transported by vehicle and physical restraint if necessary for public safety. If restraints are placed on a child's hands and feet, the hand and foot are not to be joined, as for example, in hog tying. When in restraints, a child may not be attached to any furniture or fixture in a room nor to any object in a vehicle."...
>
> "(a)(2) Physical restraints may be utilized beyond one-half hour only in the case of vehicular transportation where such utilization of physical restraints is necessary for public safety."

The issue in this case is whether OCFS shackles all of its youth during transportation to, from and during court proceedings without first assessing whether the

youth would pose a threat to the public is violative of Title 9, New York Code, Rules and Regulations ("9 N.Y.C.R.R.") §168.3.

Where a question of statutory interpretation is one of pure statutory reading and analysis, dependent only on an accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of an administrative agency, and on such occasions, the courts are free to ascertain the proper interpretation from the statutory language and intent and may undertake the function of statutory interpretation without any deference to the agency's determination. *Roberts v. Tishman Speyer Properties, L.P.*, 874 N.Y.S.2d 97 (1st. Dept. 2009).

The statute does not assess the necessity for the use of restraints by location, rather by behavior. It only creates a timing exception for juveniles who pose a threat to public safety in regards to transportation. Based upon all of the papers submitted to this Court, Defendant has not put forth any documents in evidentiary form contesting or contradicting Plaintiff's contention that it shackles all of its juveniles regardless of location, behavior or threat posed to the public. In fact, Defendant recognizes on page eleven (11) of its Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment ("Opposition Memorandum"), that restraints are not normally necessary except for when the youth is "uncontrollable and constitutes a serious and evident danger to himself and others."

Defendant relies on the assumption that family court appearances involve congested areas where emotions may run high, to justify their procedure of blanket shackling of juveniles in their custody. Defendant contends "there is no requirement that an individual determination be made with respect to public safety" thereby admitting that no such determination is ever made prior to shackling and transporting its juveniles. *Id.* That statement implies that all juveniles are shackled from the moment they leave their OCFS facility until their return to said facility. What OCFS has been doing is putting the carriage before the horse. Although the statute does not literally spell out the need for some form of an evaluation of a child's behavior, it indirectly requires OCFS to reach a conclusion regarding subject child's behavior prior to shackling.

It is the responsibility of the Congress to make new laws and amend existing ones. Article I section 8 of the United States Constitution provides "The Congress shall have power to... make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Missing the crucial step of evaluating juveniles distorts the purpose of §168.3 and allows OCFS to attempt to create law where is lacks authority to do so. Defendant relies on multiple policies that have been issued over time regarding the use of mechanical restraints to govern and direct their practice.

However, it is well settled procedure and law that a manager, former deputy, supervisor or any other member of any government entity shall not and cannot usurp the authority of the legislature by overriding what is written in statute with what is written as inter office policy.

Therefore, not only do OCFS' policies lack authority, they completely contradict the language of §168.3. "Former Deputy Director Louis Mann revised the policy to require use of mechanical restraint both in transport and while at the location to which the juvenile is transported to which included handcuffs (double locked), waist chain/belt and leg irons and the use of the black box..." Not only does the policy permit hog tying where the statute clearly prohibits, but it allows shackling of all youth- regardless of behavioral assessment or without apparent need. Prior to the 1996 revision, a policy titled "Transport Standards of the DFY State Wide Youth Transport System ("SYTS") was issued. The SYTS fails to mention when the use of mechanical restraints are appropriate. Interestingly enough, section D(2)(a) of the SYTS policy requires a risk assessment to be conducted for each youth in transport situation. Such assessments include security needs, risk of assault, Absent Without Official Leave or self injury, level of training and experience of available staff relevant to the risk and staffing, and transport ratios available to address the risk factors involved. Said risk assessment is further adopted in the "Transportation of Residents- Statewide Transport System". Thus, for Defendant to contend it is not obligated to perform any individualized assessment of each individual is to violate its own written policies, even had its policies were in line with the New York Statues.

