

Shipley v City of New York

2009 NY Slip Op 33249(U)

March 4, 2009

Supreme Court, Richmond County

Docket Number: 101114/06

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
**ANDRE SHIPLEY, KORISHA SHIPLEY and
SHANNON SHIPLEY, an infant under the age of
eighteen by her father and natural guardian, ANDRE
SHIPLEY,**

Plaintiffs,

-against-

**THE CITY OF NEW YORK, and THE OFFICE OF
THE NEW YORK CITY MEDICAL EXAMINER,**

Defendants.
-----X

Part C-2

Present:

HON. THOMAS P. ALIOTTA

DECISION and ORDER

Index No. 101114/06

Motion No. 3453-001

The following papers numbered 1 to 3 were marked fully submitted on the 10th day of December, 2008:

	Papers Numbered
Notice of Motion for Summary Judgment of Defendant City of New York (Affirmation in Support).....	1
Affirmation in Opposition.....	2
Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment.....	3

Upon the foregoing papers, defendants' motion for summary judgment is decided as follows.

This matter arises out of a fatal motor vehicle accident which occurred on January 9, 2005 in which a Port Richmond High School senior by the name of Jesse Shipley (hereinafter the "decedent") was killed. The decedent was the son of plaintiffs Andre and Korisha Shipley, and brother of the infant plaintiff Shannon Shipley. It is undisputed that an autopsy was performed on the decedent on January 10, 2005, after which his remains were released to the Harmon Funeral Home for burial. The decedent was buried on January 13, 2005.

On March 8, 2005, a forensic science class at Port Richmond High School which included some of the decedent's classmates participated in a class trip to the Richmond County Medical Examiners Office on Staten Island. It is undisputed that plaintiffs were not among those present. It is also undisputed that a jar

containing a disembodied brain and labeled with the decedent's name was observed by several of his classmates in a glass cabinet in the Medical Examiner's Office. This fact was ultimately relayed to the infant plaintiff, who later informed her parents. The ensuing complaint alleges two causes of action for violation of the right of sepulcher resulting in the negligent infliction of emotional distress, the first on behalf of the decedent's parents, and the second on behalf of his infant sibling.

In moving to dismiss the complaint pursuant to CPLR 3212, the City maintains (1) that Shannon Shipley lacks the capacity to sue pursuant to Title 24, article 205 of the Rules of the City of New York (24 RCNY Health Code Reg. §205.01[d]), which defines a decedent's next of kin as including his parents but not siblings under the age of 18; (2) that plaintiffs' cause of action for interference with the right of sepulcher is time barred, and (3) that the complaint fails to state a cause of action since the actions of the City's Medical Examiner were wholly consistent with the relevant statutes, laws, and the Charter of the City of New York.

Upon review, the Court has found that the action is not time barred and is timely pursuant to applicable statute. With respect to the infant Plaintiff, the Court notes that the New York City Code (24 RCNY Health Code Reg. §205.01(2)) defines next of kin, *inter alia*, as children who are 18 years of age or over. Consistent with this subsection the Court finds that the second cause of action pleaded on behalf of SHANNON SHIPLEY by her father and natural guardian, ANDRE SHIPLEY, will not stand since the infant plaintiff is not entitled to recover as decedent's next of kin. Accordingly, this cause of action is dismissed. Thus, the only remaining issue is whether or not defendants are entitled to summary judgment dismissing the complaint of decedent's parents, plaintiffs Andre and Korisha Shipley, on the ground that it fails to state a cause of action.

As thus affected, the balance of defendants' motion for summary judgment is denied.

A cause of action for the violation of the right of sepulcher "seeks to assure the right of the decedent's next of kin to have immediate possession of the body for preservation and burial, and it affords damages only when there has been interference with that right" (*Estate of LaMore v. Sumner*, 46 AD3d 1262, 1264, *citing Darcy v. Presbyterian Hosp.*, 202 NY 259; *Plunkett v. NYU Downtown Hosp.*, 21 AD3d 1022; *Nesbit v. Turner*, 15 AD3d 552; *Booth v. Huff*, 273 AD2d 576; *see also Augeri v. Roman Catholic Diocese of Brooklyn*, 225 AD2d 1105). In such cases, the recovery of damages for emotional distress is permissible where it is alleged to have been caused by the negligent mishandling of a corpse (*see Johnson v. State of New York*, 37 NY2d 378). To the extent relevant, this exception to the rule barring the recovery of damages for emotional injury absent unreasonable risk or fear for physical safety (*see Schultes v. Kane*, 50 AD3d 1277, 1278) is predicated on the belief that there exists in such cases a special likelihood of genuine injury which serves as a guarantee that the claim is not spurious (*see Salandy v. Bryk*, 55 AD3d 147).

At bar, the City has failed to establish as a matter of law that decedent's brain was lawfully retained for scientific purposes, *i.e.*, neuropathological examination, in light of the fact that the autopsy report concluded that the death was attributable to, *inter alia*, blunt impact injuries to the head, *i.e.*, skull fractures (*see e.g.* Public Health Law §4215). Likewise, the City has failed to demonstrate that plaintiffs were apprised when they received their son's body for burial, that his brain had been removed. In fact, the City's only proof on this issue, a copy of the report notifying plaintiffs of same, was not even typed until May 4, 2005, some four

months *after* the body was buried. Thus, a question of fact exists as to whether or not the City unlawfully interfered with plaintiffs' right of sepulcher (*see e.g.* Alvarez v. Prospect Hosp., 68 NY2d 320, 324; Winegrad v. New York Univ. Med Ctr., 64 NY2d 851, 853; Zuckerman v. City of New York, 49 NY2d 557, 562).

Finally, it is well settled that a pleading attacked for legal insufficiency must be accorded a liberal construction, and "if it states, in some recognizable form, any cause of action known to our law," it should be sustained (Clevenger v. Baker Voorhis & Co., 8 NY2d 187; *see* Conroy v. Cadillac Fairview Shopping Ctr. Props.,[Md], 143 AD2d 726; Home Reporter v. Brooklyn Spectator, 34 AD2d 956). Here, the complaint sufficiently states a cause of action for breach of the parents' right of sepulcher to withstand summary dismissal (*see* Leon v. Martinez, 84 NY2d 83, 88).

Accordingly, it is

ORDERED, that the cause of action pleaded on behalf of plaintiff Shannon Shipley, an infant under the age of eighteen, by her father and natural guardian, Andre Shipley, is dismissed, the affirmative defense of the statute of limitations tendered on behalf of the City of New York and the Office of its Medical Examiner is stricken; and it is further

ORDERED, that the motion for summary judgment dismissing the complaint of plaintiffs Andre Shipley and Korisha Shipley is denied; and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

Dated: March 4, 2009

/s/

Thomas P. Aliotta

J. S. C.