

<b>Nwankwo v New York-Presbyt.</b>
2016 NY Slip Op 31047(U)
June 3, 2016
Supreme Court, New York County
Docket Number: 150800/12
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X  
SAMUEL NWANKWO, FRANK NWANKWO,  
BENJAMIN NWANKWO, and DINAH  
NWANKWO,

Index No. 150800/12

Plaintiffs,  
-against-

NEW YORK- PRESBYTERIAN,  
Defendant.  
-----X

**Joan A. Madden, J.:**

Defendant New York Presbyterian Hospital s/h/a New York-Presbyterian (NYPH) moves for an order granting reargument of this court’s decision and order dated January 25, 2016 (“the original decision”) and, upon reargument, dismissing the claims brought by plaintiffs Samuel Nwankwo, Frank Nwankwo and Benjamin Nwankwo on the ground that they lack capacity to sue or, in the alternative, directing the parties interested in the estate of Dinah Nwankwo to show cause why the action insofar as it is submitted on her behalf should not be dismissed for failure to timely effect substitution of a personal representative. Plaintiffs oppose the motion.

Background

This action seeks damages for NYPH’s alleged negligence in the mishandling of the corpse of Joshua Nwankwo (“the decedent”), who died at NYPH’s hospital on July 14, 2011.<sup>1</sup> At the time of his death, Mr. Nwankwo was unmarried, had no domestic partner, or children. Plaintiff Dinah Nwankwo, who is now deceased, was the decedent’s mother. Plaintiffs Samuel Nwankwo, Frank Nwankwo and Benjamin Nwankwo are the decedent’s brothers.

---

<sup>1</sup>NYPH’s request to dismiss plaintiffs’ cause of action for the negligent infliction of emotional distress was granted in the original decision.

After Ms. Nwankwo died, the action was stayed on April 24, 2014, pending the appointment of an administrator for her estate. The remaining plaintiffs, who maintain that they were unable to obtain letters of administration from Nigeria, where Ms. Nwankwo was located when she died,<sup>2</sup> made an oral application to sever Ms. Nwankwo's claim. NYPH opposed the motion, arguing, *inter alia*, that Ms. Nwankwo was a necessary party to the action, as she is a next of kin, pursuant section 4-1.1 of the EPTL, and that severance would prejudice NYPH by forcing it to defend two cases in the event the letters of administration were obtained for Ms. Nwankwo. By decision made on the record on January 22, 2015, this court granted the motion to sever, but noted that it makes "no determination with respect to whether the siblings who are plaintiffs in this action have a cause of action."

NYPH then moved to dismiss, arguing that the remaining plaintiffs have no capacity to sue since the right of sepulcher, that is the right to immediate possession of a decedent's body for preservation and burial, is limited to decedent's mother (and now her estate) as next of kin, citing Gostkowski v. the Roman Catholic Church of the Sacred Hearths of Jesus and Mary, 262 NY 320 (1933). NYPH also argued that dismissal was warranted based on plaintiffs' failure to timely substitute Ms. Nwankwo's estate for Ms. Nwankwo as plaintiff.

In its original decision, the court rejected NYPH's arguments, finding that while 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, such right and priority does not

---

<sup>2</sup>While NYPH also argued that dismissal was warranted on the ground that plaintiffs had not produced a death certification or other official proof of Ms. Nwankwo's death, the court held that this argument was moot as in opposition to the motion, plaintiffs submitted a certified copy of the death certificate

deprive other family members of standing to bring a claim for loss of sepulcher under the relevant provision of the Public Health Law, when, as in the instant case, the next of kin was not available to pursue the claim. Specifically, the court wrote that “while the decedent’s mother, as a surviving parent, had priority under Public Health Law § 4201[2][a][iv]<sup>3</sup>, her death effectively transfers the priority to plaintiffs’ brothers.” In reaching this conclusion that court addressed various arguments made by NYPH. Specifically, it wrote:

The court rejects NYPH’s unsubstantiated position that Public Health Law has no relevance to the issue of a party’s right to pursue a claim for loss of sepulcher, particularly as the case law is to the contrary. In addition, NYPH’s attempt to distinguish Shepherd<sup>4</sup> from the instant case on the ground that this action was initially commenced by a next of kin is unavailing, particularly in light of the provision in the Public Health Law providing for the transfer of priority with respect to the right to control disposition of remains in the event the person designated to control the disposition of remains is unavailable. Indeed, NYPH’s interpretation of the law is unsupported by the case law on which it relies including Gostkowski supra. While the Court of Appeals in that case wrote that the surviving spouse has the “sole right to sue, *during his or her lifetime*, for damages due to interference with the dead body,” it also noted that if the next of kin “neglect[s] to exercise such right...[o]thers may act.” 262 NY at 325 (emphasis added).

As for that part of NYPH’s motion seeking to dismiss the action based on the failure to substitute the estate of Ms. Nwankwo as a plaintiff, the court found that dismissal of the action was unwarranted since merits of the action would not be affected since the decedent’s brothers could pursue the claim for loss of sepulcher, citing, inter alia, CPLR 1015 [b]; Paterno v. Cyc,

---

<sup>3</sup>Section 4201(2)(a) of the Public Health Law provides, in relevant part, “the following person in descending priority have the right to control the disposition of the remains of [ ] decedent... (iv) either of the decedent’s surviving parents, (v) any of the decedent’s surviving siblings eighteen years and older...”

<sup>4</sup>The court in Shepherd held that under Public Health Law § 4201[2][a], the right to pursue a claim for loss of sepulcher “is one of priority and not of standing.” Shepherd v. Whitestar Development Corp., 113 AD3d 1078, 1080 (4<sup>th</sup> Dept 2014) .

LLC, 46 AD3d 788 (2d Dept 2007)(plaintiff was not required to appoint a substitute for deceased co-plaintiff in an action for injury to property where the merits were not affected by the death of co-plaintiff); Bon Temps Agency, Ltd v. Hickey, 5 AD3d 157 (1<sup>st</sup> Dept 2004)(trial court erred in staying action upon death of defendant partner where his co-partner was also named a defendant and therefore the right sought to be enforced survived defendant's death).

NYPH now moves for reargument, asserting that court misapprehended the nature of its argument in its original motion papers which NYPH characterizes as arguing that "the law does not permit separate actions for the right of sepulcher on behalf of different family members to proceed," and that, here, because Ms. Nwankwo was alive when the action was commenced and named as a plaintiff, the cause of action belongs to her alone, since she is the decedent's "next of kin" as defined by the Estates Powers and Trust Law (EPTL) §§ 2.1.1, 1.25 and 4-1.1. Alternatively, NYPH argues that if under Public Health Law § 4201(b), the right to pursue the claim passed to the brothers upon Ms. Nwankwo's death, then the court should have directed that the persons interested in her estate to show cause as to the why the action should not be dismissed to the extent that it was brought on her behalf, and that the plaintiffs should not be permitted to maintain two parallel actions.

Plaintiffs oppose the motion, asserting that the court correctly interpreted the law to find that they had standing to pursue a claim of sepulcher, and that the cases cited by NYPH both in the original motion and the instant one are not to the contrary. Plaintiffs further argue that the court providently exercised its discretion in severing the action while permitting them to proceed with their claims, and that in the event an administrator is never appointed for Ms. Nwankwo, her claim will become a nullity, but that in the event an administrator is appointed

the court can reconsider the brothers' claims without prejudice to NYPH.

In reply, NYPH asserts that by severing Ms. Nwankwo's claim, the court split the single action into two separate actions and that the existence of two such actions seeking to recover a claim for sepulcher is impermissible.

### Discussion

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

Under this standard, NYPH's motion to reargue is denied to the extent it seeks to dismiss the claims by decedent's brothers on the grounds of lack of standing, as the court correctly found that under Public Health Law § 4201[2][a], as interpreted in recent case law, the right to pursue a claim for loss of sepulcher "is one of priority and not of standing." Shepherd v. Whitestar Development Corp., 113 AD3d at 1080; see also, Rugova v. City of New York, 132 AD3d 220, 231 (1st Dept 2015)(rejecting defendant's argument that family members of the decedent did not have standing to bring the action and claim damages, citing, *inter alia*, Public Health Law § 4201[2][a][iv][v] which permits the decedent's surviving parents and siblings eighteen years or older to bring a claim for loss of sepulcher). In addition, the court noted that Public Health Law § 4201(2)(b) provides "for the transfer of priority with respect to disposition of decedent's remains in the event that 'a person designated to control the disposition of a decedent's remains ... is not

reasonably available, [is] unwilling or [is] not competent to serve.” Shepherd v. Whitestar Development Corp., 113 AD3d at 1080. Furthermore, while NYPH argues that the existence of Ms. Nwankwo’s severed claim means that it conceivably needs to defend to separate actions, such argument is unavailing since there is no impediment to family members seeking a joint recovery. Rugova v. City of New York, 132 AD3d at 231.

