

Bailey v Owens Funeral Home, Inc.
2024 NY Slip Op 35175(U)
October 8, 2024
Supreme Court, Bronx County
Docket Number: Index No. 800619/2021E
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

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Francine Bailey and Jasmeen Carrie M. Edwards,

Plaintiff,

-against-

DECISION and ORDER
Index No. 800619/2021E

Owens Funeral Home, Incorporated,

Defendant.

-----X
Elizabeth A. Taylor, J.

Defendant moves pursuant to CPLR 3211(a)(7) an Order partially dismissing the complaint for failure to state a cause of action.

This action seeking damages for the violation of the plaintiffs’ right of sepulcher arises out of the death of Jonathan Edwards (hereinafter, “decedent”) on August 14, 2020, during the height of the Covid-19 pandemic. Plaintiff Francine Bailey is a former girlfriend of the decedent, while plaintiff Jasmeen Edwards is the daughter of the decedent and Francine Bailey. Arrangements were made for a wake of the decedent at defendant funeral parlor.

Bailey testified that she contacted the defendant’s funeral home on August 16, 2020, to arrange for the disposition of the decedent’s remains, and thereafter she and Edwards met with the defendant’s employee to discuss the grooming of the body and other details. They provided a digital photograph and a color copy of a photograph depicting their grooming request, which consisted of a light beard and shaped mustache. They agreed on a viewing to be held on August 27, 2020,¹ and selected a black or navy-blue metal rental casket with a light blue interior, as the remains were to be cremated.

Bailey testified that she arrived at the funeral home around 12:00 p.m. but found that it was closed. After calling three or four times, she was admitted at approximately 3:00 p.m. Edwards testified that she arrived outside the funeral home with her ex-husband and Bailey at 12:52 pm and called for admission. Around the same time the Decedent’s brother also asked for admission. Edwards testified that they were admitted at around 1:45 pm.

¹ Bailey testified that she requested that there were to be two separate viewings, one at 12:00 p.m. for the family, and another public viewing from 2:00 p.m. to 5:00 p.m. Edwards, on the other hand, testified that there was to be only one viewing, between 2 pm and 4 pm., but that the family would be allowed to view the body approximately one hour before hand.

Upon viewing the body, Bailey testified that the facial grooming was not to her liking, the casket was wood instead of the pre-selected metal, the inside of the casket was white instead of blue, and there was a brown stain on the pillow, ostensibly due to fluid leaking from the decedent's head. Edwards testified that she saw the stain on the pillow herself and thought it was blood. Edwards stated that she spoke to someone at the funeral home, and they informed her that the stain must be the embalming fluid. This unidentified person also stated that the preparation of the body had just been completed, and possibly one of the stitches ripped as he was being placed in the casket. Edwards also testified that she was told the funeral home employees were rushing, as, due to the Covid-19 pandemic, the funeral home was experiencing delays and facing problems with transportation and receipt of the remains of the deceased.

The guests were asked to leave the room and the decedent's body underwent further preparation during which time further grooming was performed and a new pillow was placed under the decedent's head. Upon decedent's re-presentation, plaintiffs allege that there was hair on and about the decedent's body that had not been removed. Plaintiffs were given extra time for the viewing and the wake and service was completed without any further interruptions.

Edwards testified that she spoke to Owens, the principal manager of the defendant, and that he had explained that the funeral home had just, hours prior to the wake, been permitted to pick up the body. In addition, the preparation of the decedent was delayed because of Covid-19 and the lack of space to store bodies. Edwards was informed by Owens that the normal timing for the funeral home was to pick up the body from the morgue two days before the viewing, which was not possible due to the pandemic, and that the decedent was in "bad shape" when the funeral home had picked him up from the morgue. She testified, "[a]nd he said that your dad was too big to get into the casket that you picked, and you owe me more money, and we gave you a Covid special, a Covid discount, whatever that means. He was really rude, really sarcastic, really arrogant."

ARGUMENT

Defendant argues, first, that pursuant to PHL 4201(2)(a), Bailey, who was only a close friend and not a surviving spouse or domestic partner, never had the right to control the disposition of the decedent's remains, and thus lacks standing in this action. Accordingly, all claims brought by Bailey must be dismissed.

In addition, defendant argues that the causes of action for negligent infliction of emotional distress

duplicate the claims for the loss of the Right to Sepulcher, and as such must be dismissed.

Lastly, defendant argues that it is exempt from liability for Public Health Law § 4201(7), which absolves from liability “actions taken reasonably and in good faith to carry out the directions of a person who represents that he or she is entitled to control of the disposition of remains.” Defendant argues that the casket selected was not compatible with decedent’s body type, and thus substituting another casket was undertaken in good faith. In addition, defendant maintains that Francine Bailey’s claim that they requested a baby blue interior rather than a white interior is contradicted by the Itemization of Funeral Services and Merchandise Selected form, Exhibit “D,” which details the interior was to be white, and as such, this claim must be dismissed. Finally, as to claims that the decedent’s body was intended to be refrigerated, or that it was not properly preserved, prepared, inspected or mishandled, these claims must also be dismissed, as the decedent’s body was not in the funeral home’s custody until shortly before the viewing. Any claim of refrigeration or preservation must be directed, defendant argues, to the City of New York.

The plaintiffs do not oppose the dismissal of all claims asserted by plaintiff Francine Bailey, as they concede that she is not the “next of kin” of the decedent. Nor do the plaintiffs oppose dismissal of the causes of action for negligent infliction of emotional distress, as they are duplicative of the cause of action for violation of the common law right of sepulcher.

Plaintiff Edwards maintains that she is not claiming that the body was not properly preserved, but instead, the claim of sepulcher rests squarely upon the allegations that the decedent’s body was improperly prepared, inspected and mishandled.

Plaintiff further argues that defendant failed to establish a *prima facie* case as to summary judgment, and even if the defendant did, the record demonstrates that despite explicit instructions about how the decedent was to be groomed, including providing defendant with a photograph of the desired grooming, decedent was initially permitted to be presented to his family, friends and loved ones in an ungroomed in that his hair was not cut, his face was not shaved, and he was “stuffed” into the wrong casket. Moreover, defendant’s employee was permitted to empty the viewing chapel, shave, and trim the hair of the decedent, leaving behind whiskers and hair clippings on his person, clothes, and inside the casket for his loved ones to see at the second viewing. Embalming fluid continued to leak from the decedent’s head and ears, belying defendant’s contentions that its actions were “reasonable” and in “good faith.”

DISCUSSION

“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. Failure to make such prima facie showing requires a denial of the motion.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986].) Once this showing has been made, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].)

In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court’s role is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated. (*Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 [1995]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true; all reasonable inferences which can be drawn from the complaint and the allegations therein must be resolved in favor of the plaintiff. (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]). When analyzing the complaint in the context of a motion to dismiss, the court must discern whether the facts as alleged fit within any cognizable legal theory. (*Sokoloff v. Harriman Estates Development Corp.*, *supra* at 414; *Leon v. Martinez*, 84 N.Y.2d 83, 88 – 89 [1994].)

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7), the facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration.” (*Simkin v Blank*, 19 N.Y.3d 46, 52, 968 N.E.2d 459, 945 N.Y.S.2d 222 [2012] [internal quotation marks omitted]). “Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141-142, 75 N.E.3d 1159, 1162, 53 N.Y.S.3d 598, 601 [2017].)

At common law, a decedent’s next-of-kin have a “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” (emphasis added)

(*Shiple v City of NY*, 25 NY3d 645, 653, 16 N.Y.S.3d 1, 37 N.E.3d 58 [2015], citing *Mack v Brown*, 82 AD3d 133, 137, 919 N.Y.S.2d 166 (2nd Dept. 2011). "The right itself is less a quasi-property right and more the legal right of the surviving next of kin to find 'solace and comfort' in the ritual of burial" (*Shiple*, 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] [containing lengthy discussion of history of right of sepulcher claims]). "Damages are limited to the emotional suffering, mental anguish and psychological injuries and physical consequences thereof experienced by the next of kin as a result of the interference with the right of sepulcher." (*Shiple*, 25 NY3d at 653.)

As indicated in *Shiple*, damages are not limited to interference with a right to possession of a body but extends to instances where the defendant "improperly deals with" the decedent's body. (*Shiple*, 25 NY3d at 653.)

As noted above, the surviving plaintiff's claims are all based on alleged "improperly dealing with" the decedent's body," in that plaintiff claims that the defendant inadequately embalmed the body which caused embalming fluid to ooze from his head and ears, failed to groom the decedent, thus allowing him to be viewed by his family, friends and loved ones in an unkempt manner, groomed the decedent during the viewing and permitted the decedent to be viewed with hair clippings and whiskers covering his person, and stuffed the decedent into a casket that was other than the casket chosen by Edwards.

There exist issues of fact as to whether the defendant improperly handled the decedent's corpse. In *Almeyda v. Concourse Rehabilitation & Nursing Center, Inc.*, 195 A.D.3d 437, 438-39 (1st Dep't 2021), plaintiff's common-law right of sepulcher claims were found sufficient in light of the fact that decedent's "hands and feet were bound, his stomach was bloated, he was dirty and unshaven, and a tube was placed down his throat," and "the area where the body was kept 'seemed like [a] garbage dump'" (Id. at 438). As the First Department stated in that case, "Burial rituals involve more than simply placing a body in its final resting place. Indeed, one need only consider the Catholic practice of holding a wake or vigil, or the ritual cleansing of a body following death by Jews and Muslims, as examples of the ways in which human tradition has shown respect to the dead in the moments preceding burial itself." (*Almeyda v. Concourse Rehab. & Nursing Ctr.*, 195 A.D.3d at 439). Similarly, the right has been found to have been violated where noxious odors emanated from a decedent's mausoleum – demonstrating decomposition and requiring disinterment. (*Massaro v. O'Shea Funeral Home*, 292 A.D.2d 349 [2d Dep't 2002]). It has also been triggered where it was determined that a

decedent's body was not in the casket at the funeral, and the body was not located for some period of time. (*Gutnick v. Hebrew Free Burial Socy. for the Poor of the City of Brooklyn*, 198 A.D.3d 880, 882 [2d Dep't 2021]. See, also, *Wainwright v. New York City Health & Hosps. Corp.*, 61 A.D.3d 851, 852 [2d Dep't 2009] [body became badly decomposed due to its placement in a known defective refrigeration unit for five days].)

Here, in the abstract, presenting a body in the wrong casket, or improper grooming, in itself, might not be actionable. But the claim here is based not on each component of the way the body was presented, but on the presentation of the body as a whole, and its effect on the next-of-kin. The improper grooming, incorrect casket, displacement of the mourners for additional grooming, and the leaking of fluids from the decedent's head, taken as a whole, raises issues of fact for a jury to resolve.

Public Health Law § 4201(7) on its face does not apply here. That section provides, in relevant part:

"...No cemetery organization, business operating a crematory, natural organic reduction facility, or columbarium, funeral director, undertaker, embalmer or funeral firm shall be held liable for actions taken reasonably and in good faith to carry out the directions of a person who represents that he or she is entitled to control of the disposition of remains, provided that such action is taken only after requesting and receiving written statement that such person:

"(a) is the designated agent of the decedent designated in a will or written instrument executed pursuant to this section; or

"(b) that he or she has no knowledge that the decedent executed a written instrument pursuant to this section or a will containing directions for the disposition of his or her remains and that such person is the person having priority under subdivision two of this section."

There is no showing here that a written statement was demanded or provided. In any event, even if applicable, questions of fact exist as to the reasonableness of the defendant's conduct. "Questions regarding the reasonableness of an action are usually for the trier of fact." (*Terrasure Dev. LLC v Illinois Union Ins. Co.*, 2013 N.Y. Misc. LEXIS 3629, *23, 2013 NY Slip Op 31912(U), 20 [Sup Ct NY Co. 2013].)

Accordingly, it is hereby,

ORDERED that the motion is granted to the extent of (1) dismissing all claims interposed by

plaintiff Francine Bailey, and (2) dismissing all claims sounding in negligent infliction of emotional distress, and the motion is otherwise denied.

The Clerk is directed to amend the caption accordingly.

This is the Decision and Order of the Court.

Dated: OCT 08 2024



Hon. Elizabeth A. Taylor, J.S.C.