

Turner v Owens Funeral Home, Inc.

2013 NY Slip Op 34261(U)

November 22, 2013

Supreme Court, Bronx County

Docket Number: Index No. 20229/2012E

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

Index No. 20229/2012E
Motion Calendar No.
Motion Date:

SHATIMA TURNER, BUSTER TURNER, ANDRE TURNER,
DEXTER TURNER, YUL TURNER, GAIL TURNER,
YOLANDA DOVE, and EUGENE TURNER,

Plaintiffs,

-against-

OWENS FUNERAL HOME, INC., ISAAH OWENS,
individually and as owner and operator of OWENS FUNERAL
HOME, INC., NORTH SHORE-LONG ISLAND JEWISH
MEDICAL CENTER, NORTH SHORE-LONG ISLAND
JEWISH HEALTH SYSTEM, INC., NORTH SHORE-LONG
ISLAND JEWISH MEDICAL CARE, PLLC, NORTH SHORE-
LONG ISLAND JEWISH MEDICAL GROUP, and
"JOHN DOE No. 1" through "JOHN DOE No. 10" inclusive,
the names of the last 10 Defendants being fictitious, the true
names of said Defendants being unknown to Plaintiffs,

Defendants.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this cross-motion to dismiss complaint or compel discovery:

Papers

Numbered

Notice of Cross-Motion by Plaintiffs, Affirmation of W. Charles Robinson, Esq. dated November 9, 2012 in Support of Cross-Motion and in Opposition to Motion to Compel by Defendants North Shore-Long Island Jewish Medical Center, North Shore-Long Island Jewish Health System, Inc., North Shore-Long Island Jewish Medical Care, PLLC, North Shore-Long Island Jewish Medical Group, Affidavit of Shatima Turner dated November 7, 2012 in Support of Cross-Motion, Affidavit of Duval H. Naughton dated November 9, 2012 in Support of Cross-Motion, and Exhibits ("A" through "J")..... 1

Plaintiffs' Memorandum of Law by W. Charles Robinson, Esq. dated November 1, 2012 in Support of Cross-Motion and in Opposition to Motion to Compel..... 2

Affirmation of David Weiser, Esq. dated May 23, 2012 in Opposition to Plaintiffs' Cross-Motion and Exhibits ("A" through "C")..... 3

Reply Affirmation of W. Charles Robinson, Esq. dated February 10, 2013..... 4

After due deliberation and upon the foregoing papers, the Decision/Order on this cross-motion is as follows:

The plaintiffs' cross-motion seeks 1) to add Andrew Cleckley as a party defendant pursuant to CPLR § 1003, 2) leave to serve a second amended complaint, 3) summary judgment on issues of liability as against defendants Owens Funeral Home, Inc. and Isaiah Owens (collectively, "Owens"), 4) to strike Owens' answer for their purported failure to furnish certain discovery, 5) to preclude Owens from testifying at trial regarding those items for which a bill of particulars as to affirmative defense has not been provided, 6) to strike the answer(s) of defendant North Shore-Long Island Jewish Medical Center, North Shore-Long Island Jewish Health System, Inc., North Shore-Long Island Jewish Medical Care, PLLC, and North Shore-Long Island Jewish Medical Group (collectively, "Hospital") for their purported failure to furnish certain discovery, and 7) to strike the Hospital's bill of particulars as to affirmative defenses. The cross-motion is hereby granted solely as order below, and is otherwise denied.

This action seeks monetary damages for the alleged mishandling of the remains of plaintiff's decedent. Preliminarily, the Court will disregard any technical defect with the propriety of the plaintiffs' cross-motion, since the non-moving party has incurred no prejudice and has had ample opportunity to argue the merits of the relief sought (*see Sheehan v. Marshall*, 9 AD3d 403 [2nd Dept 2004]). The related motions were decided by Decision and Order of Hon. Alexander W. Hunter, Jr., J.S.C. dated August 6, 2013. The instant cross-motion which involved discovery disputes was then referred to me.

The application to add Andrew Cleckley to this action as a defendant is granted without opposition. Leave is to be freely given where there has been no showing of prejudice upon the granting of the plaintiff's application. Pursuant to C.P.L.R. Rule 3025(b) and § 1003, the plaintiffs are hereby granted leave to file and serve a Supplemental Summons and Complaint naming Andrew Cleckley as a direct defendant in this action.

With respect to that branch of the cross-motion seeking summary judgment, the plaintiffs contend that there are no material issues of fact as to whether Owens took possession of the decedent's body without the proper authorization. Plaintiff Shatima Turner ("Turner") avers that she consulted with Owens with respect to arrangements for the decedent's funeral. However, Turner states that she never signed a proposal or any authorization permitting Owens to take possession of the decedent's body. Turner

consulted with a different undertaker, Unity Funeral Chapel, Inc. ("Unity") and retained them for the funeral arrangements. Apparently, upon contacting the Hospital to retrieve the body, Unity was informed that same had been released to Owens. The Hospital's "Release Form" indicates that "Andrew Cleckley" took possession of the body from the Hospital on behalf of Owens on December 30, 2011. Duval H. Naughton, Unity's funeral director, avers that he promptly managed to have Owens bring the body to his funeral home, where, upon inspection, it was found to have been embalmed with damage to the right ear and eyelid. The plaintiffs contend that there is no issue that Owens improperly possessed the body and damaged it.

Turner's affidavit notes that she was selected by the decedent's family (decedent being her grandfather) to make arrangements for his funeral. Turner states that while she initially consulted with Owens on December 28, 2011, she advised them that she was shopping around and had an appointment with Unity to secure their proposal. Turner acknowledges that Owens prepared a written proposal, which Turner declined to sign without first consulting with the other family members. After consulting with Unity on the following day, Turner decided to retain their services. She attaches a signed written contract for such services dated December 30, 2011. Turner states that she received a call from Unity on December 31, 2011 advising that defendant Hospital had released the decedent's body to an "Andrew Cleckley" on behalf of Owens. It appears that Turner and Unity contacted Owens, and arranged for the transfer of the body on that same day. Turner states that Unity's undertaker advised her that the body had already been embalmed, and that it had been damaged. Turner explicitly states that Owens was never authorized to embalm the decedent's body, or even to take custody of it.

In further support of this branch of the cross-motion, the plaintiffs submit an affidavit from Naughton. He confirms that Turner met with Unity on December 29, 2011 to discuss funeral arrangements for her grandfather. He states that Unity was retained by contract dated December 30, 2011, and he prepared a release for the body. Naughton states that when he contacted the Hospital to retrieve the body, defendant Hospital had already released the body to "Cleckley" on behalf of Owens. Finally, Naughton avers that while he received the body promptly, it had already been embalmed and presented with damage to the right ear and right eyelid.

In opposition to the application seeking summary judgment, Owens notes that no depositions have been taken, depriving them of pertinent information to defend these claims. More importantly, Owens

submits his own affidavit stating that when custody of the body was given to the other undertaker, there was no damage as described in the Naughton affidavit. Moreover, he states that it was the plaintiffs' intention to embalm the decedent's body, and notes that Turner does not deny that the body was to be embalmed. Owens argues that any damage must have been caused by Unity, a direct business competitor. Owens avers that he personally viewed and examined the body when it left his funeral home, and that the body was in good preservation and appearance, with no damage or evidence of mutilation.

Owens has failed to raise any triable issue of fact with respect to its improper possession of the decedent's body. Owens concedes that it did take possession of the body, but does not put forth any evidence or testimony to rebut Turner's contention that Owens was never authorized to retrieve the body and embalm it. Such evidence would be in Owens's possession. Owens has not demonstrated what further discovery is necessary to defend on this claim. Accordingly, it is undisputed that Owens possessed the body and embalmed it without permission (*see Melfi v. Mount Sinai Hospital*, 64 AD3d 26 [1st Dept 2009]). Issues remain with respect to what damages, if any, arise from this. The contradictory affidavits from persons with personal knowledge regarding the condition of the decedent's body raise material issues of fact with respect to the cause of any damage to the decedent's body. In addition, the plaintiffs have only satisfied their burden on this issue as to defendant Owens Funeral Home, Inc., and not individual defendant Isaiah Owens. The plaintiffs have not proffered sufficient evidence to demonstrate that he is liable in his individual capacity.

With respect to the branch of the cross-motion seeking to strike Owens' answer for discovery violations, the plaintiffs contend that Owens has not properly responded to items numbered 10 and 11 of the plaintiff's discovery notice dated May 30, 2012, and failed to respond at all to items numbered 15, 16, and 19 thereto.

Owens submits supplemental responses along with its motion papers. Specifically, Owens has responded to items numbered 10 (funeral licenses of Owens and Cleckley), 11 (suspensions/revocations), 14 (incident reports), 15 and 16 (prior or subsequent similar incidents), 19a (post-death hospital records of decedent), 19b (documents produced in connection with handling or involvement of decedent), 19(c)-(g), and 19(k)-(n).

Requests numbered 19(h) (seeking the home address of every employee of Owens on the date(s) of the "incident") 19(I) (complete employment records and personnel files of every employee of Owens

on the date(s) of the “incident”), and 19(j) (Owens’s tax records for one year prior and one year after the “incident”) are palpably improper and overbroad, and require no response (*see Spancrete Northeast, Inc. v. Elite Associates, Inc.*, 148 AD2d 694 [2nd Dept. 1989] and *Grossman v. Lacoff*, 168 AD2d 484 [2nd Dept. 1990]) They seek confidential and private information which does not appear relevant to the issues in this case.

With respect to the branch of the cross-motion seeking to preclude Owens, the plaintiff contends that Owens has failed to respond to the plaintiffs’ demand for a bill of particulars as to affirmative defenses dated May 30, 2012. This application is denied, since Owens has submitted a responsive bill of particulars in connection with its opposition to the instant cross-motion.

With respect to the branch of the cross-motion seeking to strike the Hospital’s answer, the plaintiff argues that the Hospital inadequately responded to items numbered 14, 15, 16, 19a, 19b, 19g, 19i, 19j, 19l, 19n, and 19p of the plaintiffs’ discovery notice dated May 30, 2012. The Court notes that there is no demand numbered “19p” in the discovery notice submitted in connection with this motion.

Requests numbered “19(I)” and “19(j)” require no response for the reasons stated above.

The Hospital did furnish several documents in response to items numbered 14, 19a, 19b, 19g, and 19l, and the plaintiff has not shown how they are incomplete or inadequate.

With respect to item number 19n, while the Hospital’s Response to Plaintiffs’ Combined Demands dated September 11, 2012 states that a copy of the “NSLIJ Policy on Receipt and Release of Deceased Bodies” is attached, same is omitted from the papers submitted on this motion. To the extent it has not been provided, the Hospital should do so.

Items numbered 15 and 16 request all records with respect to prior and subsequent incidents pertaining to the “alleged mishandling of decedents”. Given the sensitivity of such documents in that they would likely disclose medical information of non-parties and other issues concerning whether they are subject to disclosure, these items should be submitted to Chambers for an *in camera* review, along with a privilege log and legal brief to be also served upon the plaintiffs, who may submit a reply brief.

With respect to the branch of the motion seeking to strike the Hospital’s bill of particulars as to affirmative defenses, the plaintiff contends that several of the defenses are without merit. The statute of limitations defense is dismissed, since it is uncontested that this action was commenced within 4 months of the incident giving rise to this action. The Hospital has not shown what additional discovery it needs

to set forth facts supporting this defense. The whereabouts of the decedent's body on certain dates is known to the Hospital, who took in and subsequently released the body.

Dismissal of the Hospital's affirmative defense that the plaintiffs caused or contributed to their own damages is denied. Additional discovery, including depositions, is required to elicit information not otherwise available to the Hospital, such as the acts and omissions of the various plaintiffs in conjunction with the incident.

The affirmative defense that the complaint does not contain the plaintiff's address is dismissed. This defect is curable, and has been remedied by the plaintiff (*see Archer v. Astra Pharmaceutical Products, Inc.*, 133 Misc2d 804 [Sup. Ct. N.Y. Co. 1986] and *Forte v. Long Island Railroad*, 143 Misc2d 663 [Sup. Ct. N.Y. Co. 1989]).

Dismissal of the Hospital's affirmative defense that the plaintiffs lack the legal capacity to maintain this action is denied. The Hospital may pursue discovery concerning whether each of the eight individual plaintiffs is a proper next-of-kin for purposes of this action (*see Massaro v. Charles O'Shea Funeral Home, Inc.*, 292 AD2d 349 [2nd Dept. 2002] and *Wainwright v. New York City Health and Hospitals Corporation*, 61 AD3d 852 [2nd Dept. 2009]). In addition, this defense is statutory in nature, and need not be amplified in a bill of particulars (*see Arnold v. Siegel*, 296 AD2d 363 [2nd Dept. 2002]).

Dismissal of the Hospital's affirmative defense that the complaint fails to state a cause of action is denied. This defense is statutory in nature, and need not be amplified in a bill of particulars (*see Arnold v. Siegel*, 296 AD2d 363 [2nd Dept. 2002]).

Accordingly, it is hereby

ORDERED, that the plaintiffs have leave to add Andrew Cleckley to this action as a defendant and to file and serve a corresponding supplemental summons and complaint; and it is further

ORDERED, the plaintiff have summary judgment solely as against defendant Owens Funeral Home, Inc., such that Owens Funeral Home, Inc. is adjudicated to have possessed and embalmed the body of plaintiffs' decedent without permission and is liable for those damages proven to have resulted from such unauthorized possession and embalming and it is further

ORDERED, that to the extent not already furnished, defendant Hospital shall provide the plaintiffs with a copy of the "NSLIJ Policy on Receipt and Release of Deceased Bodies" no later than 30 days following service of a copy of this Order with notice of entry; and it is further

ORDERED, that defendant Hospital shall submit to my Chambers, Room 521 of this courthouse, those items responsive to demands numbered 15 and 16 of the plaintiffs' discovery notice dated May 30, 2012 for an *in camera* review, along with a privilege log and legal brief no later than 30 days following service of a copy of this Order with notice of entry; the plaintiffs shall have 20 days from service of the Hospital's brief to submit a reply brief; and it is further

ORDERED, that the statute of limitations defense asserted by defendant Hospital is hereby dismissed; and it is further

ORDERED, that defendant Hospital's affirmative defense that the summons and complaint does not contain the plaintiffs' address is dismissed.

The foregoing constitutes the Decision and Order of this Court.

DATED: 11-22-13
Bronx, New York

LGD
HON. LAURA G. DOUGLAS
J.S.C.