Furthermore, the cases relied on by NYPH in support of its motion to reargue are not to the contrary. While NYPH again relies on Gostkowski, *supra*, as previously found by the court this case does not support NYPH’s position but, instead, holds that where the next of kin does not pursue a claim other family members can act. Moreover, while in dicta the court states that “it is inconceivable that each member of a family could maintain a separate action to recover for mental pain and anguish” the court also states that “[p]ossibly the surviving members of the deceased’s family might join together as plaintiffs.” 262 NY2d at 325. In Shipley v. City of New York, 80 AD3d 171 (2d Dept 2010), while the Appellate Division found that the trial court properly dismissed the cause of action asserted by the sister of decedent, contrary to NYPH’s position, such holding is not dispositive here, as the sister was identified as an “infant plaintiff,” and persons under 18 years-old do not qualify as “next-of-kin.” under the Public Health Law § 4201[2][a].

The issue before the court in Lubin v. Sydenham Hospital, Inc., 181 Misc 870 (Sup Ct NY Co. 1943), another case cited by NYPH, was whether the decedent’s sister, who was appointed the administratrix of decedent’s estate, could the bring a claim for the loss of sepulcher to recover the body of the decedent’s child. The court held that the action did not abate on the death of the mother, and that the action could be maintained by the representative of

her estate. As noted by NYPH, the court also stated, in dicta, that the right to recover was limited to the mother, and after her death, her estate and “all others would be barred from claiming damages.” Id., at 872. However, dicta from a 1943 trial court decision, even if it arguably supports NYPH’s position, does not provide a basis for granting reargument, particularly as recent case law is to the contrary.

However, reargument is granted as to the issue of whether Ms. Nwankwo’s claims should be dismissed for failure to appoint a personal representative. While the court correctly found that the cause of action survived Ms. Nwankwo’s death, it did not fully address the issue of whether the action should be dismissed as to Ms. Nwankwo’s claim based on the failure to timely appoint a personal representative of her estate. Moreover, a substantial delay in this connection could potentially prejudice NYPH in the event decedent’s brothers fully pursue their claim while Ms. Nwankwo’s claim remains dormant.

Under CPLR 1021, if a party dies “and timely substitution has not been made, the court, before proceeding further, shall on such notice as it may in its discretion direct, order the persons interested in the decedent’s estate to show cause why the action or appeal should not be dismissed.” Here, almost five years has passed since the events in issue and it has been more than two years since Ms. Nwankwo’s death. Under these circumstances, the court grants reargument to the extent of directing that within 30 days of the filing of this decision and order, plaintiffs shall move by order to show cause as to why an order should not be granted dismissing the claim made by Ms. Nwankwo. Such order to show cause shall provide for service on the father of the decedent, if living, and if his whereabouts are known, on any other known siblings, if living and if their whereabouts are known, and on any other person known to have an interest in the estate

whose whereabouts are known. Affidavits shall be submitted from each brother regarding his knowledge of individuals who may have an interest in the Ms. Nwankwo's estate other than the family members identified above.

Conclusion


In view of the above, it is

ORDERED that NYPH's motion is granted to the extent of requiring plaintiffs to move, within 30 days of e-filing of this order, by order to show cause as why an order should not be granted dismissing the claim made by Ms. Nwankwo and such order to show cause shall be made as directed herein; and it is further

ORDERED that NYPH's motion is otherwise denied; and it is further

ORDERED that a settlement and/or status conference shall be held on July 28, 2016 at 2:30 pm, Part 11, room 351, 60 Centre Street, New York, NY.

DATED: June 3, 2016

  
HON. JOAN A. MADDEN  
J.S.C.