

Martin v Ability Beyond Disability

2014 NY Slip Op 33021(U)

October 6, 2014

Sup Ct, Westchester County

Docket Number: 64948/2013

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

Commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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TUWANDA C. MARTIN, as Administratrix of the Estate of JOHN ALVIN MARTIN II, deceased, JOHN MARTIN, EMMA MARTIN, and TUWANDA C. MARTIN, Individually,
Plaintiff,

Index No. 64948/2013

-against-

DECISION & ORDER

ABILITY BEYOND DISABILITY and PHILIP E. CONATY,
Defendants.

-----x
The following papers numbered 1 to 10 were considered on defendants' motion to dismiss and plaintiff's cross motion to strike Philip Conaty's affirmation in support of the defendants' motion.

PAPERS NUMBERED

Notice of Motion/Affidavits/Exhibits	1-3
Notice of Cross Motion/Affidavits/Exhibits/Memo of Law	5-8
Defendants' Affidavits Opposition to the Cross Motion	9
Defendants' Reply	10

FACTUAL AND PROCEDURAL BACKGROUND

In 1985, at the age of 15 John Martin II suffered a traumatic brain injury rendering him incapacitated. By order dated March 3, 1987, defendant Philip E. Conaty was appointed guardian of John.

On November 3, 2012, while a resident of defendant Ability Beyond Disability ("the facility"), John died. According to Conaty, he attempted to contact John's family but did not have updated contact information. Thereafter, on November 9, 2012, at Conaty's direction

John was buried at Oakwook Cemetery, Yonkers, New York. Within a week of the funeral, plaintiff Emma Martin, John's mother, called the facility and was advised of her son's death. According to defendants, thereafter they worked with plaintiffs to disinter John and move his remains to a cemetery of the family's choosing in Monticello on or about November 26, 2012.

On September 24, 2013, plaintiffs commenced this action seeking damages from both defendants on a claim of loss of sepulcher and against Conaty, individually, seeking money damages for his failure to comply with provisions of Article 81 of the Mental Hygiene Law. In the complaint, plaintiffs allege, among other things, that Conaty failed to notify them of John's death, failed to allow John to have the greatest amount of independence in light of his limited functioning failing to consult with the family about his care, failing to visit with John at least 4 times per year, and by failing to file annual reports. Plaintiffs claim these violations of the Mental Health Law resulted in their suffering emotional damages.

Defendant Conaty moves to dismiss the complaint against him on the ground that an action cannot be brought against a court appointed guardian without first seeking permission from the court, that plaintiffs' lack standing because they are not in privity of contract with Conaty, and that Article 81 provides guardians with immunity from actions based upon their failure to comply with the provisions of statute.

Plaintiffs cross move to strike the affirmation of Conaty submitted in support of the motion on the ground that a party to an action cannot submit an affirmation pursuant to CPLR 2106 which permits the use of affirmations only by attorneys, physicians, osteopaths and dentists.

Plaintiffs also oppose the motion on the ground that privity of contract is irrelevant, that the reporting requirements of Mental Hygiene Law 81.31 and 81.32 apply to Conaty, and that Conaty is not immune from claims sounding in common law negligence.

In opposition to the cross motion, defendants submit an affidavit from Conaty which is identical to the affirmation previously submitted.

DISCUSSION

Defendants' Motion to Dismiss

Once a guardian is appointed for an incapacitated person, litigation against the incapacitated person and against the guardian as representative of the incapacitated person should not proceed without the permission of the court which appointed the guardian (see *Wright v. Rickards*, 942 N.Y.S.2d 153, 154+, 94 A.D.3d 874, 875 [2nd Dept. 2012]; *Carter v. Beckwith*, 128 N.Y. 312, 316, 28 N.E. 582; *Matter of Linden-Rath*, 188 Misc.2d 537, 539, 729 N.Y.S.2d 265). However, permission to commence this type of action against the defendants can be granted *nunc pro tunc* (see *Grant v. Humbert*, 114 App.Div. 462, 466, 100 N.Y.S. 44; *Matter of Linden-Rath*, 188 Misc.2d at 540 n. 1, 729 N.Y.S.2d 265).

In their motion papers and opposition papers, defendants concede that plaintiffs have alleged a claim for loss of sepulcher against Conaty (the resolution of which is a question of fact), they argue that cause of action should be dismissed because plaintiffs failed to seek leave of Court.

In view of the fact plaintiffs may have a viable claim of loss of sepulcher, the Court grants plaintiffs permission to assert this claim *nunc pro tunc* and, therefore, DENIES Conaty's motion to dismiss the first cause of action.

However, with respect to the second cause of action, Conaty's motion to dismiss that cause of action must be granted.

The plaintiffs do not have standing to bring an action against Conaty. First the Court notes that Conaty owes no duty to the plaintiff's other than in his capacity as a guardian for John. Moreover, the remedy available to plaintiffs is not an action seeking damages against Conaty individually, but an action pursuant to Article 81 to remove a guardian due to misconduct (see Mental Hygiene Law § 81.35; see also *In re Carmen H.*, 90 A.D.3d 1049, 935 N.Y.S.2d 516 [2nd Dept 2011]).

The Court also notes that Conaty was appointed guardian of John and was ordered to protect John's funds. There is no allegation that Conaty misappropriated any of John's funds or that any of the day to day decisions made by Conaty were detrimental to John. To the extent that there is penalty for failing to comply with the reporting provisions of Article 81 the penalty imposed would be the reduction of the guardian fees awarded to the guardian (see Mental Hygiene Law § 81.44). Here, Conaty has not submitted an application for guardian fees.

Based on the foregoing, defendants' motion to dismiss the first cause of action is DENIED and to dismiss the second cause of action is GRANTED.

Plaintiff's Motion to Strike Conaty's Affirmation

To the extent that the submission of Conaty's affirmation in support of his motion was improper, that defect has been remedied by the submission of an affidavit setting for identical facts (see generally *Wester v Sussman*, 304 A.D.2d 656, 757 N.Y.S.2d 500 [2nd Dept 2003]).

Accordingly, plaintiffs' motion is DENIED.

The parties are directed to appear in the Compliance Part on December 3, 2014 as previously scheduled.

Dated: White Plains, New York
October 6, 2014



HON. WILLIAM J. GIACOMO, J.S.C.