

<b>Lewis v New York &amp; Presbyt. Hosp.</b>
2017 NY Slip Op 30588(U)
March 23, 2017
Supreme Court, New York County
Docket Number: 151707/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46  
-----x

ANDREA LEWIS,

Index No. 151707/2015

Plaintiff

- against -

DECISION AND ORDER

NEW YORK AND PRESBYTERIAN HOSPITAL  
also known as NEW YORK PRESBYTERIAN -  
WEILL CORNELL and/or NEW YORK  
PRESBYTERIAN - UNIVERSITY HOSPITAL OF  
COLUMBIA AND CORNELL,

Defendant  
-----x

LUCY BILLINGS, J.S.C.:

Plaintiff moves to compel defendant's answers to plaintiff's interrogatories, which defendant has refused to answer in reliance on C.P.L.R. § 3130(1)'s provision that, in an action to recover damages for personal injury based solely on claims of negligence, plaintiff may not both serve interrogatories on and conduct a deposition of defendant. Defendant insists that plaintiff's action to recover damages for personal injury is based solely on claims of negligence.

I. THE BASIS FOR PLAINTIFF'S ACTION

The basis for plaintiff's action is defendant's alleged deprivation of her right to control and dispose of her child's body after her child died at defendant hospital, referred to as the right of sepulcher. Shipley v. City of New York, 25 N.Y.3d 645, 653 (2015); Rugova v. City of New York, 132 A.D.3d 220, 229 (1st Dep't 2015); Melfi v. Mount Sinai Hosp., 64 A.D.3d 26, 31.

(1st Dep't 2009); Estate of Scheuer, 10 A.D.3d 272, 274-75 (1st Dep't 2004). As defendant concedes, the complaint claims defendant not only was negligent, but also was "reckless" and engaged in "unlawful actions" in losing or wrongfully disposing of the child's remains. Aff. in Opp'n of Ryan T. Cox Ex. A ¶ 77. Such unlawful actions may include a violation of New York Public Health Law (PHL) § 4201, which as defendant further concedes imposes requirements for the disposition of a deceased's remains and recognizes plaintiff's right to the immediate possession of her deceased child's remains and to control over their disposition. PHL § 4201(2)(a)(iv). See Rugova v. City of New York, 132 A.D.3d at 229; Melfi v. Mount Sinai Hosp., 64 A.D.3d at 31; Estate of Scheuer, 10 A.D.3d at 274-75. Such unlawful actions also may include a violation of 10 N.Y.C.R.R. § 405(f)(9), which requires that a dead body be delivered to only a licensed funeral director or undertaker or that person's agent.

While a violation of a statute establishes negligence, and a violation of a regulation constitutes evidence of negligence, defendant's culpability may be more than negligence. Defendant may have recklessly, as plaintiff specifically alleges, or even intentionally violated the law. As defendant concedes even further, to recover based on the deprivation of her right of sepulcher, plaintiff may show that defendant "unlawfully" interfered with that right through defendant's neglect or its other "wrongful act." Mack v. Brown, 82 A.D.3d 133, 137-38 (2d Dep't 2011). See Tinney v. City of New York, 94 A.D.3d 417, 417-

18 (1st Dep't 2012).

Interference with the right of sepulcher is thus not dependent on any showing of negligence. The decedent's next of kin are entitled to immediate possession of the decedent's remains regardless of the reasonableness of defendant's conduct. Plaintiff need only show that she was a next of kin entitled to the remains and that defendant interfered with her possession of the remains contrary to any authorization by her. Tinney v. City of New York, 94 A.D.3d at 417-18; Melfi v. Mount Sinai Hosp., 64 A.D.3d at 31; Estate of Scheuer, 10 A.D.3d at 274-75.

II. C.P.L.R. § 3130(1) DOES NOT GOVERN PLAINTIFF'S ACTION.

Plaintiff's claims that defendant violated her statutory right and acted recklessly place this action outside C.P.L.R. § 3130(1)'s scope. Kimball v. Normandeau, 83 A.D.3d 1522, 1522-23 (4th Dep't 2011); Samide v. Roman Catholic Diocese of Brooklyn, 16 A.D.3d 482, 483 (2d Dep't 2005). Her action is not predicated solely on negligence. LaJoy v. State of New York, 48 A.D.3d 1022, 1023 (3d Dep't 2008); Friedler v. Palyompis, 24 A.D.3d 501, 502 (2d Dep't 2005).

Moreover, even if the complaint were predicated solely on negligence, defendant has not shown how or why plaintiff's interrogatories seeking what happened to her child's remains, according to whose decisions, under what authority, and the timing of those occurrences are unduly burdensome in conjunction with a deposition. Kimball v. Normandeau, 83 A.D.3d at 1523; LaJoy v. State of New York, 48 A.D.3d at 1023; Samide v. Roman

Catholic Diocese of Brooklyn, 16 A.D.3d at 483. In fact, many of plaintiff's interrogatories need not have been posed in that form, but might have been propounded in a form unimpeded by C.P.L.R. § 3130(1). Her requests for the bases or factual elements of defendant's affirmative defenses and for the laws defendant relies on for legal authority to dispose of her child's remains, for example, well might have been propounded in a demand for a bill of particulars. Her requests for (1) authorizations to defendant, (2) policies, procedures, manuals, and instructional materials for defendant's staff, (3) notices to plaintiff, and (4) communications with governmental agencies regarding the disposition of the child's remains, for example, well might have been propounded in a request for production of documents.

### III. CONCLUSION

Consequently, within 20 days after entry of this order, defendant shall respond to plaintiff's First Set of Interrogatories dated July 24, 2015. C.P.L.R. §§ 3124, 3133. Upon service of a notice of defendant's deposition, defendant also shall appear for a deposition. C.P.L.R. §§ 3107, 3124.

If defendant fails to respond timely to any interrogatory, the issue about which the interrogatory inquires shall be resolved in plaintiff's favor. C.P.L.R. § 3126(1); Baldwin v. Gerard Ave., LLC, 58 A.D.3d 484, 485 (1st Dep't 2009); Weissman v. 20 E. 9th St. Corp., 48 A.D.3d 242, 243 (1st Dep't 2008); Spector v. Spector, 18 A.D.3d 380, 381 (1st Dep't 2005); Longo v.

Armor El. Co, 307 A.D.2d 848, 849 (1st Dep't 2003). For example, if the unanswered interrogatory asks what happened to the child's remains, the issue will be determined that defendant unlawfully interfered with plaintiff's right to the remains. If the unanswered interrogatory asks who decided what happened to the child's remains, the issue will be determined that defendant decided how the remains would be controlled and disposed of. If the unanswered interrogatory asks under what authority defendant interfered with plaintiff's possession of the child's remains or decided what happened to them, the issue will be determined that defendant acted without authority. If defendant fails to appear for its deposition, the issue of defendant's liability shall be determined in plaintiff's favor. C.P.L.R. § 3126(1) and (3); Loeb v. Assara N.Y. I L.P., 118 A.D.3d 457, 457 (1st Dep't 2014); Youni Gems Corp. v. Bassco Creations Inc., 70 A.D.3d 454, 455 (1st Dep't 2010); AWL Indus., Inc. v. QBE Ins. Corp., 65 A.D.3d 904, 905 (1st Dep't 2009).

DATED: March 23, 2017

*Lucy Billings*

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