



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

November 13, 2019

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Kathleen Kiernan
Ulster County DSS
1091 Development Court
Kingston, New York 12401

Barbara Phair, Esq.
Abrams, Fensterman
3 Dakota Drive, Suite 300
Lake Success, New York 11042

Beverly Morton, DNS
Park Nursing Home
128 Beach 115th Street
Rockaway Park, New York 11694

RE: In the Matter of ██████████ – Discharge Appeal

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter. This Decision is final and binding.

The party who did not prevail in this hearing may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the party wishes to appeal this decision it may seek advice from the legal resources available (e.g. their attorney, the County Bar Association, Legal Aid, etc.). Such an appeal must be commenced within four (4) months from the date of this Decision.

Sincerely,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: cmg
Enclosure

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of an Appeal pursuant to
10 NYCRR §415.3 by

██████████,

Appellant,

a former resident of

Park Nursing Home,

Respondent,

following his leaving this residential health care facility
by signing a Discharge Against Medical Advice form.

ORIGINAL

DECISION

Hearing Before:

Ann H. Gayle
Administrative Law Judge (“ALJ”)

Hearing Dates 1 and 2:

July 10, 2019¹ and August 16, 2019

Held at:

St. John’s Episcopal Hospital (“Hospital”)
327 Beach 19th Street
Far Rockaway, New York 11691

Hearing Date 3:

October 11, 2019²

Held at:

New York State Department of Health
Metropolitan Area Regional Office
90 Church Street
New York, New York 10007

Parties:

Park Nursing Home
By: Barbara Phair, Esq.
Abrams, Fensterman, et al.

██████████
Pro Se (with assistance of Kathleen Kiernan)

¹ The hearing, originally scheduled for June 20, 2019, was adjourned when Appellant required an in-patient stay at St. John’s Episcopal Hospital and was not yet cleared for discharge.

² The hearing closed on November 7, 2019, when the final transcript was received.

Pursuant to Public Health Law (“PHL”) §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k), a residential health care facility or nursing home such as Park Nursing Home (“Respondent” or “Facility”) is a residential facility providing nursing care to sick, invalid, infirm, disabled, or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). ████████ (“Appellant” or “Resident”) left the Facility on ████████ 2019, upon signing a Discharge Against Medical Advice (“AMA”) form. Thereafter Appellant, claiming that he did not voluntarily leave AMA, appealed this discharge to the New York State Department of Health (“DOH”). A hearing on that appeal was held, and a transcript (pages 1-56 and 1-405) of the hearing was made by a court reporting service.

Appellant appeared at the hearing and represented himself³ unassisted on day 1 and with the assistance of Kathleen Kiernan, a social worker with the adult protective services unit of the Ulster County Department of Social Services (“DSS”), on days 2 and 3.⁴ Facility representatives appeared at the hearing and were represented by Respondent’s attorney, Barbara Phair, Esq. Hospital representatives were present at the first two hearing dates.

Appellant testified in his own behalf and called Kathleen Kiernan and the following Facility representatives as witnesses: Rohema Woods, Occupational Therapist, Sonia DeFrietos, Director of Environmental Services, and Leonard Grunhut, Administrator.

³ At the first hearing date (July 10), Appellant requested an adjournment in order to seek legal representation (July 10 transcript, pages 5, 11, 14, 26-27, 30). After limited testimony was taken and the Parties and ALJ viewed a video recording (Facility Exhibit 1) of security footage of the area just outside the Facility’s front door and the area where Appellant signed the AMA, the hearing was adjourned. Appellant secured the services of Kevin Cremin, Esq., Mobilization for Justice, Inc., but “fired” him prior to the August 16 hearing date (August 16 transcript, page 4).

⁴ Ms. Kiernan appeared by telephone on days 2 and 3.

█/ Park

Respondent called the following Facility representatives as witnesses: Sabrina McKenzie, Receptionist, and Guy Mars, R.N., Nursing Supervisor.

The following Hospital representatives testified in response to questioning by the ALJ and the Parties: Jacqueline Lutchmidat, Sharon Bryan, Stacy Ann Thompson, and Sarah Smith.

The following documents were accepted into evidence/marked for identification⁵ by the ALJ as ALJ and Facility Exhibits:

ALJ:

- I: Notice of Hearing with AMA form
- II: July 31, 2019 letter
- III: August 20, 2019 letter

Facility:

- 1: Video footage of front desk area on █/19 from security camera
- 2: AMA form
- 3: █/19 █ consultation
- 4: marked for identification: statements of Facility employees
- 5: marked for identification █/19 social work note and nursing note
- 6: marked for identification: Hospital discharge summary

Appellant was given the opportunity but did not offer any documents into evidence; he did, however, arrange for Ms. Lutchmidat to provide the ALJ and Ms. Phair with the █/19 FDNY Prehospital Care Report Summary (“Ambulance Report”).

STATEMENT OF ISSUES

On █, 2019, Respondent left the Facility by signing an AMA form. A few hours later, the NYPD (New York Police Department) found Appellant walking in the road approximately █ from the Facility. With Appellant’s consent, an ambulance was called and they transported Appellant to St. John’s Episcopal Hospital. When Appellant was cleared for discharge, Respondent refused to readmit Appellant to its facility because he had left AMA.

⁵ Documents marked for identification but not accepted into evidence by the ALJ remained with the proponent of the document.

Appellant then claimed that his signing the AMA and leaving the Facility was involuntary. Pursuant to 10 NYCRR §415.3(h)(2)(iii)(b), the Facility has the burden of proving that the transfer was necessary and the discharge plan is appropriate. The initial issue to be determined in this proceeding is whether Appellant knowingly and voluntarily signed the AMA form and left the Facility of his own accord (August 16 transcript, page 31).

FINDINGS OF FACT

Citations in parentheses refer to transcript pages (“July T”)⁶ and (“T”)⁷ and exhibits (“Ex”) in evidence. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Respondent, Park Nursing Home (“Park”), is a residential health care facility located in Rockaway Park, New York. Appellant, ████████, age ██████ was admitted to the Facility in early ██████ 2019.
2. In the early afternoon on ██████ 2019, Appellant informed Respondent that he would be leaving the Facility to return to the ██████████ area. Respondent repeatedly encouraged Appellant to remain at the Facility until a safe discharge plan could be arranged. When Appellant refused to stay and insisted upon leaving, Respondent prepared an AMA form for Appellant to sign. Appellant signed the AMA and left without accepting cash for his immediate expenses or his medications, particularly ██████████. (Ex 2; T 38-41, 62-63, 65-67, 69, 144-145, 167, 244-245, 248, 252-253, 326, 373-374, 375, 379)
3. A few hours after Appellant left Park, police officers found Appellant a mile or so from the Facility. Appellant informed them that he was “fine but will go to the hospital” with EMS

⁶ The transcript of the July 10, 2019 hearing date is numbered 1-56; reference to the July 10 transcript will be identified as “July T” followed by the page #.

⁷ The transcript of the August 16, 2019 hearing date is numbered 1-261, and the transcript of the October 11, 2019 hearing date is numbered 262-405; reference to the August 16 and October 11 transcripts will be identified as “T” followed by the page #.

██████/ Park

(Emergency Medical Services). Appellant was brought by ambulance to St. John's Episcopal Hospital and admitted. (Ambulance Report)

4. When Appellant was cleared for discharge from the Hospital, Park would not readmit Appellant because he left Park AMA. Appellant appealed, and two days of hearing were held at the hospital. Appellant repeatedly stated during those two hearing dates that he wished to be discharged from the Hospital to a hotel in the ██████████ area. A third hearing date was scheduled for October 11, 2019. The hearing would be held at the Hospital if Appellant was still an in-patient on October 11, or at DOH's New York City regional office ("NYC") if Appellant was discharged prior to October 11. (Ex III; July T 39; T 99-106)

5. On ██████████ 2019, Appellant was discharged from the Hospital to the ██████████ in ██████████. The third day of hearing was held in NYC on October 11, 2019. Appellant and Ms. Kiernan appeared by telephone from the Ulster County DSS office. Ms. Lutchmidat was asked to briefly participate by telephone for the sole purpose of confirming Appellant's September 17 discharge from the Hospital, which she did. (T 267)

6. Appellant resided at the ██████████ from the day he was discharged from the Hospital (██████████ 2019) to ██████████ 2019, when his personal funds were exhausted. At the conclusion of the October 11 hearing date, Ms. Kiernan was going to work with Appellant to find temporary housing for Appellant for that evening and beyond if necessary. (T 267-269)

DISCUSSION

The evidence presented by both Appellant and Respondent demonstrated that not only did Appellant voluntarily and knowingly sign the AMA, but that he did so despite substantial and repeated urging by various Facility employees to remain at the Facility and not leave that day.

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Witnesses called by the Facility

Sabrina McKenzie (T 36-59 and 236-242)

Ms. McKenzie testified, "I remember him coming to the front ████████ ████████

██████ I really don't know exactly about what. It was a daily thing. I remember trying to calm him because he said he wanted to leave. I was trying to talk him out of leaving and waiting for me to call Guy to speak with him before he walked out the door. He went towards the door. He wanted to leave, but I was calling him back not to just walk out, so that he could do things the proper way before he just walked out and have nowhere to go." (T 39, 40-41)

Guy Mars (T 60-85 and 108-190)

Mr. Mars testified that he called Dr. Kabyeh to inform him that Appellant wanted to leave, and that even after Dr. Kabyeh explained to Appellant why he shouldn't leave, Appellant was still "adamant about leaving" (T 65). Mr. Mars further testified that when they realized that "there was no convincing him, we tried to make it as safe as possible. We offered him his ████████ medication, the ████████ We offered him money. We tried to facilitate where he might want to go. We told him, 'Maybe you want to delay this a little bit, so we can get you somewhere.' He didn't want to have any of that. He still wanted to leave. We were just trying to de-escalate it." (T 67)

When Mr. Mars was asked by Appellant, "In your opinion, you're a medical person, was it a safe discharge, and was I in the correct state of mind to make that decision?" Mr. Mars testified, "Medically speaking, no, I don't think it was a safe discharge. Yes, you were in a correct state of mind." (T 159-160). When asked by Ms. Phair, "In your professional opinion as a nurse, did you feel he had capacity to make a decision about AMA?" Mr. Mars responded, "Yes." (T 180)

██████/ Park

Regarding capacity, Steven E. Newman, M.D., Facility ██████ wrote on ██████, 2019, that Appellant “has capacity for AMA discharge” (Ex 3), and Mr. Mars discussed capacity in the presence of the NYPD on ██████. Mr. Mars testified, “that is where with the police being there I also talked about your capacity. They asked me what we wanted to do at that point. If you can make your own decisions they can’t force you to go or to stay ... they were there to help me just to make sure you listened to us because you really didn’t want to talk to us. You were pretty ██████ (T 144)

Witnesses called by Appellant

Rohema Woods (T 211-235)

Ms. Woods left early on ██████ 2019, so she did not witness what occurred at or around the time Appellant attempted to leave and left the Facility AMA, but she testified that in the past she has seen Appellant ██████. In response to Appellant’s questions about whether Ms. Woods has seen him “in a state that I may have been ██████ or if I was in a ██████ pain or anything else, that it was necessary to bring me back to a different level of comprehension,” Ms. Woods testified, “I don’t know what is going ██████, but ... you are very intelligent, and your comprehensive level I cannot tell, but your reactions and your ██████ the things I can see, those are the things I was able to bring you back to yourself to calm you down from a level of being ██████ to a ██████, so that you can think ... you are very intelligent ... I have never witnessed one time that you were not intelligent enough to answer any question or I never witnessed you ██████ in any of our meetings or sessions.” (T 215, 218-219)

Sonia DeFrietos (T 243-254 and 373-395)

In response to Appellant’s question, “Can you tell the court exactly what happened when I signed AMA?” Ms. DeFrietos testified, “I was coming out to the lobby, and I heard noises in

██████/ Park

the lobby. When I arrived in the lobby [Appellant] was there stating he was leaving. No one could stop him. He knew what he was doing. All he wanted was his cigarettes and let him go. Mr. Guy Mars, the RN, was explaining to him not to leave, speak to the doctor first and he should not leave. [Appellant] said he knew what he was doing and he wanted to leave and you cannot hold him against his will. Ms. Beverly came to the lobby and offered him the money. Mr. Mars came with the medication. They were telling him to please take his medication and the money just in case he needed to eat something or to pay for the train or anything. He wanted his cigarettes and his lighter. He left.” (T 244-245)

In response to Appellant’s question, “Did you make any attempt to ... talk me out of going out?” Ms. DeFrietos testified, “Yes, I tried to convince you not to leave. I said, ‘Stay. Let’s speak to your doctor. Let the doctor speak to you.’ You said ‘no,’ you know your rights. ‘Nobody can hold you against your will.’ You were leaving. You said it over and over and over again.” Appellant responded, “That is probably true, yes, but you found it necessary to ... bring me back to the desk and tried to convince me not to do what I was convinced in my mind to do?” Ms. DeFrietos responded, “Yes I tried to convince you to take the money and the medication and you said no.” (T 252-253)

Ms. DeFrietos testified that shortly after Appellant left Park AMA, she left for the day; while heading home in her car, she saw Appellant, ██████████ from Park, smoking a cigarette on a ██████████ Ms. DeFrietos testified that “I told him to return back to the Facility and he told me ‘No.’ I asked him ‘why not, Mr. [Appellant]?’ He told me that he knew where he was going. He is not a prisoner and we cannot hold him against his will.” (T 384-385)

██████/ Park

Leonard Grunhut (T 314-372)

Mr. Grunhut left early on ████████ 2019, so he did not witness what occurred at or around the time Appellant attempted to leave and left the Facility AMA, but he testified that he received information from staff that Appellant had left the Facility AMA on that date. In response to Appellant's question, "I want to make sure I am clear on something. Nobody wanted me to leave?" Mr. Grunhut replied, "Absolutely. Nobody wanted you to leave. You insisted on leaving." (T 326)

Appellant

Appellant testified (formally at pages 395-399, and throughout the hearing) that he wishes to return to the Facility, that he did not have the capacity to sign the AMA, and that the approximately one hour of footage from the security camera which shows him repeatedly walking away from and returning to the front desk demonstrates that Respondent's employees were trying to coerce him or force him into signing the AMA form.

I find that the testimony of the Facility employees demonstrates that they did all they could to keep Appellant from leaving Park and that allowing Appellant to sign himself out AMA was done as a last resort when they were convinced by him that he was leaving and they could not stop him. Their testimony further demonstrates that Appellant had the capacity to understand what he was doing and that he very convincingly exercised his will to leave Park. Their testimony also corroborates the video's footage that much time and effort was spent trying to dissuade Appellant from leaving.

DECISION

I find that Appellant knowingly and voluntarily signed the AMA form and left the Facility of his own accord.

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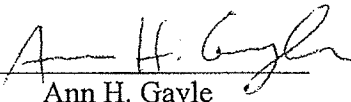
There will be no further hearing on whether the transfer was necessary and the discharge plan is appropriate.

The appeal by Appellant is DENIED.

Respondent, Park Nursing Home, is not required to readmit Appellant to its Facility.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York
November 13, 2019


Ann H. Gayle
Administrative Law Judge

TO: ████████
c/o Kathleen Kiernan
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Kingston, New York 12401

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