

Short Form Order

INDEX No: 622094/2023

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

GERALD A. CORALLO, JR. and DINA L. CARUSO,

Plaintiffs,

- against-

BERNADETTE CORALLO A/K/A
BERNADETTE GEBLER, DONOHUE CECERE
FUNERAL DIRECTORS, CARRIAGE FUNERAL
HOLDINGS, INC. D/B/A DONOHUE CECERE
FUBERAL HOME,

Defendants.

ORIG. RETURN DATE: 01/11/24
ADJOURNED DATE: 01/25/24
MOTION SEQ. NO.: 001 - MD,
002-MD, 003 - MotD & 004 MotD

PLTF'S/PET'S ATTY:

Corallo & Corallo
134 Ireland Place
Amityville, New York 11701

DEFT'S/RESP'S ATTY:

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Bernadette Gebler
108 E. Main Street
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Goldberg Segalla, LLP
Attorneys for Donohue Cecere Funeral
Directors and Carriage Funeral
Holdings, Inc. d/b/a Donohue Cecere
Funeral Home
200 Garden City Plaza, Suite 520
Garden City, New York 11530

Upon efiled documents numbered 14-21, 23-39, 41-49; it is

ORDERED that the motion by Defendant Bernadette Corallo (003) seeking dismissal of Plaintiffs' claims against her is granted as forth below; and it is further

ORDERED that the motion by Defendants Donohue Cecere Funeral Directors, Carriage Funeral Holdings, Inc. dba Donohue Cecere Funeral Home (004) seeking dismissal of Plaintiffs' claims against them is granted as set forth below; and it is further

ORDERED that motions to dismiss sequenced 001 and 002 are denied as academic; and it is further

Gerald A. Corallo, Jr. et al v Bernadette Corallo et al
Hon. Vincent J. Martorana

Index No.: 622094/2023
Page 2

ORDERED that Plaintiffs' complaint is dismissed in its entirety and Defendants' request for costs and sanctions is denied.

The within action seeks a money judgment for alleged violation of the right of sepulcher, violation of Public Health Law §420, and intentional and negligent infliction of emotional distress. Defendants, adult children of their father's first marriage, filed their first complaint on September 25, 2023 alleging that their father died on August 3, 2022 and that his wife who had been married to him for more than thirty years made burial and funeral arrangements and never informed them of his death. They claimed to be entitled to damages as next of kin, as against his wife and the funeral home entities. Plaintiffs subsequently filed a 22 page amended complaint alleging that Donohue Cecere Funeral Directors and Carriage Funeral Holdings, Inc. d/b/a Donohue Cecere Funeral Home (collectively "Donohue Cecere ") violated New York Public Health Law §4201, which governs responsibility for disposition of human remains. The amended complaint further alleges that Donohue Cecere failed to notify Plaintiffs of the death and entombing of their father and that it violated their right of sepulcher, as they were the next of kin. Similar claims are alleged as against the decedent's widow, Bernadette Corallo a/k/a Bernadette Gebler ("Bernadette"). Claims of intentional infliction of emotional distress and negligent infliction of emotional distress are alleged as against all defendants. Defendant Bernadette now moves, pre-answer, seeking dismissal of Plaintiffs' claims against her pursuant to CPLR§3211(a)(1),(3), (5) and (7), along with costs and sanctions, pursuant to 22 NYCRR §130-1.1. The Donohue Cecere Defendants seek dismissal, pre-answer, of the claims against them pursuant to CPLR§3211(a)(1),(3), (5),(7) and (8), along with costs and sanctions.

As an initial matter, it is noted that both Bernadette and the Donohue Cecere Defendants, by their respective counsel, brought pre-answer motions to dismiss the initial complaint, motions sequenced 001 and 002, and that the complaint was superceded by the Amended Complaint. Motions sequenced 003 and 004 were then filed by Defendants seeking dismissal of the Amended Complaint. As such, the court deems motions sequenced 001 and 002 to be moot and they are denied as academic. However, these motions remain part of the record and any exhibits filed with those motions which were referenced by motions 003 and 004 are considered herein.

Motion Sequence 003

Bernadette asserts entitlement to dismissal on the basis that Plaintiffs were not the next of kin, therefore they had no common law right of sepulchre and no rights under Public Health Law §4201, and that the negligent and intentional infliction of emotional distress claims are duplicative of Plaintiffs' other claims, are barred by the statute of limitations, and the allegations in support of these claims fail to meet the "outrageous conduct" and "emotional distress" standards required to support such claims. She also argues that Plaintiffs are not entitled to attorneys' fees.

By her affidavit, Bernadette attests that she is the surviving spouse and next of kin of Gerald A. Corallo, who died on August 3, 2022. The death certificate lists Bernadette as the surviving spouse and informant and the place of death as St. Francis Hospital. Bernadette's husband executed a health care proxy on June 6, 2018, designating Bernadette. Bernadette states that she and her husband were together for about eight years prior to their marriage in November 1989 and that Plaintiffs are the estranged children of her husband. Plaintiffs' counsel in this action is the wife of Plaintiff Gerald A. Corallo, Jr.

Gerald A. Corallo, Jr. et al v Bernadette Corallo et al
Hon. Vincent J. Martorana

Index No.: 622094/2023
Page 3

Defendant Bernadette requests dismissal of the claims against her, along with an award of costs and reasonable attorneys' fees, as a sanction, on the basis that the claims asserted are frivolous and without merit and that the amended complaint, apparently filed in response to the initial motions to dismiss, do not correct the fatal defects in Plaintiffs' claims.

Motion sequence 004

Donohue Cecere Defendants assert that Plaintiffs' claims against them should be dismissed because Plaintiffs were not the next of kin and had no rights of sepulcher and no rights under Public Health Law §4201, because the emotional distress claims are barred by the statute of limitations, and because the emotional distress claims are duplicative of Plaintiffs' other claims. They further state that this court lacks personal jurisdiction over them because Plaintiffs knowingly served an individual who was neither an employee nor an agent authorized to accept service on behalf of them; therefore Plaintiff's claims should be dismissed pursuant to CPLR§3211(a)(8).

In support of their motion, Donohue Cecere Defendants provide a copy of the At-Need Written Statement of Person having the Right to Control Disposition which was signed by Bernadette, as spouse, on August 4, 2022. Such form indicated that Bernadette had "no knowledge that the decedent executed a will containing directions for the disposition of his/her remains, or designated an agent by executing a written instrument pursuant to Section 4201 of the Public Health Law." They also provide a copy of the committal receipt for the mausoleum space at the Cemetery of the Holy Rood, dated August 4, 2022, which indicates that Bernadette is the owner of the crypt and spouse of the decedent.

Donohue Cecere Defendants seek dismissal of the claims against them and an award of costs and sanctions based upon frivolous conduct.

It is noted that Donohue Cecere Defendants cite one basis for dismissal that Bernadette does not. They assert that proper service of process was not made upon them and that this court lacks personal jurisdiction. This is claimed by their counsel in a conclusory fashion and there is no testimony of any party with knowledge establishing that the person served, set forth in the affidavit of service as "Brianna Carella as Office Manager at the address of 290 Post Avenue, Westbury NY 11590, who stated they are authorized to accept service," was an unauthorized person unqualified to accept service pursuant to the applicable service provisions of the CPLR. The process server's affidavits indicate that service was properly made upon both Donohue Cecere Defendants on October 3, 2023. A process server's affidavit of service is prima facie evidence of proper service which cannot be rebutted by a conclusory denial of service (*Deutsche Bank Nat'l Tr. Co. v. Fernandez*, 208 AD3d 1151, 175 NYS3d 76, 78 [2022]). As such, dismissal pursuant to CPLR§3211(a)(8) is denied. The remainder of the arguments put forth by Defendants overlap or are substantially similar.

Motion sequence 003 and 004

In opposition to both motions, Plaintiffs argue that the basis of their claims is that "it was Defendants' failure to notify Plaintiffs of their father's death which was orchestrated in bad faith to unreasonably conceal his death from Plaintiffs against the individual and moral beliefs of decedent. In so doing the Defendants violated Plaintiffs common law and statutory right of sepulcher and the statutory duty imposed on them by New York Public Health Law §4201."

Gerald A. Corallo, Jr. et al v Bernadette Corallo et al
Hon. Vincent J. Martorana

Index No.: 622094/2023
Page 4

Defendants argue that they sought to reconnect with their father prior to his death and that Defendant Bernadette interfered with this. They assert that the record before the court contains no evidence that their father did not want them or any other surviving relatives to be notified about his passing. Defendants assert that they first learned that their father may have died when a representative from Social Security called their mother about death benefits relating to her ex-husband. They confirmed his death by obtaining a death certificate from the Village Clerk.

Plaintiffs argue that common law sepulcher does not designate or prioritize family members who may bring a claim for common law sepulcher. Plaintiffs acknowledge that Bernadette was their father's wife, but contest that she has established that she is next of kin because it is possible to waive that status. Bernadette is listed as spouse and informant on the death certificate and she approved the funeral arrangements. It is unclear what actions by Bernadette might constitute evidence of waiver. Plaintiffs further argue that the documents submitted by Donohue Cecere Defendants lack evidentiary foundation. No party with actual knowledge of the documents has offered an affidavit in support of their admissibility.

Gerald A. Corallo, Jr. ("Gerald") attests that he and his sister had been in the process of repairing their relationship with their father, when they suddenly became aware that he might have died. Investigation lead them to the Village Clerk of Flower Hill, who had a death certificate on file. Gerald states that no obituary was posted, no wake was held, and that their father's adult children, sister and other family members were not notified of the decedent's death. He claims that these omissions were deliberate and calculated acts by Bernadette, assisted by Donohue Cecere, that support Plaintiffs' position that Defendants did not act appropriately or consistently with the decedent's moral beliefs. He further claims that these actions caused him severe anguish in not being able to say goodbye at the time of his father's death. Dina L. Caruso makes substantially similar assertions in her affidavit and claims that she and her brother "were traveling the path of reconciliation which Defendant GEBLER hated and would do all to destroy regardless of whether it was during our father's life, or death."

Plaintiffs also provide an affidavit by the decedent's oldest grandson, Francesco Caruso (born in 2001), attesting that he spoke to his grandfather on the telephone on March 20, 2022 for the first time since he was a little boy, that it made him happy to do so, and that Defendant Bernadette interfered with the call. He further states that he believes his mother to have been emotionally scarred by the events that transpired. An affidavit by family friend Stephen Mannino is also provided. He states that in 2019 the decedent expressed interest in his children's lives and regret about the status of their relationship and that the decedent appeared to not wish to talk about it in front of Defendant Bernadette.

"The common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial or other disposition of the remains, and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body" (*Mack v. Brown*, 82 AD3d 133, 137, 919 NYS2d 166, 169 [2d Dept. 2011]; *Shiple v. City of New York*, 25 NY3d 645, 653, 16 NYS3d 1, 63 [2015]; *Martin v. Ability Beyond Disability*, 153 AD3d 695, 59 NYS3d 766 [2d Dept. 2017])

The right of sepulcher "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" (*Gutnick v. Hebrew Free Burial Soc'y for the Poor of the City of Brooklyn*, 198 AD3d 880, 155 NYS3d 565, 567 [2d Dept. 2021] (quoting *Shiple v. City of New York*, 25 NY3d at 653)) and damages are limited to the emotional suffering,

Gerald A. Corallo, Jr. et al v Bernadette Corallo et al
Hon. Vincent J. Martorana

Index No.: 622094/2023
Page 5

mental anguish and physical consequences experienced by the next of kin as a result of interference with this right (*Martin v. Ability Beyond Disability, supra*).

“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, 912–13, 137 NYS3d 142, 144–45 [2d Dept. 2020] (quoting *Green v. Iacovangelo*, 184 A.D.3d 1198, 1200 (4th Dept. 2020)); see also *Gutnick v. Hebrew Free Burial Soc'y for the Poor of the City of Brooklyn, supra*). “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, 128 NYS3d 229, 231 [2d Dept. 2020] (quoting *Melfi v. Mount Sinai Hosp.*, 64 AD3d 26)).

Public Health Law §4201(2)(a) identifies the persons who shall have priority to dispose of a decedent's remains. The version in effect at the time of Plaintiffs' father's death sets forth the “persons in descending priority shall have the right to control the disposition of the remains of such decedent.” The first few categories of persons listed are set forth below:

- (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;
- (iii) any of the decedent's surviving children eighteen years of age or older;

Public Health Law §4201(7) provides:

No cemetery organization, business operating a crematory 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 written directions of a decedent as stated in a will or in a written instrument executed pursuant to this section. No cemetery organization, business operating a crematory 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.

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a) (7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 29 NYS3d 879 [2016]; *Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Bare legal conclusions are not presumed to be true and do not receive the benefit of such favorable

Gerald A. Corallo, Jr. et al v Bernadette Corallo et al
Hon. Vincent J. Martorana

Index No.: 622094/2023
Page 6

inference (*Grant v. DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

Affidavits submitted by a plaintiff to remedy any defects in the complaint may be considered (*Chanko v. Am. Broad. Companies Inc.*, *supra*; *Leon v Martinez*, *supra*). However, if evidentiary material submitted by the defendant movant is considered, “the criterion then becomes ‘whether the proponent of the pleading has a cause of action, not whether he has stated one’” (*Sokol v. Leader*, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (*quoting Guggenheimer v Ginzburg*, 43 NY2d at 275); *Porat v. Rybina*, 177 AD3d 632, 111 NYS3d 625 [2d Dept. 2019]; *see also Williams v. Silverstone*, 215 AD3d 787, 788, 185 NYS3d 699 [2d Dept. 2023]). In considering evidentiary material in support of a motion to dismiss for failure to state a cause of action, whether or not plaintiff might ultimately survive a summary judgment motion or prevail on the merits is not part of the analysis (*Doe v. Ascend Charter Sch.*, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; *Neuman v. Echevarria*, 171 AD3d 767, 97 NYS3d 203 [2d Dept. 2019]; *Sokol v. Leader*, *supra*). Although it is rare, dismissal under CPLR 3211 (a) (7) may be granted based upon an affidavit if such affidavit conclusively establishes that the claimant has no cause of action (*Sokol v. Leader*, *supra*; *Porat v. Rybina*, *supra*). Dismissal may be appropriate where a material fact alleged is conclusively determined not to be a material fact; however, dismissal should not eventuate unless there is no significant dispute (*Doe v. Ascend Charter Sch.*, *supra*; *McMahan v. McMahan*, 131 AD3d 593, 15 NYS3d 190 [2d Dept. 2015]; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 401 NYS2d 182[1977]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

Central to claims arising from Public Health Law §4201 and right of sepulcher is that the party asserting them must be the decedent’s next of kin or they must have priority of category under the Public Health Law. Here, Bernadette established that she was the decedent’s next of kin as his spouse, with the right to dispose of the decedent’s remains. As such, a material fact upon which Plaintiff’s complaint is premised is not a fact and Plaintiffs’ First, Second, Third, Fourth, Fifth and Sixth causes of action must be dismissed, pursuant to CPLR§3211(a)(7). Although Donohue Cercere Defendants have submitted documentary evidence which could potentially absolve them of liability under Public Health Law §4201(7), and entitle them to dismissal pursuant to CPLR§3211(a)(1), the within motion is not decided on this basis because no evidentiary foundation has been provided for such documents.

Plaintiffs’ remaining causes of action assert claims for infliction of emotional distress. It is alleged that Donohue Cerce Defendants are liable for intentional infliction of emotional distress (Seventh Cause of Action) and negligent infliction of emotional distress (Eighth Cause of Action) and that Defendant Bernadette is liable for intentional infliction of emotional distress (Ninth Cause of Action) and negligent infliction of emotional distress (Tenth Cause of Action). Plaintiffs also request attorneys’ fees but the legal basis for this is not stated.

The elements of a claim for intentional infliction of emotional distress are: (1) extreme and outrageous conduct that goes beyond the bounds of decency (2) intent to cause or disregard of the likelihood of causing severe emotional distress (3) a causal connection between the conduct and injury and (4) severe emotional distress (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 56–57, 29 NYS3d 879 [2016]; *Ruggiero v. Contemporary Shells, Inc.*, 160 AD2d 986, 554 NYS2d 708 [2d Dept. 1990]; *Tartaro v. Allstate Indem. Co.*, 56 AD3d 758, 868 NYS2d 281 [2d Dept. 2008]). In order to state a claim for intentional infliction of emotional distress, the conduct alleged

Gerald A. Corallo, Jr. et al v Bernadette Corallo et al
Hon. Vincent J. Martorana

Index No.: 622094/2023
Page 7

must be so extreme as to "...go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Taggart v. Costabile*, 131 AD3d 243, 250, 14 NYS3d 388, 393 [2d Dept. 2015] (quoting *Murphy v. American Home Prods. Corp.*, 58 NY2d at 303, quoting Second Restatement § 46, Comment d); see also *Ajie Chen v. Deliso*, 169 AD3d 761, 91 NYS3d 895 [2d Dept. 2019]; *Scialdone v. Derosa*, 148 AD3d 741, 742-43, 48 NYS3d 471, 473 [2d Dept. 2017]).

A claim for negligent infliction of emotional distress requires a breach of duty of care which results directly, rather than consequentially, in emotional harm and the claim must possess some guarantee of genuineness (*Taggart v. Costabile, supra; Ornstein v. New York City Health & Hosps. Corp.*, 10 NY3d 1, 6, 852 NYS2d 1 [2d Dept. 2008]; *Derago v. Ko*, 189 AD3d 1352, 1355, 134 NYS3d 801 [2d Dept. 2020]).

Here, Plaintiffs have neither set forth extreme and outrageous conduct that goes beyond the bounds of decency nor have they stated facts sufficient to establish that any of the defendants breached a duty of care owed to them. As such, they have failed to state a cause of action against any of the defendants for either intentional or negligent infliction of emotional distress. Accordingly, Plaintiffs' Seventh, Eighth, Ninth and Tenth Causes of Action are dismissed, pursuant to CPLR§3211(a)(7). Additionally, a negligent infliction of emotional distress claim may not be maintained where it is essentially duplicative of tort or contract claims being asserted (*Wolkstein v. Morgenstern*, 275 AD2d 635, 713 NYS2d 171 [1st Dept. 2000]).

Based upon the foregoing, Plaintiff's complaint is dismissed in its entirety as to its claims against all Defendants. As to the remaining bases for dismissal that were asserted by Defendants but not discussed herein, dismissal on those bases is denied as academic. Defendants' request for costs and sanctions for frivolousness, pursuant to 22 NYCRR 130.1-1, is denied. Although it is within the court's discretion to make such an award, this court does not deem sanctions to be appropriate upon the facts presented.

Dated: April 11, 2024
Riverhead, New York



VINCENT J. MARTORANA, J.S.C.

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