| **Powell v St. Barnabas Hosp.** |
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| 2019 NY Slip Op 35017(U) |
| July 22, 2019 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 20819/2019E |
| Judge: Howard H. Sherman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
---x
Shrill Powell,

Plaintiff,

-against-

St. Barnabas Hospital, and John Does Nos. 1 to 12,

Defendants.
---x

DECISION AND ORDER
Index No. 20819/2019E

Hon. Howard H. Sherman, J.S.C.:

Defendant, St. Barnabas Hospital ("St. Barnabas"), moves for dismissal pursuant to CPLR 3211(a)(7), dismissing the complaint against it for failure to state a cause of action. The plaintiff submits written opposition.

Plaintiff, Shrill Powell, is an individual whose brother, Frederick Williams, was a former patient at St. Barnabas. It is alleged that on or about July 15, 2018, an individual named Freddy Clarence Williams (not plaintiff's brother) was admitted to St. Barnabas in an unconscious state. Freddy Clarence Williams was in possession of his own identification cards, including a social security card when admitted to the hospital. St. Barnabas, admitted Freddy Clarence Williams into the hospital under the patient profile of plaintiff's brother. Frederick Williams' family members were listed in his St. Barnabas patient profile as emergency contacts. On or about July 15, 2018, a doctor employed by St. Barnabas, allegedly advised plaintiff that her brother, Frederick Williams had been admitted to the hospital in an unconscious state. It is alleged that on that same date, the doctor who advised the plaintiff as to her alleged brother's admittance to the hospital, maintained to the plaintiff that he did not believe her brother would survive.

On or about July 17, 2018, plaintiff went to St. Barnabas, and was allegedly advised by staff that her brother had suffered severe brain damage as a result of a drug overdose. After the plaintiff was informed of the patient's status, the plaintiff was also advised that her brother was to be transferred to St. Barnabas' hospice in patient unit.

Plaintiff remained bedside with Freddy Clarence Williams, believing him to be her brother from July 17, 2018 until July 29, 2018. On July 29, 2018, plaintiff authorized

defendant, St. Barnabas Hospital, to withdraw life support from Freddy Clarence Williams, under the mistaken belief that he was her brother, Frederick Williams.

On July 29, 2018, Freddy Clarence Williams was pronounced deceased by St. Barnabas. On that same date, plaintiff requested the New York City Office of the Chief Medical Examiner conduct an autopsy.. On or about August 16, 2018, the New York City Office of the Chief Medical Examiner identified the body to be that of Freddy Clarence Williams, and not plaintiff's brother.

Movant contends that the plaintiff has no right to recover emotional damages arising from alleged misidentification of a patient who was not a member of plaintiff's family. The movant states that, "Generally, a [health care provider] only owes a duty of care to [its] patient. [The courts] have been reluctant to expand a [provider's] duty of care to a patient to encompass non-patients. A critical concern underlying this reluctance is the danger that a recognition of a duty would render [providers] liable to a prohibitive number of possible plaintiffs." (*McNulty v. City of New York*, 100 N.Y.2d 227, 232, 762 N.Y.S.2d 12 [2003]). In addition, the movant states that "sound policy reasons underlie the refusals to extend principles of law so as to expand the liability of a negligent actor to include third parties who suffer emotional distress as a result of direct injury to others, the major reason being the difficulty in devising a rational way to limit the scope of liability." (*Jacobs v. Horton Memorial Hospital*, 130 A.D.2d 546, 548, 515 N.Y.S.2d 281 [2nd Dept. 1987].) Movant further goes on to differentiate this factual scenario from the leading precedent on third party liability, *Johnson v. State of New York*.[1]

Plaintiff argues, in opposition, that she clearly fits into the class of permissible litigant's carved out in *Johnson v. State*, where plaintiff was able to recover when the hospital misinformed her of her mother's status. "Liability was based entirely on a duty the defendant had undertaken to inform the plaintiff of her mother's status. That duty was owed directly to the plaintiff and was breached when the defendant erroneously informed the plaintiff that her mother had died." (*Johnson v State of New York*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S. 638 [1975].) Plaintiff argues that a direct duty was owed to her from the time the initial communication occurred. Plaintiff also contends that a doctor has

[1] In that case, the plaintiff's mother was a patient; therefore the hospital owed a duty to correctly advise the daughter of her mother's status.

a duty to transmit truthfully information concerning a relative's death or funeral (*Johnson v Jamiaca Hospital*, 62 N.Y.2d 523, 467 N.E.2d 502, 478 N.Y.S.2d 838 [1984]), and that this act constituted a negligent communication involving death of a family member, in which damages are recoverable for purely emotional injury. (*Rugova v City of New York*, 132 A.D.3d 220, 16 N.Y.S.3d 233 [1st Dept. 2015].)

In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court's role is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated. (*Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 [1995]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true; all reasonable inferences which can be drawn from the complaint and the allegations therein must be resolved in favor of the plaintiff. (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]). When analyzing the complaint in the context of a motion to dismiss, the court must discern whether the facts as alleged fit within any cognizable legal theory. (*Sokoloff v. Harriman Estates Development Corp.*, *supra* at 414; *Leon v. Martinez*, 84 N.Y.2d 83, 88 – 89 [1994].)

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7), the facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 222[2012] [internal quotation marks omitted]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141-142, 75 N.E.3d 1159, 1162, 53 N.Y.S.3d 598, 601 [2017].)

The Court of Appeals has outlined three distinct ways to recover for negligent infliction of emotional distress, but only one is relevant in this instance. That is, a duty is owed to a plaintiff and a defendant breaches that duty resulting in the emotional harm but no physical injury. (*Taggart v Costabile*, 131 A.D.3d 243, 14 N.Y.S.3d 388 [2nd Dept.

2015].) Plaintiff relies upon *Johnson* as support for her argument that she falls within the class of litigants entitled to recover in this situation.

*Johnson* is the seminal case regarding doctor's duty to third parties. In *Johnson*, the plaintiff was the daughter of a patient at Hudson River State Hospital ("Hudson River"). The patient, Emma Johnson, had been in Hudson River since 1960. On August 6, 1970, another patient known by the name of Emma Johnson had died. Hudson River mistook the deceased as the plaintiff's mother, and informed her Aunt, Nellie Johnson, of the death. A wake was scheduled for August 11. When the plaintiff and her Aunt arrived at the wake and further examined the body, they concluded that the deceased was not their relative. Hudson River confirmed that there was a mistake. The court concluded that, "the daughter of a hospital patient may recover for emotional harm sustained by her as a result of negligent misinformation given by the hospital that her mother had died. Key to liability, of course, is the hospital's duty, borne or assumed, to advise the proper next of kin of the death of the patient." (*Johnson* [Emphasis added]).

Following *Johnson*, the Court of Appeals again considered the extension of a medical provider's liability to a third party. In *Lafferty v. Manhasset Medical Center Hospital* (54 N.Y.2d 277, 280, 445 N.Y.S.2d 111, 429 N.E.2d 789 [1981]), the court declined to extend liability to a plaintiff who attempted to recover for emotional distress and aggravation of a preexisting heart condition as a result of witnessing a negligent transfusion of mismatched blood performed on her mother in law. In its reasoning, the Court distinguished its previous ruling in *Johnson*. "Our recent decision in *Johnson v. State of New York*, 37 N.Y.2d 378, 372 N.Y.S.2d 638, 334 N.E.2d 590, holding the defendant liable for erroneously informing the plaintiff of her mother's death, does not represent an abandonment of these concerns. That case did not involve an extension of the defendant's liability for negligently injuring or causing the death of the plaintiff's mother, who had not been injured by the defendant and was not in fact dead. Liability was based entirely on a duty the defendant had undertaken to inform the plaintiff of her mother's status. That duty was owed directly to the plaintiff and was breached when the defendant erroneously informed the plaintiff that her mother had died. Although it was also noted in that case that injury to the plaintiff was foreseeable, that alone is not sufficient to establish liability when, as here, there is no showing of any duty owed to the

plaintiff (see, e. g., *Tobin v. Grossman, supra*, 24 N.Y.2d p. 615, 301 N.Y.S.2d 554, 249 N.E.2d 419; cf. *Pulka v. Edelman*, 40 N.Y.2d 781, 785, 390 N.Y.S.2d 393, 358 N.E.2d 1019)." (*Id* at 280 [Emphasis added].)

After *Lafferty*, the Court of Appeals decided *Johnson v. Jamaica Hospital.*, in which parents sought recovery for emotional distress as a result of their daughter's abduction from the hospital nursery. The Court of Appeals dismissed this case for failure to state a cause of action, and again clarified when a medical provider's liability will be extended to third parties. "Finally, our prior holdings in *Johnson v. State of New York*, 37 N.Y.2d 378, 372 N.Y.S.2d 636, 334 N.E.2d 590, *supra* and *Lando v. State of New York*, 39 N.Y.2d 803, 385 N.Y.S.2d 759, 351 N.E.2d 426, *supra* provide no basis for recovery. In neither case was liability based upon a hospital's breach of care to its patient causing direct injury to the patient resulting in emotional injury to relatives of the patient. In *Johnson* the defendant hospital negligently sent a telegram to plaintiff notifying her of her mother's death when in fact her mother had not died, and in *Lando* the defendant hospital negligently failed to locate a deceased patient's body for 11 days, when it was found in an advanced state of decomposition. Each case presented exceptional circumstances in which courts long ago recognized liability for resultant emotional injuries: a duty to transmit truthfully information concerning a relative's death or funeral (*Johnson v. State of New York*, 37 N.Y.2d 378, 381–382, 372 N.Y.S.2d 636, 334 N.E.2d 590, *supra* ), which the hospital assumed by sending the message (*Lafferty v. Manhasset Med. Center Hosp.*, 54 N.Y.2d 277, 280, 445 N.Y.S.2d 111, 429 N.E.2d 789), and the mishandling of or failure to deliver a dead body with the consequent denial of access to the family (*Finley v. Atlantic Transp. Co.*, 220 N.Y. 249, 115 N.E. 715; *Darcy v. Presbyterian Hosp.*, 202 N.Y. 259, 95 N.E. 695). Neither exception is applicable here."

Defendant argues that *Johnson* is limited to its particular facts involving communications with regard to a dead body. In this regard, defendant relies on *Tebbutt v. Virostek* (65 N.Y.2d 931, 483 N.E.2d 1142, 493 N.Y.S.2d 1010, overruled by *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 809 N.E.2d 645, 777 N.Y.S.2d 416 [2004]), which held that a mother could not recover for emotional injuries when medical malpractice caused a stillbirth or miscarriage, absent a showing that she suffered a physical injury that was both distinct from that suffered by the fetus and not a normal incident of childbirth.

In Tebbutt, the Court of Appeals stated, "Plaintiffs also failed to establish the existence of a duty running from defendant to plaintiff Marta Tebbutt pursuant to Johnson v State of New York (37 NY2d 378 [duty of hospital to transmit truthfully information concerning a relative's death or funeral]), *which has been limited to its particular facts* (Johnson v Jamaica Hosp., 62 NY2d 523, 530). (*Jacobs*, 130 A.D.2d, at 548.)" (*Id* at 1011—1012.)

While the defendant asserts that *Johnson v. State of New York* is "limited to its particular facts," that argument does not avail the defendant here, as the facts in *Johnson v. State of New York* are legally indistinguishable from the present facts. The present case differs from *Johnson* in that plaintiff's brother was not a current patient at St. Barnabas, but rather a former patient, and that the information transmitted was not a false report of the death of a relative, but of impending death. However, defendant fails to show how these different circumstances affect the hospital's duty, or otherwise free the hospital from liability. The salient facts are that the hospital contacted the plaintiff (thus assuming a duty) and provided her with a false report of impending death (thus causing emotional distress). The act of contacting the plaintiff gave rise to the duty to provide accurate information as to the former patient. The report that plaintiff's brother was unconscious as a result of an overdose was no less alarming than a report that he had died.

That the plaintiff did not recognize her brother is not a matter which should be considered on this motion to dismiss. The reasonableness of the plaintiff's conduct raises factual issues, but does not affect the existence of the duty assumed by the hospital. Whether the plaintiff should have sooner discovered that a mistake in identification had occurred, or whether damages should cease at a point earlier in time when the error should have been discovered by the plaintiff, are matters which must be addressed at a later stage of this action.

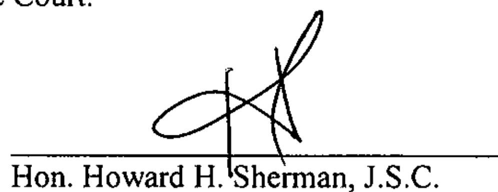
This case is not governed by *Tobin v. Grossman*, which states that no cause of action lies for unintended harm sustained by one, solely as a result of injuries inflicted directly upon another (*Tobin v* Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 [1969]). As the cases cited earlier indicate, the gravamen of the present cause of action is that the hospital assumed a duty by contacting the plaintiff, and that the injury is the emotional distress inflicted directly on the plaintiff as a result of that emotional

distress. Plaintiffs is not (and cannot) seeking to recover for the loss of life sustained by Freddy Clarence Williams, but she may potentially recover for the distress that allegedly resulted from the consequences of the false identification of her brother as the unconscious patient, up to and including authorizing that life support be withdrawn from a person with whom she had no familial connection.

Based upon the foregoing, it is hereby,

ORDERED that defendant's motion to dismiss is denied.

This is the Decision and Order of the Court.



Dated: July 22, 2019

Hon. Howard H. Sherman, J.S.C.