

Harrison v Sullivan
2022 NY Slip Op 30361(U)
February 3, 2022
Supreme Court, New York County
Docket Number: Index No. 158308/2021
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD PART 35

Justice

-----X

SHERMAN HARRISON

Petitioner,

- v -

ANN MARIE SULLIVAN,

Respondent.

-----X

INDEX NO. 158308/2021

MOTION DATE 10/04/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Sherman Harrison (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross motion, pursuant to CPLR 3211, of the respondent Ann Marie T. Sullivan, in her official capacity as Commissioner of the New York State Office of Mental Health (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment dismissing the proceeding and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with notice of entry, on all parties within 10 days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Sherman Harrison (Harrison) seeks an order in the nature of mandamus to compel the respondent Ann Marie T. Sullivan, the Commissioner of the New York State Office of Mental Health, (OMH, Commissioner Sullivan), to grant a statutory designation to a certain psychiatric facility, and Commissioner Sullivan cross-moves to dismiss Harrison's petition (together, motion sequence number 001). For the following reasons, the petition is denied, and this proceeding is dismissed.

BACKGROUND

Harrison is currently confined as an inmate at one of the New York City Department of Correction's (DOC's) Rikers Island facilities, where he is awaiting the completion of the court-ordered psychiatric evaluation process (a "Track Status Hearing") that is mandated by Criminal Procedure Law (CPL) § 330.20 et seq. as a result of his pleading "not responsible by reason of mental disease or defect" to charges of Murder in the Second Degree (Penal Law § 125.25 [2]).

Harrison entered the aforementioned plea in this court on December 9, 2020. *See* verified petition, ¶ 6. Upon his doing so, the judge (Kiesel, J.) commenced the Track Status Hearing process by issuing an "examination order" pursuant to CPL § 330.20 (2) directing that Harrison be evaluated by two OMH-designated psychiatric examiners. *Id.*, ¶ 8. The examination order also directed that Harrison "be committed to a secure facility designated by the commissioner as the place for such psychiatric examination," pursuant to CPL § 330.20 (3). *Id.*, ¶ 8. The statute defines the term "secure facility" as:

“. . . a facility within the state office of mental health . . . which is staffed with personnel adequately trained in security methods and is so equipped as to minimize the risk or danger of escapes, *and which has been so specifically designated by the commissioner.*" CPL § 330.20 (1) (b) (emphasis added). OMH selected the Kirby Forensic Psychiatric Center (Kirby) located on Randalls Island, New York, as the location where Harrison's psychiatric

examination would be carried out, and he was admitted there on March 9, 2021. *See* verified petition, ¶ 8. The examinations were performed, and two evaluation reports were submitted to Judge Kiesel on June 9, 2021. *Id.*, ¶ 10. The next step of the Track Status Hearing process is mandated by CPL § 330.20 (6) (“Initial hearing; commitment order”), and requires that:

“After the examination reports are submitted, the court must, within ten days of the receipt of such reports, conduct an initial hearing to determine the defendant's present mental condition. If the defendant is in the custody of the commissioner pursuant to an examination order, the court must direct the sheriff to obtain custody of the defendant from the commissioner and to confine the defendant pending further order of the court, except that the court may direct the sheriff to confine the defendant in an institution located near the place where the court sits *if that institution has been designated by the commissioner as suitable for the temporary and secure detention of mentally disabled persons*. At such initial hearing, the district attorney must establish to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill. If the court finds that the defendant has a dangerous mental disorder, it must issue a commitment order. If the court finds that the defendant does not have a dangerous mental disorder but is mentally ill, the provisions of subdivision seven of this section shall apply.”