As for Defendant's bald allegation that an OCFS official was advised by a Court Officer responsible for all court officers in New York City family court that OCFS would have to use restraints on juvenile delinquents being held in public areas of the courthouse, there has been no name, affidavit, documentation or authority to support it. As such, same is rejected as baseless and unsupported.

Lastly, under §168.3 how long a juvenile should remained shackled is clear. Specifically, §168.3(a)(2), allows the use of restraints beyond one-half hour only in the case of vehicular transportation where such utilization of physical restraint is necessary for public safety. Thus, in the case of John F. and those similarly situated, a 15 hour span of being shackled is an egregious disregard for the half hour limit imposed on OCFS by statute. Again, the determination of whether a juvenile poses a threat to public safety relies upon some form of risk assessment of the juvenile prior to shackling. Something clearly and utterly lacking under OCHS' current policies.

Accordingly, Plaintiff has requested and it is hereby declared that: (1) The shackling of John F. was done without first conducting an assessment to determine whether he was uncontrollable and constituted a serious and evident danger to himself or others thereby violating 9 N.Y.C.R.R §168.3(a); (2) Defendant's shackling of John F. by joining his hand and foot with a restraint belt and a restraint box violated 9 N.Y.C.R.R §168.3(a); (3) Defendant's policy and

practice of shackling children in their custody in non-secure and limited secure residences with handcuffs and footcuffs, without an individualized determination that the children are uncontrollable or constitute a serious and evident danger to themselves and others at the time they are in the courthouse while the children are in New York City's court buildings violates 9 N.Y.C.R.R §168.3(a); (4) Defendant's joining of children's hand and foot transported to New York City's courts by way of restraint belts and restraint boxes violates 9 N.Y.C.R.R §168.3(a).

Plaintiff's request to have John F. declared neither uncontrollable nor a danger to himself and others at the time he was shackled is denied as no evaluation was done to reach such a conclusion.

As for Plaintiff's request for permanent and preliminary Injunctions, Defendant is hereby enjoined from restraining John F. with handcuffs and/or footcuffs for future court appearances unless Defendant determines John constitutes a serious and evident danger to himself and others while in the courthouse. Defendant is also enjoined from joining John's hands and feet, as in hogtying, by any means at any time.

Defendant is further enjoined from restraining, with handcuffs and/or footcuffs, children placed in their non-secure or limited secure custody pursuant to Article 3 of the Family Court Act, during the time the children spend in New York City Court buildings except that Defendant may restrain an individual child in the court building only if defendant makes a reasonable determination that the child constitutes a serious and evident danger to himself and others at the time defendant seeks to restrain the child. Defendant is further enjoined from joining subject children's hands and feet, as in hogtying, by any means, at any time.

Plaintiffs request for Defendant to pay expenses and reasonable attorney's fees incurred in the prosecution of this matter is granted pursuant to New York Equal Access To Justice Act, CPLR Article 86 and CPLR 909.

CPLR Article 9(a) list the prerequisites to a class action. One or more members of a class may sure or be sued as a representative parties on behalf of it all if: (1) the class is so numerous that joinder of all members, whether otherwise required or permitted is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members;(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interest of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The proposed action meets the requirements of §901(a). The number of children in OCFS custody is substantial and joinder of all members is impracticable. Whether or not the children in OCFS custody were shackled

without first being evaluated and were shackled in a manner consistent with hog tying are questions of law or fact common to the class which predominate over any questions affecting only individual matters. The claims or defenses of the representative party, John F., are typical of the claims or defenses of the class. John F. will fairly and adequately protect the interest of the class. Lastly, a class action is superior to other available methods for the fair and efficient adjudication of the controversy. §901(a)(5)(b) does not apply. Therefore, this class is hereby certified.

Accordingly, Plaintiff's motion for summary judgment is hereby granted.

The issue of Attorneys' fees is set down for a hearing. Parties are to appear on May 12, 2010 at 9:30am.

1/25/10

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HON. MILTON A. TINGLING
J.S.C.

FILED
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