

James v Office of the Chief Med. Examiner
2024 NY Slip Op 35193(U)
February 27, 2024
Supreme Court, Queens County
Docket Number: Index No. 702807/2020
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

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CYNTHIA JAMES, as Administrator of the Estate of
JAMES EVERETT, deceased,

Index No.:702807/2020

Motion Date: 1/8/2024

Plaintiff,

Motion Cal. No.:10

-against-

Motion Sequence No.: 1

OFFICE OF THE CHIEF MEDICAL EXAMINER and
THE CITY OF NEW YORK,

Defendants.

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The following papers 17-42 submitted and considered by Defendant City of New York, s/h/a Office of the Chief Medical Examiner and The City of New York (hereinafter “City”), seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3211 and 3212, dismissing the complaint against City and granting summary judgment to City.

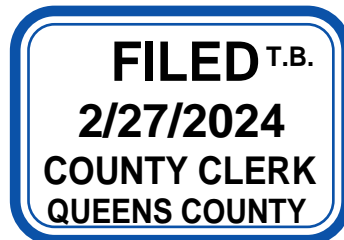
Motion Sequence 1

Papers
Numbered

Notice of Motion-Affirmation in Support-
Affidavits-Exhibits..... EF 17-38
Affirmation in Opposition-Affidavits-Exhibits..... EF 39-41
Affirmation in Reply-Affidavits-Exhibits..... EF 42

Relevant Factual and Procedural Background

The City seeks dismissal of Cynthia James’ (hereinafter “James”) complaint and the granting of summary judgment in favor of the City in this case involving the plaintiff’s common law right of sepulcher. James’ brother, James Everett (hereinafter Everette), passed away on January 15, 2019, and Mr. Everett’s remains were transferred to the Office of the City Medical Examiner’s (hereinafter “OCME”) on January 26, 2019. OCME’s Family Outreach Unit contacted James, the next of kin on May 10, 2019, to inform her of Everett’s death.



James alleges loss of sepulcher rights, claiming the family was not informed of or given the opportunity to attend the burial at Hart Island on June 13, 2019. James claims that only after a year later, on June 8, 2020, that the City identified the exact location of Mr. Everett's burial plot, leaving the family without specific information about his final resting place for 396 days.

In support of the motion, the City first contends that the notice of claim did not allege a special duty between the City and James, or the decedent Everett. The City argues that there was no special relationship that would necessitate a special duty, and no evidence supports such a claim. The City further asserted immunity from suit due to its discretionary actions in operating the OCME, as authorized by the New York City Charter. The OCME's standard operating procedures were followed, including receiving, refrigerating, and investigating the decedent's remains, and locating and notifying next of kin. The City details the procedures followed by the OCME, including not performing an autopsy based on the circumstances of Mr. Everett's death and arranging for his burial in the City Cemetery on Hart Island at the family's request. The City contends that James' sepulcher rights were not violated since the OCME promptly notified her of her brother's death upon identifying her as next of kin and informed her of her options regarding his remains. The City highlights that the complaint and bill of particulars introduce claims not found in the notice of claim, such as negligent hiring and training, which contravenes General Municipal Law and are not supported by evidence. Based on the absence of a special duty claim, the City's immunity due to discretionary functions, adherence to standard operating procedures, and the lack of evidence for new claims, the City concludes that the complaint should be dismissed, and summary judgment should be granted in its favor.

James, in opposition, contends that the City ignores the fact that they delayed in notifying the family of where exactly Everett was buried for over a year, which is part of the right of sepulcher. James cited *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 32 (1st Dept 2009) and *Scheuer v City of New York*, 10 AD3d 272, 273 (1st Dept 2004) to establish the right of sepulcher as including immediate possession of the deceased's body for burial and knowledge of the remains' location. James then cited *Cansev v City of New York*, 185 AD3d 894 (2d Dept 2020), and argued that delaying of the information regarding the decedent's death and the exact location of the decedent's remains after the identification of the decedent interfered with James' right of sepulcher. James claims that the City's failure to timely provide the information of Everett's burial to the family constituted a deprivation of sepulcher rights for 396 days, and that the office's discretion in family outreach does not exempt them from sepulcher rights while adhering to procedures does not negate the delay in informing the family of the burial details. James concludes that there are triable issues of fact regarding whether the City interfered with her sepulcher rights, especially given the lack of opportunity for the family to attend the burial or know the burial's location in a timely manner.

In reply, the City cited cases like *Ferreira v City of Binghamton*, 38 NY3d 298, 310 (2022) and *Valdez v City of New York*, 18 NY3d 69, 74 (2011) to argue that the handling of remains, searching for next of kin, and communication with the family should be considered governmental actions, and James needed to demonstrate a special duty owed specifically to her by the City, which she failed to do. The City cited *Cuffy v City of New York*, 69 NY2d 255, 256 (1987) to outline the

criteria for establishing a special duty. The City contends that even if this court finds that a special duty exists, they are still not liable under the government immunity doctrine, since the OCME followed standard operating procedures and makes discretionary decisions throughout the process. The City argues that the case at hand differs from *Cansev v City of New York*, 185 AD3d 894 (2d Dept 2020), since there was no delay in notifying James once she was identified as the next of kin and that contrary to James' contention, she was aware of the burial at Hart Island.

Law and Application

CPLR § 3212 provides:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be 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. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...

“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” (see *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (see *Id.* at 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Antonyuk v Brightwater Towers Condo Homeowners' Ass'n, Inc.*, 147 AD3d 711, 712 [2d Dept 2017]; *Bartels v City of New York*, 125 AD3d 583, 587 [2d Dept 2015]). “Once a prima facie 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” (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]). “If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied” (see *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *St. Clair v City of New York*, 266 AD2d 277 [2d Dept 1999]). “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (see *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Derise v Jaak 773, Inc.*, 127 AD3d 1011 [2d Dept 2015]). “Moreover, the court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist” (see *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]).

Governmental immunity arises “when the conduct complained of ‘involves the exercise of professional judgment,’ even if the judgment was poor” (see *Kadymir v New York City Tr. Auth.*, 55 AD3d 549, 551 [2d Dept 2008]). “If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a ‘special duty’ to the injured party” (see *Ortiz v City of New York*, 171 AD3d 1198, 1199 [2d Dept 2019]). “The core principle is that to sustain liability against a municipality, the duty breached must be more than that owed the public generally” (*Id.* at 1199). “It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself” (see *Ortiz v City of New York*, 171 AD3d 1198, 1200 [2d Dept 2019]). “The common-law right of sepulcher affords 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” (see *Cansev v City of New York*, 185 AD3d 894, 895 [2d Dept 2020]; citing *Shipley v City of New York*, 25 NY3d 645, 653 [2015]; *Martin v Ability Beyond Disability*, 153 AD3d 695, 696 [2d Dept 2017]). “When a municipal defendant has all of the necessary identifying information, the obligation of informing the next of kin of the decedent's death is a ministerial function that creates a special duty running to the decedent's next of kin rather than to the public at large” (see *Cansev v City of New York*, 185 AD3d 894, 896 [2d Dept 2020]; citing *Rugova*

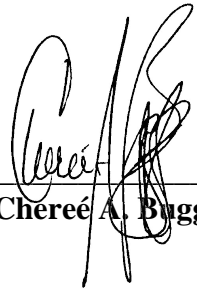
v City of New York, 132 AD3d 220, 231 [1st Dept 2015]; *Tinney v City of New York*, 94 AD3d 417, 418 [1st Dept 2012]; *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 39 [1st Dept 2009]). “The Court of Appeals in *Shiple v City of New York* clarified the distinction between a ministerial function, which includes a duty to notify the next of kin of the whereabouts of the decedent's body, as opposed to a discretionary function, such as determining when an autopsy is necessary and whether to remove and retain an organ for further examination and testing, where no or limited liability may exist” (see *Cansev v City of New York*, 185 AD3d 894, 896 [2d Dept 2020]; citing *Shiple v City of New York*, 25 NY3d 645, 653 [2015]). Here, after reviewing of the records, this court finds that while the City did notify James of Everett’s death once they “had all the identifying information” (in this case, when the City located the next of kin, James), they failed at providing the whereabouts of Everett’s remains and at informing James of the specifics of the burial ceremony (so that James can attend) and the exact location of where Everett is buried (so that James and the decedent’s family members can visit). In the testimony of Cassie Erpenbeck, the Assistant Director of the Outreach Unit for the New York City Office of Chief Medical Examiner, Ms. Erpenbeck stated that after the phone call with James on May 24, 2019, they confirmed that James requested for a City burial for Everett, of which the Ms. Erpenbeck claims that they would not know when exactly would be held, and that there is a rule that family members are not allowed to be present for the actual burial. According to the testimony of James, it was not until June 8, 2020 when City identified the exact location of Everett’s burial plot. No information was provided to James during the one-year period. All James was told is to complete a form online to request for the information of the whereabouts of Everett’s remain, which James claims that she did but again received no answer from the City.

Contrary to the City’s contentions, providing the time and exact location of the burial to relatives in time so that they can attend the burial and visit their loved ones is not a discretionary decision by the City that is protected by government immunity doctrine. It is instead a “ministerial function, which includes a duty to notify the next of kin of the whereabouts of the decedent's body” (see *Cansev v City of New York*, 185 AD3d 894, 896 [2d Dept 2020]; citing *Shiple v City of New York*, 25 NY3d 645, 653 [2015]). This Court finds that this special duty of the City to inform James in the case at hand so that James and other family member of Everett can attend the burial in time and visit the burial site is an essential part of the right of sepulcher. “The right of sepulcher is premised on the next of kin's right to possess the body for preservation and burial (or other proper disposition), and is geared toward affording the next of kin solace and comfort in the ritual of burying or otherwise properly disposing of the body...” (see *Shiple v City of New York*, 25 NY3d 645, 654 [2015]). The City’s duty here does not simply end when they notified James of Everett’s death or when they informed James of her options regarding Everett’s remain, the City’s duty includes providing the exact location and time of Everett’s burial to James, at a reasonable time prior to the burial, so that the next of kin or other family members can attend the ceremony or visit if they so chose to. Opposite to Ms. Erpenbeck’s statement, there exists no rule where the family members of the deceased are forbidden from attending the burial, which would directly go against the long-standing right of sepulcher. Even though James was informed that Everett’s burial would happen somewhere on Hart island, that general information is insufficient for James and other family members to either attend the burial or to visit Everett’s burial site afterwards. This Court finds that there exists a triable issue of fact regarding whether the City’s delay in informing James of the exact

time and place of Everett's burial interferes with James' right of sepulcher (see *Cansev v City of New York*, 185 AD3d 894, 896 [2d Dept 2020]; citing *Rugova v City of New York*, 132 AD3d 220, 231 [1st Dept 2015]; *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 39 [1st Dept 2009]). This Court further finds the remaining of the City's arguments unavailing. Accordingly, it is hereby

ORDERED, that Defendant City of New York, s/h/a Office of the Chief Medical Examiner and The City of New York's motion for summary judgment is denied in its entirety.

Dated: February 27, 2024



Hon. Chereé A. Buggs, JSC

