

**Milazzo v Moloney Family Funeral Homes, Inc.**

2011 NY Slip Op 31615(U)

May 25, 2011

Sup Ct, Suffolk County

Docket Number: 09-5599

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 1-12-11  
ADJ. DATE 2-23-11  
MNEMONIC: # 001 - MG; CASE DISP

-----X  
ROSE MILAZZO, :  
 :  
 : Plaintiff, :  
 :  
 : - against - :  
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 :  
 : MOLONEY FAMILY FUNERAL HOMES, INC. :  
 : and NASSAU SUFFOLK CREMATORY, :  
 :  
 : Defendants. :  
-----X

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/  
Order to Show Cause and supporting papers (001) 1-9; Notice of Cross Motion and supporting papers    ; Answering  
Affidavits and supporting papers 10-17; Replying Affidavits and supporting papers    ; Other 18; 19-20; ~~(and after~~  
~~hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion (001) by the defendants, Moloney Family Funeral Homes, Inc. and Nassau Suffolk Crematory, for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint as asserted against them is granted with prejudice.

In this action to recover damages for emotional injuries, Rose Milazzo, (hereinafter plaintiff) claims that the defendants were negligent and grossly negligent in performing the cremation of her husband's body after his death in that she found "bones and metal shards" in her husband's cremated remains. Although inartfully pleaded, the parties agree that the complaint states causes of action for the intentional infliction of emotional distress and the negligent infliction of emotional distress.

The defendants now move for summary judgment dismissing both causes of action as the plaintiff has not pleaded, and cannot prove, that the defendants' conduct was outrageous and extreme, or that they intentionally caused the plaintiff to suffer emotional distress. The complaint does not plead compensatory damages and, therefore, the plaintiff has not pleaded a cause of action for negligence. Plaintiff's counsel has set forth in the papers submitted in opposition to the defendants' motion that "[t]he plaintiff has proffered admissible evidence sufficient to prove their (sic) prima facie case for intentional and negligent infliction of emotional distress." Therefore the Court will consider those two causes of action in deciding this motion.

AH

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979], *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980].) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the verified answer, and the plaintiff's verified bill of particulars; signed copies of the transcripts of the examinations before trial (hereinafter EBT) of the plaintiff, dated March 5, 2010, and Peter G. Moloney, dated April 12, 2010, and a copy of the agreement for cremation of John Milazzo. In opposing this application, the plaintiff has submitted an attorney's affirmation; the plaintiff's affidavit; copies of the transcripts of the EBT's of the plaintiff, dated March 5, 2010 and Peter G. Moloney, dated April 12, 2010, and photographs.

At her EBT, the plaintiff testified that she and her husband, John Milazzo, had agreed to be cremated upon their deaths. John Milazzo died on March 7, 2006. The priest from her husband's parish gave her recommendations for funeral directors and she chose Moloney Family Funeral Homes, Inc (hereinafter Moloney). She advised Moloney that she wished to have her husband's body cremated. She chose a cardboard file box instead of a casket for his body as she thought that would be what her husband would like as he liked to recycle cardboard boxes. Since she was an artist, she painted the cover of the file box with her family and returned it to Moloney with hiking clothes for her husband to be cremated in, as he liked to hike. She also provided an urn, or receptacle from home, for his ashes and made a stopper from a wine cork, as her husband liked wine. She remembered signing the documents for the cremation, but stated she probably chose not to read about the cremation process and did not remember discussing the cremation process with anyone from Moloney.

About a week and a half after the cremation, she had a funeral mass for her husband with his remains present. In May, 2006, when she went to place her husband's ashes into separate little plastic bags for the family members to spread at Mount Washington, New Hampshire, she discovered that her husband's urn contained not only ashes, but also bone fragments, screws and metal clips. She used a strainer at home and separated the bones and metal from the ashes. Several days later, she was contacted by a woman from Moloney, as a standard follow-up call, and advised the woman of this situation. Peter Moloney from Moloney then came to her home and took

the fragments with him, except for one bone which she kept.<sup>1</sup> She testified that Peter Moloney was very upset and kept saying this has never happened before, and explained about the filter used in the cremation process to prevent this. When Peter Moloney sent her a check by certified mail refunding the costs for the cremation, she did not cash the check and stated, "I didn't want their money; I was angry." She further stated that if Moloney had done the proper thing there would not have been a complaint.

The plaintiff further testified that at no time had she sought or received psychological counseling prior to her husband's death. After his death, she saw two nuns, Sr. Josephine Daspro (hereinafter Daspro) and Sr. Mary Sullivan (hereinafter Sullivan), with whom she spoke concerning her anxiety level about past happenings. She met with Daspro for a few hours about a year after her husband's death and discussed with her the terrible situation she was in at the time, losing her husband as quickly as she did, adjusting to what was happening in her life, and the complication of the actual end of his life concerning the cremation and how it affected her. Then, she met with Sullivan, thereafter, once a month<sup>2</sup> and "had the feeling the situation concerning her husband's cremation" was discussed with Sullivan. She also recalled a therapist coming to her house on one occasion to speak with her, but she did not feel this was of benefit to her.

At his EBT, Peter Moloney testified that he was a shareholder and secretary of the corporation known as Moloney's Hauppauge Funeral Home, and was the funeral director, as well. He stated that Nassau Suffolk Crematory was a separate corporate entity which fell under Cemetery Law and was a not-for-profit with a board of directors consisting of his brothers, Dan Moloney and Michael Moloney, and himself. In May 2006, he became aware that the plaintiff was unhappy with the crematory services involving her husband. He immediately went to see the plaintiff at her home. Upon arrival, he saw some ash and between five and twenty staples from the minimal container in which the ashes of John Milazzo had been placed, metal pins, and particles which he could not identify as bone fragments. He stated that he had seen cremated ash remains and it was common to see bone fragments, but he could not identify the item which the plaintiff claimed to be a bone fragment as such. He took the items she claimed were in the urn from her home and reprocessed the fragments, but not the metal, utilizing the cremation process.

He further testified that his procedure for a cremation was that authorization is obtained upon receiving a call from a family and a general price list, as required by the Federal Trade Commission, is provided, and an itemized funeral statement and the forms required by the state are prepared. He described the preparation of the body and the process of cremation, which took from three to six hours, depending upon the individual and the material in which the person was placed. The cremated remains were placed in an ash pan and someone<sup>3</sup> runs a magnet through the remains to remove metallic foreign debris. If the staples are too deep in the ash remains, they may not be

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<sup>1</sup> The plaintiff testified about several photographs and stated that the ashes depicted in the photos were her dog's ashes, and the metal pieces were pieces of metal she had, and that she just wanted a picture to show what the things she found in the urn looked like. She stated that she retained one piece of bone from the urn.

<sup>2</sup> The plaintiff does not set forth either in her affidavit or in her testimony, the number of monthly visits she had with Sullivan.

<sup>3</sup> Whomever is certified by the cemetery board is permitted to process remains.

removed by the magnet. The remainder is placed in a machine which mechanically breaks down the cremated remains, which are then placed into a temporary container until placed into a vessel provided by the family. Depending upon the size of the opening of the vessel, a funnel would be used to transfer the cremated remains by using a cylinder from the processing machine into the funnel, then into the urn. These cremated remains are then signed out from Nassau Suffolk Crematory and delivered back to the funeral home.

Peter Moloney also testified that every attempt to process the cremated remains was made to alleviate issues such as metal debris in the cremains. He continued that the cremation authorization form clearly states that some foreign materials could be left behind. He stated that nothing like this had ever happened before to him in his career, but it could happen without anyone making a mistake.

The authorization form for the cremation of John Milazzo's body, signed by the plaintiff on March 8, 2006, set forth at paragraph two of the Cremation Process that "...all substances are consumed or driven off, except bone fragments (calcium compounds) and metal... as the temperature is not sufficient to consume them. At paragraph six, it continued that "[w]hen the cremated remains are removed from the cremation chamber, the skeletal remains often contain recognizable bone fragments. Unless otherwise specified, after the bone fragments have been separated from the other material, they will then be mechanically processed (pulverized).... These granulated particles of unidentifiable dimensions will be virtually unrecognizable as human remains."

#### INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

"The tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (3) a causal connection between the conduct and injury; and (4) severe emotional distress (citations omitted). In practice, courts have tended to focus on the outrageousness element, the one most susceptible to determination as a matter of law (citations omitted). Unlike other intentional torts, intentional infliction of emotional distress does not proscribe specific conduct, but imposes liability based on after-the-fact judgments about the actor's behavior.... Liability for the tort of intentional infliction of emotional distress is found only where the conduct has been 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" (see, **Howell v New York Post Company, Inc.**, 81 NY2d 115, 596 NYS2d 350 [1993]; **Sarlo v Fairchild Sons, Inc.**, 256 AD2d 322, 681 NYS2d 555 [2<sup>nd</sup> Dept 1998]).

Since the tort of intentional infliction of emotion distress is unlike other torts in that an actor may not have notice of the precise conduct proscribed, the standard of liability is strict. Recovery for emotional harm to a close relative resulting from negligent mishandling of a corpse is recognized. Recovery in such cases is based on interference with a relative's quasi-property right in the body, which is a legal fiction constructed to protect the personal feelings of the next-of-kin (see, **Roach v Stern**, 171 Misc2d 80, 653 NYS2d 532 [Sup. Ct. of New York, Kings County 1996]).

Here, with regard to the metal shards and an unidentified object in the cremated remains, the Court finds, as a matter of law, that the conduct did not rise to a level which would satisfy the "extreme and outrageous conduct" element of the cause of action premised upon the intentional infliction of emotional distress. Nor have the evidentiary submissions created a factual issue

concerning whether the defendants intentionally allowed any particles of cremation to remain, including screws, staples, or remnants of the hard container in which the decedent was cremated.

“Not every deplorable act...is redressable in damages.” (**Andrews v Bruk**, 220 AD2d 376, 631 NYS2d 771 [2<sup>nd</sup> Dept 1994] [internal quotation marks omitted]). Additionally, the testimony establishes that the cremation process takes into account that metal may remain, and bone fragments may not be completely burned. The remains are then put through the mixer or crusher after cremation to reduce the size of the cremated fragments. A funnel is then used to power the cremains into the vessel which is to house the cremains. Based upon the foregoing, no intentional conduct by the defendants has been demonstrated showing that the defendants intentionally left fragments in the cremains or intentionally caused upset and emotional distress to the plaintiff. The plaintiff has failed to raise a triable issue of fact to preclude summary judgment on the issue of the intentional infliction of emotional distress.

Accordingly, the cause of action premised upon the intention infliction of emotional distress is dismissed with prejudice.

### NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

One to whom a duty of care is owed may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma but with ensuing psychic harm with residual physical manifestations (**Johnson v State of New York**, 37 NY2d 378, 372 NYS2d 638 [1975]). In **Johnson v State of New York**, supra, the Court of Appeals noted exceptions to the general rule in cases involving the negligent false transmission of notice of the death of a family member, and for the negligent mishandling of a corpse, stating that in such cases, “there exists an especial likelihood of genuine mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.”

The Court, in **Brown v New York City Health and Hospitals Corporation**, 225 AD2d 36, 648 NYS2d 880 [2<sup>nd</sup> Dept 1996], after noting that physical injury is no longer a necessary component of a cause of action to recover damages for the negligent infliction of emotional distress, stated the following general rule with regard to claims for such injuries: “[i]t is well settled that the circumstances under which recovery may be had for purely emotional harm are extremely limited and, thus a cause of action seeking such recovery must generally be premised upon a breach of a duty owed directly to the plaintiff which either endangered the plaintiff’s physical safety or caused the plaintiff fear for his or her own physical safety” (see, **Sanders v St. Vincent’s Hospital**, 2002 NY Slip Op 50087U [Sup. Ct. of New York, New York County 2002]). The Court, in **Sanders v. St. Vincent’s Hospital**, supra, further noted that the Supreme Court, Appellate Division, First Department had repeatedly stated that a cause of action for negligent infliction of emotional distress must be based on allegations of conduct so extreme in degree and outrageous in character as to go beyond all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized society.

The Court, in **Bailey v Benta’s Funeral Home, Inc.**, 2010 NY Slip Op 30368U [Sup. Ct. of New York, New York County]), applied such standard in considering a cause of action premised upon the negligent infliction of emotional distress and found that “[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.’”

