

Robins v New York City Off. of Chief Med. Examiner
2022 NY Slip Op 31120(U)
April 7, 2022
Supreme Court, New York County
Docket Number: Index No. 151399/2020
Judge: Melissa Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA CRANE PART 60M

Justice

INDEX NO. 151399/2020
MOTION DATE 02/07/2020, 09/02/2020, 09/02/2020, 03/04/2021, 09/28/2021
MOTION SEQ. NO. 001 002 003 004 005

HOWARD ROBINS,

Plaintiff,

- v -

NEW YORK CITY OFFICE OF CHIEF MEDICAL EXAMINER, BARBARA SAMPRON MD. PHD, CITY OF NEW YORK

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 8, 9, 11, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 51, 76, 77, 78

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 38, 40, 41, 43, 45, 47, 49, 52

were read on this motion to/for LEAVE TO FILE

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 39, 42, 44, 46, 48, 50, 53, 54, 55, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 79

were read on this motion to/for AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents,

In this CPLR article 78 proceeding, petitioner Howard Robins DPM (petitioner), a podiatrist, challenges a determination of respondent New York City Office of Chief Medical Examiner (OCME), which found that the cause of his patient's death was "homicide" and the

result of “extreme medical negligence.” In addition, petitioner seeks a judgment directing respondents to issue an amended report consistent with the findings of the court. Alternatively, petitioner seeks leave to conduct discovery in this proceeding.

On September 25, 2019, the decedent, who was then 76 years old at the time, visited petitioner’s office for podiatric treatments, including ozone therapy treatment (NY St Cts Elec Filing [NYSCEF] Doc No. 110 at 5). The decedent appeared to have fainted after receiving ozone therapy (*id.*). The decedent was subsequently transported to the hospital by ambulance (*id.* at 6). The decedent died at the hospital (*id.*).

The following day, OCME medical examiner Dr. Margaret Prial performed an autopsy of the decedent’s body in OCME’s Manhattan Forensic Pathology Center (NYSCEF Doc No. 114 ¶ 157; NYSCEF Doc No. 115 at 26). OCME also created microscopic slides from tissues taken during the autopsy (NYSCEF Doc No. 115 at 11). On September 29, 2019 and October 10, 2019, OCME filed a preliminary certificate of death and an amended certificate of death, which listed the cause and manner of death as “Pending Further Study” (NYSCEF Doc Nos. 116, 117).

On July 20, 2020, OCME filed a final certificate of death for the decedent, indicating that the immediate cause of death was “Gas Emboli Complicating Direct Intravenous Injection of Ozone-Oxygen Gas for Prevention, Not Otherwise Specified” (NYSCEF Doc No. 118 at 3). The final certificate of death listed the manner of death as “Homicide” and that the decedent’s death occurred as the result of “Extreme medical negligence” (*id.*). Additionally, the final certificate of death stated that “Hypertensive Cardiovascular Disease” was another “significant condition[] contributing to death but not resulted in the underlying cause . . .” (*id.*).

By decision and order dated October 15, 2020, the court granted petitioner leave to amend the original petition (NYSCEF Doc No. 53). The first amended verified petition, annexed

to petitioner's motion, seeks: (1) a judgment setting aside respondents' findings as to the cause and nature of the decedent's death pursuant to CPLR 7803 (3); (2) a judgment compelling respondents to issue an amended report pursuant to CPLR 7803 (1) and 24 RCNY § 205.03 (g)¹; and (3) leave to conduct discovery (NYSCEF Doc No. 36 at 31-37).

CPLR 7803² provides that the standard of review of an agency's determination, such as OCME, is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). The "arbitrary and capricious" standard, defined by the Court of Appeals in *Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County* (34 NY2d 222 [1974]), "relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact" (*id.* at 231 [internal quotation marks and citation omitted]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts [T]he proper test is whether there is a rational basis for the administrative orders" (*id.* [internal quotation marks omitted]). If the agency's decision is rational, "it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion" (*Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101, 107 [1st Dept 2003] [internal quotation marks and citation omitted]).

¹ 24 RCNY § 205.03 governs reporting deaths. Subsection (g) states that "Within five business days of receipt of any autopsy results or other information that would change the information in the cause of death section of the certificate or the confidential medical report, the person required to report the death shall file a supplemental report of the cause of death to amend the certificate or confidential medical report, if any" (24 RCNY § 205.03 [g]).

² Petitioner has moved for summary judgment in this special proceeding. CPLR 409 (b) provides that "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (CPLR 409 [b]).

OCME is required to keep “[r]ecords . . . properly indexed, stating the name, if known, of every person dying under the circumstances described in paragraph one of subdivision (f) of section five hundred fifty-seven of the charter, the place where the body was found and the date of death. To the record of each case shall be attached the original report of the medical examiner and the detailed findings of the autopsy, if any” (Administrative Code of the City of N.Y. § 17-205).

Contrary to petitioner’s contention, OCME’s determination was not arbitrary and capricious (*see Matter of Cavaliere v Suffolk County*, 114 AD3d 677, 677 [2d Dept 2014], *lv denied* 25 NY3d 912 [2015]). Dr. Prial performed an autopsy of the decedent’s body, and took tissue samples from the decedent’s body, which were then placed into microscopic slides (NYSCEF Doc No. 115 at 19-21; NYSCEF Doc No. 124, Prial aff ¶¶ 8-15). She considered that petitioner had administered ozone therapy to the decedent shortly before her cardiac arrest, and spoke with paramedics who responded to petitioner’s office (*id.*). Dr. Prial also conducted a microscopic examination of the tissue samples and noted that gas emboli were present in the decedent’s blood vessels (*id.*). Dr. Prial concluded, based upon the large number of gas emboli she observed during the microscopic examination, their location in both small and large blood vessels, and the known intravenous ozone therapy administered shortly before the decedent’s cardiac arrest, “that the cause of the existence of gas emboli is the injection of ozone-oxygen directly into Decedent’s vein” (NYSCEF Doc No. 124, Prial aff ¶ 14). Therefore, Dr. Prial determined that the cause of the decedent’s death was the gas emboli, the contributory cause was “Hypertensive Cardiovascular Disease,” and the manner of death was “Homicide (Extreme Medical Negligence)” (NYSCEF Doc No. 124, Prial aff ¶ 21). In view of the foregoing, Dr. Prial “set forth a reasonable basis for [her] determination in an area where administrative

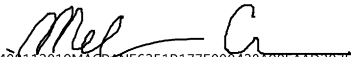
judgment involves specialized medical and scientific expertise” (*Matter of Infante v Dignan*, 12 NY3d 336, 341 [2009] [medical examiner’s determination was not arbitrary where medical examiner performed an autopsy and a comprehensive drug screen analysis and concluded that the cause of death was suicide]). Even if competing inferences could be drawn from the record, OCME’s determination must be sustained because it was not arbitrary (*see id.*).

Petitioner is not entitled to a judgment requiring OCME to amend its records or the final certificate of death. The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only when there exists a clear right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]; *Matter of Qureshi v Roberto*, 28 AD3d 564, 565 [2d Dept 2006]). Petitioner only seeks this relief in the event that the court finds that OCME’s determination was arbitrary and capricious. In any event, petitioner has failed to demonstrate a clear right to this relief. While petitioner relies on the New York City Health Code, he has not shown the existence of “autopsy results or other information that would change the information in the cause of death section of the certificate or the confidential medical report” (24 RCNY § 205.03 [g]).

Finally, petitioner’s request for discovery is denied. In special proceedings, “[l]eave of court shall be required for disclosure” (CPLR 408). “[D]iscovery should not be granted unless the movant’s need for discovery outweighs opposing interests in expediency and confidentiality. The discovery, therefore, must be necessary and must not cause undue delay” (Vincent C. Alexander, 2015 Supp Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C408). Petitioner requests depositions and document discovery in his first amended verified petition. However, petitioner has failed to identify what, in particular, he is seeking, and the court finds that discovery would unduly protract this proceeding.

Accordingly, it is

ADJUDGED that the first amended verified petition is denied and the proceeding is dismissed.


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4/7/2022
DATE

MELISSA CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE