

**Borkowska v Peter Jarema Funeral Home, Inc.**

2023 NY Slip Op 31117(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 152292/2022

Judge: Mary V. Rosado

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

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

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JADWIGA BORKOWSKA

Plaintiff,

- v -

PETER JAREMA FUNERAL HOME, INC.,

Defendant.

-----X

INDEX NO. 152292/2022

MOTION DATE 06/13/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISSAL

Upon the foregoing documents, Defendant Peter Jarema Funeral Home, Inc.’s (“Defendant” or “PJFH”) motion to dismiss Plaintiff Jadwiga Borkowska’s (“Plaintiff”) Complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7) is granted in part and denied in part.

**I. Background**

Plaintiff commenced this action on March 17, 2022 (NYSCEF Doc. 1). Plaintiff alleges loss of sepulcher, negligence, breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent infliction of emotional distress (*id.* at ¶¶ 41-67). This action arises over the mishandling of Plaintiff’s husband’s cremated remains by Defendant.

Plaintiff and her now deceased husband were married in Poland in 1984 (*id.* at ¶ 5). In 1999, Plaintiff and her husband moved to New York (*id.* at ¶ 6). On November 16, 2021, Plaintiff’s husband passed away in New York (*id.* at ¶ 8). That same day, Plaintiff or a home health aide notified Defendant of the decedent’s death, and Defendant came to retrieve the decedent’s body (*id.* at ¶ 9). The next day, Plaintiff met with Mr. Buzzetta, Defendant’s funeral home director (*id.* at ¶ 10). Plaintiff informed Mr. Buzzetta that the decedent wished to be cremated and for his funeral

and interment to take place in Warsaw, Poland (*id.*). Plaintiff and Defendant entered into an agreement wherein Defendant was to arrange for decedent's cremation, supply an urn, and transport decedent's remains to Poland for funeral arrangements (*id.* at ¶ 11). Plaintiff paid for these services in full upon execution of the agreement (*id.* at ¶ 13).

Allegedly, Mr. Buzzetta told Plaintiff that the decedent would be sent to another location in New York for cremation, and it would take about one week for Defendant to receive the cremated remains (*id.* at ¶ 14). Mr. Buzzetta allegedly represented that after receipt of the cremated remains, he would ship the remains by international courier to Plaintiff's residence in Warsaw, Poland, which would take six to ten days (*id.* at ¶ 15). Plaintiff alleges that decedent's remains were cremated on November 28, 2021 (*id.* at ¶ 16). On November 29, 2021, a small memorial service for decedent was held in New York at Defendant's place of business (*id.* at ¶ 17). Plaintiff then proceeded to arrange for a large, formal, religious funeral in Warsaw (*id.* at ¶ 18). The funeral was scheduled for December 15, 2021 (*id.*). On November 29, 2021, Plaintiff boarded a flight to Warsaw to continue coordinating arrangements for decedent's funeral (*id.* at ¶ 19).

Plaintiff alleges that upon information and belief, Defendant placed an urn containing decedent's ashes in a postal box with a depository of the United States Parcel Service ("USPS") addressed to Plaintiff's personal residence in Warsaw, Poland (*id.* at ¶ 20). However, Plaintiff alleges that Defendant did not follow Polish law when shipping decedent's remains. Specifically, Plaintiff alleges that Polish law requires the issuance of a certificate by Polish authorities allowing the repatriation of ashes to Poland, and that to obtain said certificate, the Polish authorities must be presented with an original or certified copy of a decedent's death certificate (*id.* at ¶¶ 21-22). Further, under Polish law, a party seeking to ship cremated human remains may need to present a burial transit permit, which requires a funeral director's notarized affidavit to be presented to

Polish authorities (*id.* at ¶ 25). Moreover, Plaintiff alleges that under Polish law, cremated remains cannot be sent to a private residence but must be received in Poland by a funeral home (*id.* at ¶ 26). Plaintiff alleges that Defendant did not follow any of the required procedures prior to shipping decedent's ashes to Plaintiff's private residence in Warsaw (*id.* at ¶ 27).

Plaintiff allegedly discovered that Defendant had not complied with these protocols when she contacted local authorities in Warsaw on December 13, 2021 (*id.* at ¶ 29). Allegedly, decedent's ashes were stuck in customs (*id.*). As a result, on December 14, 2021, she was forced to cancel decedent's funeral (*id.* at ¶ 30). On December 15, 2021, Plaintiff alleges she contacted Mr. Buzzetta who told her that the ashes were being held up due to holiday season delays (*id.* at ¶ 31). Plaintiff alleges Mr. Buzzetta did not contact the Polish consulate in New York City to seek assistance until December 17, 2021 (*id.* at ¶ 32). On December 20, 2021, as Plaintiff was still not in possession of decedent's remains, she cancelled her husband's funeral for a second time (*id.* at ¶ 34). On December 22, 2021, Mr. Buzzetta e-mailed Plaintiff a certificate from the Polish consulate permitting the release of decedent's remains to a Polish funeral home (*id.* at ¶ 37). Allegedly, on the evening of December 24, 2021, Mr. Buzzetta emailed Plaintiff to confirm that a Warsaw funeral home was in possession of the decedent's remains (*id.* at ¶ 38). Plaintiff alleges that the decedent was not given a proper Roman Catholic funeral until December 29, 2021 (*id.* at ¶ 39).

On May 25, 2022, Defendant filed this motion to dismiss (NYSCEF Doc. 7). Defendant argues it is entitled to dismissal because loss of sepulcher does not apply to cremated remains (NYSCEF Doc. 8). Defendant argues that the breach of contract claim should be dismissed because Defendant performed under the terms of the contract and Plaintiff has not sustained any damages under the contract. Defendant argues the remaining claims are duplicative and should be dismissed.

In opposition, Plaintiff submitted an affidavit as well as a memorandum of law (NYSCEF Doc. 13 and 23). In her affidavit, Plaintiff swears that Mr. Buzzetta represented the decedent's cremated remains would arrive in Poland within six to ten days, and that Defendant specialized in worldwide shipping (NYSCEF Doc. 4 at ¶ 4). Plaintiff also submitted e-mails and documents from Polish authorities which substantiate her allegations (NYSCEF Docs. 15-21). Plaintiff asserts that Defendant makes factual arguments related to Plaintiff's breach of contract claim which may not be resolved on a motion to dismiss. Moreover, Plaintiff argues that a cause of action based on loss of sepulcher is not as narrowly applied as Defendant argues (NYSCEF Doc. 23).

Plaintiff concedes that the negligence cause of action may be duplicative if Plaintiff's loss of sepulcher cause of action survives. Plaintiff also argues that its cause of action for negligence and other relief are not duplicative of her breach of contract claim. Specifically, Plaintiff argues that professionals and bailees may be subject to tort liability for failure to exercise reasonable care, irrespective of contractual duties, as in those instances, it is policy, not a contract, that gives rise to a duty of care (*citing Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]). Plaintiff argues that funeral directing, which is a heavily regulated industry, is the type of business where tort liability may still arise from the failure to exercise due care allowing for a breach of contract claim and negligence claims to be pled in the same Complaint. Plaintiff argues this is especially true when the damages alleged are not solely economic, but also in the nature of pain and suffering.

In reply, Defendant argues that even if loss of sepulcher encompasses cremated remains, Defendant did not interfere with Plaintiff's immediate right of possession of Decedent's body, nor was any interference unauthorized (NYSCEF Doc. 26). Defendant argues that there is no authority which supports the argument that a funeral director may be subject to tort liability when there

exists a contract between the parties. Alternatively, Defendant again asserts there can be no breach of contract claim where Plaintiff has suffered no damages as a result of any purported breach.

## II. Discussion

### A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). In opposing a motion to dismiss for failure to state a claim, a plaintiff may amplify the allegations in the Complaint through affidavits (*Mulder v Donaldson, Lifkin & Jenrette*, 208 AD2d 301, 307 [1st Dept 1995]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint

based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

### **B. Loss of Sepulcher**

Defendant's motion to dismiss Plaintiff's loss of sepulcher cause of action is denied. As held by the First Department, "the right of sepulcher is a legal right of the surviving next of kin to find 'solace and comfort' in the ritual of burial" (*Melfi v Mount Sinai Hosp.* 64 AD3d 26, 32 [1st Dept 2009]). A cause of action for loss of sepulcher accrues when an interference with the next of kin's right to possession of a decedent's remains for preservation and burial directly impacts the "solace and comfort" of the next of kin (*id.*).

To state a claim for interference with the right of sepulcher a plaintiff must allege "(1) plaintiff is the decedent's next of kin; (2) plaintiff had a right to possession of the remains; (3) defendant interfered with plaintiff's right to immediate possession of the decedent's body; (4) the interference was unauthorized; (5) plaintiff was aware of the interference; and (6) the interference caused plaintiff mental anguish" (*Stanley v City of New York*, 71 Misc.3d 171, 177 [Sup. Ct. NY Co. 2020] quoting *Shepherd v Whitestar Dev. Corp.*, 113 AD3d 1078, 1080 [4th Dept 2014]).

While Defendant asserts that the element of the right of sepulcher which requires an interference with the "immediate" possession of the body should be construed narrowly, the Court of Appeals has stated the right of sepulcher is broader than simply protecting the "immediate" possession of the body (*see Shipley v City of New York*, 25 NY3d 645, 653 [2015] ["damages may be awarded against any person who...improperly deals with the decedent's body"]) quoting *Mack v Brown*, 82 AD3d 133, 137 [2d Dept 2011]).

The broader interpretation of the right of sepulcher has been routinely and recently applied by other courts (*see Semidey v Evergreens Cemetery Preservation Foundation Inc.*, 75 Misc.3d

302, 309-310 [Sup. Ct., Bronx Co. 2022] [cemetery employees who roughly handled coffin when attempting to place it inside a grave that was not dug to the appropriate dimensions, resulting in coffin being damaged, coffin coming open, plaintiffs seeing their deceased mother's arms were no longer folded, and damaged coffin laying on ground for hours while cemetery had to enlarge the dimensions of the grave, violated plaintiff's right to find "solace and comfort in the ritual of burial"])). Likewise, the fact that Plaintiff alleges a loss of sepulcher claim arising from alleged mishandling of her deceased husband's cremated remains does not warrant dismissal (*see Gerardi v Paul W. Harris Funeral Home Inc.*, 48 Misc. 3d 200 [Sup. Ct., Monroe Co. 2014] [funeral home interfered with right of sepulcher when it buried decedent's ashes against widow's wishes]).

As such, accepting all the allegations as true and giving Plaintiff the benefit of all favorable inferences, which flow from the Complaint, as this Court must on a pre-answer motion to dismiss, Plaintiff has sufficiently stated a cause of action based on loss of sepulcher. Plaintiff, as decedent's wife, was the next of kin. Plaintiff had a right to possession of her husband's cremated remains. Accepting the facts as true, Defendant interfered with Plaintiff's right to possession of her husband's ashes by failing to follow Polish law to ensure the ashes would be delivered to Plaintiff in time for his funeral. This interference was unauthorized, as Plaintiff allegedly selected Defendant based on its representation it would deliver the ashes in six to ten days, and based on its representation that it specialized in shipping remains worldwide. Plaintiff was aware of the interference, as she had to cancel two planned funerals. Finally, Plaintiff has alleged she suffered mental anguish because of the interference. Therefore, there is no basis for dismissing Plaintiff's loss of sepulcher claim at this stage. This branch of Defendant's motion is denied.

### C. Breach of Contract

Viewed through the prism of the standard of review on a pre-answer motion to dismiss, Plaintiff has stated a cause of action for breach of contract. To plead a cause of action for breach of contract, a plaintiff must allege that (1) a contract exists, (2) plaintiff performed in accordance with the contract, (3) defendant breached its contractual obligations, and (4) defendant's breach resulted in damages (*34-06 73, LLC v Seneca Insurance Company*, 39 NY3d 44 [2022]). There is no dispute that the contract exists, and the contract provided by Defendant states that Plaintiff performed as she paid \$2800.00 in full. Plaintiff alleges that Defendant breached its contractual obligations by failing to ship the ashes to Poland in the time and manner expected by the parties. Indeed, under Section I(11) of the Contract, Defendant stated it would perform the additional service of "Shipping to Poland" (*see* NYSCEF Doc. 11). While there are no express representations as to what "Shipping to Poland" entails, accepting Plaintiff's allegations as true, it was expected that the ashes would be shipped to Poland in conformance with Polish law and within six to ten days, so that Plaintiff's husband could receive a prompt burial. Instead, Plaintiff alleges that the funeral had to be cancelled twice due to Defendant's violations of Polish law. Therefore, for purposes of this motion to dismiss, Plaintiff has sufficiently alleged that Defendant breached its contractual obligations. Although the ashes did ultimately make it to Poland, the provision which provides that Defendant will ship the ashes to Poland is vague in terms of the time and manner by which Defendant will perform. Whether Defendant breached by the time and manner of its performance is therefore a factual issue which cannot be resolved on this motion to dismiss.

Whether Plaintiff was damaged as a result of the breach is a fact issue which must be flushed out in discovery. Indeed, Plaintiff paid Defendant to deliver ashes to Poland, and alleges she did not receive the benefit of her bargain. Moreover, she reportedly planned and had to cancel

two funerals as a result of Defendant's breach. Giving the Plaintiff the benefit of all favorable inferences, the breach resulted in economic damages.

Nor will the Court dismiss the breach of contract claim because it may be duplicative of the loss of sepulcher claim. Indeed, where, as here, economic damages may flow from the breach of contract, the loss of sepulcher claim, which is an express remedy for mental anguish, goes to Plaintiff's pain and suffering. As held by the Court of Appeals, a tort obligation "is 'apart from and independent of promises made and therefore apart from the manifested intention of the parties' to a contract" (*New York University v Continental Ins. Co.*, 87 NY2d 308 [1995] quoting Prosser and Keeton, Torts § 92, at 655 [5th ed.]). As the damages and obligations pertaining to Plaintiff's breach of contract claim and loss of sepulcher claim are distinct and separate, there is no reason to dismiss the breach of contract claim as duplicative of the loss of sepulcher claim. Thus, Plaintiff's cause of action alleging breach of contract survives this motion to dismiss.

#### **D. Remainder of Plaintiff's Claims**

The remainder of Plaintiff's claims are dismissed as duplicative. Plaintiff concedes in her opposition that if her loss of sepulcher claim survives, the claims sounding in negligence may well be duplicative. Moreover, a separate cause of action for breach of the covenant of good faith and fair dealing cannot be maintained where it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages resulting from the breach of contract (*see Parlux Fragrances, LLC v S. Carter Enterprises, LLC*, 204 AD3d 72 [1st Dept 2022]). The breach of contract claim survives this motion to dismiss, and the breach of the covenant of good faith and fair dealing claims are premised on the same alleged conduct as the breach of contract cause of action. Therefore, the breach of the covenant of good faith and fair dealing cause of action is dismissed as duplicative of the surviving breach of contract claim.

Accordingly, it is hereby,

ORDERED that Defendant Peter Jarema Funeral Home, Inc.’s motion to dismiss Plaintiff Jadwiga Borkowska’s first cause of action for loss of sepulcher and third cause of action for breach of contract is denied; and it is further

ORDERED that Defendant Peter Jarema Funeral Home, Inc.’s motion to dismiss Plaintiff Jadwiga Borkowska’s second cause of action alleging negligence, fourth cause of action alleging breach of the implied covenant of good faith and fair dealing, and fifth cause of action alleging negligent infliction of emotional distress is granted; and it is further

ORDERED that within twenty days of entry, counsel for Defendant Peter Jarema Funeral Home, Inc. shall serve an Answer to Plaintiff Jadwiga Borkowska’s Complaint; and it is further

ORDERED that on or before May 17, 2023, the parties shall submit a proposed preliminary conference order to the Court via e-mail at SFC-Part33-Clerk@nycourts.gov. In the event the parties are unable to agree to a proposed preliminary conference order, the parties are directed to appear for an in-person preliminary conference with the Court on May 24, 2023 at 9:30 a.m. in 60 Centre Street, Room 442; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this decision and order, with notice of entry, on Defendant via NYSCEF; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>4/10/2023</u> DATE			<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<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