

Watton v Public Adm'r of Kings County

2022 NY Slip Op 30706(U)

March 1, 2022

Supreme Court, New York County

Docket Number: Index No. 805054/2019

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 56M

Justice

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ROBERT WATTON, AS ADMINISTRATOR OF THE
ESTATE OF CONNIE WATTON, DECEASED, AND
ROBERT WATTON, INDIVIDUALLY,

Plaintiff,

- v -

PUBLIC ADMINISTRATOR OF KINGS COUNTY, AS
ADMINISTRATOR OF THE ESTATE OF MELANIE
LIVERPOOL-TURNER, DECEASED, NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION, NEW YORK
CITY TRANSIT AUTHORITY, MOUNT SINAI BETH
ISRAEL,

Defendant.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for DISCOVERY/PROTECTIVE ORDER.

In this consolidated action to recover damages for assault and battery, medical malpractice, and negligence, the plaintiff moves pursuant to CPLR 3124 to compel the defendant Public Administrator of Kings County, as Administrator of the Estate of Melanie Liverpool-Turner, Deceased (hereinafter the Public Administrator), to provide the plaintiff with HIPAA-compliant authorizations permitting the plaintiff to obtain medical and psychiatric records pertaining to the Public Administrator's decedent. The plaintiff also seeks to compel the defendants New York Health and Hospitals Corporation (NYC HHC) and Mount Sinai Beth Israel (MSBI) to produce a complete and legible copy of the medical and psychiatric records pertaining to Liverpool-Turner. The Public Administrator and MSBI oppose the motion. NYC HHC opposes the motion and cross-moves pursuant to CPLR 2221(e) to renew its motion pursuant to CPLR 3103 and 3122 for a protective order preventing any party from obtaining

Liverpool-Turner's medical and mental health records, which had been denied as premature by order dated February 22, 2021. The plaintiff opposes the cross motion.

The plaintiff's motion is granted to the extent that the Public Administrator shall provide the requisite authorizations, and NYC HHC and MSBI shall produce the records sought upon presentation of the authorizations, provided, however, that the parties shall keep those records confidential except as to court personnel, the parties, and their attorneys, and no such records shall be uploaded to the New York State Court Electronic Filing System (NYSCEF) except under seal. The motion is otherwise denied. The cross-motion is granted to the extent that renewal is granted and, upon renewal, the subject records shall be provided pursuant to those protective restrictions, and the cross-motion is otherwise denied. The court makes no advance ruling as to whether these records may be admitted into evidence at the trial of this action or precluded from admission at trial, should a trial eventuate.

Shortly before October 19, 2016, Liverpool-Turner had told police officers that she had shoved somebody off of a subway platform and onto the tracks. Police officers took her to MSBI for psychiatric examination and evaluation. On or about October 19, 2016, MSBI 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 an action (Action No.1) against Liverpool-Turner, NYC HHC, and NYCTA in the Supreme Court, New York County, under Index No. 805003/2018. The action against NYC HHC was based, in part, on information that the plaintiff and his attorneys obtained from media reports that Liverpool-Turner had been hospitalized at

NYC HHC's Bellevue Hospital after admitting responsibility for a similar incident. On February 13, 2019, the plaintiff commenced a second action (Action No. 2) against MSBI under Index No. 805054/2019. 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, and her death stayed Action No. 1 by operation of law. On March 11, 2020, the Public Administrator of Kings County was appointed as administrator of Liverpool-Turner's estate in Action No. 1.

By order dated December 3, 2020, the court (Madden, J.) granted the plaintiff's motion in Action No. 1, under Motion Sequence 003, to substitute the Public Administrator for Liverpool-Turner, consolidate Action Nos. 1 and 2 under Index No. 805054/2019, amend the caption accordingly, and lift the stay. On February 22, 2021, after the two actions were reassigned, this court denied, as premature, NYC HHC's September 30, 2020 motion in Action No. 1, under Motion Sequence 004, for a protective order, without prejudice to renewal after a party made an actual demand for the production of Liverpool-Turner's medical and mental health records. On September 7, 2021, the plaintiff filed the current motion. On October 12, 2021, NYC HHC filed its cross motion.

The plaintiff argues that Liverpool-Turner waived her physician-patient privilege and any privilege or confidentiality applicable under Mental Hygiene Law § 33.13 by disclosing her medical and psychiatric records to government employees who were not involved in her treatment, and affirmatively placed her psychiatric condition at issue during her criminal proceeding and sentencing hearing. The plaintiff also argues that Liverpool-Turner's psychiatric condition and records were considered during her plea bargaining sessions and at sentencing for the purpose of receiving a lesser sentence and, as such, she waived any privilege attached

to those records. The plaintiff further asserts that, because Liverpool-Turner's psychiatric condition was previously placed at issue in the related criminal proceeding, any physician-patient privilege is subsequently waived in this civil action, and therefore warrants discovery in this matter.

The Public Administrator, MSBI, and NYC HHC all argue that Liverpool-Turner pleaded guilty to murder and did not attempt to use her medical and/or psychiatric records to defend herself. These defendants also argue that Liverpool-Turner merely referenced her psychiatric history during sentencing. The Public Administrator specifically argues that the only records in the sentencing court's possession were those that came to exist after the crime and were generated as a result of the psychiatric examinations Liverpool-Turner underwent to determine her competency to stand trial pursuant to CPL 730.30 and 330.20. The Public Administrator argues that, consequently, Liverpool-Turner did not waive her physician-patient privilege.

The court notes MSBI's contention that the plaintiff did not adhere to the requirements of 22 NYCRR 202.20-f(b), but nonetheless will decide this motion on the merits, as it involves an issue of law that was previously briefed by the parties, for which an additional conference would not have altered the parties' positions.

Mental Hygiene Law § 33.13(c)(1) provides, in relevant part, that

"information about [mental health] patients . . . reported to [relevant] offices, including the identification of patients, . . . clinical records or clinical information tending to identify patients . . . at office facilities shall not be a public record and shall not be released by the offices or its facilities to any person or agency outside of the offices except . . . pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality."

CPLR 4504(a) provides, in relevant part, that

"Unless the patient waives the privilege, a person authorized to practice medicine, . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, . . . a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice

medicine . . ., and the patients to whom they respectively render professional medical services.”

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”

The privilege is deemed to be waived when, in commencing or defending an action, the litigant affirmatively placed his or her mental or physical condition in issue (*see Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]; *Koump v Smith*, 25 NY2d 287, 294 [1969]). However,

“a party does not waive the privilege whenever forced to defend an action in which his or her mental or physical condition is in controversy. In order to effect a waiver, the party must do more than simply deny the allegations in the complaint—he or she must affirmatively assert the condition ‘either by way of counterclaim or to excuse the conduct complained of by the plaintiff”

(*Dillenbeck v Hess*, 73 NY2d at 287-288, quoting *Koump v Smith*, 25 NY2d at 294). Where the privilege is waived in one proceeding, the waiver remains in effect in a subsequent, related proceeding (*see Webdale v North Gen. Hosp.*, 7 Misc 3d 947, 955 [Sup Ct, N.Y. County 2005], *affd no op.* 24 AD3d 153 [1st Dept 2005]; *see also Fox v Marshall*, 91 AD3d 710 [2d Dept 2012], *Szmania v State of New York*, 82 AD3d 1688 [4th Dept 2011]).

Liverpool-Turner initially did not raise her psychiatric condition as an excuse for her conduct in the criminal proceeding against her, although there were some references to her psychiatric records. In fact, she pleaded guilty, acknowledged that she was aware of any possible defenses including a psychiatric or extreme emotional disturbance defense, and confirmed that she was prepared to proceed with the plea, thereby waiving those defenses. However, during her sentencing hearing, Liverpool-Turner, by asking her attorney to speak on her behalf, affirmatively asserted her psychiatric condition in an attempt to mitigate her sentence. As her attorney explained it,

“[S]ome lady jumped in front of a train, taking her own life, I believe it was a lady, and my client had taken responsibility for that, where it turned out that it wasn’t

her that did it, and she was institutionalized. And, you know, at that point we would know that she had some serious issues. And, I mean, why else would somebody, no warnings, no record, no nothing, loved family life, has a child, has a significant other, has a family, why else would they take credit for something that they didn't do, as horrific as that? Other than the fact that there is some serious mental problems. And she was institutionalized, as we know."

Regarding the plaintiff's decedent, Liverpool-Turner's attorney explained that

"Now, I'm not trying to downgrade the fact of whether or not she physically did this or not. She already pled guilty. But, certainly, my client approaching a stranger she never said a word to, she has no criminal record, she never, other than the month before this allegation, she never did anything to anyone, and she all of a sudden pushes a woman, ... ending their life, and that can only be done, in my humble opinion, by someone who didn't necessarily take into account as to what they were doing."

Finally, her attorney asked the sentencing court to take into account "her psychiatric records that are available for Your Honor in making that decision." The sentencing court also opined that it had not only considered the statements by counsel, but also "the history of this case, which has given me some familiarity with Ms. Liverpool's psychiatric issues."

By affirmatively referring to her psychiatric condition at sentencing, either to excuse her conduct, or to mitigate the punishment to be imposed in connection therewith, Liverpool-Turner waived her physician-patient privilege and any privilege or confidentiality under Mental Hygiene Law § 33.13. Therefore, she has waived that privilege in this action as well (*see Webdale v North Gen. Hosp.*, 7 Misc 3d at 955). The "serious mental problems" that Liverpool-Turner claimed she had at the time of the plaintiff's decedent's death, and which should have been considered at her sentencing, are the same "problems" for which the plaintiff now seeks disclosure. Allowing the Public Administrator to invoke the physician-patient privilege in this case would militate against the truth finding process (*see Doe v Karpf*, 2006 NY Slip Op 50834[U], *4, 11 Misc 3d 1093[A] [App Term, 1st Dept, May 8, 2006]) and would not serve the interests of justice. Rather, the interests of justice significantly outweigh the need for confidentiality. As such, the plaintiff's motion is granted, subject, however, to the limited protective order that the court is granting in connection with NYC HHC's cross motion

That branch of NYC HHC's cross motion seeking renewal is granted and, upon renewal, a protective order is granted to the extent that the psychiatric records shall be provided to the plaintiff, except that they may not be disclosed to anybody other than court personnel, the parties, and their attorneys in this action (see CPLR 3103; *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 457 [1983]). Furthermore, if the records need to be filed at any point in the future, they shall be filed under seal, and subject to confidentiality (see CPLR 3103[a]; see also Mental Hygiene Law § 33.13).

Finally, the foregoing will not be deemed to preclude the plaintiff from employing the records at trial. Rather, the court expresses no opinion at this juncture as to whether those records may be admitted at the trial of this action. The court denies NYC HHC's request for an *in camera* review of the records, as the court has already determined that they are privileged and warrant limited protection. The court recommends that the parties enter into a confidentiality stipulation concerning the subject records that may be so-ordered by the court.

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that, on or before March 24, 2022, the Public Administrator of Kings County, as Administrator of the Estate of Melanie Liverpool-Turner, Deceased, shall provide the plaintiff with HIPAA-compliant authorizations permitting the plaintiff to obtain the medical and psychiatric records in the possession of New York Health and Hospitals Corporation and Mount Sinai Beth Israel that pertain to Melanie Liverpool-Turner and, upon being presented with those authorizations, New York Health and Hospitals Corporation and Mount Sinai Beth Israel shall forthwith produce a complete and legible copy of the medical and psychiatric records pertaining to Melanie Liverpool-Turner, subject to the conditions set forth below, and the motion is otherwise denied; and it is further,

ORDERED that New York Health and Hospitals Corporation's cross motion is granted to the extent that renewal is granted and, upon renewal, any medical and psychiatric records so provided to the plaintiff by either New York Health and Hospitals Corporation or Mount Sinai

Beth Israel shall not be disclosed to any person other than court personnel, the parties, and the parties' attorneys in this action, and if the records need to be filed at any point in the future, they shall be filed under seal, and subject to confidentiality, and the cross motion is otherwise denied; and it is further,

ORDERED that the protective order shall not be deemed to preclude the plaintiff from using the medical records at trial.

This constitutes the Decision and Order of the court.


JOHN J. KELLEY, J.S.C.

3/1/2022
DATE

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