

Matter of Upton v Town of Mooers
2024 NY Slip Op 35016(U)
September 23, 2024
Supreme Court, Clinton County
Docket Number: Index No. 2023-00000076
Judge: Allison M. McGahay
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**STATE OF NEW YORK
SUPREME COURT COUNTY OF CLINTON**

In the Matter of the Article 78 Petition of
LEROY UPTON,

DECISION AND ORDER

Petitioner,

Index No: 2023-0000076

RJI No.: 09-1-2023-0173

-against-

**TOWN OF MOOERS, RIVERSIDE CEMETERY,
JEFFREY MENARD, and KELLY MCDONALD, JOINTLY
AND SEVERALLY LIABLE,**

Respondents.

Documents considered: 1.) Notice of Petition, filed on March 21, 2023, and Verified Petition, filed on March 21, 2023; 2.) 4 separate Affidavits of Service, filed on April 13, 2023; 3.) Notice of motion, filed on July 10, 2023, and affirmation, filed on July 10, 2023, and memorandum of law, filed on July 10, 2023, and certificate of service, filed on July 10, 2023; 4) and NYSCEF Doc. #s 7-9, 11-17.

Appearances -Oral argument- January 30, 2024: Alan Weinraub, Esq. for Petitioner
Michael Crowe, Esq. for Respondents
McGAHAY, J.

This matter, commenced in the form of a special proceeding, was originated by the Petition of Leroy Upton, verified on March 20, 2023, and filed with the Clinton County Clerk on March 21, 2023.

The Petition deals with Leroy Upton’s dissatisfaction with the Town of Mooers’ management of Riverside Cemetery. Petitioner’s list of grievances, as alleged in the Petition, can be summed up as follows: 1) Respondents overcharged Petitioner for a burial plot; 2) Respondents refused to sell Petitioner a burial plot adjacent to his father; and 3) Respondents failed to know the proper burial location for Petitioner’s father. Based thereon, Petitioner asserts six causes of action against Respondents, wherein he seeks money damages, specific performance of a sale of a burial plot and the ordering of an accounting and audit be made of the cemeteries owned or operated by the Town of Mooers.

Respondents Town of Mooers, Riverside Cemetery, Jeffrey Menard and Kelly McDonald appeared in this action through service of a pre-answer motion to dismiss.

In opposing the motion, Petitioner has asserted a string of new and unconnected complaints concerning the Respondents' management of the cemetery.

Also before the Court is the motion of Petitioner's Counsel for an order to compel the deposition of the Respondents.

By this Decision and Order the Court resolves the two motions, referenced above, that are pending before the Court.

Deposition of Respondents

Petitioner has moved this Court to compel the deposition of the Respondents. In this regard, Petitioner notes that leave of Court is required to conduct discovery in a proceeding pursuant to Article 78 of the CPLR (see CPLR § 408).

Initially, the Court notes that while the Article 78 relief Petitioner seeks, which is disposed of below, is appropriately brought in the context of a special proceeding, Petitioner's claim for money damages should have been prosecuted in the form of a plenary action. In a plenary action, discovery is available as of right (see CPLR § 3101); however, pursuant to CPLR § 3211(g)(3), the filing of a CPLR § 3211 motion to dismiss stays discovery.

Here, the Court declines to convert the claims for money damages into a plenary action, in accordance with CPLR § 103(c), as they are nevertheless subject to dismissal for the reasons stated below. Even if such claims were converted, discovery would be stayed pending resolution of the motion to dismiss before the Court, and the Court does not otherwise find that discovery is necessary in this matter. The Court, accordingly, is denying the Petitioner's application for discovery.

“Article 78 Dereliction of Duty” and “Specific Performance”

Petitioner in the First and Fifth causes of action has asserted claims for “Article 78 Dereliction of Duty” and “Specific Performance” respectively, stemming from the Respondents alleged refusal to sell to Petitioner a burial plot next to the burial plot of the Petitioner’s father. As a result, thereof, Petitioner seeks an order of the Court directing the Respondents to sell him the requested plot.

At the January 30, 2024 appearance in this matter, it was conceded by Petitioner’s Counsel, on the record, that Respondents have since sold the Petitioner the requested plot. Based thereon, Petitioner withdrew so much of the Petition seeking relief pursuant to Article 78 of the CPLR.

Negligent Infliction of Harm / Gross Negligence in the Infliction of Harm and Emotional Distress

Petitioner, throughout the Petition, and more specifically in the Second and Third causes of action, seeks money damages against Respondents, sounding in negligent infliction of emotional distress, based upon: 1) Respondents “negligently not knowing which plot Petitioner’s father was to be buried in, overcharging Petitioner and refusing to sell petitioner a cemetery plot next to his father”; and 2) Respondents Menard and McDonald violations of the Cemetery Law of the State of New York when Respondent Menard stated to Petitioner that he, as Town Supervisor, “did not have to sell Petitioner a cemetery lot next to Petitioner’s fathers burial site when such a plot is vacant and available and Petitioner is a resident of the town of Mooers”.

On a motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7), a court must “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” (*Leon v. Martinez*, 84 NY2d 83, 87–88 [1994]).

A cause of action for negligent infliction of emotional distress generally requires plaintiff “to show a breach of a duty owed to her which unreasonably endangered her physical safety, or caused her to fear for her own safety” (*Graber v Bachman*, 27 AD3d 986, 987 [2006]; see *Miller v Chalom*, 269 AD2d 37, 40 [2000]), but an “exception permits recovery for emotional harm to a close relative resulting from negligent mishandling of a corpse” (*Johnson v State of New York*, 37 NY2d 378, 382 [1975]; see *Schultes v Kane*, 50 AD3d 1277, 1278 [3d Dept 2008])

In *Schultes v Kane*, plaintiff Marie Schultes sued her former husband, defendant Duane Kane, as well as defendant Afton Glenwood Cemetery Association, Inc., for, *inter alia*, negligent infliction of emotional distress, after learning that defendant Kane had the bodies of four of their children disinterred from a plot jointly owned by plaintiff and Kane, and reinterred them in a plot he purchased near his parents' graves in the same cemetery owned by defendant Afton Glenwood Cemetery Association, Inc. In affirming so much of the lower court's dismissal of the negligent infliction of emotional distress cause of action, the Appellate Division, Third Department held, in relevant part, as follows:

A cause of action for negligent infliction of emotional distress generally requires plaintiff “to show a breach of a duty owed to her which unreasonably endangered her physical safety, or caused her to fear for her own safety” (*Graber v Bachman*, 27 AD3d 986, 987 [2006]; see *Miller v Chalom*, 269 AD2d 37, 40 [2000]), but an “exception permits recovery for emotional harm to a close relative resulting from negligent mishandling of a corpse” (*Johnson v State of New York*, 37 NY2d 378, 382 [1975]). Nothing in the record reveals any mishandling of the bodies here, which apparently remained encased in the caskets during the disinterment and reinterment (see *Estate of LaMore v Sumner*, 46 AD3d 1262, 1264 [2007]). Further, New York courts do not recognize a cause of action for wrongful disinterment (see *id.* at 1263; *Orlin v Torf*, 126 AD2d 252, 255 [1987], *lv denied* 70 NY2d 605 [1987]). Accordingly, those causes of action should be dismissed on this ground.

(*Schultes v Kane*, 50 AD3d at 1278-79 [3d Dept 2008])

Here, none of the allegations in the Petition suggest Respondents unreasonably endangered Petitioner's physical safety or cause him to fear for his own safety. To the extent the Petitioner

seeks relief pursuant to the exception, which permits recovery for emotional harm stemming from negligent mishandling of a corpse, the Court finds the allegations do not suggest the Petitioner's father's body was negligently mishandled (see *Schultes v Kane*, supra). As clarified by Petitioner's Counsel on the January 30, 2024 appearance, Petitioner's father was not buried in the wrong gravesite; rather, the allegation is that the Respondents did not initially know the proper burial site for Petitioner's father, resulting in the Petitioner having to inform the Respondents of the proper location. Neither this allegation, nor any of the other allegations in the Petition amount to mishandling of Petitioner's father's corpse. The Court, therefore, is dismissing so much of the Petition.

Intentional Infliction of Harm and Emotional Distress

Petitioner, in the Fourth Cause of action seeks money damages for intentional infliction of emotional distress based upon Respondents' alleged refusal to sell Petitioner a burial plot next to his father, and for their conduct "with respect to the treatment of petitioner's father's body". Petitioner alleges this conduct was "in the execution of respondent's office" was done with the intent to cause emotional harm to petitioner.

To succeed on a claim for intentional infliction of emotional distress, a plaintiff is required to plead and prove extreme and outrageous conduct, the intentional or reckless nature of such conduct, a causal relationship between the conduct and the resulting injury, and severe emotional distress (see *Howell v. New York Post Co.*, 81 NY2d 115, 121 [1993]; *Cusimano v United Health Services Hosps., Inc.*, 91 AD3d 1149, 1152 [3d Dept 2012]; *Christenson v. Gutman*, 249 AD2d 805, 808 [3d Dept 1998]). Liability has been found only where "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community". (*Murphy v. American*

Home Prods. Corp., 58 NY2d 293, 303 [1983] [internal quotation marks and citation omitted]; accord *Howell v. New York Post Co.*, 81 NY2d at 122).

Here, accepting the allegations in the petition as true, and affording the Petitioner the benefit of every possible inference, the Court cannot find that the complained of conduct was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” (*Murphy v. American Home Prods. Corp.*, 58 NY2d 293, 303 [1983] [internal quotation marks and citation omitted]; accord *Howell v. New York Post Co.*, 81 NY2d at 122). Furthermore, “it is well settled that a claim of intentional infliction of emotional distress cannot be maintained against governmental entities” (*Moore v Melesky*, 14 AD3d 757, 761 [3d Dept 2005]; see *Wells v Town of Lenox*, 110 AD3d 1192 [3d Dept 2013]; *Matter of Lynch v State of New York*, 2 AD3d 1002, 1003 [2003]). The Court, therefore, is dismissing so much of the petition.

Various Allegations of Mismanagement in the Opposition Papers

Petitioner, in opposing dismissal of the Petition, has asserted a hodgepodge of maintenance and administrative concerns related to Respondents’ management of the cemetery. It is unclear from Petitioner’s affidavit if he seeks to expand this proceeding to include relief from these complaints, or if they are merely anecdotal accounts of the Respondents’ management of the cemetery. To the extent the Petitioner seeks for these to be treated as new claims for relief, the Court agrees with the Respondents’ counsel in his reply affirmation, that no claim is made that there has been the requisite demand and refusal in order to support relief in this proceeding (*see Remedy for Infinite Unconcern for Mentally & Physically Handicapped, Inc. v. O’Shea*, 77 AD2d 363, 365 [3d Dept 1980] [“As conditions precedent to a proceeding in the nature of mandamus to compel action, such as we have here, there must be a demand upon a public body or officer to

perform a duty and a refusal by the body or officer to perform. In this instance, the record lacks evidence of the necessary demand, and, therefore, petitioner is precluded from instituting the mandamus proceeding." [internal citations omitted]). The Court, accordingly, is dismissing such claims.

Accounting

Respondents seeks dismissal of the cause of action for an accounting, arguing that the Petitioner has failed to sufficiently allege a fiduciary relationship between the Petitioner and Respondents, which is required to maintain a cause of action for an accounting (*see Reichert v N. MacFarland Builders, Inc.*, 85 AD2d 767, 768 [3d Dept 1981] ["a cause of action for an accounting must allege a fiduciary relationship"]; *see Brigham v. McCabe*, 27 AD2d 100, 105, *affd.* 20 N.Y.2d 525). Upon reviewing the papers, the Court agrees, with such argument, and is dismissing the claim.

Accordingly, and for the foregoing reasons, it is hereby

ORDERED that Petitioner's motion to compel depositions is denied; and it is further

ORDERED AND ADJUDGED that the Respondents' motion is granted as provided for herein, and the Petition be, and hereby is, dismissed; and it is further

ORDERED that this original Decision and Order is being filed by the Court with the Clinton County Clerk, and Counsel for the Respondents shall, within fourteen (14) days of the date hereof: 1) serve a copy of this Decision and Order, with notice of entry, upon all persons/entities entitled to notice; and 2) file proof of such service.

Dated: September 23, 2024
Elizabethtown, NY


HON. ALLISON M. MCGAHAY, J.S.C.