

<b>Yeboah-Asuamah v McCoy</b>
2024 NY Slip Op 35072(U)
September 3, 2024
Supreme Court, Westchester County
Docket Number: Index No. 56211/2020
Judge: Damaris E. Torrent
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
YAW YEBOAH-ASUAMAH, as the Administrator of the Estate of F. Y.-A., deceased, and YAW YEBOAH-ASUAMAH, Individually,

Plaintiffs,

-against-

DIANA MCCOY, JOHN G. CRAWFORD,  
WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, WESTCHESTER COUNTY CHILD PROTECTIVE SERVICES, WESTCHESTER COUNTY, and JOHN G. CRAWFORD MEMORIAL SERVICES, LLC,

Defendants.

-----X  
**DAMARIS E. TORRENT, A.J.S.C.**

**DECISION AND ORDER**  
**Index No.: 56211/2020**  
**Motion Date: 06/11/2024**  
Seq. Nos. 3 – 4

The following papers numbered 1 to 80 were read on (Seq. No. 3) the motion by defendants Diana McCoy,<sup>1</sup> Westchester County Department of Social Services, Westchester County Child Protective Services, and Westchester County (together, the County) for an order granting summary judgment dismissing the complaint and the cross-claim asserted against them; and (Seq. No. 4) the motion by defendants John G. Crawford and John G. Crawford Memorial Services, LLC (together, Crawford) for an order granting summary judgment dismissing the complaint against them:

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<sup>1</sup> As indicated in the moving papers on Seq. No. 3, this defendant’s surname is misspelled in the caption, and the correct spelling is McCaughey.

<u>PAPERS</u>	<u>NUMBERED</u>
(Seq. No. 3) Notice of Motion / Affirmation (Carey) / Exhibits A – SS / Affidavit (McCaughey) / Statement of Material Facts / Memorandum of Law	1 – 50
Affirmation in Opposition (Collins) / Statement of Material Facts / Exhibits 1 – 2	51 – 54
Affirmation in Opposition (Johnson) / Exhibit 1	55 – 56
Memorandum of Law in Reply	57
 (Seq. No. 4) Notice of Motion / Affirmation (Johnson) / Affidavit (Crawford) / Memorandum of Law / Exhibits A – J	 58 – 71
Affirmation in Opposition (Collins) / Exhibits 1 – 2	72 – 74
Reply Affirmation (Johnson) / Exhibits A – E	75 – 8

Upon the foregoing papers, both motions are granted.

This action for interference with the common-law right of sepulcher<sup>2</sup> arises out of the death of plaintiff's decedent on February 24, 2019 and the subsequent burial of the decedent on August 12, 2019. Following the decedent's death, an autopsy was initiated by the Westchester County Medical Examiner (ME). From the date of the decedent's death through approximately April 5, 2019, the decedent's body remained in the ME's office. On April 5, 2019, the Westchester County Public Administrator referred the matter to the Westchester County Department of Social Services (DSS) Bureau of Resources (BOR) for burial assistance. On or about that date, BOR selected Crawford from a list of funeral directors which offer services for indigent burials to complete the burial of the decedent.

On April 9, 2019, after Crawford had taken possession of the decedent's body, but prior to burial, plaintiff's prior counsel notified Crawford that plaintiff intended to have a private autopsy conducted and that Crawford should not proceed with the burial, whereupon Crawford returned the decedent's body to the ME. The record does not contain any evidence to establish that a private

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<sup>2</sup> Plaintiff also asserted claims against separate defendants sounding in medical malpractice, which were severed from the instant action and assigned Index No. 50003/2022.

autopsy was performed. On August 7, 2019, plaintiff's current counsel faxed a letter to Crawford, the contents and authenticity of which are not disputed. The body of the letter reads as follows:

Dear Mr. Crawford:

Please be advised that the above law firm represents the interests of the Estate of (decedent). Please note that the funeral and burial of the decedent may now proceed, as the autopsy has been completed and the Westchester Medical Examiner's Office is awaiting contact from you to release the body. Please call Dawn at the Medical Examiner's office at (a certain telephone number) to make the necessary arrangements.

Thank you for your efforts on behalf of the Yeboah family.

(County Exh. N). After receipt of this letter, on August 12, 2019, Crawford buried the decedent.

No members of the decedent's family were present at the burial.

Plaintiff thereafter served a Notice of Claim (County Exh. HH) dated November 8, 2019. In the Notice of Claim, it is alleged that the claim arose on August 12, 2019, when the decedent's body was buried by Crawford, acting under the control and at the direction of the County. Plaintiff commenced this action by filing a Summons and Verified Complaint on June 16, 2020, alleging, in substance, that the County, and Crawford acting in its capacity as an employee of the County, wrongfully interred the decedent without seeking or obtaining proper authority to proceed.

The County and Crawford now separately move for an order granting summary judgment dismissing the complaint. Because resolution of both motions turns on a single issue, the arguments asserted by the movants are not separately set forth herein. In sum and substance, the movants contend that no triable issues of fact exist as to plaintiff's sepulcher claim because plaintiff, by counsel, specifically authorized the decedent's burial.

In opposition, plaintiff contends that triable issues of fact remain as to whether the County improperly failed to inform plaintiff, at any time prior to the burial of the decedent, that the decedent's body could be released to plaintiff for funeral services. Plaintiff further contends that triable issues of fact remain as to whether the August 7, 2019 letter faxed to Crawford by plaintiff's

counsel authorized Crawford to proceed with the decedent's burial. Plaintiff thus concludes that both motions must be denied.

In reply, the County submits that plaintiff's contention in opposition that the County failed to inform plaintiff that the decedent's body could be released impermissibly raises a new theory of liability which was not asserted either in the Notice of Claim or the Complaint. The County further contends that, even if the assertion of a new theory of liability were entertained, it cannot defeat the motion, as it would expand the scope of circumstances in which a defendant may be liable for interference. In any event, the County points out that it is undisputed that the decedent's body was previously released to Crawford for burial in April 2019, prior to plaintiff's counsel instructing Crawford not to proceed with the burial and long before plaintiff claims to have been misled as to whether the decedent's body could be released. Crawford in reply reiterates its contention that the letter faxed to it by plaintiff's counsel on August 7, 2019 specifically authorized Crawford to contact the ME's office to make the necessary arrangements to proceed with the burial.

The Court has fully considered the submissions of the parties.

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[T]he 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. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . 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] [citations omitted]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

As stated in *Scott v Long Island Power Auth.* (294 AD2d 348, 348, [2d Dept 2002]):

It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether ‘by no rational process could the trier of facts find for the nonmoving party’ (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Dolitsky v. Bay Isle Oil Co.*, 111 AD2d 366).

“The common-law right of sepulcher affords to the deceased’s next of kin an ‘absolute right to the immediate possession of a decedent’s body for preservation and burial..., and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent’s body” (*Shipley v City of New York*, 25 NY3d 645, 653 [2015], quoting *Mack v Brown*, 82 AD3d 133, 137 [2d Dept 2011]). “To establish a cause of action for interference with the right of sepulcher, [a] plaintiff must establish that: (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” (*Turner v Owens Funeral Home, Inc.*, 189 AD3d 911, 912-913 [2d Dept 2020], quoting *Green v Iacovangelo*, 184 AD3d 1198, 1200 [4th Dept 2020]).

Of these six elements, only the third (that defendants interfered with plaintiff's right to immediate possession of the decedent's body) and fourth (that the interference was unauthorized) are disputed on these motions. "Interference can arise either by unauthorized autopsy or by disposing of the remains inadvertently, or ... by failure to notify the next of kin of the death" (*Cansev v City of New York*, 185 AD3d 894, 895 [2d Dept 2020], quoting *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 39 [1st Dept 2009]).

### The County

The County on its motion made a prima facie showing of its entitlement to judgment as a matter of law dismissing the complaint and the cross-claim against it. The County's moving papers establish that there are no genuine issues to be tried as to plaintiff's claim that the County interfered with plaintiff's right to immediate possession of the decedent's body or that any such alleged interference was unauthorized. In opposition, plaintiff failed to raise a triable issue of fact.

As an initial matter, plaintiff's attempt to raise a new theory of liability in opposition which was not asserted in the Notice of Claim cannot defeat the motion. "To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim. A notice of claim must set forth, among other things, the nature of the claim and the time when, the place where and the manner in which the claim arose" (*Washington v City of New York*, 190 AD3d 1009, 1010-1011 [2d Dept 2021] [internal quotation marks and citations omitted]). "A court may consider evidence adduced at a 50-h hearing to correct a good faith and nonprejudicial technical mistake, omission, irregularity, or defect in the notice of claim. However, the evidence adduced at the 50-h hearing cannot be used to substantively change the nature of the claim or the theory of liability. Moreover, causes of action or legal theories may not be raised in the complaint that were

not directly or indirectly mentioned in the notice of claim and that change the nature of the claim or assert a new one” (*id.* at 1011 [internal quotation marks and citations omitted]).

