

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

TRACY CANNON, *as Administratrix of the Estate*
of MARK CANNON, Jr.,

Plaintiff,

- v -

Civ. No. 9:15-CV-1417
(DJS)

CORRECTIONAL MEDICAL CARE, INC, *et al.*,

Defendants.

APPEARANCES:

LAW OFFICES OF ELMER ROBERT
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OF COUNSEL:

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MARIA K. DYSON, ESQ.

CATHLEEN KELLY REBAR,
ESQ.

MOLLY C. CASEY, ESQ.

THOMAS A. CULLEN, ESQ.

¹ The "CMC Defendants" include Correctional Medical Care, Inc., Emre Umar, Maria Carpio, Dr. Silver Masaba, and John Doe 1-2.

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JOHN W. LIGUORI, ESQ.

DANIEL J. STEWART
United States Magistrate Judge

DECISION and ORDER

On August 30, 2014, Mark Cannon, Jr. died while in the custody of the Albany County Sheriff. Thereafter, on November 25, 2015, this civil rights lawsuit was commenced by Tracy Cannon, the Administratrix of the Estate of Mark Cannon, Jr., against Correctional Medical Care and its staff, as well as against the County of Albany and its officials. Dkt. No. 1, Compl. Nearing the end of a lengthy litigation process, a settlement conference was held with the Court which ultimately resulted in a settlement of the case. That settlement was placed on the record and consisted of a monetary payment between Correctional Medical Care and the County of Albany, and Plaintiff, with all other claims and cross-claims to be discontinued and dismissed. However, because the action involved the alleged wrongful death of Mark Cannon, Jr., whose sole distributee is his daughter, a formal motion to approve

² The "Albany County Defendants" include County of Albany, Craig Apple, Sr., and Christian Clark.

the settlement was required pursuant to New York State Estates, Powers and Trusts Law (“EPTL”) § 5-4.6 and New York State Surrogate’s Court Procedure Act § 2204.

On October 26, 2017, Plaintiff’s counsel filed a Motion to Approve Settlement of Wrongful Death And Civil Rights Action. Dkt. No. 165. The CMC Defendants are generally in support of the Motion to Approve Settlement, but object to certain statements and characterizations made by Plaintiff’s counsel in his Motion papers; question the procedure for the payment of the settlement and funding of the proposed structure; and have concerns regarding the scope of the non-disparagement clause agreed to by the parties. Dkt. Nos. 168 & 172. Defendants County of Albany, Goyer, and Coogan join in the request to settle the action. Dkt. Nos. 169, 170 & 171.

With regard to the proposed settlement, the Court has considered the total settlement of \$1,094,999.99³ and finds it to be an appropriate resolution after considering the merits of the action. *See* EPTL § 5-4.6(a). The Court has dealt extensively with the facts of this case in prior rulings, in particular in its decision regarding the Commission of Correction Report, Dkt. No. 136, and incorporates those facts by reference in this Decision and Order. Plaintiff has alleged that there was a failure to provide Mark Cannon, Jr., with proper medical care, and further, that this failure was part of a broader pattern and practice implemented by Correctional Medical Care. Dkt. No. 52, Am. Compl. at ¶¶ 15-46; Dkt. No. 165-1, Keach Affirm. at ¶¶ 3-4. The Defendants have denied the allegations contained in the Amended

³ Of that amount, \$999,999.99 is to be paid by Correctional Medical Care, Inc., and \$95,000 is to be paid by the County of Albany.

Complaint, Dkt. Nos. 65 & 80, and the Albany County Defendants and the CMC Defendants specifically moved to dismiss, *inter alia*, Plaintiff's pattern and practice claim. Dkt. Nos. 81 & 99.⁴ Plaintiff's attorney indicates to the Court several factors which counsel in favor of settlement, including the risks of litigation in this action, particularly as may relate to damages. Keach Affirm. at ¶¶ 7-11. Based upon the foregoing, together with the opportunity the Court had to discuss the matter privately with each side (as well as the mother of Mr. Cannon's daughter) during a lengthy settlement conference, the Court concludes that the proposed settlement is appropriate under the facts and circumstances of this case.⁵

It is also the Court's obligation to review the proposed attorney's fee requested by Plaintiff's counsel. Mr. Keach notes that his firm expended \$20,773.24 as disbursements in this matter, and further notes that his office spent approximately 800 hours in preparing and prosecuting the matter. Keach Affirm. at ¶¶ 13 & 16. In addition, Plaintiff Tracy Cannon, on behalf of the Estate of Mark Cannon, Jr., signed a retainer agreement authorizing a one-third attorney's fee, calculated *prior* to the deduction of expenses. *Id.* at ¶¶ 5 & 13; *see also* Dkt. No. 165-5. The Court has reviewed the retainer agreement and finds that it is in compliance with State law, and in particular with 22 N.Y.C.R.R. § 806.13 of the Appellate Division rules dealing with contingent fees in claims involving wrongful death.

⁴ The Motions to Dismiss were still pending at the time this settlement agreement was entered into.

⁵ Both Mr. Cannon's mother, as well as the distributee's mother, have submitted Affidavits in support of the proposed settlement. Dkt. Nos. 165-8 & 165-9.

Accordingly, the Court authorizes reimbursement of disbursements to Plaintiff's counsel in the amount of \$20,773.24, and approves an attorney's fee award in the amount of \$364,635.00, for a total amount of \$385,408.24. Mr. Keach and his Firm will continue on as representative of the Estate in order to obtain Surrogate's Court approval. In that regard, he shall be entitled to reimbursement of additional expenses from the Estate, but he shall not be entitled to any further fees for work related to the wrongful death claim. *See Estate of Haag*, 43 N.Y.S.3d 870 (N.Y. Sur. Ct. 2016).

As to the settlement procedure, Plaintiff's counsel is requesting that any distribution of the settlement proceeds be approved by the Surrogate's Court.⁶ Further, Plaintiff's counsel is requesting that \$650,000.00 of the settlement proceeds be utilized to fund a structured settlement account for the benefit of Mr. Cannon's minor daughter. Because of tax regulations specifically relating to the creation of such a structured settlement account, *see* Dkt. No. 173, Plaintiff's counsel is requesting that the \$650,000.00 not be paid until a short period of time after the Surrogate's Court approves of the structured settlement and distribution. The remaining amount of the settlement consists of \$385,408.24 in attorney's fees and expenses, as well as a residual amount of \$59,591.75. These amounts would be paid pursuant to New York's prompt payment law. N.Y. C.P.L.R. § 5003-a. The above-referenced residual amount would be placed in an account as authorized by the May 24, 2016 decree signed by the Honorable Vincent Versaci, Schenectady County Surrogate's Court.

⁶ The proper venue for proceedings relating to the Estate is in the Surrogate's Court of the County of the decedent's domicile at the time of his death. N.Y. Surr. Ct. Proc. Act § 205.



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