CPL § 330.20 (6) (emphasis added). Judge Kiesel scheduled Harrison’s “initial hearing” for June 24, 2021. *See* verified petition, ¶ 10. Shortly before that hearing date, Harrison was returned to Rikers Island from Kirby. *Id.*, ¶ 10. Judge Kiesel commenced Harrison’s initial hearing on June 24, 2021 and thereafter adjourned it several times for the presentation of further testimony and evidence. *Id.*, ¶¶ 11-14. It is evidently still pending. On the July 9, 2021 hearing date, Judge Kiesel issued an order pursuant to CPL § 330.20 (6) stating that it was:

“ORDERED that the sheriff and/or the New York City Department of Corrections confine the defendant in an institution located near the place where the court sits that has been designated by the commissioner as suitable for the temporary and secure detention of mentally disabled persons, to wit:

“KIRBY FORENSIC PSYCHIATRIC CENTER

“102 Rivers Edge Road

“New York, NY 10035”

Id., ¶ 11; exhibit A. Shortly thereafter, counsel for the OMH contacted Judge Kiesel’s chambers to inform her that Kirby was not “an institution . . . that has been designated by the commissioner as suitable for the temporary and secure detention of mentally disabled persons,” and that OMH

was therefore unable to admit Harrison to Kirby pursuant to Judge Kiesel's July 9, 2021 order. *Id.*, ¶ 12. Judge Kiesel's chambers contacted both Harrison's counsel and the New York County District Attorney's Office about this development on July 12, 2021, and Harrison's counsel thereafter corresponded with counsel for the OMH several times during July and August 2021 in what they describe as an ultimately fruitless attempt to resolve the issue. *Id.*, ¶ 13; exhibits B, C, D. Unable to do so, counsel for Harrison instead commenced this proceeding on September 10, 2021. *See* verified petition. The New York State Attorney General filed a cross motion to dismiss it on behalf of Commissioner Sullivan on September 27, 2021. *See* notice of cross motion. With the service of the parties' respective opposition and reply papers, this matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

CPLR 7803 (1) provides that “[t]he only questions that may be raised in a proceeding under this article are: . . . whether the body or officer failed to perform a duty enjoined upon it by law.” The Appellate Division, First Department, recognizes that a party seeking an order in the nature of mandamus to compel an official act must demonstrate that it has a “clear legal right” to such relief. *See e.g., Matter of New York City Yacht Club v New York City Dept. of Bldgs.*, 172 AD3d 606, 606-607 (1st Dept 2019). The First Department also recognizes that the remedy of mandamus is only available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion. *See e.g., Matter of Yohay v City of New York*, 181 AD3d 408, 409 (1st Dept 2020), citing *New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 (2005).

Here, counsel for Harrison argues that Commissioner Sullivan's “determination that Kirby is not an ‘institution . . . suitable for the temporary and secure detention of mentally ill

persons' is arbitrary and capricious and an abuse of discretion," and that she has "failed to perform her lawful duty to designate an 'institution . . . suitable for the temporary and secure detention of mentally disabled persons' pursuant to CPL § 330.20 (6)." *See* verified petition, ¶¶ 16-24. OMH responds that "mandamus does not lie because OMH owes no 'mandatory duty,' and defendant Harrison has no 'clear legal right' to admission to Kirby under CPL § 330.20 (6)." *See* respondent's mem of law at 9-13. After careful consideration, the court finds that OMH is correct on both points of its argument.

First, CPL §§ 330.20 (3) and (6) both plainly acknowledge the OHM Commissioner's authority to designate a mental health treatment facility as being a "secure facility," or a facility that is "suitable for the temporary and secure detention of mentally disabled persons," is discretionary. These statutes do not contain any mandatory language; e.g., that the commissioner "shall designate" a facility as being one or the other. The fact that CPL §§ 330.20 (1) (b) lists the minimum criteria that a mental health treatment facility must possess in order to be designated as "secure" is of no moment. The statute also expressly acknowledges the OMH Commissioner's discretion to decide whether any given facility meets those criteria sufficiently so as to warrant the "secure facility" designation. The court finds that the statutory language discloses the Legislature's intent that the conferring of mental health treatment facility designations is a discretionary act within the exclusive authority of the OMH Commissioner.

Next, the available case law also acknowledges the OMH Commissioner's discretion during the Track Status Hearing process that is governed by CPL § 330.20. CPL § 330.20 (11) grants the OMH Commissioner the authority to determine whether an involuntarily committed defendant should be confined to a secure facility because s/he was found to suffer from a "dangerous mental disorder," or whether treatment at a non-secure facility is sufficient. The

statute also grants the OMH Commissioner authority over decisions to transfer committees between the two types of facilities. The Appellate Division, First Department, has squarely held that a trial court may *not* conduct a de novo review of the Commissioner’s “administrative determinations” regarding choice of treatment facilities under CPL § 330.20 (11)¹ (although it may review them pursuant to CPLR 7801’s “arbitrary and capricious” standard). *See e.g., Matter of Consilvio v Michael B.*, 307 AD2d 852, 852-853 (1st Dept 2003), citing *Matter of Jerome G. v New York State Dept. of Mental Health*, 201 AD2d 562, 563 (2d Dept 1994); *see also People v Anonymous*, 32 Misc 3d 1239 (A), 2011 NY Slip Op . 51640(U) (Sup Ct, Bronx County 2011). The First Department derived its ruling from the Court of Appeals’ earlier admonition that “it is not the province of the courts to weigh the degrees of medical and security considerations which may go into any individual transfer decision.” *Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 509 (1998) *see also Matter of Jamie R. v Consilvio*, 6 NY3d 138, 153 (2006) (“the decision to treat a patient in a secure as opposed to a nonsecure facility ‘reflects primarily a medical judgment about the kind of facility that would best serve the patient’s therapeutic needs’”). Since determinations of whether and for how long an involuntary committee should be treated in a secure or a non-secure facility are within the OMH Commissioner’s administrative discretion, it follows logically that the Commissioner’s discretion should also encompass whether or not to designate a given facility as meeting the necessary security and medical criteria to provide effective treatment.

¹ This is distinct from an involuntarily committed defendant’s right to request a de novo jury trial on the question of his/her involuntary commitment in a psychiatric hospital. *See e.g., Matter of New York State Off. of Mental Health v Marco G.*, 167 AD3d 49, 59 (1st Dept 2018) (internal citations omitted).

The court concludes that both CPL § 330.20 and the case law which interprets it consider the OMH Commissioner's capacity to confer designations of approval on mental health treatment facilities to be a discretionary act. Consequently, the court also concludes that Harrison has no right to seek an order of mandamus against Commissioner Sullivan to designate Kirby as an "institution . . . suitable for the temporary and secure detention of mentally disabled persons" pursuant to CPL § 330.20 (6). As previously observed, it is black letter law that the remedy of mandamus is not available to compel a governmental entity or officer to perform an act which involves an exercise of judgment or discretion. *Matter of Yohay v City of New York*, 181 AD3d at 409. Accordingly, the court finds that Harrison's Article 78 petition should be denied as meritless.² As a result, the court grants Commissioner Sullivan's cross motion to dismiss this proceeding should be dismissed pursuant to CPLR 3211 (a) (7) for "failure to state a cause of action."

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

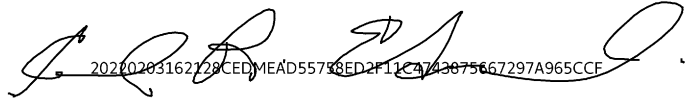
ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Sherman Harrison (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross motion, pursuant to CPLR 3211, of the respondent Ann Marie T. Sullivan, in her official capacity as Commissioner of the New York State Office of Mental Health (motion sequence number 001), is granted, and this proceeding is dismissed; and it is further

² Because the court so finds, it need not review the parties' respective arguments as to whether Harrison has a "clear legal right" to the relief he seeks; i.e., placement in the facility of his choice. In any case, it does not appear that he possesses such a right, and he has not cited any precedent which indicates that he does.

ORDERED that the Clerk of the Court shall enter judgment dismissing the proceeding and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with notice of entry, on all parties within 10 days.



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2/3/2022
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE