Mohr v Hillside Children's Ctr.

2006 NY Slip Op 30659(U)

October 12, 2006

Sup Ct, NY County

Docket Number: 120010/00

Judge: Shirley Werner Kornreich

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SCANNED ON 10/20/2006

[* 1]

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

PRESENT: SHIRLEY WERNER KORNREICH, J. PART 54

- Index Number : 120010/2000
MOHR, LAURA INGER
INDEX NO.
VS
HILLSIDE CHILDREN'S
MOTION DATE 8/10/06
Sequence Number : 022
MOTION SEQ. NO.
SUMMARY JUDGMENT
MOTION CAL. NO.
-

The following papers, numbered 1 to 7 were read on this motion to/for Summary Judgment & X-motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6-7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
OCT 20 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/12/06

SHIRLEY WERNER KORNREICH
J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

LAURA INGER MOHR, as mother and natural guardian of JOSE VICENTE REAL-MOHR and KILLIAN MANLIO REAL-MOHR, infants under the age of fourteen (14) years,

PlaintiffS,

Index No.: 120010/00

-against-

DECISION & ORDER

FILED
OCT 20 2006
COUNTY CLERK'S OFFICE
NEW YORK

HILLSIDE CHILDREN'S CENTER,

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

This is an action for negligence brought by Laura Inger Mohr ("Mohr") on behalf of her sons, Jose Vicente Real-Mohr and Killian Manlio Real-Mohr ("Infant Plaintiffs"), claiming psychological and emotional damages stemming from alleged sexual assaults of the Infant Plaintiffs by a non-party, S.R. Plaintiffs allege that defendant, Hillside Children's Center ("Hillside"), a residential psychological treatment facility, was negligent in releasing S.R. for home visits under the supervision of his family; and in failing to warn plaintiffs that S.R. had a history of sexually molesting children. Plaintiffs move for summary judgment on the issue of liability only; defendant cross moves for summary judgment dismissing the complaint.

I. Factual Background

S.R. is a disturbed young man who was around 19 years old when the events at the heart of this action occured. S.R. was admitted voluntarily as an inpatient at defendant's facility ("Hillside") on or around October 14, 1997. According to the

testimony of his mother, E.R., and documentary evidence submitted on this motion, S.R. had a long and dense history of sexual misconduct, often involving minors. Immediately before being admitted to Hillside, S.R. had boarded at Linden Hill Residential Treatment Facility ("Linden Hill"). He was transferred to Hillside because he continued to engage in sexual activities with children while in the Linden Hill program.

S.R.'s case was assigned to Wendy Yost ("Yost"), a Hillside a social worker, also described in the record as a caseworker. S.R. was assigned to a treatment team, which consisted of a psychiatrist, anybody who worked on the unit, and his teacher. *See,* Yost, EBT, pp. 44-45. Yost was aware, at the time of S.R.'s admission, that he had engaged in sexually assaultive behavior at Linden Hill, and that criminal charges stemming from his conduct were pending. As part of her duties, Yost accompanied S.R. to the criminal court hearings.

At all times during his stay at Hillside, S.R. was designated as a "Status 3" client, and assigned to the intensive treatment unit. According to, Charles Weld ("Weld"), one of Yost's supervisors, the intensive treatment unit was dedicated to the housing and treatment of patients with "serious emotional disturbance," who, in many cases, had failed to make progress at another residential mental health program. The Hillside Children's Center Direct Care Manual (the "Manual"), which was in effect at the time of S.R.'s stay at Hillside, sets out the parameters for status assignments, as well as the guidelines pertaining to the appropriate "staff response" (also referred to as "principles of supervision") for each status level.[1] A designation of Status 3 indicated the following:

[1]The Manual defines five "levels of supervision" employed for categorizing patients at Hillside: Status 1, "Suicide/Homicide Alert," is the most severe level; Status 2, "Strict Adult," is

> A. Client requires monitoring at all times, except when client is bathing, showering, dressing, toileting, or in room. Client is no [sic] in imminent danger to self, others, or likely to engage in property destruction.
>
> B. Without this intervention, clients may enter into, or engage in, situations which could lead to danger to self, others, or likely engage in property destruction.

See, Plaintiffs' Motion, Exh. E, p. 19-3. The Manual dictates that in the limited situations when Status 3 clients were not in eyeshot, they had to be checked at definite intervals: every five minutes while in the bathroom, every fifteen minutes while in the bedroom. *Id.* During off-campus recreation, one staff member was permitted to supervise no more than two Status 3 clients. *Id.*

Between two and four months after his admission to Hillside, S.R. began making home visits on weekends, staying overnight at the home of his mother, E.R. The Manual section prescribing "Visiting Procedures" instructs that:

> Each unit or program shall establish, in writing, visitation procedures specific to its own needs and requirements. These procedures shall include the parameters around which clients may visit with family members, guardians, friends, and designated authorities. The procedures shall also contain directions for visitation either away from or at the Hillside facility for which they are written.

The visitation section further states:

> All visits will be arranged by the caseworker and family with clear notification to sociotherapy staff and other appropriate Agency staff. Visits may occur on or off the Agency grounds and may include an overnight stay at the family's home.

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the next most severe level; Status 3, "Adult," is the intermediate level; Statuses 4 and 5, "Staff Support" and "Regular Level," respectively, represent the least restrictive levels. The record does not explain why S.R. was placed on Status 3, instead of the more restrictive Status 2, in light his history at Linden Hill.

See, See, Plaintiffs' Motion, Exh. G, p. 22-1. There is no evidence in the record that during S.R.'s stay at Hillside the intensive treatment unit had written visitation procedures or directions. Weld could not remember whether there were written protocols that governed visitation for patients in the intensive treatment unit. *See,* Weld EBT, p. 34

Hillsides' witnesses admitted that before home visits could begin there was a practice and protocol to make a treatment team decision, to speak to the family to assess supervision, to give families written instructions, and to notify the psychiatrist. *See,* Yost EBT, pp. 6 and 71, and Weld EBT, p. 34 and 56. Nevertheless, Yost could not recall discussing S.R.'s home visits with her supervisor. *See,* Yost EBT, p. 83. Likewise, the record does not contain evidence that a team decision was made to allow S.R. to go home, or that his psychiatrist was notified of the decision. The record does not disclose whether anyone other than Yost participated, or was consulted, in the decision to permit S.R.'s home visits, although Weld testified that he also had the discretion to grant or deny home visits. *See,* Weld EBT, pp. 61-62 and 88.

Yost and Weld testified that the factors to be considered in determining whether home visits were appropriate were a client's past history; safety risks to others; and the available supervision at home (including any relevant disabilities, willingness to supervise, schedules and cognitive abilities of those in the home). *See,* Yost EBT, pp. 49-53 and Weld EBT, pp. 56-59 and 64. However, the record contains no evidence from which it could be inferred that those factors were considered in S.R.'s case, although Yost did admit that she knew that E.R. was working, disabled and receiving Social Security Disability benefits. *See,* Yost EBT, p. 63 and errata sheet.

In contrast, E.R's unrebutted testimony was that she was given no written instructions from Hillside before S.R. was sent home, that she did not discuss her ability to supervise him with anyone from Hillside, that she was not able to manage or control him, that she could not prevent him from molesting children, that she was disabled, and that she and other family members could not give him round the clock supervision. *See* EBT of E.R., pp. 10, 23 and 34. The sole evidence in the record regarding Hillside's instructions to E.R. was that she was told that "we have to be careful." *Id.*, p. 19.

S.R. had been acquainted with the Infant Plaintiffs prior to his admission to Hillside, and had gained enough trust from the family to convince Mohr to write an undated letter to Yost (the "Letter", Plaintiffs' Motion, Exh. J), expressly granting permission for S.R. to make telephone calls to the Infant Plaintiffs from Hillside, saying, "we would like to hear from him while he is upstate in your facility." In her deposition, Mohr claims that at the time of writing the letter, she believed Hillside to be a "boarding school." A postscript to the Letter stated:

> I met [S.R.] through my boys who are now 9 & 10 ready to be 10 & 11. They've known [S.R.] for nearly two years. He has babysat with them extensively and we all love him very much. I think he is a wonderful, kind and very sensitive kid!

After receiving the Letter, which was hand-delivered by S.R., Yost called Mohr, who said that she was too busy to talk but would call back. Yost testified that she called Mohr because she had permission from S.R. to speak with Mohr, but that he subsequently revoked his permission. *See,* Yost EBT, pp. 72-80. Yost never succeeded in reaching Mohr before S.R. changed his mind. *Id.* Yost did not inform S.R.'s psychiatrist, his

mother, Weld, or anyone else at Hillside, about the Letter, although Yost put it in his file. *Id.* S.R.'s home visits continued after Yost received the Letter. *Id.*, p. 80.

S.R. was allowed during his home visits to leave the apartment alone, including one occasion when he told E.R. that he was going to attend the birthday party of a child, although E.R. did not know who the child was. In fact, S.R. went to the home of plaintiffs on multiple occasions during his home visits, including times when S.R. would babysit the Infant Plaintiffs without other supervision. Plaintiffs allege that S.R. sexually molested each of the Infant Plaintiffs on at least one occasion while he babysat them.

II. Conclusions of Law

It has long been held that institutions for dangerously disturbed people have a duty to properly supervise their inmates and to use their best professional judgment before releasing patients who might cause harm to themselves or third persons. *Schrempf v. State*, 66 N.Y.2d 289, 294-95 (1985); *Rattray v. State*, 223 A.D.2d 356, 357 (1st Dept. 1996) ("where the State engages in a proprietary function such as providing medical and psychiatric care, it is held to the same duty as private individuals and institutions engaged in the same activity."); *Weihs v. State*, 267 A.D. 233, 236 (3rd Dept. 1943) (hospital required to exercise degree of care in protecting society from which persons of common prudence exercise under like conditions); *Restatement of Torts 2d*, §319, ("One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.").[2]

[2] The duty of a state institution for the mentally infirm to protect the public is an exception to the rule that the state cannot be held liable for negligent failure to perform governmental functions, such as police and fire

Liability is not imposed for an honest error of professional judgment made by qualified and competent persons, even if the decision turns out to be erroneous. *Schrempf v. State, supra* at 295; *Rattray v. State, supra,* 223 A.D.2d at 357; *St. George v. State*, 283 A.D. 245, 248 (3d Dept. 1954). The policy behind the professional judgment standard is that, when incarcerating a mental patient for treatment, the "objective is to return the patient to society, which should be done as soon as, in the judgment of properly qualified doctors and psychiatrists, it is likely to be safe for others and helpful to the patient." *St. George v. State, supra* at 248. The policy gives deference to professional judgment, which involves a "calculated risk," in order to support the rehabilitative goal of mental health care. *Taig. v. State,* 19 A.D.2d 182, 183 (3rd Dept. 1963) (without deference to professional judgment therapists would have disincentive to grant therapeutic release for fear of liability).

However, liability will be found where there has been a failure to exercise professional judgment. *Huntley v. State,* 62 N.Y.2d 134 (1984) (prior to patient's unsupervised release, suicide threat not communicated by staff to psychiatrist in charge of leave privileges); *Bell v. N.Y.C. Health & Hospitals Corp.*, 90 A.D.2d 270 (2d Dept. 1982) (patient released where nurse's notes indicated patient not stable and psychiatric interview did not include inquiry as to delusions of patient to determine whether he was psychotic); *Rivera v. N.Y.C. Health & Hospital Corp.*, 191 F.Supp.2d 412 (S.D.N.Y. 2002) (issue of fact as to whether involuntary commitment of dangerous homeless outpatient was considered and whether there was careful examination); *see generally,*

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protection, unless it undertakes a special duty to protect the injured person. *Shrempf v. State, supra* at 293-294.

Kagan v. State, 221 A.D.2d 7, 16(2d Dept. 1996) ("liability can and should ensue if [professional] judgment was not based upon intelligent reasoning or upon adequate examination"). The following cases cited by Hillside are inapposite, as they involved situations where professional judgment was exercised or the threat of danger was attenuated: *Eiseman v. State of New York*, 70 N.Y.2d 175, 1990 (1987) (ex-convict had served sentence and was entitled to release on conditions that did not include continuing care or treatment); *Adams v. Elgart*, 213 A.D.2d 445 (2nd Dept. 1995) (professional judgment to place alcoholic in general hospital for withdrawal rather than mental ward consistent with public policy), and *Wagshall v. Wagshall*, 148 A.D.2d 445 (2nd Dept. 1989) (attack by wife on husband 7 to 8 months after termination of outpatient marriage counseling). A hospital's failure to promulgate, or abide by, its own rules is some evidence of negligence. *See, Schneider v. Kings Highway Hospital Center, Inc.*, 67 N.Y.2d 743, 745 (1986); *Haber v. Cross County Hospital*, 37 N.Y.2d 888, 889 (1975); *Barresi v. State*, 232 A.D.2d 962, 964 (3d Dept. 1996); *Finkel v. State,* 37 Misc. 2d 757, 759 (Ct. of Claims 1962).

In this case, there is no evidence from which a jury could find that Hillside exercised professional medical judgment in deciding to release S.R. for home visits. On the other hand, there is evidence that Hillside violated its own rules and practices in approving S.R.'s weekend furloughs. Thus, there is evidence that the intensive treatment unit failed to adopt written visitation procedures and that Yost did not notify sociotherapy staff that S.R. would be making home visits, both of which were required by the Manual. There is no evidence that S.R.'s team decided that home visits were appropriate, or that

prior to approving S.R.'s home visitation, Hillside considered the supervision available at home, S.R.'s past history, or safety risks to others. No written instructions were given to E.R., and S.R.'s psychiatrist was not notified that home visits had begun. Hillside has admitted that all of these things should have been done, or considered, prior to the home visitation stage of S.R.'s treatment. While the court is mindful that counsel for Hillside asserted S.R.'s privilege to questions designed to elicit evidence concerning which Hillside staff members discussed the decision to release him and whether various factors were considered, the result is that there is no evidence in the record from which a jury could find that the decision was reached based upon the exercise of professional judgment.[3]

Plaintiffs ha submitted the following uncontradicted evidence, which must be accepted as true on a motion for summary judgment, *John William Costello Associates, Inc., v. Standard Metals Corporation*, 99 A.D.2d 227 (1st Dept. 1984): E.R. was not given written instructions for home visits and did not discuss her ability to supervise S.R. with anyone from Hillside; E.R. was not able to manage or control S.R.; E.R. was unable to prevent him from molesting children; E.R. was disabled; and E.R. and other family members could not give S.R. round the clock supervision.

In sum, plaintiffs have come forward with evidence that Hillside violated its own rules and procedures for approving home visitation, while Hillside has failed to present evidence that it followed its own procedures, or that it exercised professional judgment.

[3] For purposes of this motion, the court is not required to rule upon whether the privilege was properly invoked in response to questions designed to elicit whether the staff had meetings or discussed various topics, as opposed to the content of the confidential communications. In the face of a motion for summary judgment, it was Hillside's burden to come forward with evidence that it exercised professional judgment.

The conclusory testimony of Yost and Weld that S.R.'s release was a professional decision did not address the participants in the decision, the factors considered, the staff notified, the discussions with the family, or the instructions to the family.

With respect to plaintiffs' claims for failure to warn and Hillside's claim that a warning would have violated privileged communications, the court concludes that there is a duty to warn which overcomes the privilege in the limited situations where a mental health facility is aware of a specific and imminent threat. *Schrempf v. State, supra* (duty to warn persons threatened by patient); *Oringer v. Rotkin,* 162 A.D.2d 113 (1st Dept. 1990) (duty to warn of serious and imminent threat); *People v. Bierenbaum,* 301 A.D.2d 119, 141 (1st Dept. 2002) (psychiatrist's duty to warn an intended target of patient's violence is an exception to rule of confidentiality); *MacDonald v. Clinger*, 84 A.D.2d 482, 487-488 (4th Dept. 1982) (duty to warn of threat). However, here the record contains evidence, in the form of Weld's affidavit, that S.R. did not tell anyone at Hillside that he had molested, or intended to molest, the Infant Plaintiffs. The sole evidence that plaintiffs rely on to prove knowledge of a threat is the Letter. However, the Letter does not rise to the level of an imminent threat of molestation that was known to Hillside. At most, the Letter informed Hillside that S.R. babysat for the Infant Plaintiffs in the past, not that he had, or wanted to, molest them on home visits. There is no evidence in the record from which a jury could find a specific, imminent, threat to the safety of the Infant Plaintiffs was communicated to Hillside.

In conclusion, plaintiffs are entitled to summary judgment on liability on their claim for failure to supervise, but solely on the issue of whether Hillside was guilty of

failing to exercise professional judgment when it granted home leave to S.R., and Hillside is entitled to summary judgment dismissing plaintiffs' claims for failure to warn Mohr of S.R.'s proclivities. A trial is still necessary to prove the nature of S.R.'s alleged actions toward the Infant Plaintiffs; that S.R.'s behavior toward the Infant Plaintiffs caused the damages that they claim; and, if so, the amount of such damages, as the record presents issues of fact as to whether the Infant Plaintiffs' claimed emotional injuries were caused by the alleged sexual molestation or other factors. Accordingly, it is

ORDERED that the plaintiffs' motion for summary judgment on liability is granted solely to the extent that summary judgment is granted in favor of plaintiffs on the issue of whether Hillside exercised professional judgment in deciding to release S.R. for home visits, and is denied on all other issues including failure to warn, the nature of the alleged acts of S.R. toward the Infant Plaintiffs, and whether S.R.'s alleged acts caused the Infant Plaintiffs' injuries; and it is further

ORDERED that defendant Hillside's cross-motion for summary judgment is granted solely to the extent that plaintiffs' claim for failure to warn is dismissed with prejudice; and in all other respects Hillside's cross-motion is denied.

FILED
OCT 20 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 12, 2006

ENTER:

J.S.C.