SHORT FORM ORDER

INDEX No. 08-38808
CAL No. 10-01036-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-1-10
ADJ. DATE 12-10-10
Mot. Seq. # 002 - MotD

JUSTIN WELLS, Plaintiff, - against - SHERIFF OF SUFFOLK COUNTY and COUNTY OF SUFFOLK, Defendants.	BAUMAN & KUNKIS P.C. Attorney for Plaintiff 14 Penn Plaza, Suite 2208 New York, New York 10122 CHRISTINE MALAFI, ESQ. Suffolk County Attorney By: Diana T. Bishop, Esq. 100 Veterans Memorial Highway Hauppauge, New York 11788

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendants, dated September 9, 2010, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated November 18, 2010, and supporting papers; (4) Reply Affirmation by the defendants, dated November 29, 2010, and supporting papers; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the defendants for an order pursuant to CPLR 3211 (c) and CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent of granting summary judgment dismissing the complaint in its entirety against the Sheriff of Suffolk County and dismissing the plaintiff's first, second, and fourth causes of action against the County of Suffolk, and is otherwise denied.

This is an action for personal injuries allegedly sustained when the plaintiff was denied medication to control his diabetes while in the custody of the Suffolk County Police Department (SCPD) and subsequently in the custody of the Suffolk County Sheriff. On June 9, 2008, at approximately 3:17 a.m., the plaintiff was arrested along with three friends for possession of burglary tools. He was transported to the SCPD's Third Precinct where he was processed, interviewed and held until his court appearance later that day. After his court appearance, he was transported to the Suffolk County Correctional Facility where he was evaluated by the Sheriff's employees and immediately transported to a local hospital. The plaintiff alleges that upon his arrest, and multiple times thereafter, he requested that he be allowed to take his diabetes medication which was in his motor vehicle at the scene of the arrest.

He further alleges that his requests were ignored, causing him to vomit repeatedly after becoming weak and nauseous, and to otherwise suffer severe injuries.

The plaintiff sets forth four causes of action in his complaint. The first alleges medical malpractice on the part of the defendants, *inter alia*, in failing to properly diagnose and treat the plaintiff. The second alleges that the defendants failed to obtain the plaintiff's informed consent to the treatment given to him. The third alleges negligence on the part of the defendants, in failing to heed his requests and to furnish him with his medications. The fourth alleges that the defendants deprived the plaintiff of his right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

The plaintiff testified at a 50-h municipal hearing on October 6, 2008, and he was deposed on January 15, 2010. His testimony was essentially the same at both proceedings and can be summarized as follows: on the morning of his arrest, he and his three friends were stopped by a police officer, searched and taken into custody. When he realized that he was being arrested, he told the arresting officer, Timothy Farino, that he needed his diabetes medication which was in his motor vehicle parked nearby. Farino told him that he could get his medication at the police precinct. At the precinct, the plaintiff again asked for his medication and Farino told him that he had to wait to talk to the detectives on the case. At his interview with the detectives, he asked for his medication and one detective said he would get it for him immediately, but he never received it. After his interview, he was moved to a room with other detainees where he vomited five times, the last four times into a garbage can. He was then transferred to a holding cell where he vomited more than 20 times. In the morning, he was brought out to an area to await transport to the court. While he was waiting, he continued to vomit and heave, and he told a police officer that he might need to be taken to a hospital. At approximately 1 p.m., a police officer drove him to the court in a patrol car. When they arrived at the court, he had to open the car door to vomit. He was taken to a cell in the courthouse where he again asked for his medication. While waiting to see the judge, he vomited another 40 times or more. After he saw the judge, he continued to vomit and he continued to ask for his medication or to go to a hospital. However, he was told that he had to get evaluated at the correctional facility. He was then turned over to the Sheriff's personnel, who transported him by bus to the correctional facility. At the correction facility, they tested his blood sugar which was so elevated that he was transported to a local hospital, where he was admitted and spent one week.

Farino testified that he was employed by the SCPD on the date of the plaintiff's arrest, and that he also had been certified as an EMT in 2006. He stated that he arrested the plaintiff after patting him down and finding a screwdriver in his front pocket. The plaintiff's motor vehicle was impounded and taken to the Third Precinct. However, he did not search the vehicle at any time. He further testified that the plaintiff did not ask him to go to the vehicle to get any medication at the time of his arrest. In addition, the plaintiff did not ask for any medication while being transported to the precinct. At the precinct, the plaintiff was interviewed by the desk sergeant, Karen Ryan, who completed the top portion of the Prisoner Activity Log (Log) and noted that the plaintiff was a diabetic. Farino indicated that he intermittently observed the plaintiff between the hours of 3:35 a.m. and 5:26 a.m., and that he made entries on the Log every half hour regarding his observations. He further testified that the plaintiff never

asked for medication of any kind, and that if a detainee asks for medications he is taken to a hospital immediately.

Karen Ryan testified that she remembers interviewing the plaintiff upon his arrival at the precinct, and that he appeared calm. When asked, the plaintiff said that he was not in pain and that he had no injuries. When asked about medications, he informed her that he was a diabetic, that he took medication three times every 24 hours, and that he did not need his medication because he had already taken it. She noted all of this information on the Log in her handwriting. After the interview, the plaintiff was taken to the uniform squad room (USR) which is directly across from her office. She stated that she could see and hear the plaintiff from her office and that she never saw the plaintiff vomit or heard him complain of pain up until the time her shift ended at 7:00 a.m. Ryan further testified that the Log is used to keep track of prisoners, that SCPD procedure requires personnel to make entries every half hour, and that Farino made the entries from 3:35 a.m. to 5:26 a.m., when the plaintiff was turned over to a police detention attendant (PDA), who then made the required entries. She indicated that, if a detainee asks for medication, an emergency incident report is created, and that none was created for the plaintiff. As desk sergeant, it is her responsibility to handle requests for medication. If the medication is in pill form, she verifies that it is what it is claimed to be and then allows the detainee to administer the medication. If the medication requires an injection, as in the case of the plaintiff, the detainee must be sent to the hospital to obtain the medication. She further stated that a PDA is required to report a detainee who is in pain or requesting medication to a desk sergeant or lieutenant, who is responsible for handling the situation.

Richard Rosetti testified that he was the PDA on duty the morning that the plaintiff was arrested and made the Log entries under "PDA 116," which is his badge number. His duties include searching detainees when the arresting officer brings them back to the cell block area and lodging them in a cell. He is stationed in a booth in the center of the cell block and he can observe the interiors of the cells that he is responsible for on a given shift. He indicated that detainees are observed continuously in their cells, and that observations are logged every half hour and whenever there is any unusual activity, including medical requests. He further testified that he made the log entries from 5:56 a.m. to 7:35 a.m., when the plaintiff was moved back to the USR, that the log indicates that the plaintiff did not vomit at anytime, and that there were no complaints by the plaintiff at any time. Rosetti stated that the entries made after the plaintiff was taken to the USR indicate that he was sitting and waiting to go to court.

Thomas Krug testified that he was one of the two detectives who questioned the plaintiff at the precinct after his arrest. He indicated that the plaintiff did not have any vomit on his clothing, that he did not appear disoriented or combative, and that he neither asked for any medication nor told the detectives that he was a diabetic. He stated that he was familiar with the symptoms of diabetic shock. Krug further testified that, if a detainee requests medication, SCPD procedure requires him to bring the matter to the attention of a supervisor, such as a desk sergeant.

Upon review of the parties' submissions, it is evident that the defendants have brought this motion pursuant to CPLR 3212 and that the parties have deliberately charted a summary judgment course by laying bare their proof (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Schultz v***

Estate of Sloan, 20 AD3d 520, 799 NYS2d 246 [2005]; ***Singer v Boychuk***, 194 AD2d 1049, 599 NYS2d 680, *lv denied* 82 NY2d 657, 604 NYS2d 556 [1993]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion, which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). The parties' competing interests must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]; ***Rebecchi v Whitmore,*** *supra*).

The Sheriff established its entitlement to summary judgment. A review of the record reveals that there is no testimony or evidence that the plaintiff requested his medication or made any complaints about his physical condition to anyone associated with the Sheriff. In addition, it is clear that almost immediately upon the plaintiff's arrival at the Suffolk County Correctional Facility, his blood sugar was tested and he was transported to a local hospital. In opposition, the plaintiff has failed to raise a material issue of fact requiring a trial. Accordingly, summary judgment is granted dismissing the complaint against the Sheriff.

Defendant County of Suffolk (the County) established its entitlement to summary judgment on the first and second causes of action sounding in medical malpractice and lack of informed consent. "The distinction between malpractice and ordinary negligence turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of facts" (***Evangelista v Zolan***, 247 AD2d 508, 669 NYS2d 325 [1998] *quoting* ***Miller v Albany Med. Ctr. Hosp.***, 95 AD2d 977, 464 NYS2d 297 [1983]; *see also* ***Twitchell v MacKay***, 78 AD2d 125, 434 NYS2d 516 [1980]). A specialized cause of action for medical malpractice applies where the matter requires considerations of the professional skill and knowledge of the practitioner or medical facility (***Scott v Uljanov***, 74 NY2d 673, 543 NYS2d 369 [1989]; ***Bleiler v Bodnar***, 65 NY2d 65, 489 NYS2d 885 [1985]; ***Gross v Kurk***, 224 AD2d 582, 639 NYS2d 711 [1996]; ***Borrillo v Beekman Downtown Hosp.***, 146 AD2d 734, 537 NYS2d 219 [1989]). In order to succeed in an action premised on lack of informed consent, a plaintiff must establish that the defendant failed to disclose the risks, benefits, and alternatives to the treatment that a reasonable practitioner would have disclosed, and that a reasonable person in the plaintiff's position would have elected not to undergo the procedure or treatment if fully informed (*see* Public Health Law § 2805-d [1], [3]; ***Orphan v Pilnik***, ___ NY3d ____, 2010 NY Slip Op 8610 [2010]). In addition, expert medical testimony is required to prove that the information disclosed to the plaintiff was insufficient (CPLR 4401-a; ***Orphan v Pilnik***, *supra*).

Here, the plaintiff does not contend that he was treated by a medical provider, that the County undertook to provide any medical assistance or treatment to him, or that he was ever faced with a decision to undergo treatment requiring informed consent. Accordingly, summary judgment is granted dismissing the plaintiff's first and second causes of action against the County.

The County also established its entitlement to summary judgment on the fourth cause of action alleging a violation of his constitutional rights. 42 USC § 1983 enables an aggrieved individual to seek a civil remedy against every person who, under color of law, subjects that individual to a deprivation of his or her rights, privileges or immunities secured by the Constitution (*see* ***Monell v New York City Dept. of Social Servs.***, 436 US 658, 98 S Ct 2018 [1978]; *see* ***Manti v New York City Tr. Auth.***, 165 AD2d 373, 568 NYS2d 16 [1991]). Although 42 USC § 1983 does not provide a substantive right, it does provide a means to redress a deprivation of a right provided elsewhere (***Chapman v Houston Welfare Rights Organization***, 441 US 600, 99 S Ct 1905 [1979]). Municipalities and other governmental units are included among those "persons" to whom § 1983 applies (***Monell v New York City Dept. of Social Servs.***, *supra*). Such liability, however, cannot be predicated upon a theory of respondeat superior; rather, liability only will be imposed if the acts that were carried out were derived from a policy or custom of the municipality (***City of Oklahoma City v Tuttle***, 471 US 808, 105 S Ct 2427 [1985]; ***Thomas v Roach***, 165 F3d 137 [2d Cir 1999]; ***Simpson v New York City Tr. Auth.***, 112 AD2d 89, 491 NYS2d 645 [1985]). Proof of a single incident of objectionable behavior by a municipality is insufficient to establish the existence of a municipal policy for § 1983 purposes, in the absence of any wrong which could be ascribed to the municipal policymakers (*see id.*).

Therefore, a plaintiff alleging a constitutional harm attributable to a municipality under § 1983 must "demonstrate that, through its *deliberate* conduct, the municipality, was the 'moving force' behind the injury alleged" (***Board of Commrs. of Bryan County v Brown***, 520 US 397, 404, 117 S Ct 1382, 1388 [1997]; *see also* ***DiPalma v Phelan***, 81 NY2d 754, 593 NYS2d 778 [1992]). Thus, there are only four situations in which a municipality can be held liable under 42 USC § 1983 (***Wahhab v City of New York***, 386 F Supp 2d 277 [SD NY 2005]): (1) an officially promulgated policy endorsed or ordered by the municipality (***Pembaur v City of Cincinnati***, 475 US 469, 106 S Ct 1292 [1986]); (2) a custom or practice that is so pervasive and widespread that the municipality had either actual or constructive knowledge of it (***Oklahoma City v Tuttle***, *supra*); (3) actions taken or decisions made by the municipal employee who, as a matter of state law, is responsible for establishing municipal policies with respect to the area in which the action is taken (***Pembaur v City of Cincinnati***, *supra*); and (4) where the failure of the municipality to train its employees rises to the level of deliberate indifference to the constitutional rights of others (***Walker v City of New York***, 974 F2d 293, 297 [2d Cir 1992]).

The plaintiff failed to demonstrate that the County's alleged failure to adequately train its employees rose to the level of a deliberate indifference to the constitutional rights of others (***City of Canton v Harris***, 489 US 378 [1989]; ***Howe v Village of Trumansburg***, 199 AD2d 749, 605 NYS2d 466 [1993]), or that there was a widespread policy or custom of police officers to ignore detainees' requests for medication (*see* ***Bryant v City of New York***, 188 AD2d 445, 590 NYS2d 913 [1992]; ***Manti v New York City Tr. Auth.***, *supra*). Moreover, the plaintiff failed to raise any material issue of fact requiring a trial of the subject cause of action. Accordingly, summary judgment is granted dismissing the plaintiff's fourth cause of action against the County.

The County, however, failed to establish its entitlement to summary judgment on the third cause of action sounding in negligence and the negligent hiring/training of its personnel. There are issues of material fact regarding the actions of the plaintiff as well as the police officers and others employed by the County. In addition, there is an obvious conflict in the testimony regarding whether the plaintiff requested his medications. A court's function on summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2004]; ***Roth v Barreto***, *supra*; ***Rennie v Barbarosa Transp.***, 151 AD2d 379, 543 NYS2d 429 [1989]). A movant's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, that branch of the defendants' motion which is for summary judgment dismissing the plaintiff's third cause of action is denied.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining cause of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 3/1/11

Peter H. Mayer
PETER H. MAYER, J.S.C.