Plaintiff’s Notice of Claim (County Exh. HH) alleges that the claim arose on August 12, 2019, when the decedent’s body was buried by Crawford, acting under the control and at the direction of the County. The Notice of Claim asserts that the decedent’s body was in the possession of the defendants, “all of whom it is claimed were negligent and careless in the possession, preservation, and burial of Infant-Decedent on August 12, 2019.” Nowhere in the Notice of Claim are any allegations from which the County could have discerned that plaintiff intended to assert that defendants interfered with plaintiff’s right to immediate possession of the decedent’s body prior to August 12, 2019. Plaintiff’s attempt to assert for the first time in opposition to the County’s motion for summary judgment that the County interfered with plaintiff’s right to immediate possession of the decedent’s body by allegedly failing to inform plaintiff that the body could be released at some time prior to August 12, 2019 is improper.

In any event, it is undisputed that the decedent’s body had been released to Crawford in April 2019, after the County had made numerous unsuccessful attempts to contact plaintiff and his wife,<sup>3</sup> and that the burial for which Crawford was engaged by the County was postponed at the direction of plaintiff’s counsel for the express purpose of permitting plaintiff and his family to conduct a private autopsy. Plaintiff counsel’s attempt, via an Affidavit (Plaintiff Exh. 1) consisting of hearsay accounts of telephone conversations to which the Affiant was not a party, to assert that plaintiff and his attorneys were somehow misled by the County as to whether and when the decedent’s body could be released thus is not persuasive.

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<sup>3</sup> These attempts are documented in County Exhibits I and J, the contents of which are unrebutted.

Furthermore, there is no allegation that the County failed to notify the next of kin of the decedent's death (*see Cansev*, 185 AD3d at 895; *Melfi*, 64 AD3d at 39)), and plaintiff's apparent attempt to expand the scope of the concept of interference to include circumstances in which the decedent's body, which had previously been released for burial, was not buried at the direction of plaintiff's counsel, and counsel subsequently were unable to determine when the body could be released, is unsupported. Finally, as plaintiff asserts that the ME's refusal to release the body was made in connection with the conduction of an autopsy, any such alleged interference with the plaintiff's right of possession was specifically authorized by Public Health Law § 4210(2)(c). In short, even if the Court were permitted on this motion to consider plaintiff's new theory of liability, which it is not, the Court would decline the invitation to expand the scope of the concept of interference with the plaintiff's right to possession of the decedent's body to encompass the circumstances alleged in plaintiff's opposition.

As to the theory of liability which was asserted in the Notice of Claim and thus is properly raised in opposition to the motion, alleging that the County interfered with plaintiff's right of sepulcher when it, via its agents, improperly buried the decedent's body on August 12, 2019, plaintiff likewise failed to raise a triable issue of fact. Viewing the evidence in the light most favorable to plaintiff, no reasonable jury could conclude that the letter from plaintiff's counsel to Crawford on August 7, 2019 did not authorize the County to release the decedent's body to Crawford, or that it did not authorize Crawford to proceed with the burial after contacting the ME to secure the release of the body. The language of the letter, as quoted above, explicitly states that the burial may proceed, and that the ME is awaiting contact from Crawford to release the body. The only further directive to Crawford in that letter is to contact an individual at the ME's office "to make the necessary arrangements." Plaintiff thus failed to raise a triable issue of fact as to

whether any alleged interference by the County on August 12, 2019 was unauthorized, and the County's motion is granted.

Crawford

In light of the explicit authorization in the letter from plaintiff's counsel faxed to Crawford on August 7, 2019, plaintiff failed to raise a triable issue of fact as to whether any alleged interference by Crawford on August 12, 2019 was unauthorized, and Crawford's motion is granted.

Cross-Claim

In the absence of a viable claim against Crawford, its cross-claim against the County for indemnification is dismissed without consideration of the merits thereof.

Accordingly, it is hereby

ORDERED that the motion (Seq. No. 3) by the County defendants is granted, and the complaint and the cross-claim against them are dismissed; and it is further

ORDERED that the motion (Seq. No. 4) by the Crawford defendants is granted, and the complaint against them is dismissed; and it is further

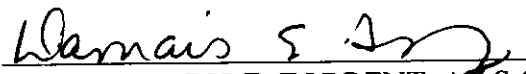
ORDERED that all defendants shall have judgment dismissing all claims against them, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that, within ten (10) days of the date hereof, all defendants shall serve a copy of this Decision and Order, with notice of entry, upon plaintiffs, and shall file proof of said service via NYSCEF.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 3, 2024  
White Plains, New York

**ENTER:**

  
HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF