

**Hanna v Fenton**

2020 NY Slip Op 31745(U)

June 4, 2020

Supreme Court, New York County

Docket Number: 161610/2018

Judge: James E. d'Auguste

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

**PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM**

*Justice*

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CHARLES JEFFREY HANNA, individually and as  
Executor of the Estate of Kathleen R. Hanna, and JAMES R.  
HANNA,

Plaintiffs,

- v -

MICHAEL FENTON, VALERIE PAULINO, JAMES  
PUCCIO, QUALITY FUNERAL SERVICE, INC. d/b/a  
GLASCOTT FUNERAL HOME and CASSESE FUNERAL  
HOME, INC.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 47, 48, 49, 50, 67,  
68, 69, 70, 71, 72, 73

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, defendant Michael Fenton's motion seeking dismissal of the instant action, pursuant to CPLR 3211(a)(7), is granted.

On the morning of July 20, 2017, at approximately 5:40 a.m., Kathleen R. Hanna ("Ms. Hanna" or "decedent") passed away in her home. At approximately 6:00 a.m., her home health aide informed defendant Valerie Paulino ("Paulino"), one of Ms. Hanna's Court-appointed Co-Personal Needs Guardians,<sup>1</sup> who in turn informed defendant Michael Fenton ("Fenton"), one of Ms. Hanna's Co-Property Management Guardians. Defendant James Puccio ("Puccio"), the licensed funeral director of defendant Glascott Funeral Home ("Glascott"), allegedly picked up Ms. Hanna's remains under the verbal authorization of Paulino and Fenton, without informing

<sup>1</sup> The guardianship appointments were made in a related proceeding, captioned *In re Kathleen R. Hanna*, Index No. 500150/2016.

plaintiff James R. Hanna, Ms. Hanna's brother and the Co-Personal Needs and Property Management Guardian, with the knowledge that he was appointed as agent in Ms. Hanna's Dispositional Appointment.<sup>2</sup> Fenton and Paulino represented to Puccio that they had the authority to control the disposition of Ms. Hanna's body.

At approximately 8:54 a.m., James Hanna emailed Fenton to report Ms. Hanna's death, unaware that Fenton had already been informed of the same by Paulino because she allegedly waited over two hours after Ms. Hanna's demise to inform James Hanna of the same. At approximately 9:10 a.m., Fenton emailed James Hanna to inform him that the decedent's remains were transferred to Reddens Funeral Home ("Reddens"), even though her remains were in transit to, or had already arrived at, Glascott. At approximately 10:00 a.m., James Hanna called Reddens and Reddens informed him that they had no record of any such transfer. James Hanna could not reach Fenton at that time. Late in the afternoon of the same day, Puccio, from Glascott, informed James Hanna that the remains were located at Glascott. James Hanna insisted that the remains be transferred to Reddens, which Puccio agreed to do for free, after initially asking to charge a fee. On July 21, 2020, decedent's remains were transferred by Puccio and Glascott to Reddens. On July 26, 2017, a service was held for Ms. Hanna at Reddens.

Plaintiffs assert two causes of action against Fenton: the right of sepulcher and fraud. Fenton moves for an order (1), pursuant to CPLR 3211(a)(7), dismissing the Amended Verified Complaint; or, (2) alternatively, pursuant to CPLR 3211(a)(3), dismissing the causes of action asserted in the Amended Verified Complaint to the extent they are asserted on behalf of plaintiff Charles Jeffrey Hanna, who lacks standing to assert the claims therein; (3) alternatively, pursuant to CPLR 8501, directing plaintiffs to give security for costs; (4) alternatively, dismissing the

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<sup>2</sup> Fenton has denied under oath the knowledge of James Hanna's appointment at the time of Ms. Hanna's death.

demands for punitive damages; and (5), pursuant to 22 NYCRR 130-1.1, awarding costs, including attorneys' fees, and sanctions for plaintiffs' frivolous conduct.

Plaintiffs' first cause of action alleging a right to sepulcher must be dismissed. The common law right of sepulcher originates from the absolute right of a decedent's surviving next of kin to immediately possess the body for preservation and burial.<sup>3</sup> *See Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 31 (1st Dep't 2009). As the First Department reflected, "the right of sepulcher is less a quasi-property right and more the legal right of the surviving next of kin to find 'solace and comfort' in the ritual of burial." *Id.* at 32. Further, "a cause of action does not accrue until interference with the right directly impacts on the 'solace and comfort' of the next of kin—that is, until interference causes mental anguish for the next of kin." *Id.* In general, the following scenarios constitute actionable interference: performance of an unauthorized procedure on the body (such as an unauthorized autopsy), inadvertent disposal of the remains, or defendant's failure to notify the next of kin of the death. *Id.* at 36-39.

Plaintiffs do not allege that Fenton performed an unauthorized procedure on the body, inadvertently disposed of the remains, or failed to notify the next of kin of the death. Although Fenton initially conveyed the wrong funeral home information to plaintiffs, the decedent's remains were located and transported to the funeral home of plaintiffs' choice on the day of decedent's demise without any mishandling of the remains. Additionally, because plaintiffs are residents of Pennsylvania and could not take immediate possession of the body, the several hour delay in locating and transporting Ms. Hanna's remains to Reddens is not the type of deprivation of "solace

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<sup>3</sup> At the outset, this Court finds that contrary to Fenton's assertion that "individuals with different degrees of kinship cannot both be a decedent's surviving next of kin" (NYSCEF Doc. No. 50, at 15), Ms. Hanna's brother, James Hanna, and her nephew, Charles Jeffrey Hanna, are both decedent's next of kin. *See In re Starrett*, 53 A.D.2d 846, 846 (1st Dep't 1976) (explaining that a decedent's next of kin are two half-brothers and two nephews). As such, Charles Jeffrey Hanna has capacity to sue in this matter for the causes of action brought herein.

and comfort” of burial as contemplated by a claim sounding in a right of sepulcher, especially in light of the fact that a service was held for the decedent five days later. Accordingly, plaintiffs’ cause of action sounding in the right of sepulcher is dismissed as against Fenton.

Plaintiffs’ fraud claim similarly must be dismissed. To recover damages for fraud, plaintiffs must have justifiably relied on and suffered damages because of a material misrepresentation of fact made by defendants with knowledge of its falsity and an intent to induce reliance. *People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 638 (2018); *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421 (1996). Such damages are limited to “out of pocket loss,” which does not include damages for emotional distress. *Lama Holding Co.*, 88 N.Y.2d at 421 (“The true measure of damage [for fraud] is indemnity for the actual pecuniary loss sustained as the direct result of the wrong” or what is known as the ‘out-of-pocket’ rule.”); *see Ross v. Louise Wise Servs., Inc.*, 28 A.D.3d 272, 287 (1st Dep’t 2006) (holding that damages for fraud do not include damages for emotional distress), *aff’d as mod.*, 8 N.Y.3d 478.


Plaintiffs fail to allege any facts that indicate or permit a reasonable inference that Fenton had knowledge of the falsity of his representation regarding the location of Ms. Hanna’s remains, or that he intended to induce reliance upon that incorrect representation. Indeed, plaintiffs’ fraud claim is largely conclusory. Additionally, the complaint does not indicate that plaintiffs suffered any injuries or pecuniary damages as Puccio agreed to release and transfer the remains from Glascott to Reddens without any charge. *See Connaughton v. Chipotle Mexican Grill, Inc.*, 135 A.D.3d 535, 538 (1st Dep’t 2016) (“Not only is there no suggestion or indication that actual pecuniary damages were sustained, but the complaint does not allege facts from which actual damages can be inferred.” (citation omitted)).

Based upon the foregoing, it is hereby

ORDERED that Fenton's motion to dismiss plaintiffs' complaint, pursuant to 3211(a)(7), is granted and the action is dismissed as against him; and it is further

ORDERED that the remaining branches of Fenton's motion are denied as moot.

This constitutes the decision and order of this Court.

<u>6/4/2020</u> DATE			 JAMES EDWARD D'AUGUSTE, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE