

Watton v Liverpool-Turner

2021 NY Slip Op 30520(U)

February 22, 2021

Supreme Court, New York County

Docket Number: 805003/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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ROBERT WATTON, as the Administrator of the Estate of
CONNIE WATTON, deceased, and ROBERT WATTON
Individually,

Plaintiff,

- v -

MELANIE LIVERPOOL-TURNER, NEW YORK CITY
HEALTH & HOSPITALS CORPORATION, and
NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

INDEX NO. 805003/2018

MOTION DATE 02/22/2021

MOTION SEQ. NO. 004

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 65, 66, 67, 68, and 73 (Motion 004)

were read on this motion to/for PROTECTIVE ORDER.

In this action to recover damages for assault and battery, medical malpractice, negligence, and wrongful death, the defendant New York City Health & Hospitals Corporation (NYC HHC) moves pursuant to CPLR 3103 and 3122 for a protective order preventing any party from obtaining the medical and mental health records of its now-deceased codefendant, Melanie Liverpool-Turner, a Brooklyn resident who had been a psychiatric patient at its Bellevue Medical Center. The plaintiff opposes the motion. The motion is denied as premature, without prejudice to renewal if and when a demand for such records is made, and the Public Administrator of Kings County, who was recently substituted for Liverpool-Turner as a party defendant, declines to waive the physician-patient privilege on her behalf.

Prior to October 19, 2016, Liverpool-Turner allegedly was a psychiatric patient at Bellevue, and apparently had been suffering from schizophrenia or schizoaffective disorder. On or about October 19, 2016, Bellevue allegedly discharged her as a patient. On November 7, 2016, Liverpool-Turner, without provocation, shoved the plaintiff's decedent, Connie Watton,

from the platform of the southbound Number 1 subway train at the defendant New York City Transit Authority's (NYCTA's) Times Square subway station, and onto the tracks as a southbound train was about to enter the station. The train struck the plaintiff's decedent, who was gravely injured, and died from her injuries later that day. Liverpool-Tuner was arrested and charged with murder in the second degree.

On January 4, 2018, the plaintiff commenced this action (Action No. 1) against Liverpool-Turner, NYC HHC, and NYCTA, alleging that Liverpool-Turner committed an assault and battery that caused his decedent's injuries and death. He also alleged that NYCTA either was vicariously liable for the negligence of its motorman in operating the subject train at an excessive rate of speed, failing to notice the decedent's presence on the tracks, and failing timely to stop the train to avoid striking the decedent, or, in the alternative, negligent in the training and supervision of that motorman. The plaintiff further alleged that NYC HHC committed medical malpractice in the diagnosis, treatment, and care of Liverpool-Turner by discharging her from its care, despite the fact that it knew or should have known that she had violent propensities caused by her psychiatric conditions, and presented a danger to others.

On July 9, 2018, under Motion Sequence 002, NYC HHC moved in this action for a protective order preventing any party from obtaining Liverpool-Turner's medical and mental health records in its possession on the ground that those records were subject to the physician-patient privilege. By so-ordered stipulation dated August 30, 2018, the Supreme Court, New York County (Madden, J.), stayed this action pending completion of the criminal proceedings against Liverpool-Turner, and permitted NYC HHC to withdraw its motion without prejudice to resubmission at the appropriate time.

On February 13, 2019, the plaintiff commenced a related action against Mount Sinai Beth Israel Hospital (MSBI) in the Supreme Court, New York County, under Index No. 805054/2019 (Action No. 2). In his complaint in Action No. 2, the plaintiff alleged that, shortly before October 19, 2016, and thus weeks prior to Liverpool-Turner's attack upon the decedent,

Liverpool-Turner had told police officers that she had shoved somebody off of a subway platform and onto the tracks, that police officers had taken her to MSBI for psychiatric examination and evaluation, and that MSBI committed medical malpractice by discharging her prior to November 7, 2016, the date on which she attacked the plaintiff's decedent.

On March 4, 2019, Liverpool-Turner pleaded guilty to murder in the second degree in the Supreme Court, New York County. On or about April 5, 2019, she was sentenced to an indeterminate term of incarceration of 25 years to life. The court remanded her to the custody of the New York State Department of Corrections and Community Supervision, which incarcerated her at the Bedford Hills Correctional Facility in Bedford, New York. On May 8, 2019, Liverpool-Turner committed suicide. On March 11, 2020, the Public Administrator of Kings County was appointed as administrator of Liverpool-Turner's estate.

On July 15, 2020, under Motion Sequence No. 3, the plaintiff moved in this action (Action No. 1) to substitute the Public Administrator of Kings County as a party defendant in place of Liverpool-Turner, consolidate Action No. 1 with Action No. 2, amend the caption accordingly, and lift both the stay previously imposed by the court in 2018 and the stay automatically imposed by operation of law upon Liverpool-Turner's death. NYCTA did not oppose the motion. In its responsive papers, NYC HHC expressly did not oppose the relief sought by the plaintiff, but, without making a formal cross motion, urged the court to reconsider its prior application for a protective order.

On September 30, 2020, during the pendency of Motion Sequence No. 3, NYC HHC formally made the instant motion for a protective order. By order dated December 3, 2020, the court (Madden, J.) granted the plaintiff's motion under Motion Sequence 003 in its entirety, substituting the Public Administrator for Liverpool-Turner, consolidating Action Nos. 1 and 2 under Index No. 805054/2019, amending the caption accordingly, and lifting the stays. In that order, however, the court wrote that:

“As for NYHHC’s request that the court find that Public Administrator does not have the capacity to waive the decedent’s privilege as to mental health records, the court finds that such request is premature, particularly as plaintiff does not seek mental health or other records in its moving papers. Moreover, NYCHH[C] has separately moved for a protective order with respect to these records under motion sequence no. 004.”

This court notes that no party has taken the necessary administrative steps to effectuate and finalize the consolidation of the two actions or the amendment of the caption, so they remain, at least in the court’s records, as separate actions. Hence, the court disposes of Motion Sequence 004 under Index No. 805003/2018, but directs the plaintiff to take the appropriate administrative steps to finalize consolidation and amendment, as set forth below.

With respect to the merits of the motion, the ultimate relief sought by NYC HHC remains premature, as no party has sought to obtain Liverpool-Turner’s medical and mental health records from it, any other party, or any other health care provider, either pursuant to a discovery demand made upon a party or pursuant to a subpoena duces tecum.

In any event, the court rejects NYC HHC’s contention that the Public Administrator of Kings County, Richard Buckheit, as administrator of Liverpool-Turner’s estate, lacks authority to waive her physician-patient privilege should he deem a waiver to be warranted in this matter.

CPLR 4504(c)(1) provides that

“A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege *has been waived*: . . .

“*by the personal representative, or the surviving spouse, or the next of kin of the decedent*”

(emphasis added). Consequently, although a decedent’s physician-patient privilege is not terminated by his or her death (see *Prink v Rockefeller Center, Inc.*, 48 NY2d 309, 314 [1979]), and CPLR 4504(c) confers standing upon NYC HHC, as a party to this action, to assert the privilege by way of objection (see *Matter of Grand Jury Investigation*, 59 NY2d 130, 135 [1983]; *1 Christopher Realty, LLC v Miller*, 2009 NY Slip Op 51284[U], 24 Misc 3d 1206[A] [Sup Ct, N.Y.

County, Jun. 19, 2009]; *Greene v New England Mut. Life Ins. Co.*, 108 Misc 2d 540, 542 [Sup Ct, N.Y. County 1981]; *cf. Doe v Haight*, 2020 NY Slip Op 20315 [Sup Ct, Albany County, Sep. 9, 2020] [nonparty employer that was the custodian of certain employee medical records may not assert physician-patient privilege on behalf of deceased employee]),

“[t]he current version of the statutory doctor-patient privilege, reflecting various amendments enacted subsequent to the *Westover v Aetna Life Ins. Co.* case (*supra* [99 NY 56 (1885)]), expressly allows executors, among others, to waive the doctor-patient privilege on behalf of their decedents (*see* CPLR 4504[c]; *Holcomb v Harris*, 166 NY 257, 59 NE 820; Barker and Alexander, *Evidence in New York State and Federal Courts* § 5:20, at 353)

(*Mayorga v Tate*, 302 AD2d 11, 17 [2d Dept 2002]; *see Liew v New York Univ. Med. Ctr.*, 55 AD3d 566, 567 [2d Dept 2008] [the physician-patient privilege may be waived by a personal representative when the patient is deceased]) Nor does the federal Health Insurance Portability and Accountability Act of 1996 (*see* Pub L 104-191, 110 US Stat 1936; hereinafter HIPAA) preempt state law with respect to the statutory physician-patient privilege which is, in any event, “stricter than that provided by HIPAA” (*Liew v New York Univ. Med. Ctr.*, 55 AD3d at 567; *see Arons v Jutkowitz*, 9 NY3d 393, 414-415 [2007]). Moreover, CPLR 4504(c) does not require an express waiver by the decedent or the decedent’s representative, but provides that “waiver may be implied” (*Mayorga v Tate*, 302 AD2d at 17, quoting *Lynch v Mutual Life Ins. Co. of N.Y.*, 55 Misc 2d 179, 181 [Sup Ct, Bronx County 1967]; *see Cronin v Harris*, 2011 NY Slip Op 51733[U], 32 Misc 3d 1246[A] [Sup Ct, Nassau County, Sept. 7, 2011]).

Accordingly, it is

ORDERED that the motion of the New York City Health and Hospitals Corporation is denied, without prejudice to renewal after a party makes a demand for the production of the medical and mental health records of Melanie Liverpool-Turner that are in its possession, or seeks to subpoena those records, and after the Public Administrator of Kings County, as administrator of the estate of Melanie Liverpool-Turner, has the opportunity to determine

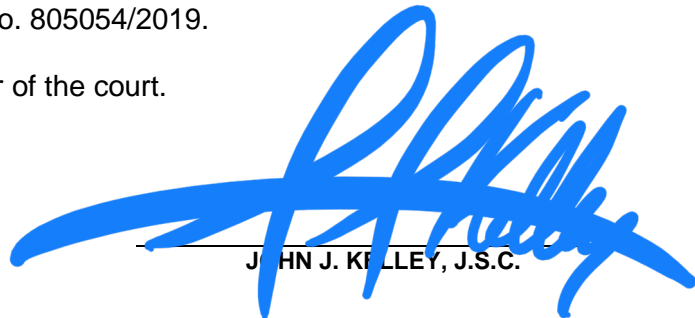
whether or not to waive her physician-patient privilege in connection with those records; and it is further,

ORDERED that, on the court's own motion, within 15 days of the entry of this order, the plaintiff shall serve a copy of the substitution, consolidation, and caption-amendment order in this action, dated and signed by Justice Joan A. Madden on December 3, 2020, and entered December 8, 2020, upon the Trial Support Office (60 Centre Street, Room 158, New York, NY 10007), and shall separately file and upload the notice required by CPLR 8019(c) and a completed Form EF-22 under both Index No. 805003/2018 and Index No. 805054/2019, and the Trial Support Office shall thereupon amend the court records accordingly; and it is further,

ORDERED that the determination set forth in this order shall continue to have force and effect in the consolidated action under Index No. 805054/2019.

This constitutes the Decision and Order of the court.

2/22/2021
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	