

Smith v R.G. Ortiz Funeral Home, Inc.
2024 NY Slip Op 35716(U)
October 8, 2024
Supreme Court, Bronx County
Docket Number: Index No. 804807/2021E
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

-----X
DERRICK SMITH,

Plaintiff,

-against-

R.G. ORTIZ FUNERAL HOME, INC.,

Defendant.
-----X

Elizabeth A. Taylor, J.

DECISION and ORDER
Index No. 804807/2021E

Defendant moves pursuant to CPLR 3211(a)(3), (5) for an Order dismissing the complaint based upon (1) the statute of limitations, and (2) legal incapacity to sue.

The complaint alleges that plaintiff Derek Smith is the son and next of kin of the decedent Derek West, who died on March 29, 2017. Plaintiff alleges that defendant R.G. Ortiz Funeral Home, Inc. took custody of the decedent to prepare the body for the purposes of cremation on or about April 4, 2017. The complaint further alleges that plaintiff should have received the cremated remains on or about April 18, 2017. It is undisputed that after numerous phone calls and inquiries, plaintiff was informed for the first time on February 26, 2029, that the cremated remains of the decedent could not be located. Plaintiff interposes causes of action sounding in negligence, right of sepulcher, emotional distress and mental anguish.

Defendant argues that the causes of action alleged in the complaint accrued on April 18, 2017, when the plaintiff did not receive the cremated remains of the decedent as expected. As such, the statute of limitations period should have ended on April 18, 2020. Factoring the tolling provision by the Governor's Executive Order due to the COVID pandemic, plaintiff's statute of limitations would have ended in December 2020, long before the summons and complaint were filed on April 8, 2021. Defendant further argues that plaintiff has not established whether the decedent's spouse or other

children are deceased. Thus, defendant argues, the plaintiff, a son of the decedent, has not established that he is the next of kin of the decedent.

Plaintiff opposes the motion, contending that the causes of action in the complaint accrued on February 26, 2019, when plaintiff first became aware and had knowledge that defendant interfered with plaintiff's right of sepulcher, at the time defendant admitted to plaintiff that it had misplaced the cremated remains of plaintiff's father. Plaintiff maintains that he timely commenced the action within the applicable three-year statute of limitations on May 26, 2021. Plaintiff further argues that he has adequately alleged that he is the next of kin of the decedent.

DISCUSSION

CPLR §3211(a)(3) governs dismissal of a complaint based on a plaintiff's lack of capacity to prosecute the action. On a motion to dismiss for lack of standing pursuant to CPLR 3211(a)(3), "the burden is on the moving defendant to establish, *prima facie*, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied.... To defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (Phoenix Grantor Tr. v Exclusive Hosp., LLC, 172 AD3d 923, 101 N.Y.S.3d 175 [2d Dept 2019] [internal citations and punctuation omitted]).

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, a defendant must establish, *prima facie*, that the time within which to sue has expired. Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period." (Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP, 188 A.D.3d 530, 531,

136 N.Y.S.3d 13, 14-15 [1st Dept. 2020] quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085, 1085-1086, 30 NYS3d 288 [2d Dept. 2016] [internal quotation marks omitted].) In considering the motion, the court must take the allegations in the complaint as true, resolve all inferences in favor of the plaintiff, and accord plaintiff's submissions in response to the motion "their most favorable intendment." (*Benn v Benn*, 82 AD3d 548, 548, 918 NYS2d 465 [1st Dept 2011].)

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) (*Shipley 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" (*Shipley*, 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." (*Shipley*, 25 NY3d at 653.) As indicated in *Shipley*, 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. (*Shipley*, 25 NY3d at 653.)

The First Department has held that "the accrual of claim in right of sepulcher actions belongs in that small body of case law where a claim does not accrue with the negligent act but at the time a plaintiff is actually injured by the negligent act." (*Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 39, 877 N.Y.S.2d 300, 309 [1st Dept. 2009]; see also *Distel v. County of Ulster*, 107 AD2d 994, 996, 484 NYS2d 715, 717 [3rd Dept 1985] [stating that the 90-day notice requirement under section 50-e of

the General Municipal Law began to run when plaintiffs received an affidavit stating that defendant could not locate portions of organs of decedent, affording them sufficient notice to cut off the tolling of the statute].) In Melfi (supra), the decedent was held in the hospital mortuary for 30 days without notifying his heirs and was then sent for embalming practice before being buried in a mass grave at Potter's Field. The cause of action for loss of sepulcher arose not when the body was sent from the hospital to the Mortuary Science Department of Nassau Community College, but instead, when decedent's next of kin, his brother, discovered that the body had been mutilated and buried in a mass grave.

Here, the injury occurred when plaintiff became aware that the decedent's body was lost. Prior to that time, plaintiff was aware only that the remains had not been delivered, not that they had been lost.

As noted above, the burden of demonstrating lack of standing fall on the defendant as the movant. The complaint alleges that the plaintiff is the decedent's son,¹ and the plaintiff does not have the burden of demonstrating that there are no other next of kin with greater priority to control the disposition of the decedent's remains.

Accordingly, it is hereby,

ORDERED that the motion is denied.

This is the Decision and Order of the Court.

Dated: OCT 08 2024



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

¹ PHL 4201 sets forth a list persons in descending priority who have the right to control the disposition of the remains of a decedent, beginning with (i) the person designated in a written instrument executed pursuant to the provisions of this section; (ii) the decedent's surviving spouse; (ii-a) the decedent's surviving domestic partner; and, (iii) any of the decedent's surviving children eighteen years of age or older.