

**Schilling v Walsh**

2023 NY Slip Op 30931(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 157678/2020

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

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TARA SCHILLING, DEIRDRE LIVINGSTON,

Plaintiffs,

- v -

GARY JOE WALSH, DEBRA DOE, MOUNT SINAI HEALTH SYSTEM, CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, POLICE OFFICER TOLLIS, POLICE OFFICER BERK,

Defendant.

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INDEX NO. 157678/2020

MOTION DATE 08/02/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168

were read on this motion to DISMISS.

Upon the foregoing papers, the motion by defendant Mount Sinai Health System ("Mount Sinai"), pursuant to CPLR §3211, to dismiss this action as against it is granted for the reasons set forth below.

As pertinent here, the complaint alleges that during the week of December 2, 2019, plaintiff Deirdre Livingston visited her sister, Taya Williams, at Mount Sinai Hospital (the "Hospital") where Williams was receiving palliative care (NYSCEF Doc. No. 1 [Compl. at ¶¶1, 25]). Defendants Walsh and Debra Doe were present in the Hospital and, during the course of that week, repeatedly shouted insults and threats Livingston and Livingston's sister, plaintiff Tara Schilling (who was present virtually, via Facetime). The complaint further alleges that Walsh and Doe also threatened plaintiffs with a gun Walsh had on his person and pushed and shoved Livingston (Id. at ¶¶28-29, 31, 35, 43, 51). Plaintiffs allege that they repeatedly asked Hospital personnel to address

this abusive, threatening behavior and remove Walsh and Doe but that the Hospital personnel failed to do so, causing plaintiffs fear and emotional distress. Plaintiffs' complaint asserts three causes of action as to Mt. Sinai: (1) intentional infliction of emotional distress- 1st cause of action; (2) negligent infliction of emotional distress; and (3) negligent hiring, training, discipline, and retention.

Mt. Sinai now moves to dismiss these claims, arguing that they are insufficiently pled as a matter of law, and as relevant here, that the negligent infliction of emotional distress claim must be dismissed because plaintiffs failed to plead the requisite extreme and outrageous conduct or establish that emotional distress they suffered was a direct result of a breach of duty by Mount Sinai. Plaintiffs oppose the motion only as to the negligent infliction of emotional distress claim.

Mt. Sinai also moves to dismiss all crossclaims against it asserted by the City of New York, sued here as the New York City Police Department. This motion is unopposed.

### DISCUSSION

As a threshold matter, as plaintiffs do not oppose those branches of Mt. Sinai's motion to dismiss plaintiff's causes of action for intentional infliction of emotional distress and negligent hiring, training, discipline, and retention, those causes of action are dismissed. Similarly, that branch of Mount Sinai's motion to dismiss all crossclaims against it is also granted without opposition and those crossclaims are hereby dismissed.

The Court now turns to that branch of Mount Sinai's motion to dismiss plaintiffs' claim for negligent infliction of emotional distress. "A cause of action for negligent infliction of emotional distress ... must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her own safety" (Bernstein v E. 51st St. Dev. Co., LLC, 78 AD3d 590, 591 [1st Dept 2010] [internal

citations omitted]). Contrary to Mount Sinai’s contention, “extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress” (Brown v New York Design Ctr., Inc., 155964/14, 2023 WL 2417772, at \*3 [1st Dept 2023]).

However, the emotional injury claimed here, “is generally compensable only when it is the direct, rather than consequential, result of the breach of a duty owed” (Brown v New York Design Ctr., Inc., 155964/14, 2023 WL 2417772, at \*2 [1st Dept 2023]; see also Ornstein v New York City Health and Hosps. Corp., 10 NY3d 1, 6 [2008]). As Mount Sinai notes, the emotional injury at issue here was directly caused by Walsh and Doe, and was only a consequential result of any negligent failure to act by Mount Sinai employees (See e.g., Allstate Ins. Co. v Burger King Corp., 25 AD3d 472 [1st Dept 2006] “[t]he claimed exacerbation of plaintiffs’ preexisting medical conditions, caused by displacement from their home for nine months, is a consequential—not a direct—result of any negligence, and is therefore not compensable”]; see also Howard v Lecher, 42 NY2d 109 [1977] [parents’ claim for emotional injury resulting from death of their child by disease obstetrician failed to test for and diagnose the probability of the child contracting was properly dismissed as alleging a consequential harm rather than direct harm]). As a result, the facts alleged here are insufficient to sustain a negligent infliction of emotional distress claim as to Mount Sinai.

Accordingly, it is

**ORDERED** that Mount Sinai Health System’s motion to dismiss is granted and the complaint and all cross claims are hereby dismissed as against it; and it is further

**ORDERED** that the action is severed and continued against the remaining defendants; and it is further

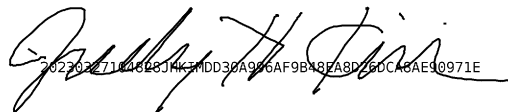
**ORDERED** that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

**ORDERED** that counsel for Mount Sinai Health Systems shall serve a copy of this order with notice of entry upon plaintiffs within fifteen days of the date of this decision and order; and it is further

**ORDERED** that counsel for Mount Sinai Health Systems shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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3/27/2023

DATE

HON. JUDY H. KIM, 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