

Chang v St. Luke's-Roosevelt Hosp. Ctr.

2006 NY Slip Op 30762(U)

November 9, 2006

Supreme Court, New York County

Docket Number: 105188/05

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 62

ZIFEN GU CHANG,
Plaintiff,
-against-

INDEX NO. 105188/05
MOTION DATE _____
MOTION SEQ. NO. 002

**ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,
CONTINUUM HEALTH PARTNERS, INC.,d/b/a
ST. LUKE'S ROOSEVELT HOSPITAL CENTER,
and NEW YORK CITY OFFICE OF THE
MEDICAL EXAMINER,**
Defendants.

The following papers, numbered 1 to 10, were read on this motion for summary judgment:

PAPERS NUMBERED

- ✓ Notice of Motion 1
- Notice of Cross-Motion 2
- Affirmation in Support — Exhibits 3
- Affirmation in Support of Cross-Motion — Exhibits 4
- Memorandum of Law in Support of Cross Motion 5
- Reply Affirmation in Support 6
- Reply Affidavit in Support of Cross Motion 8
- Memorandum of Law in Support of Cross-Motion 9
- Order of Judge Smith 9
- Reply Affirmation in Opposition to Cross-Motion – Exhibits 10

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Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the defendants' motion to dismiss the complaint and for sanctions is granted. Plaintiff's cross-motion to amend her complaint is denied.

Introduction

Plaintiff is a widow embroiled in a will contest with her husband's children from a prior marriage. She initiated this action against the hospital in which he died for the intentional infliction of severe emotional distress, arising from the performance of an autopsy on her husband without her consent. The autopsy, however, was performed by the New York City Office of the Medical Examiner, not the hospital. And it was performed at the request of his children, who expressed suspicions that their father's death was the result of "foul play" by his wife.

Background

Harry Chang, who was 86, died in the defendant hospital on July 21, 2003, survived by three adult children, and his second wife, the plaintiff, Zifen Zu Chang. Ms. Chang left the hospital for an appointment with her accountant two hours before her husband died.¹ Mr. Chang's daughters expressed suspicions to the attending physician that their father's death was the result of "foul play" by Ms. Chang. The attending physician reported the daughters' statements to the office of the medical examiner who performed an autopsy the following day.

¹ Mr. Chang's hospital records indicate that his prognosis was "explained to the wife and daughter Julie" when he was admitted the night before. (*Defendant's motion for summary judgment, Exhibit E, p.2*).

The record contains no documentation from the office of the medical examiner.

Mr Chang's hospital records specify:

There was some conflict within the family. Apparently the daughters have some suspicions of foul play by step mother. ME [New York City Medical Examiner] has been called for reviewing the case. Their contention is that he gets anxious, sobs and upset when she is around. No specific foul play has been claimed. Await ME to accept case. (*Defendant's motion for summary judgment, Exhibit E, p.2*).

The referral form, completed by Dr. Kamini Mehta, stated: "Medical Examiner has been requested by pt.'s [patient's] daughter for suspicion of foul play, namely by pt.'s spouse (stepmom), Zifen Gu Chang." (*Defendant's motion for summary judgment, Exhibit E, p.3*). Dr. Mehta confirms that, as the attending resident, he recorded the daughters' statements and had "no role in obtaining a consent for an autopsy or making the decision regarding performance of an autopsy." (*Defendant's motion for summary judgment, Exhibit H, I*).²

Ms. Chang challenged the validity of a will proffered by the children indicating that she had waived her right of election. Mr. Chang's children challenged the validity of her marriage to their father. Litigation in the surrogate's court ensued. (*Defendant's motion for summary judgment, Exhibit F*). Two years later, Ms. Chang initiated this action against the hospital for the intentional infliction of emotional distress for turning Mr. Chang's body over to the office of the medical examiner. It was consolidated with her previously filed action against the office of the medical examiner.

The hospital moves for summary judgment and to dismiss the complaint, correctly

² Mrs. Chang was aware that an autopsy had been performed at the latest within a few days of his death. Mr. Chang's death certificate, indicating that an autopsy had been performed, named Ms. Chang as the informant. (*Defendant's motion for summary judgment, Exhibit J*).

arguing that: (1) the hospital did not perform the autopsy; and (2) the statute of limitations on actions for the intentional infliction of emotional distress is one year. Plaintiff cross-moved to amend her complaint to bring her claims within the three-year statute of limitations, alleging two different bases of negligence: (1) violation of the common law right of sepulcher; and (2) failure by the hospital to comply with its statutory duties, pursuant to 10 NYCRR 400.16 and 405.4. (*Plaintiff's Notice of Cross-Motion, Affirmation of Noah Potter, Exhibit 4, ¶¶ 9, 11, 12, 13, 14, 15*). Both claims rely upon her allegation that she had “religious and/or moral objections” to an autopsy.

The hospital replied, *inter alia*, that a religious objection to an autopsy must be based upon the decedent’s religious beliefs, not those of the surviving spouse, and must be previously communicated. Plaintiff replied that Harry Chang “retained his traditional Chinese belief that the body should remain whole after death. He made me swear to him that I would not let anyone perform an autopsy on him.” (*Reply Affidavit of Zifen Gu Chang ¶2*) Mrs. Chang’s statements are well beyond the permitted scope of reply and, as a sur-reply served without obtaining prior permission, should not be considered. However, even if it were considered, it does not help her, since it confirms that the hospital had no notice of Mr. Chang’s religious beliefs before the autopsy was performed. The hospital also served a sur reply without seeking prior permission. It has not been considered.

Discussion

A motion to dismiss, pursuant to CPLR §3211, raises the inquiry as to whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from the four corners of the complaint. (*Foley v D’Agostino*, 21 AD2d 60 [1st Dept

1964]). Accepting, for the purposes of this motion, plaintiff's allegations as true, her complaint fails to state either any claim cognizable under the laws of the State of New York, or any compensable damages.

New York Charter § 17-201 obligates the hospital to report a death occurring "in any suspicious or unusual manner." The hospital was, therefore, required to report the daughters' suspicions to the office of the medical examiner. It had absolutely no duty to conduct an independent investigation into the credibility or sufficiency of the allegations.

The decision to conduct an autopsy, and the autopsy itself, was performed by the office of the medical examiner. Under New York law, the office of the medical examiner is vested, in the interest of public health and safety, with broad discretion to make the decision to conduct an autopsy in circumstances where there is any uncertainty as to the cause of death. It is authorized to conduct an autopsy without first obtaining the consent of a family member, where no objection has been raised. *Banks v United Hospital et al.*, 275 AD2d 623 [1st Dept. 2000]). Since Ms. Chang failed to voice a timely objection to the autopsy, the office of the medical examiner was fully authorized to perform it without obtaining Ms. Chang's consent. This is especially true since it appears that the autopsy was requested by the decedent's children. The decision of the office of the medical examiner was made within the framework of its statutory authority and does not give rise to any liability either to the hospital or the office of the medical examiner.

Cremonese v City of New York, 17 NY2d 22, 24 [1966]; ³ *Moriates v City of New York*, (7/11/96

³ In *Cremonese*, the Court of Appeals explicitly distinguished the case extensively analyzed by the parties, *Darcy v Presbyterian Hospital in New York*, 202 NY 259 [1911], in which the complaint failed to allege that the patient died in an "unusual manner." There was, therefore, a question of fact as to the reasonableness of the hospital's decision to refer the case to the coroner.

NYLJ 29, (col. 6), [2d Dept. 1996]).

Both the Court of Appeals and the Second Department have dismissed claims, like those of the plaintiff, brought by spouses against hospitals for emotional distress, arising from autopsies performed, without their consent, by the office of the medical examiner. *Cremonese, supra* [“The city [hospital] is not liable for the official decisions of the medical examiner within the frame of his statutory authority.”]; *Moriates, supra* [“As the hospital did not order the performance of this autopsy, no liability may attach.”]

Moreover, plaintiff’s claim for damages is both time-barred and legally insufficient. Claims for the intentional infliction of emotional distress are governed by CPLR § 215(3) and are subject to a one-year statute of limitations. *Gallagher v. Directors Guild of America, Incorporated*, 144 AD2d 261 [1st Dept. 1988], *leave to appeal denied*, 73 NY2d 708 [1989]). Mr. Chang died on July 21, 2003. The autopsy was performed on July 22, 2003. The lawsuit was initiated almost two years later. Plaintiff’s proposed amended complaint, which seeks to re-cast the identical allegations into a claim of negligence, fails to remedy the insufficiency of her pleadings.

In order to recover damages for emotional distress, the emotional disturbance must be serious and verifiable. (*Bovsun v Sanperil*, 61 NY2d 219 [1984]) The plaintiff must produce evidence which is sufficient to guarantee the genuineness of the claim. (*Conway v Brooklyn Union Gas Company*, 189 AD2d 851 [2d Dept. 1993]). Plaintiff’s proposed amended complaint fails to describe a single symptom suffered nor treatment sought. Her claims are bare legal conclusions, insufficient as a matter of law.

Finally, to make out a claim for the intentional infliction of emotional distress, a

complaint must describe behavior which is “atrocious and utterly intolerable in a civilized society ... so severe that no reasonable man could be expected to endure it. (*Restatement of Torts, Second, Sec. 46; Talmor v Talmor*, 185 Misc. 2d 293 [NY Cty 2000] (citations omitted)). It is absurd to argue that the hospital’s conduct comes anywhere close to meeting this standard.

Although leave to amend is freely granted absent prejudice or surprise, leave should be denied where the proposed amendment is insufficient as a matter of law or devoid of merit. (*Goldman v City of New York*, 287 AD 2d 689 [2d Dept. 2001]. The determination as to whether leave should be granted lies within the sound discretion of the trial court and, absent an abuse of that discretion, will not be disturbed. (*Rayco of Schenectady Incorporated v City of Schenectady*, 267 AD2d 664, 666 [2d Dept. 1999]).

Plaintiff’s attorneys have failed, despite repeated efforts, to articulate any cognizable basis of liability on the part of the hospital nor any compensable damages. The law was well-settled, long before this lawsuit was initiated, that (1) the hospital’s actions were in full compliance with its statutory duty to report any and all suspicions to the office of the medical examiner; and (2) the office of the medical examiner had absolute discretion to decide whether to conduct an autopsy. Despite extensive research, plaintiff’s attorneys have failed to produce a single case suggesting that the hospital had a duty to attempt to locate a missing relative and seek her permission to report a suspicious death to the office of the medical examiner, especially when that relative was the target of suspicion.

Plaintiff’s complaint is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. Moreover, plaintiff’s attorneys persevered in the prosecution of these frivolous claims after defendant’s

demonstration of their legal insufficiency. In accord with 22 NYCRR § 130 -1.1, a sanction in the amount of One Thousand (\$1000.00) Dollars is assessed against the plaintiff's attorneys, Cox Padmore Skolnik & Shakarchy LLP. In light of the fact that the frivolous nature of the plaintiff's submission arise from legal insufficiency only, no penalty is assessed against Ms. Chang personally.

Additionally, in accord with CPLR §8303- a and 22 NYCRR § 130 -1.1, defendant is entitled to reimbursement for costs reasonably incurred and a reasonable attorney's fees. In the Court's evaluation of "reasonable" reimbursement, consideration has been given to the extent to which the defendant itself unnecessarily prolonged the proceedings. The motion papers reveal a level of acrimony on the part of both attorneys more appropriate to the school yard than to the courtroom. Plaintiff's attorneys are directed to pay to the defendants, St. Luke's-Roosevelt Hospital Center, Continuum Health Partners, Inc.,D/b/a St. Luke's Roosevelt Hospital Center, the sum of Four thousand (\$4,000.00) Dollars.

This reflects the decision and order of this Court.

Dated: 11/9/06

HON. MARILYN SHAFER, JSC
J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

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