

Luckey v City of New York
2012 NY Slip Op 33674(U)
December 5, 2012
Sup Ct, Bronx County
Docket Number: 0018937/2003
Judge: Douglas E. McKeon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

PART 19A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

-----X
LUCKEY, TARSHEKAIndex No. **0018937/2003**

-against-

Hon. **DOUGLAS E. MCKEON****CITY N.Y.**Justice.
-----X

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
 Noticed on **May 25 2011** and duly submitted as No. _____ on the Motion Calendar of _____

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

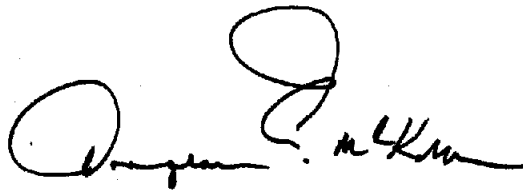
Upon the foregoing papers this _____ motion is decided in accordance with the annexed
 decision and order of the Court.

So ordered.

Motion is Respectfully Referred to:

Justice: _____

Dated: _____

Dated: 12 / 5 / 12Hon. **DOUGLAS E. MCKEON, J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

-----X
TARSHEKA LUCKEY and ANTONIO WATKINS,
as Administrators of the Goods, Credits and
Things that were of EVA LUCKEY, Deceased,

Plaintiff(s),

- against -

INDEX NO:18937/03

CITY OF NEW YORK, THE NEW YORK CITY
HEALTH and HOSPITALS CORPORATION,
PRISON HEALTH SERVICES, INC., ERIC
PERRY, MYRTLE POWELL, and CONNIE RASHID,

Defendant(s)

DECISION/ORDER

-----X
HON. DOUGLAS E. MCKEON

Defendant's motion for summary judgment and an order dismissing the complaint and all causes of action against them is decided a follows:

This is an action for medical malpractice negligence and civil rights violations resulting from the death of plaintiff's decedent, Eva Luckey, on April 25, 2002 while she was an inmate at Riker's Island. Decedent was arrested and charged with petit larceny on April 8, 2002. She was arraigned on April 9th and thereafter entered DOC custody. She was transferred to the Rose M. Singer Center ("RMSC") Dorm 5B. Her next court appearance was scheduled for April 26, 2002, the day after she died as a result of an asthma attack.

On the date of her initial arrival at RMSC on April 10, 2002, Ms. Luckey was evaluated and it was noted that she had asthma. According to the in-take sheet, she was in the emergency room for an asthma attack on the date of her arrest. Initial medication orders included Proventil, a rescue medication used for acute symptoms of asthma. Plaintiff claims, and her expert Dr. Greifinger, opines, that, at the in-take assessment, her baseline peak expiratory flow measured far below normal and it was negligent for the decedent to not be referred for controller medication. Ms. Luckey saw a physician on April 18th 2002 during her incarceration. At this time she was given a new prescription for Albuterol, but it was not noted that the patient had apparently finished a whole canister of Albuterol in 8 days. According to plaintiff's expert, Dr. Greifinger, when used as prescribed, a canister of Albuterol should last 30 days. The use of a canister in eight days was excessive and should have been addressed by the physician.

On April 23rd decedent signed up for a sick call but there is no record that she was seen by a medical care provider. On April 24, 2002 around 10:00 or 11:00 p.m. Eva Luckey complained that she was having an asthma attack. CO Pearson, who was on duty, told her to use her pump and sign up for sick call. On April 25th around 4:00 p.m. CO Rashid was informed that Eva Luckey was ill. Initially CO Rashid asserted that CO Ramseur advised her that Luckey was ill, however, while CO Ramseur denied in her written statement any knowledge about Ms. Luckey's illness, she subsequently acknowledged that she was aware of Luckey's illness at

approximately 4:06 p.m. Upon being informed that Luckey was ill, CO Rashid proceeded to where Luckey was housed in order to investigate. Luckey informed CO Rashid that she had asthma and was having difficulty breathing. CO Rashid advised her to get ready to go to the clinic. CO Rashid proceeded to call the clinic at approximately 4:08 p.m. CO Rashid claims that CO Powell assumed the B post so that Rashid could enter the A station and call the clinic. CO Powell, in an addendum to her initial written statement, denied that she had ever assumed the B post. CO Rashid claims that once she entered the A station she called the clinic advising them that medical staff was needed for Luckey. Plaintiff claims that this statement contradicts CO Rashid's other statement that she told Luckey to get dressed to be transported to the clinic. According to CO Powell, CO Rashid had arranged for CO Ramseur to escort Luckey to the clinic. This seems to indicate that at that time Luckey was still mobile and could have been escorted to the clinic by CO Ramseur.

According to movants, at approximately 4:20 p.m. the medical staff in the RMSC clinic was informed of an emergency involving Luckey and immediately proceeded to the housing area. It is documented in a log book that medical staff left the clinic at 4:16 arriving at 4:24 p.m. to find Luckey unresponsive with no respiration, no pulse and with dilated pupils. The medical staff performed CPR and advanced cardiac life support procedures from approximately 4:24 until 5:05 p.m. During this time Luckey was provided with medications, intubated, and shocked

twice with a defibrillator. Unfortunately, she died. An autopsy report indicates that she died of bronchial asthma.

Plaintiff has advised the Court that at the time the officers became aware that Ms. Luckey was having difficulty breathing, the institutional count was underway and no unescorted inmate movement was permitted. Therefore, an escort was required for Luckey to go to the clinic. CO Rashid also has stated that, after calling the clinic and while Luckey was getting ready to go to the clinic, there was a disturbance on the other side prompting her to leave Luckey. While she was investigating the incident she observed inmates pounding on the glass saying that Luckey was not breathing. Upon her return, CO Rashid noticed Luckey lying on her back unconscious. CO Rashid claims she began resuscitation efforts until the medical staff arrived. It is disputed whether CPR was performed by CO Rashid. There are also questions as to whether Luckey was able to walk to the clinic by herself initially and whether CO Rashid called the clinic twice.

Defendants have moved for summary judgment arguing that there are no material issues of fact and no evidence to support the theory that any corrections officers were negligent or deliberately indifferent to Luckey's medical needs or in responding to her asthma attack. They further argue that Officers Powell, Perry and Rashid are entitled to qualified immunity and NYC is entitled to governmental immunity because the evidence fails to establish the validity of the claims against the NYC staff. They argue that the officers properly followed the Department of

Corrections Rules and Regulations in responding to Luckey's complaints which required that they notify the clinic that Luckey required medical attention which they promptly did. First they called an officer to request an escort since initially there was no reason to think Luckey could not walk to the clinic. Approximately six minutes later, when she was unable to walk, the officers again called the clinic and requested medical assistance. She collapsed, and, defendants argue, Rashid went above her job duties as defined by DOC rules and regulations and administered first aid breathing until an inmate took the code pack from her contaminating the airway. They argue that these were appropriate steps to obtain medical assistance and that Officer Rashid's performance of rescue breathing falls under the Good Samaritan provision of Public Health Law PHL § 3000-A(1); 3001(14). The DOC Rules and Regulations require only that employees may provide first aid until medical personnel arrive which places the decision of whether to perform it at the discretion of Officer Rashid therefore rendering her performance voluntary. Movants also argue that plaintiff fails to state a cause of action against Officers Powell, Perry and Rashid under 42 USC § 1983 for deprivation of medical treatment in violation of the 8th and 14th Amendments of the Constitution because they cannot show that they acted with deliberate indifference to her serious medical needs. For liability to attach, a plaintiff must show that the official acted or failed to act with reckless disregard to plaintiff's health or safety. See Farmer v. Brennan 511 USC § 25 (1994). As such, defendants argue that even assuming that there was a condition of emergency

herein there is no evidence that they acted with culpable states of mind equal to criminal recklessness. They both followed DOC protocol. They alerted the clinic so that medical personnel and equipment were dispatched. Furthermore, Officer Perry's only involvement in the events occurred after Luckey's demise. As such, there is no evidence that he was personally involved with the alleged constitutional violation. Movants further argue that the officers are entitled to qualified immunity. Here, it cannot be said that it would be unreasonable for Powell to remain in the control room given that DOC guidelines expressly required her to do so and because she had to supervise the other inmates. Similarly it cannot be said that CO Perry was unreasonable as he was only involved in the investigation after her death. Finally, with regard to the defaulting Officer Rashid, her actions cannot be deemed unreasonable given the steps she took to obtain medical care for Luckey and that she voluntarily performed first aid.

Defendants also argue that plaintiff's claims of negligence are barred against NYC by the principle of Governmental Immunity. Municipalities are generally immune from claims or negligence regarding the performance of their discretionary governmental function. Part of NYC's discretionary function in operating Riker's is to have corrections officials establish guidelines, rules and regulations while taking into consideration NYC's concerns for keeping the facility secure and the needs of the inmates. Inasmuch as the officers acted in accordance with the guidelines rules and regulations the plaintiff's complaint should be dismissed.

Finally, movants argue that Luckey was provided with care and treatment in accordance with good and accepted medical practice.

Here, the Court finds that there is an issue of fact as to whether the care provided to Luckey departed from accepted standards. Movants have provided the Court with the opinion of Dr. Newmark that Luckey's death was sudden and resulted from an acute severe asthma attack. Dr. Newmark argues that Luckey's death was unavoidable and that even if an escort had been immediately available and Luckey started walking to the clinic at 4:06 p.m., by the time she worsened and collapsed at 4:12 she still would not have reached the clinic. He also opines that given the level of mucus in her airways by the time medical personnel got to her, she could not be saved. The autopsy report confirms that Luckey's airways were blocked by mucus. Summary judgment, however, is denied on this point. The Court finds that Dr. Robert Greifinger, plaintiff's expert, and a physician licensed to practice medicine in New York has raised a question of fact as to whether the treatment Ms. Luckey received during her incarceration at Riker's Island was negligent. According to this expert, M

s. Luckey's initial evaluation on April 10th should have prompted the doctors to give her controller medications but she was only provided with rescue medication. At her initial intake her peak expiratory flow rate was far below normal and the failure to refer her for controller medication which would have been appropriate for a person suffering from moderate or severe persistent asthma was a departure from good and

accepted medical practice. Instead, she was told to seek medical attention if her symptoms got worse. Furthermore, on April 18, 2002 when she was seen by a physician and a new prescription for Albuterol given her, the physician did not note that she had finished the whole canister of Albuterol in eight days. This expert states that when used as prescribed, a canister of Albuterol should last for 30 days and that the use of the canister in eight days was excessive, indicated inadequate control of asthma, and the failure to address this was a departure from good and accepted medical practice. This expert's other conclusions including that the staff treated her complaints lightly, that there was a failure to train and supervise personnel, a failure to initiate CPR on Ms. Luckey, a delay in providing medical care from the time the officers learned she was ill and the time medical staff arrived at the unit, a refusal to perform CPR because she could be contaminated which indicates cynicism and a failure of training and supervision, are rejected as inflammatory and conclusory.

In sum, the Court finds that there is a question of fact sufficient to defeat summary judgment as to whether Ms. Luckey's condition required the prescription of controller medication on a daily basis initially. However, summary judgment is granted as to the other claims.

Any claims for violation of plaintiff's right to familial association and loss of enjoyment of life is dismissed. The Court notes that plaintiffs have failed to assert such claims in their pleadings but that the issues were raised peripherally at a recent court conference. The Court notes that under Federal Law 42 USC § 1983 this

cause of action can only stand where family members can demonstrate that the state's alleged interference with the family's right to privacy was intentional and purposeful or that there was a deliberate indifference to the familial association that was shocking to the conscience. McCray v. City of New York 2007 WL 4352748 (SDNY 2007). These factors have not been met here. Furthermore, decedent's estate cannot recover damages for loss of enjoyment of life herein. Because the Court finds that Luckey was not deprived of her Federal Civil Rights and because loss of enjoyment of life is a component of recovery under § 1983 inasmuch as it is asserted to recover for personal injuries decedent experienced as a result of the deprivation of Federal Civil Rights while alive the claim is dismissed. Banks v. Yokemich 177 F Supp 2d. 239 (SDNY 2001.)

So ordered.

Dated.

December 5, 2012



Douglas E. McKeon, J.S.C.