

**Diliberto v New York Presbyt. Hosp.-Weill
Cornell Campus**

2020 NY Slip Op 31029(U)

April 18, 2020

Supreme Court, New York County

Docket Number: 161510/2013

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

FRANCIS DILIBERTO JR, BRIAN VAUGHAN

Plaintiff,

- v -

NEW YORK PRESBYTERIAN HOSPITAL-WEILL
CORNELL CAMPUS,

Defendant.

-----X

INDEX NO. 161510/2013

MOTION DATE 11/20/2019

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115 were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for injuries sustained by two police officers who were struck with a telephone thrown by a prisoner they were guarding at a hospital, the defendant, New York Presbyterian Hospital-Weill Cornell Campus (NYPH), moves for summary judgment pursuant to CPLR 3212 dismissing the complaint against it. The plaintiffs oppose. The motion is denied.

On July 10, 2013, the plaintiffs, New York City Police Officers Francis Diliberto (Diliberto) and Brian Vaughan (Vaughan) were guarding a prisoner undergoing medical treatment at NYPH. Upon arriving at NYPH, the plaintiffs relieved two other New York City police officers guarding the prisoner. Those officers told the plaintiffs that the prisoner was under arrest for assault, violating an order of protection, and resisting arrest. Medical records from prior to the altercation show that the prisoner was bi-polar, not taking his medication, had used ecstasy prior to his arrest, and was being treated for a burn injury after he set fire to his left leg. The medical records further note that the prisoner suffered from "fits of rage." The prisoner's arms and legs were shackled to a hospital gurney. While guarding the prisoner, the plaintiffs were advised by hospital staff that the prisoner was going to be moved to the hospital's burn unit for treatment. The plaintiffs accompanied the prisoner to the burn unit to ensure that he remained restrained during the transport. Upon their arrival at the burn unit, the plaintiffs moved the

prisoner to his new hospital bed, unshackling him from his previous bed and re-shackling him to the new one.

Later, a nurse came to the room and asked the plaintiffs to unshackle one of the prisoner's hands so that she could treat the burn injury. Diliberto uncuffed the prisoner's right hand. The nurse then asked the officers to step outside while she examined the prisoner. The officers complied. After her initial examination, the nurse came outside and informed the officers that the prisoner was making a call on the landline telephone in the burn unit. Vaughan's notes quote the nurse as saying "I let him make a phone call, is that alright?" The officers immediately went into the room and told the prisoner to get off the telephone. A struggle ensued between the prisoner and the plaintiffs. The plaintiffs claim that during the struggle, Diliberto was struck on his right hand with the telephone receiver and Vaughan was struck on the back of the head with the receiver.

On December 16, 2013 the plaintiffs commenced this action against NYPH, alleging it was negligent in allowing the prisoner access to the telephone despite knowing the danger that the prisoner posed to others. The action was brought pursuant to New York General Obligations Law §11-106, which provides a police officer the right to bring a common law negligence action against a private party for the officer's injuries suffered in the line of duty. Following discovery, the plaintiff filed the Note of Issue on April 2, 2019. The instant motion was filed on June 3, 2019.

In support of the motion, NYPH argues that it did not owe a duty to the plaintiffs since the prisoner was under their sole custody and control. In opposition, the plaintiffs argue that (i) the motion is untimely and (ii) NYPH had a duty to ensure that the obviously dangerous patient who was unshackled at NYPH's request did not gain access to an unsafe object during treatment.

Contrary to the plaintiffs' contention, the motion was timely. The court's Part Rules require summary judgment motions to be filed 60 days after the Note of Issue is filed. Pursuant to CPLR 3212(a) the 60-day deadline for moving for summary judgment is calculated starting from the day after the Note of Issue is filed, not the day it is filed. As the Note of Issue was filed on April 2, 2019, the 60-day deadline expired on June 1, 2019, a Saturday, and therefore NYPH's motion, filed on the next business day, Monday June 3, 2019, was timely. See CPLR

3212(a); New York General Construction Law § 25-a. Nonetheless, NYPH has not established entitlement to summary judgment.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting Nesbitt v Nimmich*, 34 AD2d 958, 959 (2nd Dept. 1970).

A hospital, as a landowner, has a duty to protect persons lawfully present on its premises from the reasonably foreseeable criminal or tortious acts of third persons. See Royston v Long Island Med. Ctr. Inc., 81 AD3d 806 (2nd Dept. 2011); Sandra M. v St. Luke's Roosevelt Hosp. Ctr., 33 AD3d 875 (2nd Dept. 2006). Tortious conduct is reasonably foreseeable if there is sufficient notice of prior similar incidents or similar aggressive behavior by a patient such that a hospital should anticipate the alleged incident and protect a plaintiff from it. See Royston v Long Island Med. Ctr. Inc., supra; Guo Hua Wang v Lang, 47 AD3d 766 (2nd Dept. 2008); Browne v GMRI, Inc., 6 AD3d 640 (2nd Dept. 2004).

In support of its argument that it did not owe a duty to the plaintiffs, NYPH relies upon the Appellate Division's holding in Zerba v New York City Health & Hosps. Corp., 5 AD3d 679 (2nd Dept. 2004), that a hospital was not liable to two police officers who brought a prisoner to the hospital for a psychiatric evaluation and were subsequently injured by the prisoner because

the prisoner was always in the police officer's custody and control. NYPH also submits, *inter alia*, the deposition testimony of Magdalena Czupryna, the nurse who treated the prisoner and her related notes from the treatment, stating that she asked the plaintiffs to unshackle one of the prisoner's hands so she could treat him, that the plaintiffs complied, and that the plaintiffs then left the hospital room but stayed outside of the door while she treated the prisoner. NYPH further submits Diliberto and Vaughan's deposition testimony, both of which state that the plaintiffs thought that it was safe at the time to allow the nurse to tend to the prisoner without their presence, and that the prisoner remained restrained, except for his one arm, at all times.

These submissions fail to establish, *prima facie*, that the prisoner was in the plaintiffs' custody and control the entire time, such that NYPH did not owe a duty to the plaintiffs. Unlike in Zerba, where it was held that a hospital did not have a duty to protect the police officers from the violent acts of the prisoner they were actively guarding, and who had remained in their custody the entire time, here there is a triable issue of fact as to whether NYPH assumed custody and control of the prisoner following the plaintiffs unshackling the prisoner's arm and leaving the room, such that NYPH was under a duty to prevent the prisoner from accessing an unsafe or dangerous object during treatment. Compare Zerba v New York City Health & Hosps. Corp., *supra*.

Even assuming that NYPH had met its burden in the first instance, the plaintiffs' submissions in opposition to the motion raise a triable issue of fact regarding whether NYPH should have reasonably foreseen the tortious conduct of the prisoner. That is, the plaintiffs' submissions show that NYPH was on notice of the prisoner's aggressive behavior, and therefore should have taken affirmative steps to prevent the prisoner from accessing an unsafe or dangerous object. In support of their argument, the plaintiffs submit, *inter alia*, the prisoner's medical records and Vaughan's notes made contemporaneously with the incident. While these submissions do not establish that NYPH knew specifically that the prisoner was under arrest for assault, violating an order of protection, and resisting arrest, they do show that NYPH was on clearly notice that the prisoner was under arrest, had all four limbs shackled to a gurney, and was being guarded by the police. Additionally, the medical records show that NYPH knew that the prisoner was bi-polar, not taking his medication, had taken ecstasy prior to his arrest, was being treated for a burn injury after he lit his left leg on fire, and suffered from fits of rage. As such, there is also a triable issue of fact as to whether NYPH had a duty to protect the plaintiffs by preventing a dangerous prisoner from gaining access to an object that he could use in an

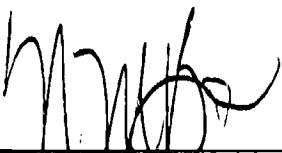
unsafe manner. See Royston v Long Island Med. Ctr. Inc., supra; Guo Hua Wang v Lang, supra; Sandra M. v St. Luke's Roosevelt Hosp. Ctr., supra.

Accordingly, it is,

ORDERED that the defendant's motion for summary judgment pursuant to CPLR 3212 is denied in its entirety; and it is further,

ORDERED that the parties shall to appear for a settlement conference, with full settlement authority, on July 9, 2020 at 9:30 a.m.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

<u>4/18/2020</u> DATE					_____ NANCY M. BANNON, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE