

<b>Dixon v City of New York</b>
2012 NY Slip Op 30697(U)
February 22, 2012
Supreme Court, Queens County
Docket Number: 18033/05
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

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Monique Dixon and Sean Alleyne,  
  
Plaintiff,  
  
- against -

Index  
Number: 18033/05  
  
Motion  
Date: 2/21/12

The City of New York and The Office  
of Chief Medical Examiner - The City  
of New York,

Defendants.

Motion  
Cal. Number: 2

Motion Seq. No.: 4

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The following papers numbered 1 to 13 read on this motion by plaintiffs to lift the stay and schedule a pre-trial conference, and for summary judgment; and cross-motion by defendant for renewal.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Affirmation in Opposition.....	9-10
Reply.....	11-13

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

That branch of the motion by plaintiffs for summary judgment on the issue of liability is denied. Plaintiffs previously moved for the instant relief by way of cross-motion to the City's prior motion to dismiss, which cross-motion was denied pursuant to the order of this Court issued on February 26, 2009.

Cross-motion by the City to renew its cross-motion to dismiss the complaint pursuant to CPLR 3211(a)(7), which cross-motion was denied pursuant to the order of this Court issued on February 26, 2009, is also denied.

Plaintiffs commenced an action asserting causes of action for wrongful autopsy and damages for emotional harm which they allegedly sustained as a result of the interference by the Office of the Chief Medical Examiner (OCME) with plaintiffs' right of

sepulcher of the body of their child who was killed by a drunk driver and which body was autopsied and released to plaintiffs for burial without the brain and spinal cord. Plaintiffs allege that such body parts had been removed without their knowledge and were not replaced, causing plaintiffs the trauma of having to disinter the body and re-inter it with those organs upon discovering, via a copy of the autopsy report provided to them nearly four months after the autopsy and the release of the body to them that their son's brain and spinal cord had been removed and retained by OCME for further tests and not returned with the body.

The City moved to dismiss the complaint against it for failure to state a cause of action upon the ground that plaintiffs failed to serve a timely notice of claim. Plaintiffs cross-moved for summary judgment on the issue of liability. The motion was granted, pursuant to this Court's February 26, 2009 order solely to the extent that plaintiffs' cause of action alleging wrongful autopsy was dismissed for failure to assert a timely claim, but denied in all other respects, thereby preserving plaintiffs' remaining causes of action for negligent infliction of emotional distress and violation of their right of sepulcher, finding that such claims were timely asserted since the causes of action thereon ran from the time of discovery rather than, as the City argued unsuccessfully, from the date of the autopsy.

Moreover, although the City did not move for dismissal upon the ground of governmental immunity, since it tangentially made reference to this issue, and since the issue of governmental immunity implicates the Court's subject-matter jurisdiction, which can be raised at any time, even on the Court's own initiative, the Court, sua sponte, held that OCME's failure to restore the organs of plaintiffs' deceased son to his body and its failure to inform plaintiffs' of this fact when the body was released to them was a ministerial failure, not a discretionary one, and therefore, the waiver by the State of the City's immunity from suit applies to bestow upon the Court subject-matter jurisdiction over this matter.

Plaintiffs' cross-motion for summary judgment on the issue of liability was also denied in that plaintiffs failed to proffer evidence eliminating all issues of fact as to the City's negligence.

The City appealed this Court's order of February 26, 2009 and the Appellate Division, Second Department, in affirming the order (76 AD 3d 1043 [2010]), held, in accordance with this Court's decision, that the 90-day period for filing a notice of claim on plaintiffs' cause of action for negligent infliction of emotional distress occasioned by the violation of their right of sepulcher

accrued when they discovered what OCSME's did and suffered mental anguish as a result. The Appellate Division also found without merit the City's contention that the complaint must be dismissed upon the ground of governmental immunity, citing Shipley v City of New York (80 AD 3d 171 [2<sup>nd</sup> Dept 2010]), decided at the same time as this matter. Shipley also involved an action for violation of the right of sepulcher when OCSME released the deceased's body to the next of kin for burial without informing them that the deceased's brain had been removed for study and not returned to the body. The Appellate Division, Second Department, affirmed so much of the Supreme Court's order which denied the City's motion for summary judgment dismissing the complaint for violation of the right of sepulcher, holding that the Medical Examiner "has the mandated obligation, pursuant to Public Health Law §4215(1) and the next of kin's common-law right of sepulcher, to turn over the decedent's remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains have been fulfilled. The latter duty is not only ministerial in nature...but is clearly for the benefit of, and is owed directly to, the next of kin" (80 AD 3d at 178 [internal citation omitted]).

The instant motion for summary judgment is in derogation of the doctrine of the law of the case and the rule against making successive motions for summary judgment. Plaintiff's counsel argues that since the Shipley case was decided at the same time as the instant matter and held that the plaintiff stated a cause of action in damages for violation of the right of sepulcher, that determination is now the law of the case in our case and, therefore, plaintiffs are entitled to renewal of their motion for summary judgment upon the ground that the Appellate Division, Second Department, has ruled that plaintiffs are entitled to summary judgment on the issue of liability as a matter of law. Counsel's argument is without merit.

In the first instance, counsel contends merely in passing in his affirmation in opposition that plaintiffs are entitled to renew their motion. The notice of motion was not denominated, and the motion was not brought, or argued, as a motion to renew pursuant to CPLR 2221(e) but merely as a motion for summary judgment. Therefore, the motion must be denied for this reason alone.

Moreover, counsel cites no authority or principle of jurisprudence in support of his peculiar argument that an Appellate determination of another case involving entirely different parties and events and different issues is somehow to be considered the law of the case in this matter merely because it was decided at the same time as our case. Also, Shipley did not set forth a new law or

a different interpretation of existing law that would have changed the result in this matter, and it was not a reversal or modification of this Court's February 26, 2009 order, so as to form the basis for renewal. If it did, the Appellate Division would have reversed so much of this Court's order which denied plaintiffs' cross-motion for summary judgment. Instead, the Appellate Division affirmed this Court's denial of plaintiffs' cross-motion, citing its holding in Shipley. Finally, the Court notes that the Appellate Division, Second Department, in Shipley, did not decide that the plaintiff in that case was entitled to summary judgment as a matter of law, but merely that he stated a cause of action for violation of the right of sepulcher.

Therefore, plaintiffs' motion is without merit and must be denied.

The City's motion to renew is also without basis and must be denied. The argument of counsel for the City that renewal is appropriate upon the basis that the Court of Appeals in its recent holding in Valdez v City of New York (18 NY3d 69 [2011]) overruled its prior holdings on the issue of governmental immunity and, therefore, established new law which did not exist at the time of the City's original application, is without merit. The Court of Appeals does not set forth any new or different principles of law in Valdez but merely reiterates more clearly the law as explained by it in its prior decisions, such as Lauer v City of New York (95 NY 2d 95 [2000]) and McLean v City of New York (12 NY 3d 194 [2009]), namely, that "[g]overnmental action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (12 NY 3d at 76-77 [quoting McLean at 203]).

Counsel is in error in his understanding that the Court of Appeals, for the first time in Valdez, introduced the new "construct" that a plaintiff, in order to establish a case of liability against a municipality for governmental action must establish not only that the government action was ministerial as opposed to discretionary, but also, for the first time, that the municipality owed the plaintiff a special duty. Such has always been the analysis articulated by the Court of Appeals. Therefore, Valdez does not overrule the decision of the Appellate Division, Second Department, in Shipley. Indeed, the Appellate Division therein, as heretofore quoted, did determine that the actions of OCME were ministerial in nature and, presumably by its language that OCME's duty was for the benefit of and owed directly to the next of kin, that the plaintiffs therein satisfied some prongs of the special duty test. Moreover, this Court's sua sponte

determination in its February 26, 2009 order was limited to the finding that the actions of OCME were ministerial and not discretionary and, therefore, that the Court did not obviously lack of subject-matter jurisdiction to entertain the action. This Court did not go on to determine or explore whether or not all the prongs of the special duty test were applicable or were met because the City did not move for summary judgment upon the ground of governmental immunity, and the issue of special duty was not raised either by the City or plaintiffs. The City only moved for dismissal for failure of plaintiffs to serve a timely notice of claim.

In affirming this Court's limited determination that the actions of OCME were ministerial rather than discretionary, and in rejecting the City's governmental immunity argument, the Appellate Division, Second Department, cited its holding in Shipley to the extent that it supports this Court's limited determination that the actions of OCME were ministerial. The issue of special duty was not considered because it was not raised either by the parties or this Court, and, therefore, the citation by the Appellate Division to its holding in Shipley in support of its affirmance of this Court's determination, may not be taken to be a finding by it that plaintiffs established the existence of a special duty in our case merely because that holding included a finding relating to the issue of special duty raised in that case.

Finally, the remaining branch of plaintiffs' motion for an order "lifting the current stay and placing the case back onto the active calendar" and "scheduling a pre-trial conference in this matter" is granted solely to the extent that plaintiffs are directed to file a note of issue and certificate of readiness no later than March 23, 2012. The case shall be restored to the active calendar upon the filing of the note of issue. All conferences shall be scheduled in the ordinary course thereafter. The Court notes that there is no "current stay" of this matter to be vacated. Moreover, the Court record reflects that the note of issue heretofore filed was vacated on March 18, 2009 and no new note of issue has been filed. Therefore, the Court may not set the matter down for a pre-trial conference at this time.

Accordingly, the motion is granted solely to the foregoing extent and is denied in all other respects, and the cross-motion is also denied.

Dated: February 22, 2012

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KEVIN J. KERRIGAN, J.S.C.