

**Rugova v City of New York**

2013 NY Slip Op 33937(U)

May 24, 2013

Supreme Court, Bronx County

Docket Number: 303175/09

Judge: Larry S. Schachner

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This opinion is uncorrected and not selected for official publication.

[\* 1]

## PART 03

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:Case Disposed   
Settle Order   
Schedule Appearance -----X  
RUGOVA, ALBANA

Index No. 0303175/2009

-against-

Hon. LARRY S. SCHACHNER

THE CITY OF NEW YORK

Justice.  
-----XThe following papers numbered 1 to 3 Read on this motion, DISMISSAL  
Noticed on September 28 2012 and duly submitted as No. 14 on the Motion Calendar of October 19, 2012

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *motion is decided in accordance with the annexed memorandum decision.*

Motion is Respectfully Referred to:

Justice: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: 5/24/13Hon.   
LARRY S. SCHACHNER, J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA-3**

-----X  
ALBANA RUGOVA, as Administrator of the Estate:  
DARDEN BINAKAJ, ALBANA RUGOVA,  
Individually, DRITA BINAKAJ, MUSA BINAKAJ :  
and DONIKA BINAKAJ, deceased,

Index No. 303175/09

Plaintiffs,

- against -

THE CITY OF NEW YORK, CHIEF MEDICAL  
EXAMINER OF THE CITY OF NEW YORK, :  
NEW YORK CITY HEALTH AND HOSPITALS :  
CORPORATION, POLICE DEPARTMENT OF :  
THE CITY OF NEW YORK, POLICE OFFICER :  
VICKERY (TAX ID NUMBER 926258), POLICE :  
OFFICER SHARPE, POLICE OFFICER :  
DELANUEZ and POLICE OFFICER FILIBERTY, :

Defendants.

**DECISION/ORDER**

**Present:**

**Hon. Larry S. Schachner**  
Justice, Supreme Court

-----X  
Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion and cross motion for summary judgment:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Affirmation and Exhibits Annexed</b>	<b>1</b>
<b>Notice of Cross Motion and Affirmation</b>	<b>2</b>
<b>Affirmation in Opposition to Cross Motion and in Reply</b>	<b>3</b>

Plaintiffs commenced this action to recover damages for loss of rights to sepulcher allegedly sustained beginning on Sunday, April 20, 2008 after Darden Binakaj (“decedent”) died as a result of a motor vehicle accident on the southbound Bronx River Parkway, at or near 216<sup>th</sup> Street at approximately 12:50 A.M. Plaintiffs allege that defendants improperly failed to notify them of decedent’s death, improperly conducted an autopsy of decedent and deprived plaintiffs of their right to provide decedent a proper burial. Additionally, plaintiffs claim negligent investigation and negligent design, construction, and maintenance of the Bronx River Parkway.

Defendants, The City of New York s/h/a Chief Medical Examiner of the City of New York, New York City Health and Hospitals Corporation, The City of New York s/h/a Police Department of the City of New York, P.O. Dennis Vickery, P.O. Michael J. Sharpe, P.O. Randy Delanuez and P.O. Milton Filiberty (collectively City) now move for summary judgment on the grounds that (1) plaintiffs have not pled and cannot prove a special duty on their first cause of action for negligent failure to investigate and negligent failure to notify next of kin of decedent's death; (2) plaintiffs inappropriately rely on Public Health Law § 4214 (1) for their second and fourth causes of action for negligent performance of an autopsy, and the Medical Examiner's autopsy was proper; (3) "neither unreasonable passage of time nor improper burial exists to give rise to a claim for loss of sepulcher" with respect to plaintiff's third cause of action for negligent interference with the decedent's right to a proper burial, and (4) defendants' decisions regarding the design and planning of the Bronx River Parkway were made in the exercise of a discretionary governmental function (plaintiff's fifth cause of action).

Plaintiffs cross-move for summary judgment for the loss of the right of sepulcher as a result of defendants' failure to notify decedent's next of kin of his death, the performance of an unauthorized autopsy, and through their interference with decedent's right to a proper burial. Plaintiffs do not oppose that portion of defendant's motion pertaining to the negligent design and planning of the Bronx River Parkway. Plaintiffs adopt the City's Procedural Background and Statement of Facts for the purposes of this motion.<sup>1</sup> The motion and cross motion are consolidated for disposition and decided as follows.

As there is no cause of action for negligent failure to investigate in New York and

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<sup>1</sup>Plaintiffs' cross motion footnote 1.

plaintiffs do not oppose dismissal of their claim for the negligent design and planning of the Bronx River Parkway, summary judgment dismissing these claims is granted in favor of the City.

“It is well established that the common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent’s body for preservation and burial, and that damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent’s body.” *Melfi v Mount Sinai Hospital*, 64 AD3d 26 (1<sup>st</sup> Dept 2009). In order “for a right of sepulcher claim to accrue (1) there must be interference with the next of kin’s immediate possession of decedent’s body *and* (2) the interference has caused mental anguish, which is generally presumed.” *id.* at 39 (emphasis supplied). “Interference can arise either by unauthorized autopsy, or by disposing of the remains inadvertently or, as in this case, by failure to notify next of kin of the death.” *id.* Moreover, “because the injury is solely emotional, it is axiomatic that a next of kin cannot be injured emotionally until he or she becomes aware or has knowledge that his or her right of sepulcher has been interfered with unlawfully.” *id.*

A review of the record before the court reveals that City Police Officers Dennis Vickery and Michael Sharpe responded to a radio call regarding the subject accident, conducted the initial on-the-scene accident investigation and remained on the scene until approximately 5:00 A.M. Officer Sharpe testified that when there is a driver fatality, the detective assigned to the case would typically be responsible for notifying the registered owner of the vehicle. There were multiple police units at the scene. Detective Patrick Rooney also responded to the subject accident scene and conducted an investigation which included calling for a medical examiner and medical examiner transport team to respond at the scene. Medical Examiner Dr. Aglae Charlot

went to the scene of the accident on the morning of Sunday April 20, 2008 at approximately 2:30 A.M. Dr. Charlot conducted an investigation that included taking photographs of the scene and decedent. At approximately 4:00 A.M. Dr. Charlot notified the Communications Unit of the Medical Examiner's Office that the body should be picked up and brought to the Bronx office where the determination whether or not an autopsy should be conducted is made. None of the police officers involved in the investigation had contacted the family up to that point. An autopsy was performed on the body of Darden Binakaj on April 20, 2008 commencing at 9:00 A.M. by the Office of the Chief Medical Examiner (OCME).

From approximately 7:00 to 10:00 A.M. on Monday April 21, 2008 decedent's relatives searched for him since he had not returned home. After hearing of and then reading a newspaper article about a car accident, the family went to the location of the subject accident where they found debris from the accident and some of decedent's personal items. They did not contact the police at this point but split up to check the two closest hospitals. At a police station inside North Central Hospital, Albana Rugova spoke to police officers, explaining that her brother had been killed in a car accident, and asked if his body was at this hospital. The police responded that he was not there, but called Jacobi Hospital and found out that decedent was there. The family members who were at North Central Hospital then returned to their mother's house. At or around 11:00 or 12:00 in the evening on April 21, 2008, decedent's sister Albana Rugova's husband Kujtim Rugova, went to Jacobi Hospital and identified decedent's body and was informed that an autopsy had been performed on decedent's body.

The "authority to conduct an autopsy derives solely from statute." *Bambrick v Booth Memorial Medical Center*, 190 AD2d 646 (2d Dept 1993). New York City Charter § 557(f) (1)

states, in pertinent part,

“The chief medical examiner shall have such powers and duties as may be provided by law in respect to bodies of persons dying from criminal violence, *by accident*, by suicide, suddenly when in apparent health, when unattended by a physician, in a correctional facility or in any suspicious or unusual manner or where an application is made pursuant to law for a permit to cremate the body of a person.”  
(Emphasis added)

In addition, New York City Administrative Code Section 17-203 states, in relevant part,

“If it may be concluded with reasonable certainty that death occurred from natural causes or obvious traumatic injury, and there are no other circumstances which would appear to require an autopsy, the chief medical examiner, deputy chief medical examiner or medical examiner or medical investigator in charge shall certify the cause of death and file a report of his or her findings in the office of chief medical examiner. *If, however, in the opinion of a medical examiner, an autopsy is necessary, the same shall be performed by a medical examiner.*” (Emphasis added)

Moreover,

“[W]hile the medical examiner has the statutory authority to exercise his or her discretion to perform an autopsy in certain cases, and to remove and retain bodily organs for further examination and testing in connection therewith, he or she also has the mandated obligation pursuant to Public Health Law § 4215 (1) and the next of kin’s common-law right of sepulcher, to turn over the decedent’s remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains have been fulfilled.”  
*Shiple v City of New York*, 80 AD3d 171, 178 (2d Dept 2010).

In the instant matter, plaintiffs allege that defendants knew of the decedent’s death but failed to notify the plaintiffs for nearly 36 hours and that the autopsy was unauthorized. However, since the OCME has the discretion to conduct an autopsy in accident cases, plaintiffs have failed to demonstrate that the autopsy was unauthorized or negligently performed.

Plaintiffs' cross motion for summary judgment for the loss of the right of sepulcher as a result of defendants' failure to notify decedent's next of kin of his death, and through their interference with decedent's right to a proper burial, is granted based upon the First Department decision in *Tinney v City of New York*, 94 AD3d 417, 418 (1<sup>st</sup> Dept 2012). In that case, summary judgment on the issue of liability in an action for alleged violation of the right to sepulcher, was granted as the First Department found that the City's omissions gave rise to a cause of action for loss of the right to sepulcher since the "defendant had all the necessary identifying documents." *Tinney v City of New York*, 94 AD3d 417, 418 (1<sup>st</sup> Dept 2012).

The City contends that *Valdez v City of New York*, 18 NY3d 69 (2011) is controlling. *Valdez* held that, "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general." *Valdez v City of New York*, 18 NY3d 69, 76-77 (2011). In *Valdez*, plaintiff "sued the City of New York for failing to provide her with adequate police protection to prevent the attack" by her former boyfriend who shot her outside her apartment after she reported to police that he had threatened to kill her. *id.* at 72-73. Thus, *Valdez* is a case that, on its facts, follows a prior line of cases where it was generally held that "[t]he 'special relationship' doctrine applies in situations where the City is alleged to be liable for injuries caused by a third party non-employee, often a criminal, based on alleged failure by the City to provide police protection or perform some other governmental function." *Rodriguez v City of New York*, 189 AD2d 166, 172 (1<sup>st</sup> Dept 1993).

However, the instant matter is distinguishable from *Valdez* as it does not involve injuries caused by a third party non-employee, but rather, it is the alleged failure to notify the next of kin

regarding the decedent's death on the part of the City's own employee police officers and the resulting interference with the decedent's right to a proper burial that is the gravamen of plaintiffs' cause of action for loss of the right of sepulcher. *See generally, Tinney v City of New York*, 94 AD3d 417, 418 (1<sup>st</sup> Dept 2012) (where City failed to notify plaintiffs that they had located their father's body and buried him five years before a relative discovered the information from the medical examiner's office in 2006). In addition, in *Duffy v City of New York*, 178 AD2d 370, 371 (1<sup>st</sup> Dept 1991), the Appellate Division, First Department held that "the record demonstrates that plaintiff has a viable cause of action against it [the City of New York] for negligently withholding news of the death of her son for approximately 18 months, thereby depriving plaintiff of her right to take possession of the body for a proper burial." The length of time that the next of kin were deprived of the decedent's body and its resulting interference with immediate possession and burial are issues of fact that go toward damages that must be resolved at trial.

Accordingly, summary judgment is granted in favor of the City only as to plaintiffs' claims for negligent failure to investigate, negligent performance of an autopsy and negligent design and planning of the highway. On the cross motion, summary judgment on liability is granted in favor of plaintiffs for the loss of the right of sepulcher as a result of defendants' failure to notify decedent's next of kin of his death, and through their interference with decedent's right to a proper burial.

This constitutes the decision and order of the court.

  
LARRY S. SCHACHNER, J.S.C.

Dated: May 24, 2013