

<b>Small v City of New York</b>
2015 NY Slip Op 31893(U)
September 18, 2015
Supreme Court, Bronx County
Docket Number: 23325-2003
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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MARIETTA SMALL and ano.,

Plaintiffs,

- against -

INDEX NO. 23325-2003

CITY OF NEW YORK, et al.,

DECISION/ORDER

Defendants.

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**HON. DOUGLAS E. MCKEON**

Plaintiffs commenced this action against defendants seeking damages for medical malpractice, wrongful death, and violations of 42 U.S.C. § 1983. Defendants seek summary judgment dismissing the § 1983 cause of action; plaintiffs cross-move for summary judgment on the issue of liability on that cause of action and to amend the complaint to substitute individuals for the “John Doe” defendants. For the reasons that follow, defendants’ motion is granted, plaintiffs’ cross motion is denied, and the § 1983 cause of action is dismissed.

In September 2001, the decedent, Miguel Nesbitt, tested positive for exposure to tuberculosis. Shortly thereafter, he began receiving INH therapy – 900 mgs of Isoniazod and 50 mgs of vitamin B6 twice weekly. Approximately one month after beginning the INH therapy, the decedent, an inmate in a Florida correctional facility, was transferred to a correctional facility operated by defendant City of New York.<sup>1</sup> The

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<sup>1</sup>Defendant City of New York delegated to defendant New York City Health and Hospitals Corporation (HHC) responsibility for overseeing the provision of medical services to the inmates. Defendant HHC contracted with defendant Prison Health

decedent continued to receive the INH therapy while incarcerated in New York.

On May 29, 2002, a little more than six months after his transfer to New York, the decedent went to the facility's medical clinic complaining of yellow eyes and dark urine, decreased appetite for one week, and pain in his upper right quadrant. The decedent informed the physician's assistant who examined him that he had stopped taking his INH therapy approximately two weeks prior. The physician's assistant ordered some tests, and rendered a differential diagnosis of drug induced hepatitis.

The next day, the decedent returned to the medical clinic, as he did not feel well, was spitting up a red-colored substance, was experiencing nausea, and was vomiting. After being evaluated, the decedent was transferred to the emergency room of a New York City hospital. The decedent was experiencing liver toxicity, and was diagnosed with hepatitis.

The decedent was transferred to another hospital for a liver transplant evaluation. At the hospital to which he was transferred, the decedent was diagnosed with liver failure. He slipped into a coma and died on June 1, 2002. An autopsy report states that the cause of death was liver failure due to Isoniazid-based therapy.

Plaintiffs, the co-administrators of the decedent's estate, brought this action for damages for medical malpractice, wrongful death, and violations of § 1983.

Defendants seek summary judgment dismissing the § 1983 cause of action, arguing that no triable issue of fact exists with respect to whether they had a policy or

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Services to provide those services.

custom that resulted in the violation of the decedent's rights.<sup>2</sup> More specifically, defendants assert that no policy-makers had any involvement in the decedent's medical treatment, there was no widespread failure to treat inmates undergoing INH therapy, and plaintiffs identified no specific deficiency in defendants' training program for treating inmates undergoing INH therapy.

Plaintiffs oppose the motion and cross-move for summary judgment on the issue of liability on their § 1983 cause of action. They argue that, as a matter of law, defendants had a policy or custom evincing deliberate indifference to the medical needs of the inmates undergoing INH therapy. Plaintiffs say that, as a matter of law, defendants had a widespread custom of failing to monitor inmates receiving INH therapy, and that defendants failure to train their medical personnel in the administration and monitoring of inmates receiving INH therapy constitutes, as a matter of law, a deliberate indifference to the medical needs of such inmates.

Plaintiffs also seek leave to substitute Luke Aneke, M.D., Karl Brown, M.D., Kyaw Aung, M.D., Jorge Villalobo, P.A., and Ronald Williams, P.A., as party-defendants in place of the "John Doe" defendants. These individual medical professionals rendered treatment to the decedent or supervised those who did, and these individuals were on notice of plaintiffs' claims prior to the running of the statute of limitations.<sup>3</sup>

A municipality cannot be held liable under § 1983 solely on the basis of

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<sup>2</sup>Defendants also argue that plaintiffs failed to adequately plead a §1983 cause of action. That argument is wholly without merit (see amended complaint, third cause of action).

<sup>3</sup>Both defendants and plaintiffs submitted reply papers, which the court has considered.

respondeat superior (*Monell v Department of Social Services*, 436 US 658 [1978]). A § 1983 cause of action does lie against a municipality (and certain municipal officials and officers) where it has an official policy or well-established custom that causes a plaintiff to be deprived of his or her constitutional rights (*id.*). An official policy or well-established custom exists where one of the following criteria are satisfied: (1) the municipality had a formal policy officially adopted by the municipality; (2) an authorized municipal decision-maker performed the act that caused the plaintiff's constitutional deprivation; (3) the acts of the municipal agent were part of a widespread practice that, although not expressly authorized, constituted a custom or usage of which a supervising policy-maker must have been aware; and (4) the municipality's failure to provide adequate training or supervision of its agents rises to the level of deliberate indifference of the plaintiff's constitutional rights (*Fasiana v County of Suffolk*, 996 F Supp 2d 174, 184 [EDNY 2014]; *Sulehria v City of New York*, 670 F Supp 2d 288, 320 [SDNY 2009]).

Defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing the § 1983 cause of action on the ground that, at the time of the decedent's death, they did not have an official policy or well-establish custom that caused the decedent to be deprived of any constitutional right. Defendants submitted, among other things, a 10-page HHC Correctional Health Services medical protocol addressing tuberculosis control and treatment, a protocol that was in place at the time of the decedent's incarceration and death. That protocol demonstrated that defendants had an official policy designed to protect the rights of inmates, such as the decedent,

who required treatment for tuberculosis.<sup>4</sup>

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs' assertion that a constitutional-right-depriving policy or custom existed at the time of the decedent's incarceration and death is premised on the third and fourth criteria listed above: that the acts of the municipal agent were part of a widespread practice that, although not expressly authorized, constituted a custom or usage of which a supervising policy-maker must have been aware, and that the municipality's failure to provide adequate training or supervision of its agents rose to the level of deliberate indifference of the decedent's constitutional rights.

On the former criteria, plaintiffs did not submit sufficient evidence to warrant a trial on the issue of whether a widespread custom existed of failing to monitor patients on INH therapy of which defendants must have been aware. Plaintiffs point to the deposition testimony of two health care professionals who treated the decedent in the medical clinic of the New York City correctional facility. The testimony of those individuals indicates that *they* were ignorant of (and therefore did not follow) defendants' official policy regarding the control and treatment of tuberculosis. But the ignorance of the formal policy of two staff-level health care professionals is not sufficient to raise a triable issue of fact. Isolated instances of unconstitutional conduct by defendants' staff-level employees are not suggestive of a well-settled custom (see *Bowen v County of Westchester*, 706 F Supp 2d 475, 484 [SDNY 2010]; Schwartz,

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<sup>4</sup>Plaintiffs have not raised a triable issue of fact regarding whether this protocol was inappropriate or deficient. Although their expert suggests that the protocol was deficient, his opinion on that particular subject is based, in large measure, on post-incident changes made to it.

*Section 1983 Litigation Claims & Defenses* § 7:16, n 870 [collecting cases]; see also *City of Oklahoma v Tuttle*, 471 US 808, 823-824 [1985].

On the failure-to-provide-adequate-training-or-supervision criteria, plaintiffs have not raised a triable issue of fact regarding whether the alleged failure to train correctional facility personal in the administration and monitoring of INH therapy amounted to a deliberate indifference to the decedent's constitutional rights.

As discussed above, there was, at most, isolated instances of unconstitutional conduct by defendants' staff-level health care professionals. "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for the purposes of failure to train... Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chose a training program that will cause violations of constitutional rights" (*Connick v Thompson*, 131 S Ct 1350, 1360 [2011], quoting *Board of the County Commissioner of Bryant County, Oklahoma v Brown*, 520 US 397, 409 [1997]). Thus, "[d]eliberate indifference is a stringent standard of fault" that is difficult to establish (*Connick*, 131 S Ct at 1359-1360 ["A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train"]). In the absence of evidence of similar constitutional violations by defendants' staff-level health care professionals, i.e., multiple instances of improper treatment or monitoring of inmates' tuberculosis conditions, no triable issue of fact exists. To permit plaintiffs to recover under § 1983 under the theory that defendants failed to train their staff-level health care professionals with respect to the administration and monitoring of INH therapy, based on evidence that two employees may have been improperly trained, would result in a

failure-to-train claim collapsing into respondeat superior liability, an outcome that is not permitted under the case law (*see Amnesty America v Town of West Hartford*, 361 F3d 113, 130 [2d Cir 2004]).

At bottom, defendants' staff-level health care professionals may well have been negligent in the manner in which they monitored and cared for the decedent, and that such negligence, for which defendants' may be vicariously liable, caused the decedent's death. Indeed, plaintiffs' expert makes a persuasive case for such findings. But the proper remedy for that negligence is a medical malpractice-wrongful death action, which plaintiffs will have as a result of the court's decision.

Therefore, defendants' motion for summary judgment dismissing the § 1983 cause of action is granted, and that aspect of plaintiffs' cross motion seeking summary judgment on the issue of liability on that cause of action is denied.

Concerning that aspect of plaintiffs' cross-motion to substitute Luke Aneke, M.D., Karl Brown, M.D., Kyaw Aung, M.D., Jorge Villalobo, P.A., and Ronald Williams, P.A., as party-defendants in place of the "John Doe" defendants, the court notes that this amendment is sought eleven years after the treatment at issue, nine years after commencement of this litigation and the serving of the bill of particulars, six years after the last deposition was taken, and eight months after the filing of the note of issue. Plaintiffs offer no persuasive excuse for the lengthy delay in seeking the amendment, a delay that has prejudiced defendants and would prejudiced the would-be defendants.

Critically, the statute of limitations expired long ago for claims of deliberate

indifference under § 1983, and plaintiffs have not shown that the relation back doctrine applies herein. Plaintiffs have not shown that the proposed individual defendants were united in interest with defendant City of New York. Furthermore, plaintiffs have not established that the proposed individual defendants knew or should have known that, but for a mistake by plaintiffs as to the identity of the proper parties, the action would have been brought against them.

Accordingly, defendants' motion for partial summary judgment is granted, and plaintiffs cross motion is denied.

This constitutes the decision and order of the court

Dated: September 18, 2015

A handwritten signature in black ink, appearing to read "Douglas E. McKeon", written over a horizontal line.

Douglas E. McKeon, J.S.C.