

Arifi v City of New York
2020 NY Slip Op 31379(U)
May 13, 2020
Supreme Court, New York County
Docket Number: 162562/2015
Judge: Laurence L. Love
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE, JSC PART 62

Justice

-----X

HATIGE ARIFI, SABRIJE UKPERAJ,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, OFFICE OF THE CHIEF MEDICAL
EXAMINER OF THE CITY OF NEW YORK, MEDICAL
EXAMINER JANICE DIAZ

Defendant.

-----X

INDEX NO. 162562/2015
MOTION DATE 4/3/2020
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motions are decided as follows:

Plaintiffs commenced this action on December 9, 2015, by filing a Summons and Verified Complaint with the New York County Clerk's Office. The City joined issue by service of its Answer on December 31, 2015 and served an Amended Answer on February 16, 2016. Plaintiffs commenced this action seeking to recover for emotional damages sustained as a result of the City's alleged negligence in performing an unauthorized autopsy and loss of sepulcher based upon the interference and hindrance in the immediate and complete possession of the body of their sister, Drita Arifi. Defendant, the City of New York, now moves, *inter alia*, for summary judgment, dismissing the instant action for plaintiffs' failure to plead and establish a special duty on behalf of the City of New York. Plaintiff's cross-move for partial summary judgment on the issue of liability.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In New York, the common law right of sepulcher is defined as the next of kin's "absolute right to the immediate possession of a decedent's body for preservation and burial." *Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 31 (1st Dep't 2009); *Estate of Scheuer v. City of New York*, 10 A.D.3d 272, 274 (1st Dep't 2004). Any person who unlawfully interferes with that right, or delays the next of kin's possession of the body, violates the right of sepulcher. *Melfi*, 64 A.D.3d at 31. The right of sepulcher is designed to compensate the next of kin for their emotional suffering from being unable to properly bury their decedent. *Henderson v. Kingsbrook Jewish Med. Ctr.*, 91 A.D.3d 720 (2d Dep't 2012). In order to recover for emotional injuries that result from a violation of this right, the plaintiff must demonstrate that the injuries were "the natural and proximate consequence of

some wrongful act or negligence on the part of the one sought to be charged". *Mack v. Brown*, 82 A.D.3d 133, 138 (2d Dep't 2011). However, a defendant cannot be liable for a plaintiff's injuries unless it owes a duty of care running directly to the injured person. See, e.g., *Valdez*, 18 N.Y.3d at 75; *Lauer v. City of New York*, 95 N.Y.2d 95, 100 (2000); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 584 (1994). Under the public duty rule, liability for the performance of governmental functions cannot attach unless plaintiff both pleads and establishes a special duty. *Valdez v. City*, 18 N.Y.3d; see also *McGinness v. City of New York*, 113 A.D.3d 566 (1st Dep't 2014); *Freeman v. City of New York*, 111 A.D.3d 780 (2d Dep't 2013); *Rozell*, 98 A.D.3d 960.

On April 17, 2018, Detective Jeffrey Adaszewski appeared for an EBT on behalf of the City. Officer Adaszewski testified that on January 31, 2014, he was notified over dispatch regarding an individual in need of medical attention at 154 East 2nd Street, New York, New York. Upon arrival, he entered Drita's apartment and observed a woman lying on a bed, was approached by an individual who introduced himself as Drita's boyfriend. Drita was pronounced dead at the scene and Officer Adaszewski notified his patrol supervisor, precinct detective squad, and OCME as per NYPD protocol and procedure. While at the scene, an investigator from OCME arrived to conduct an initial investigation and arrange for the body to be retrieved. Officer Adaszewski then notified Drita's boyfriend of her death. And secured the apartment while Drita's body was removed. Drita's Personal Data Sheet was provided at the scene by the building staff but it did not list any next of kin.

On November 26, 2018, Cassie Erpenbeck appeared for an EBT on behalf of OCME. Drita's body was transferred to OCME for identification, autopsy, and investigation to attempt to locate next of kin. On February 1, 2014, an autopsy was conducted. Drita's body had been tentatively identified at the scene by the building's night manager, Surrenca Albert, fingerprints

were taken from the body and submitted to the Department of Criminal Justice System Database (hereinafter "DCJS") for confirmation. On February 3, 2014, the DCJS search came back, indicating that the fingerprints had been matched to a NYSID number, which is used to identify people that have previously been incarcerated in New York State. The NYSID number was linked to Drita Arifi, along with her corresponding date of birth.

On February 25, 2014, Sheril Pitters, an employee assigned to OCME's outreach department, conducted an Accurint search in an attempt to locate Drita's next of kin. The Accurint search revealed a name and telephone number related to Ajshe Arifi, one of Drita's sisters. Ms. Pitters left a message with Ajshe Arifi. But did not receive a call back. On March 7, 2014, Janice Diaz, a medical examiner at OCME, certified the body for burial. at City Cemetery located on Hart Island.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*,

153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In New York, the common law right of sepulcher is defined as the next of kin's "absolute right to the immediate possession of a decedent's body for preservation and burial." *Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 31 (1st Dep't 2009); *Estate of Scheuer v. City of New York*, 10 A.D.3d 272, 274 (1st Dep't 2004). Any person who unlawfully interferes with that right, or delays the next of kin's possession of the body, violates the right of sepulcher. *Melfi*, 64 A.D.3d at 31. The right of sepulcher is designed to compensate the next of kin for their emotional suffering from being unable to properly bury their decedent. *Henderson v. Kingsbrook Jewish Med. Ctr.*, 91 A.D.3d 720 (2d Dep't 2012). In order to recover for emotional injuries that result from a violation of this right, the plaintiff must demonstrate that the injuries were "the natural and proximate consequence of some wrongful act or negligence on the part of the one sought to be charged". *Mack v. Brown*, 82 A.D.3d 133, 138 (2d Dep't 2011). However, a defendant cannot be liable for a plaintiff's injuries unless it owes a duty of care running directly to the injured person. See, e.g., *Valdez*, 18 N.Y.3d at 75; *Lauer v. City of New York*, 95 N.Y.2d 95, 100 (2000); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 584 (1994). Under the public duty rule, liability for the performance of governmental functions cannot attach unless plaintiff both pleads and establishes a special duty. *Valdez v. City*, 18 N.Y.3d; see also *McGinness v. City of New York*, 113 A.D.3d 566 (1st Dep't 2014); *Freeman v. City of New York*, 111 A.D.3d 780 (2d Dep't 2013); *Rozell*, 98 A.D.3d 960.

As discussed in detail in *Rugova v. City of New York*, 132 A.D.3d 220, 226 (1st Dep't 2015), "As a matter of statute, the Medical Examiner has extensive authority to perform autopsies within the exercise of professional discretion (Public Health Law § 4210) including where, as here, circumstances indicate that the death was accidental (N.Y. City Charter § 557[f][1]). Public Health

Law § 4214, which imposes an affirmative duty to seek consent before doing an autopsy, is limited to hospitals and does not impose any such duty on the OCME (*Harris–Cunningham v. Medical Examiner of N.Y. County*, 261 A.D.2d 285, 286 [1st Dept.1999]).” As such, plaintiffs’ cause of action seeking to recover for an unauthorized autopsy is without merit. However, as further discussed in *Rugova*,

The law in this Department was reiterated in *Tinney v. City of New York* 94 A.D.3d 417, 941 N.Y.S.2d 571 (1st Dept.2012), which holds that where the City defendants “had all the necessary identifying documents,” the asserted negligence—failure to timely inform the next of kin of their father's death—was a breach of a ministerial function, not a discretionary act shielding the City from liability (*id.* at 418, 941 N.Y.S.2d 571). Implicit in this and similar rulings is that, as a matter of judicial policy, the function of informing the family of a death is a special duty that runs to the next of kin and not the public at large (see *McLean*, 12 N.Y.3d at 202, 878 N.Y.S.2d 238, 905 N.E.2d 1167; *Lauer*, 95 N.Y.2d at 100, 711 N.Y.S.2d 112, 733 N.E.2d 184). The imposition of liability against the City for an inaccurate report of the death of a close relative reflects a policy that a municipality's duty of accurate communication is both ministerial and owed directly to the next of kin (*Johnson*, 37 N.Y.2d at 382–383, 372 N.Y.S.2d 638, 334 N.E.2d 590). Likewise, this Court's holding that interference with the next of kin's right to immediate possession of a decedent's body may arise from the municipality's failure to notify them of the death presumes a ministerial duty owed directly to the immediate family (*Melfi*, 64 A.D.3d at 39, 877 N.Y.S.2d 300).

The ruling in *Rugova* is binding upon this Court. As the City was in possession of all of the necessary identifying documents by February 3, 2014 and failed to notify the decedent’s next of kin of her death, the City may have interfered with plaintiffs’ sepulcher rights. As the City’s duty was ministerial, a duty was owed directly to the plaintiffs in this action as pled in plaintiffs’ complaint. As such, the City is not entitled to dismissal of this action in its entirety.

The NYPD and OCME are entitled to dismissal from this action as same are not legal entities for the purpose of suit and therefore should not be named as parties. See, e.g., *Bailey v. New York City Police Dep’t*, 910 F. Supp. 116, 117 (E.D.N.Y. 1996) (“It has been widely held that because the New York City Police Department is an agency of the City of New York, it cannot be

sued independently under § 1983.”); *Funt v. Human Resources Admin. of the City of New York*, 68 A.D.3d 490, (1st Dep’t 2009) (holding that the Human Resources Administration was not a proper party); *Sino v Department of Educ. of the City of N.Y.*, 44 A.D.3d 568 (1st Dep’t 2007) (holding that the Department of Investigation is not a proper party).

In support of their cross-motion for summary judgment, plaintiffs submit the depositions of Hatige Arifi, Sabrije Ukperaj, Officer Adaszewski, and Cassie Erpenbeck, together with the affidavit of Ajshe Arifi. Based upon same, plaintiffs did not suspect that anything had happened to their sister until January 2015, approximately a year after her death and did not receive confirmation of same until February 2015. Plaintiff’s argue that this this as a result of the NYPD and OCME’s breach of their respective duties to notify plaintiffs as next of kin. Plaintiffs specifically argue that with a minimum of effort, the municipal defendants would have been able to notify plaintiffs of the death of Drita Arifi. The OCME depositions indicate that the only attempt to locate said next of kin was an Accurint search and a single phone call, which Ajshe Arifi’s affidavit denies receipt of. Plaintiffs’ motion essentially only speculates about what the City defendants should have done, however the reasonableness of the City’s action is an issue of fact for trial.

Defendants’ motion is granted to the extent that plaintiffs’ cause of action alleging an unauthorized autopsy is dismissed and denied with respect to plaintiffs’ claims based upon sepulcher rights.

Plaintiffs’ cross-motion is hereby denied in its entirety.

ORDERED that the motion of defendant NYPD and OCME to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further


ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

8 OF 8

<u>5/13/2020</u> DATE			 LAURENCE L. LOVE, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED		