Eng v NYU Hosps. Ctr.
2019 NY Slip Op 33610(U)
December 10, 2019
Supreme Court, New York County
Docket Number: 156810/2014
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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DOROTHY ENG, as the Executor of the Estate of HING MAY ENG,

Plaintiff,

- v -

NYU HOSPITALS CENTER,

Defendant.

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INDEX NO. 156810/2014

MOTION DATE

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 184-198, 200-203 were read on this motion to set aside verdict.

Plaintiff, executor of the estate of Hing May Eng (decedent), moves pursuant to CPLR 4404 for an order setting aside the jury verdict rendered against her and in favor of defendant-hospital and directing judgment in her favor, or in the alternative, a new trial. Defendant opposes.

I. PERTINENT PROCEDURAL BACKGROUND

Plaintiff, one of decedent's daughters, brought an action against defendant for false imprisonment, based on her allegation that it had failed to comply with decedent's request to be discharged. (NYSCEF 3).

II. THE TRIAL (NYSCEF 189-198)

The trial commenced before me on July 11, 2019.

A. Pertinent evidence

Admitted in evidence were decedent's medical charts which reflect that on the afternoon of August 9, 2013, decedent, an 86-year-old with terminal stage-four lung cancer, arrived at

defendant-hospital after her doctor had found that her blood pressure was low following a recent fall at her home. At the time, decedent's other daughter, nonparty Martina Eng, was employed as a nurse at defendant and was decedent's healthcare proxy. Although decedent was medically cleared for discharge that day, Martina informed a physician's assistant, an employee of defendant, that decedent is "chronically paranoid." Upon being asked whether she wanted to go home with her daughter, decedent "refused and said a curse word and wanted her son." Thereafter, due to concerns about decedent's "[c]apacity to participate in discharge planning," a psychiatric consultation was ordered. A psychiatry resident examined decedent and determined that she was:

> unable to provide much reliable history given preoccupation with paranoid ideas about her daughter. She is unsure why her doctor sent her here today, except to say that she has run out of pills for her cancer and is having pain. She lives alone in a fifth floor walk-up apartment in Queens, and has no services at home as she has sent [Visiting Nurse Service] away multiple times in the past, accusing them of stealing from her; she states that [Martina] "controls everything" and was sending the nurses to steal her money. She uses an umbrella as a cane to get around outside of her apartment, and reports walking "very slowly" and holding onto chairs inside the apartment. She has fallen at home in the past. When asked what she would do if she were to fall again, she says that she "could do nothing," and that [Martina] controls the firemen and the ambulances; when she fell at home in the past, she says that the ambulance took her "upstate" where she was abused by hospital staff. She is unable to state the potential consequences of falling and being unable to get help. She says that she wants to go home and is waiting for her son to pick her up; she says that her son lives in Long Island (per documentation, he lives in NC and they have not had contact in years). She is unable to provide his phone number and says that [Martina] took that from her as well.

Based on her examination of decedent, the resident found that she did "not have capacity at this time to participate in discharge planning."

Defendant's attending psychiatrist and consultation liaison, Seema Quraishi, MD, who saw decedent daily and advised decedent's primary medical team concerning her capacity to participate in discharge planning, testified that decedent lacked the capacity to participate in discharge planning because she exhibited paranoid delusions that were not acute and wanted to

go home without a safety plan in place. As decedent was neither suicidal nor a danger to others, she was not transferred to the psychiatric service or involuntarily committed.

Based on Quraishi's determination that decedent lacked the capacity to participate in discharge planning, decedent was admitted to defendant's "Medicine, Oncology" service. On August 12, Quraishi reaffirmed that decedent's paranoia was "chronic" and that anti-psychotic medication would "likely be beneficial." On August 14, defendant determined that decedent was to be discharged to "home hospice." Over the next few days, Quraishi reaffirmed that decedent lacked capacity to participate in discharge planning, while decedent continued to express her desire to go home.

According to notes in the medical records, defendant notified decedent's daughter on August 19 that decedent was to be discharged to hospice, and while Martina acknowledged that decedent was safe for discharge, she reported that she was unable to pay the necessary fees and that she was pursuing a temporary guardian for decedent. Martina filed an appeal of the decision to discharge decedent to hospice and while her appeal pended, decedent got dressed and attempted to leave the hospital during the night because her room smelled bad. She was "placed on 1:1 constant observation" and given a new room near the nurses' station so that she could be constantly observed.

Martina's appeal was denied, and after decedent had been hospitalized for 17 days, she was discharged to a hospice on August 26, 2013. The medical records reflect that decedent was upset about being sent to a hospice, rather than being discharged home, and that defendant's employees discussed with decedent "at length that she cannot go home at this time."

Plaintiff's expert, Thomas Bojko, MD, JD, is a former pediatrician and hospital administrator, licensed to practice law in New Jersey and employed as an expert legal consultant.

He conceded that he is not a psychiatrist, has never evaluated a patient for a psychiatric diagnosis or treatment, is not qualified to render a psychiatric assessment that a patient lacks capacity to participate in discharge planning due to a psychiatric problem, has never treated a geriatric patient, and did not recall ever having been involved in the discharge of an adult patient. He opined that notwithstanding decedent's capacity, or lack thereof, to participate in discharge planning, it would have been unsafe to send her home alone, that a healthcare proxy has the right to object to a patient's discharge until a safety plan is in place, and that upon such an objection, the hospital cannot release the patient. He also opined, over objection, that if a patient's wishes differ from the decision of their health care proxy, a court order is required to affirm the patient's lack of capacity.

Defendant's expert, Philip Muskin, MD, board certified in geriatric psychiatry and consultation liaison psychiatry, testified that decedent lacked the capacity to participate in discharge planning, which does not mean she otherwise lacked capacity. He explained that when a patient is determined to lack the capacity to participate in safe discharge planning, the treatment team would look for a safe discharge plan which could take the form of a transfer to another facility or a discharge to the patient's home if safe. Pending that determination, the patient would remain in the medical unit with protocols in place to keep her safe, such as having an alarm on her bed which would ring at the nursing station if the patient got out of bed or having a nurse stationed outside the room.

Muskin asserted that judicial proceedings are unnecessary when a patient is deemed to lack capacity to participate in discharge planning and that it is unnecessary to tell patients about their rights. He observed that 99.9 percent of elderly infirm patients indicate a desire to leave the hospital and that it is common for elderly people to harbor suspicions that others are stealing

their money. Thus, in his opinion, defendant's conduct in keeping decedent safe pending the identification of a safe place for her to live was in keeping with a high standard of care.

Muskin admitted that notwithstanding a patient's right to refuse treatment, where treatment is necessary for one lacking capacity, the patient is treated over objection and not told that he or she can talk to a lawyer, although he has occasionally litigated his right to make health care decisions over a patient's objection.

B. Charge conference

At the charge conference, plaintiff objected, among other things, to asking the jury whether a proper discharge plan had been in place, arguing that a health care proxy cannot trump a patient's demand to be discharged. Defense counsel argued, in pertinent part, that the Public Health Law applies and that there remained an issue as to whether it had confined decedent, as it had allowed her to go home with a safe discharge plan in place. He also asserted that decedent had consented to the confinement because "the consent is the healthcare proxy's consent," and asked that portions of Bojko's opinion concerning New York law be stricken given his lack of expert qualifications.

The parties were advised, in pertinent part, that the jury would be instructed to disregard Bojko's testimony about New York law, that the PHL prohibits a hospital from discharging a patient absent a safe discharge plan, and that it was undisputed that defendant had failed to comply with the procedures for retaining a patient under the MHL.

C. Summations

In summing up to the jury, defense counsel denied that defendant had confined decedent, contending that she had been permitted to leave if accompanied. Thus, having refused Martina's accompaniment, he argued, decedent remained in the hospital of her own accord and that

defendant was not permitted to discharge decedent because her health care proxy had filed an appeal.

Plaintiff's counsel denied that decedent had been permitted to go home. Rather, defendant had confined her by placing conditions on the discharge and thereby confined her. He relied on Bojko's testimony that a court process is required to overrule a patient's wishes.

D. Verdict sheet and verdict

The first question on the verdict sheet is "Did defendant confine Hing May Eng?" If the jury answered no to this question, it was instructed to proceed no further. On July 16, 2019, the jury found that defendant had not confined decedent and, in compliance with the instructions, it proceeded no further.

III. DISCUSSION

Pursuant to CPLR 4404(a):

> After a trial of a cause of action . . . upon the motion of any party . . . the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice . . .

A party's entitlement to judgment as a matter of law depends on whether the jury verdict is "utterly irrational," in that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Killon v Parrotta*, 28 NY3d 101, 108 [2016] [internal quotation marks and citation omitted]).

Generally, "in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict," and "the court may not employ its discretion simply because it disagrees with a verdict, as this would unnecessarily

interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty." (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004] [internal quotation marks and citation omitted]).

A. Confinement

To prevail on a cause of action for false imprisonment, "the plaintiff must demonstrate that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement and that the confinement was not privileged." (*Torres v Jones*, 26 NY3d 742, 759 [2016]).

Plaintiff contends that the jury verdict must be set aside and a verdict directed in her favor because the evidence at trial demonstrates, as a matter of law, that defendant had confined decedent, that defendant had intended to confine her, that decedent was aware of the confinement, that decedent did not consent to it, and that the confinement was not privileged. She maintains that the sole evidence supporting the defense verdict is the immaterial evidence that Martina had consented to decedent's confinement and conditions for her discharge and that no evidence was offered that decedent had ever agreed to remain at the hospital or that she had otherwise consented to defendant's treatment and proscriptions. Rather, the undisputed evidence was that decedent had repeatedly asked to go home and was given anti-psychotic medication to render her complacent, and that protocols were implemented to prevent her from leaving. In the alternative, and for the same reasons, plaintiff contends that the evidence that defendant had not confined decedent is against the weight of the evidence, which so preponderates in her favor.

According to defendant, plaintiff's motion must be denied as no evidence was offered to support a finding that decedent was confined. Rather, when it attempted to discharge her on the first day of her admission, she refused to go home with Martina or a home health aide.

Consequently, decedent remained in the hospital until a safe discharge plan could be formulated. When defendant later tried to discharge decedent, Martina objected and filed an appeal. Defendant observes that the "only thing that [decedent] was not free to do was to go home alone and without help," and that Quraishi, plaintiff, and Bojko agreed that she could not have been safely discharged home by herself. That decedent desired to go home, defendant argues, does not mean that she was confined, relying in part on the statistic offered by Muskin demonstrating that most elderly infirm patients want to leave the hospital.

Here, it is undisputed that decedent had repeatedly asked to leave the hospital, refused to be accompanied by her daughter or a healthcare aide, and was detained at the hospital until a safe discharge plan could be formulated. Moreover, when she got dressed and attempted to leave the hospital, she was accompanied to another room and placed under constant supervision which was intended to prevent her from leaving the hospital on her own.

Assuming that defendant's placement of a condition on decedent's discharge is not privileged (*see* Privilege, *infra* at III.B.), the condition placed by defendant on her discharge, in conjunction with defendant's disregard of her repeated demands to be released, its success in preventing her from leaving, and its communication to her that she could not go home instead of going to the hospice, evidence confinement as a matter of law. (*Cf* 59 NY Jur 2d, False Imprisonment § 20 ["a conditional confinement from which release may be effected by compliance with a condition which the defendant has no right to impose constitutes false imprisonment"]; *Peters v Rome City School Dist.*, 298 AD2d 684 [4th Dept 2002] [jury properly found plaintiff falsely imprisoned where, as part of behavioral plan, he was placed in "time-out" room from which he was not allowed to leave until his behavior improved and, although room's door unlocked, staff person held door closed if plaintiff attempted to leave]). Contrary to

defendant's argument to the jury, conditioning decedent's release on her agreement to be accompanied home does not evidence that she was not confined, whether or not the vast majority of elderly infirm patients ask to be discharged to their homes.

Absent a rational basis for the jury's finding that defendant had not confined decedent, the verdict that defendant had not confined decedent is "utterly irrational" on "any fair interpretation of the evidence" and "there is no valid line of reasoning and permissible inferences" which could lead rational jurors to the conclusion reached here based on the law and the evidence. Given this result, the weight of the evidence need not be addressed.

In addition to setting aside the verdict, plaintiff asks that judgment be entered in her favor, arguing that the evidence demonstrates that in addition to being confined, defendant intended to confine decedent, decedent was conscious of her confinement, and the confinement was not privileged. Defendant opposes. As defendant admitted that it would not permit decedent to leave without a safe discharge plan, it is undisputed that defendant intended to confine her. Likewise, decedent's repeated demands to go home unequivocally demonstrate that she was conscious of her confinement and did not consent to it.

Plaintiff's alternative argument that decedent was involuntarily committed pursuant to the Mental Hygiene Law (MHL) need not be addressed absent supporting evidence. Even if decedent should have been committed, there was no evidence that she had been committed. In any event, it is not disputed that defendant did not comply with the procedural requirements set forth in the MHL.

B. Privilege

The sole issue remaining is whether defendant satisfies its burden of proving that its confinement of decedent is privileged pursuant to the PHL. (*See Cass v State*, 134 AD3d 1207,

1209 [3d Dept 2015], *lv dismissed* 27 NY3d 972 [2016] [once confinement, awareness of confinement, and intent to confine established by plaintiff, burden shifts to defendant to demonstrate that confinement privileged]).

"A patient who requires continuing health care services in accordance with such patient's discharge plan may not be discharged until such services are secured or determined by the hospital to be reasonably available to the patient." (PHL § 2803[1][g]). Likewise, pursuant to 10 NYCRR § 405.9(h)(1):

> [t]he hospital shall ensure that each patient has a discharge plan which meets the patient's post-hospital care needs. No patient who requires continuing health care services in accordance with such patient discharge plan may be discharged until such services are secured or determined by the hospital to be reasonably available to the patient.

Plaintiff asserts that confining a patient absent a discharge plan constitutes a violation of due process and requires a finding that defendant was not authorized to confine decedent in these circumstances. She contrasts with PHL § 2803(1)(g) the pertinent provisions for involuntarily committing a psychiatric patient pursuant to article nine of the MHL, which provide for notice and an opportunity to be heard.

Defendant argues that PHL § 2803(1)(g) and 10 NYCRR § 405.9(g) govern here, and that the evidence establishes that it had fully complied with both and there is no evidence that they were employed to bypass the requirements of the MHL.

While PHL § 2803(1)(g) and 10 NYCRR § 405.9(g) prohibit the discharge of patients who require and desire continuing health care services, they do not authorize the detention or confinement of a patient against her will, except perhaps by implication. Rather, and although not cited by plaintiff, 10 NYCRR § 405.9 (b)(13) provides that "[n]o patient 18 years of age or older shall be detained in a hospital against his will, . . . except as authorized by law," and that the prohibition against detaining a patient against his or her rights "shall not be construed to

preclude or prohibit attempts to persuade a patient to remain in the hospital in his/her own interest, nor the temporary detention of a mentally disturbed patient for the protection of himself/herself or others, pending prompt legal determination of his/her rights."

Thus, even if the prohibition against discharge contained within PHL § 2803(1)(g) and 10 NYCRR § 405.9(h)(1) implies that a hospital may detain or confine a patient absent a discharge plan, it is unreasonable to suppose that the legislature unintentionally omitted a provision therein for the detention or confinement of such a patient. (*See* McKinney's Cons Laws of NY, Statutes § 74 [court cannot by implication supply in a statute a provision which it is reasonable to suppose legislature intended to omit; failure of legislature to include matter within scope of an act may be construed as indication that exclusion intended]). In light of the absence of specific statutory or regulatory authorization to detain or confine a patient in the circumstances of this case, and given the prohibition against detaining or confining a patient against his or her will, it would be irrational for a jury to find that the confinement of decedent was privileged as argued by defendant.

Moreover, decedent objected to being discharged home with her daughter or VNS services, and it is undisputed that defendant did not seek a court order to supersede her objection. (PHL § 2893[5] ["Notwithstanding a determination pursuant to this section that the principal lacks capacity to make health care decisions, where a principal objects to the determination of incapacity or to a health care decision made by an agent, the principal's objection or decision shall prevail unless the principal is determined by a court of competent jurisdiction to lack capacity to make health care decisions."]). Consequently, Martina's objection to decedent's discharge is immaterial, and as Bojko is not qualified to render an opinion on New York law, his testimony concerning a health care proxy's legal authority is disregarded. Muskin's testimony

was inconclusive and otherwise not consistent with governing law.

IV. CONCLUSION

As the PHL does not privilege decedent's confinement in these circumstances and as defendant does not otherwise prove that its confinement of decedent was privileged, defendant is liable, as a matter of law, for false imprisonment. However, a trial on damages is required.

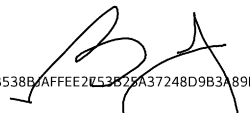
As judgment is directed in plaintiff's favor, defendant's application for the imposition of sanctions is without basis.

Accordingly, it is hereby

ORDERED, that plaintiff's motion is granted to the extent that the verdict is set aside; it is further

ORDERED, that pursuant to CPLR 4404(a), judgment is entered in favor of plaintiff as a matter of law, with a trial on damages to be held; and it is further

ORDERED, that the parties contact the court within 10 days of the date of this order in order to schedule a conference to discuss future proceedings.



12/10/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
	x	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE