

Hallman v James H. Robinson Funeral Home

2023 NY Slip Op 34998(U)

May 31, 2023

Supreme Court, Bronx County

Docket Number: Index No. 26072/2020E

Judge: Elizabeth A. Taylor

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 2

-----X
MITZI HINES HALLMAN and HOPE DUKES,
Plaintiffs,

Index No. 26072/2020E

-against-

Hon. HON. ELIZABETH A. TAYLOR,

Justice Supreme Court

JAMES H. ROBINSON FUNERAL HOME,
JAMES H. ROBINSON, ANDREW T. CLECKLEY
FUNERAL SERVICES, INC., and ANDREW T.
CLECKLEY FUNERAL HOME, INC.,
And JOHN DOES 1-10,

Defendants.

-----X
The following papers having were read on this motion (Seq. No. 4), for Summary Judgment, noticed April 27, 2022, submitted May 18, 2022.

| | |
|-------------------------------------------------------------|-------------------------|
| Notice of Motion – Affirmation and Exhibits- by Defendants | NYSCEF Doc No(s). 54-68 |
| Answering Affirmation & Exhibits – Opposition by Plaintiffs | NYSCEF Doc No(s). 75-86 |
| Replying Affirmation & Exhibits – | NYSCEF Doc No(s). |
| Miscellaneous - | NYSCEF Doc No(s). |
| | |

Upon the foregoing papers, the motion by Defendants, JAMES H. ROBINSON, and JAMES H. ROBINSON FUNERAL HOME, to dismiss the Complaint pursuant to CPLR 3211, and for summary judgment pursuant to CPLR 3212, and for other and related relief, is decided in the annexed memorandum decision and order.

Dated: MAY 31 2023

Hon. 
ELIZABETH A. TAYLOR, J.S.C.

-
- 1. CHECK ONE..... CASE STILL ACTIVE
 - 2. MOTION IS DENIED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
MITZI HINES HALLMAN and HOPE DUKES,
Plaintiffs,

-against-

Index No.: 26072/2020E

JAMES H. ROBINSON FUNERAL HOME,
JAMES H. ROBINSON, ANDREW T. CLECKLEY
FUNERAL SERVICES, INC., and ANDREW T. CLECKLEY
FUNERAL HOME, INC.,
And JOHN DOES 1-10,
Defendants.

-----X
HON. ELIZABETH A. TAYLOR:

Defendants JAMES H. ROBINSON, and JAMES H. ROBINSON FUNERAL HOME (also referred to herein as the ROBINSON Defendants), move to dismiss the Complaint on various grounds pursuant to CPLR 3211, and for summary judgment pursuant to CPLR 3212, and for other and related relief.

PARTIES/ALLEGED FACTS

This is an action to recover damages for claims which include the mishandling the corpse of the deceased, Nathaniel Hallman, who passed away on April 17, 2020, near the beginning of the pandemic.

Plaintiff MITZI HINES HALLMAN is the surviving widow of Nathaniel Hallman. She is the Administrator of her husband's Estate, having received Letters of Administration.

Plaintiff HOPE DUKES made arrangements for the handling of Nathaniel Hallman's remains, at the behest of MITZI HINES HALLMAN. Ms. Dukes is the goddaughter of Nathaniel Hallman and MITZI HINES HALLMAN.

Plaintiffs filed the Summons and Complaint on June 19, 2020, which included causes of action, as against Defendants, sounding in breach of contract, breach of fiduciary duty, mishandling of remains, negligence, negligent and intention infliction of emotional distress, and violation of General Business Law § 347 for deceptive trade practices. Plaintiffs seek compensatory damages, treble damages, and punitive damages.

In the "Affidavit of Service" of the Summons and Complaint, the Process Server alleges as follows: "Person to be Served JAMES H. ROBINSON, JR. FUNERAL HOME C/O ANTHONY R. ATWELL, ESQ. REGISTERED AGENT 1213 CLINTON AVENUE, IRVINGTON, NJ 07111;" and that he left a copy of the pleadings with Dranne Atwell, Secretary, a person authorized to accept service, on August 12, 2020. (See "Affidavit of Service," at NYSCEF Doc. No. 58).

The ROBINSON Defendants' Answer, filed on September 22, 2020, included, in pertinent part, affirmative defenses of lack of personal jurisdiction, and failure to state a cause of action; and Counterclaims for defamation, slander, negligence, negligent and intentional infliction of emotional distress, fraud, and misrepresentation.

In the aforesaid Answer, Defendants admit that JAMES H. ROBINSON FUNERAL HOME is a New York business with a principal place of business at 2037A Utica Avenue, Brooklyn, NY; and that JAMES H. ROBINSON is a Licensed Funeral Director, and is the owner and operator of JAMES H. ROBINSON FUNERAL HOME. (See Defendants' Answer, verified by JAMES H. ROBINSON on September 22, 2020).

The ROBINSON Defendants' instant motion was filed April 6, 2022. In support of their Motion, Defendants include the pleadings; a purported

"Affidavit" of JAMES ROBINSON -- which does not set forth his signature or the notary's signature; and the aforesaid "Affidavit of Service" of the Complaint upon the ROBINSON Defendants. In opposition to the motion, Plaintiffs' submissions include the Affidavits of Plaintiffs MITZI HINES HALLMAN and HOPE DUKES, and various supporting documents.

It is noted that this Court had granted Plaintiffs a judgment on liability, by default as to Co-Defendants ANDREW T. CLECKLEY FUNERAL SERVICES, INC. and ANDREW T. CLECKLEY FUNERAL HOME, INC. (also referred to herein as the CLECKLEY Defendants), to the extent set forth in this Court's Order. (See Order dated April 8, 2022, at NYSCEF Doc. No. 65). The CLECKLEY Defendants are alleged to be New York Corporations with a principal place of business at 2037A Utica Avenue, Brooklyn, New York, acting as agents of the ROBINSON Defendants. (See Plaintiff's Complaint). In its Order granting Plaintiffs the judgment on liability by default, the Court noted, in part, as follows: "plaintiffs claim that they contracted with James H. Robinson to receive and assume responsibility for Mr. Hallman's remains and deliver the remains to another funeral home, which was hired to transport the remains. On May 5, 2020, plaintiffs learned from the Medical Examiner's office that Mr. Hallman's body was found among the many dozens of bodies stuffed into an unrefrigerated U-Haul at Cleckley's." (See Order dated April 8, 2022).

APPLICABLE LAW/ANALYSIS

Motion to Dismiss

Defendants move to dismiss the complaint based upon various grounds under CPLR 3211 "Motion to dismiss," which provides, in relevant part, as follows:

“(a) Motion to Dismiss Cause of Action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded upon documentary evidence; or... 3. the party asserting the cause of action has not legal capacity to sue; or... 7. the pleading fails to state a cause of action; or 8. the court has not jurisdiction of the person of the defendant”.

--Personal Jurisdiction

Defendants JAMES H. ROBINSON, and JAMES H. ROBINSON FUNERAL HOME, seek to dismiss this Complaint, as against them, upon the ground of lack of personal jurisdiction, pursuant to CPLR 3211(a) (8).

With respect to this ground, Defendants argue that the Court does not have personal jurisdiction because service of process was not properly effectuated.

As far as service upon Defendant JAMES H. ROBINSON, his Counsel alleges that the Summons and Complaint was not properly served upon him in his individual capacity, since the “Affidavit of Service” names the person served as “JAMES H. ROBINSON, JR. FUNERAL HOME”.

As far as service upon Defendant, JAMES H. ROBINSON FUNERAL HOME, its Counsel alleges that the Summons and Complaint was not properly served upon it, based on various grounds, including that the proper party would be JAMES H. ROBINSON d/b/a JAMES H. ROBINSON FUNERAL SERVICE. Counsel acknowledges that ROBINSON had initially designated his attorney, Anthony Atwell, as agent for service of process, many years ago (*see* Certificate of Incorporation, NYSCEF Doc. No. 76); however, he alleges that the designation had expired.

Plaintiffs maintain that they reasonably relied on public sources of information which were created and filed by Defendants; and that ROBINSON’s

designated registered agent and attorney had accepted service and forwarded the pleadings to Defendants, who had promptly filed their Answer.

CPLR § 3211 (e) is applicable, and it provides that: “an objection that the summons and complaint ... was not properly served is **waived** if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading”. [emphasis added] Thereby, as explained by Professor Siegel, “CPLR 3211(e) singles out the objection of improper service of process and imposes a special additional time limit on asserting it. If the objection is taken by answer instead of by motion, as it may be, the party so asserting it must move for summary judgment under CPLR 3212 based on the objection within 60 days after serving the answer, or the objection is waived.” (Siegel, *New York Practice*, § 274 “Option to Plead Instead of Move; Waiver;” *see also* § 266 “Lack of Personal Jurisdiction; Paragraph 8” [6th ed.]).

Accordingly, that part of Defendants’ motion which seeks to dismiss this action, upon the ground that the Court does not have personal jurisdiction over them because service of process was not properly effectuated, is denied pursuant to CPLR § 3211 (e). Herein, the ROBINSON Defendants are deemed to have waived the objection that the pleadings were not properly served, because they failed to move on that ground within 60 days after serving their Answer. In fact, the ROBINSON Defendants did not file the instant motion until April 6, 2022, which was about 19 months after the date they filed their Answer on September 22, 2020.

It appears that Defendants’ Counsel also seems to be arguing that the Court does not have personal jurisdiction over Defendants because they are not domiciled in New York, in that Counsel alleges that: “JAMES H. ROBINSON

FUNERAL SERVICE is and was a funeral service registered and operating in the state of New Jersey in the township of Neptune. It is neither a corporation, partnership nor association," and that "JAMES ROBINSON d/b/a JAMES H. ROBINSON FUNERAL HOME ... had ceased operations in New York for some time during the Covid period because he was inundated with bodies in New Jersey; therefore, he is neither a local nor foreign business that was, at that time, doing business regularly in the state of New York." (Affirmation by Defendants' Counsel Blackman, dated April 4, 2022, p. 2-3).

However, the latter allegations cannot be credited, because they are not supported by a sworn affidavit made by JAMES ROBINSON, who would be the person with knowledge of the facts. ROBINSON's "Affidavit" is not in proper form, because it is not signed by him, and the notary. Rather, only the typed letter "S" is in the signature lines.

Nevertheless, even assuming *arguendo* that ROBINSON's "Affidavit" was in proper form, his statements therein do not support his Counsel's position. Rather, ROBINSON, who does not state where he is domiciled, admits that he works in New York as well as in New Jersey; and that he was registered as a funeral director at the Brooklyn New York location where the decedent Hallman's body was left. Also, in their Answer, Defendants admit that JAMES H. ROBINSON FUNERAL HOME is a New York business with a principal place of business at 2037A Utica Avenue, Brooklyn, NY; and that JAMES H. ROBINSON is a Licensed Funeral Director, and is the owner and operator of JAMES H. ROBINSON FUNERAL HOME. (See Defendants' Answer, verified by JAMES H. ROBINSON on September 22, 2020).

That ROBINSON transacts business, and contracts to supply services as a funeral director, in New York, is further corroborated by Plaintiffs' research, which shows that JAMES H. ROBINSON was, and is, a New York State licensed funeral director; and that his business, JAMES H. ROBINSON FUNERAL HOME, is listed as an active funeral home in Brooklyn and Bronx, New York, with the New York State Department of Health.

Furthermore, in their Affidavits, Plaintiffs allege facts to support that ROBINSON contracted to supply services in New York State. For example, they allege that ROBINSON directed that the remains of decedent Hallman "be taken to Robinson's funeral home located at 2037A Utica Avenue in Brooklyn." (Affidavit by Plaintiff DUKES, dated May 20, 2021).

Thus, to the extent that Defendants' Counsel is requesting dismissal on the basis that there is no personal jurisdiction over them since they are non-domiciliaries, this relief is also denied, pursuant to New York's so-called "longarm" statute, CPLR § 302 "Personal jurisdiction by acts of non-domiciliaries," which provides as follows:

"(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

- 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or**
- 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or**
- 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he**

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." [emphasis added]

-- Defense upon documentary evidence; Failure to state a cause of action

In addition to the foregoing, the ROBINSON Defendants seek to dismiss this case upon the grounds of a defense founded upon documentary evidence, and failure to state a cause of action, pursuant to CPLR 3211(a) (1) and (7). In this regard, the Court of Appeals has established the following principals:

"On a motion to dismiss pursuant to **CPLR 3211**, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481, 484; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634). Under **CPLR 3211 (a) (1)**, a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see, e.g., *Heaney v Purdy*, 29 NY2d 157). In assessing a motion under **CPLR 3211 (a) (7)**, however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, supra, at 635) and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, supra, at 636)". [emphasis added] (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

A motion pursuant to **CPLR 3211 (a) (1)** to dismiss a complaint based on documentary evidence may not be appropriately granted unless "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively

establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

"A CPLR 3211 (a) (7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a **claim cognizable at law**. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim (*see Rovello*, 40 NY2d 633, 357 NE2d 970, 389 NYS2d 314; *Guggenheimer*, 43 NY2d 268, 372 NE2d 17, 401 NYS2d 182; *see also Board of Managers of Fairways at N. Hills Condominium v Fairways at N. Hills*, 150 AD2d 32, 545 NYS2d 343 [2d Dept 1989]). **When documentary evidence is submitted by a defendant "the standard morphs from whether the plaintiff stated a cause of action to whether it has one"** (John R. Higgitt, CPLR 3211 [A] [7] and [A] [7] Dismissal Motions—Pitfalls and Pointers, 83 NY St BJ 32, 33 [2011] [emphasis omitted]; John R. Higgitt, CPLR 3211 [A] [7]: Demurrer or Merits-Testing Device?, 73 Albany L Rev 99, 110 [2009]). As alleged here, if the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a **well-pleaded cognizable claim is flatly rejected by the documentary evidence**), dismissal would be appropriate [citations omitted]." [emphasis added] (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st Dept 2014]; *See Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

-- Defense upon documentary evidence

With respect to the allegation that this action should be dismissed as against the moving Defendants, upon the ground of a defense upon documentary evidence, pursuant to CPLR 3211(a) (1), Defendants' Counsel argues that Plaintiffs had actually hired nonparty Hosten Funeral Service, and not Defendants, to take charge of the body of the decedent Hallman.

In support of this position, Defendants submit a copy of a partially illegible document alleged to be a Permit, issued by the NYC Department of Health and Mental Hygiene, to Hosten Funeral Service, on April 29, 2020, for the transportation the body of the decedent Hallman, to the Greenwood Crematory in Newark, New Jersey; and a blurry photograph alleged to be a "Visitors Register" showing that Hosten had picked up a body on April 23, 2020.

In his purported "Affidavit," ROBINSON describes his conversations with Hallman's minister, Reverend Marshall Morton, wherein he references a permit, and acknowledges as follows: "I informed him [Reverend Morton] that if we got the permit then maybe I could assist in getting a favor from a crematory that I had just dealt with for multiple bodies. I told him to get the paperwork done properly and gave him the directions on how to acquire the permit for cremation from the Office of the Medical Examiner. **If he got the permit, I would meet him at the Crematory and ask the favor for him.**" [emphasis added] (See unsigned "Affidavit" by ROBINSON, dated April 4, 2022).

In opposition, Plaintiff DUKES explains Plaintiffs' position, in relevant part, as follows:

"We reached an agreement that Robinson was to receive and assume responsibility for Mr. Hallman's remains on April 23, 2020. Under the agreement the remains were **to be delivered by another funeral home**, which was hired to transport them ... My family minister and the transport funeral director immediately called Robinson. Robinson ... directed that the remains be taken to Robinson's funeral home located at 2037A Utica Avenue in Brooklyn, New York to be placed under Robinson's custody, care and control... Robinson assured me that my godfather's remains would be protected, well cared for, and would be cremated on April 29 at Greenwood Crematory in Elizabeth, New Jersey... Robinson said that he was personally picking up my godfather's cremated remains at Greenwood Crematory and would be in touch soon to bring us the cremated remains.

The next day, on May 5, I learned from the Medical Examiner's Office that the uncremated remains of my godfather, Nathaniel Hallman were found among the many dozens of bodies stuffed into an unrefrigerated U-Haul at the funeral home location owned and operated by Cleckley." [emphasis added] (Affidavit by Plaintiff DUKES, dated May 20, 2021).

Therefore, considering these allegations, even assuming, *arguendo*, that the subject documents tendered by Defendants are what they are alleged to be, it appears that they do not "utterly refute" Plaintiffs' factual allegations, or conclusively establish a defense, as a matter of law, within the meaning of the applicable law.

--Failure to state a cause of action; Lack of capacity to sue/ standing

Defendants further allege that this action should be dismissed, as against the moving Defendants, upon the grounds of Plaintiffs' alleged failure to have a cause of action, due to a lack of capacity to sue or standing, pursuant to CPLR 3211(a) (3) and (7), because only the surviving next of kin would be able to assert a cause of action for the common law right of sepulcher.

"The principle is well established that the common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial, and that damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body (see *Shiple v City of New York*, 25 NY3d 645, 653, 16 N.Y.S.3d 1, 37 N.E.3d 58 [2015]; *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 31, 877 N.Y.S.2d 300 [1st Dept 2009]). The right of sepulcher thus protects the legal right of the next of kin to "find solace and comfort in the ritual of burial" (*Shiple*, 25 NY3d at 653 [internal quotation marks omitted], citing *Melfi*, 64 AD3d at 32)" (*Almeyda v Concourse Rehabilitation & Nursing Ctr.*, 195 AD3d 437, 438 [1st Dept 2021]). Further, in a claim for the right of sepulcher, emotional injury to next of

kin can be presumed for the mishandling of a corpse. (*Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 36-37 [1st Dept 2009]).

As to Plaintiff MITZI HINES HALLMAN, Defendants question whether she is actually the decedent Hallman's surviving spouse, and his next of kin.

As to Plaintiff HOPE DUKE, Defendants aver that, as Hallman's purported goddaughter, she would not have standing to bring this action as against them.

With respect to these grounds, Defendants cite Public Health Law § 4201 "Disposition of remains," which sets forth the "priority" of persons having the right to control the disposition of the corpse of a decedent; and which provides, in pertinent part, as follows:

"(2)(a) The following persons in descending priority shall have the right to control the disposition of the remains of such decedent; provided that if there are more than two members of a class listed in subparagraph (iii), (v), or (vii) of this paragraph entitled to control the disposition of remains of a decedent, the disposition shall be determined by a majority of the members of the class who are reasonably available:

(i) the person designated in a written instrument executed pursuant to the provisions of this section;

(ii) the decedent's surviving spouse; ...

(viii) a duly appointed fiduciary of the estate of the decedent;

(ix) a close friend or relative who is reasonably familiar with the decedent's wishes, including the decedent's religious or moral beliefs, when no one higher on this list is reasonably available, willing, or competent to act, provided that such person has executed a written statement pursuant to subdivision seven of this section...

(b) If a person designated to control the disposition of a decedent's remains, pursuant to this subdivision, is not reasonably available, unwilling or not competent to serve, and such person is not expected to become reasonably available, willing or competent, then those persons of equal priority and, if there be none, those persons of the next succeeding priority shall have the right to control the disposition of the decedent's remains".
[emphasis added]

In opposition to this part of the motion, Plaintiff MITZI HINES HALLMAN avers that she is the decedent Hallman's surviving spouse and the Administrator of his Estate; and she has cognizable claims as against Defendants. (Affidavit by MITZI HINES HALLMAN, dated November 4, 2021). As a surviving spouse, she would have priority to control the disposition of the remains of her husband, pursuant to Public Health Law § 4201.

Further, according to Plaintiff MITZI HINES HALLMAN, because of the stress of her husband's death, she delegated the rights and responsibility of arranging the handling of her husband's remains to their goddaughter, HOPE DUKES. (See Affidavit by MITZI HINES HALLMAN, dated November 4, 2021). In this regard, Public Health Law § 4201 (2) (b) provides for the transfer of priority with respect to the right to control the disposition of the decedent's remains in the event that no one higher on the list is reasonably available, willing, or competent to act.

With respect to claims for loss of sepulcher, there is no question that a decedent's sister, as well as a decedent's adult children, would have "standing" to seek judicial enforcement of this right; and that, on defendants' motion, the burden was on movants to establish that there was no possibility that a plaintiff did not have "priority." (*Shepherd v Whitestar Dev. Corp.*, 113 AD3d 1078, 1080-1081 [4th Dept 2014]). Although plaintiffs will bear the burden of proof at trial, this branch of the motion must be denied as movants failed to establish that plaintiff's do not have standing.

Summary Judgment

Defendants JAMES H. ROBINSON, and JAMES H. ROBINSON FUNERAL HOME, also, move for summary judgment dismissing this Complaint, as against

them, pursuant to CPLR R 3212, which provides that a motion for summary judgment shall be supported by affidavit, made “by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.”

The Court of Appeals has established applicable principals:

“As we have stated frequently, the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center, supra*, at p 853). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Herein, Defendants have not made a *prima facie* showing of entitlement to summary judgment, because they have not submitted an affidavit, in admissible form, from a person having knowledge of the material facts, namely, JAMES H. ROBINSON. Neither ROBINSON, nor the Notary, signed the tendered “Affidavit.” Further, it is not acceptable as it violates the Part rules.

However, even assuming *arguendo* that ROBINSON made a *prima facie* showing of entitlement to judgment as a matter of law, the motion for summary judgment would still be denied, because Plaintiffs have raised issues of fact as to Defendants’ liability, including as to whether Defendants improperly dealt with

the decedent's body. (See *Almeyda v Concourse Rehabilitation & Nursing Ctr.*, 195 AD3d 437, 438 [1st Dept 2021]. See Plaintiffs' Affidavits).

CONCLUSION

Accordingly, the motion by the ROBINSON Defendants to dismiss the Complaint on various grounds pursuant to CPLR 3211, and for summary judgment pursuant to CPLR 3212, and for other and related relief, is denied.

This constitutes the decision and order of this Court.

Dated: MAY 31 2023



HON. ELIZABETH A. TAYLOR, J.S.C.