

Bailey v Benta's Funeral Home, Inc.

2010 NY Slip Op 30368(U)

February 22, 2010

Supreme Court, New York County

Docket Number: 105257/07

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla, J.S.C.
Justice

PART 19

Index Number : 105257/2007
BAILEY, DANA
vs.
BENTA'S FUNERAL HOME
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion and cross-motion are decided in accordance with accompanying memorandum decision.

FILED
FEB 25 2010
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

This constitutes Decision and Order of the Court.

Dated: 2/24/10

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
DANA BAILEY,

Plaintiff,

- against-

BENTA'S FUNERAL HOME, INC.,

Defendant.

----- X

Index No.:105257/07

Submission Date: 2/24/10

DECISION AND ORDER

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Papers considered in review of this motion for summary judgment:

Notice of Motion	1
Aff in Opp	2
Reply Aff.	3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for negligent infliction of emotional distress, defendant Benta's Funeral Home, Inc. ("Benta") moves for summary judgment dismissing the complaint.

Plaintiff Dana Bailey ("Bailey") commenced this action in or about April 2007 alleging that on or about February 4, 2007, she entered into an agreement with Benta through its funeral director Edwin Barnes ("Barnes") whereby Benta agreed to conduct a memorial service for the deceased, Bailey's mother Barbara G. Betran ("the deceased"), to arrange for

cremation of the body of the deceased, to place the cremains in an urn supplied by Bailey, and to then return the urn to Bailey. The body was to be cremated at Oxford Hills Crematory, Inc.

Bailey supplied the urn to Benta on February 7, 2007 and the memorial service was held on February 9, 2007. Bailey took the urn home after the funeral. On February 27, 2007, Bailey discovered that the urn contained no ashes. She notified Benta, which allegedly informed Bailey that it had mistakenly failed to put the ashes in the urn on the day of the memorial service but that the box containing the ashes were in the funeral home's office and they would be delivered to Bailey. Bailey refused receipt of those ashes because she could not feel certain that they were her mother's ashes. She has not gone to Benta to see the box containing the ashes.

Bailey sought to recover damages she allegedly sustained as a result of Benta's negligence in "losing and then failing to deliver to the plaintiffs the ashes of the plaintiff's mother, Barbara G. Betran, in an urn provided to the defendant by the plaintiffs and in attempting to deliver to the plaintiffs substitute ashes at a later date." She alleged that she sustained "severe psychic injury, mental anguish, mental distress, emotional pain, mental suffering, injured feeling and various other emotional injuries." Benta answered the complaint and denied all material allegations.

Benta now moves for summary judgment dismissing the complaint arguing that Bailey can not sustain a claim for negligent infliction of emotional distress because there is no

evidence to support her theory of liability. In support of its motion, Benta submits Barnes' deposition testimony and affidavit. Barnes avers that the ashes were not delivered in time for the beginning of the memorial service and they were inadvertently not given to the family when they left the funeral home. After the ashes arrived from the crematory, they remained in the funeral home's main office. They were in a hard plastic temporary urn enclosed in a cardboard box with the name of the crematory and the name of the deceased on the label of the box. Barnes explained that there are more than ten such boxes in their office at any given time and they are checked periodically, usually monthly, by an office manager. After receiving the call from Bailey on February 27, 2007, he checked through the boxes and discovered that box containing the deceased's ashes was still in the office.

Benta argues that contrary to Bailey's contention, no evidence has been presented that it was negligent by "losing" the ashes or attempting to deliver "substitute ashes." Rather, evidence was presented that the deceased's ashes were merely inadvertently placed in the main office instead of placed in the urn and given to the family. In any event, even if Benta breached some duty by failing to place the ashes in the urn following the memorial service, such conduct was not "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community," as required to sustain a cause of action for negligent infliction of emotional distress.

In opposition, Bailey alleges that she did not allege a emotional distress cause of action, rather she merely asserted negligence. She argues that issues of fact exist as to whether Benta was negligent in losing the ashes, failing to deliver the ashes and then attempting to deliver substitute ashes at a later date.

Discussion

Bailey maintains that she is not alleging a claim for emotional distress, rather, she is merely stating a cause of action for “negligence” resulting from Benta’s “losing and then failing to deliver to the plaintiffs the ashes of the plaintiff’s mother, Barbara G. Betran, in an urn provided to the defendant by the plaintiffs and in attempting to deliver to the plaintiffs substitute ashes at a later date.” However, as she has failed to demonstrate any compensatory damages sustained as a result of this alleged negligence, a claim for ordinary negligence can not be maintained.

Although Bailey refuses to label her claim as one for emotional distress, the allegations set forth in her complaint as well as the relief sought suggest that Bailey is in fact alleging negligent infliction of emotional distress. A claim for negligent infliction of emotional distress can only be supported by allegations of conduct by the defendants “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Sheila C. v. Povich*, 11 A.D.3d 120, 130-131 (1st Dept. 2004); *see Wilson v. City of New York*, 294 A.D.2d 290 (1st Dept. 2002). Here, no evidence of such conduct has been

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presented. Rather, the evidence presented demonstrates that the ashes were unfortunately misplaced at the time Bailey left the memorial service, but that they remained at the funeral home for Bailey to retrieve at any time. Benta even offered to have the ashes delivered to Bailey immediately upon discovering that they were in its office, but Bailey refused. There is no evidence that the deceased's ashes were ever lost or substituted with other ashes. Any such allegations are based on mere speculation. Bailey's claim that triable issues of fact exist as to any negligence on Benta's part is without merit.

In accordance with the foregoing, it is

ORDERED that defendant Benta's Funeral Home, Inc.'s motion for summary judgment dismissing the complaint is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York
February 22, 2010

ENTER:

FILED
FEB 25 2010
NEW YORK
COUNTY CLERK'S OFFICE


J.S.C.
SALIANN SCARPULLA
J.S.C.