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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe Justice

PART 5

Index Number : 406873/2007
GILCHRIST, MANICA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT CAL # 46

INDEX NO. _____
MOTION DATE 1/10/12
MOTION SEQ. NO. 003

The following papers, numbered 1 to 6, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3, 4
Replying Affidavits _____ | No(s). 5, 6

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
APR 25 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/23/12
APR 23 2012

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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MANICA GILCHRIST, as the Administratrix of the Estate of MARGARET LANE, and EDITH GILCHRIST,

Plaintiffs,

-against-

CITY OF NEW YORK, and NYC MEDICAL EXAMINERS OFFICE,

Defendants.

----------x

THE CITY OF NEW YORK,

Third-Party Plaintiffs,

-against-

MCCALL'S BRONXWOOD FUNERAL HOME, INC.,

Third-Party Defendant.

----------x

MANICA GILCHRIST, as the Administratrix of the Estate of MARGARET LANE, EDITH GILCHRIST, MANICA GILCHRIST, TERMAINE BLOW and PAUL GILCHRIST,

Plaintiffs,

-against-

MCCALL'S BRONXWOOD FUNERAL HOME, INC.,

Defendant.

----------x

MCCALL'S BRONXWOOD FUNERAL HOME, INC.,

Second Third-Party Plaintiff,

-against-

CITY OF NEW YORK and NYC MEDICAL EXAMINERS OFFICE,

Second Third-Party Defendants.

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Index No. 406873/07

Motion Date: 1/10/12
Motion Seq. No.: 003
Motion Cal. No.: 46

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

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By notice of motion dated August 4, 2011, defendant/third-party defendant McCall's Bronxwood Funeral Home, Inc. (McCall's) moves pursuant to CPLR 3212 for an order dismissing plaintiffs' claims, City's third-party complaint, and all cross-claims against it. City and plaintiffs oppose.

By notice of cross-motion dated November 16, 2011, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment on their claims against defendants City of New York and the New York City Medical Examiners Office (Medical Examiner's Office) (collectively City). City opposes.

I. BACKGROUND

On March 21, 2006, plaintiff's decedent, Steven Lane, was fatally shot, and his body was transported to the New York City Medical Examiner's Office. (Affirmation of David Weiser, Esq., dated Aug. 4, 2011 [Weiser Aff.], Exhs. B, M). On March 22, 2006, plaintiffs Manica Gilchrist and Margaret Lane, decedent's mother and sister, respectively, identified the body. (Affirmation of Mitchell Franzblau, Esq., dated Nov. 16, 2011 [Franzblau Aff.], Exh. A). The body remained there until March 24, 2006, when it was retrieved by and transported to McCall's. (Weiser Aff., Exhs. N, S). That day, decedent's family viewed the body and perceived that it was decomposing and odorous. (Franzblau Aff., Exh. A). On March 30, 2006, decedent's funeral was held. (*Id.*).

On or about December 4, 2006, Manica, as administratrix of the estate of Margaret, and Edith Gilchrist, decedent's sister, commenced an action against City with the filing of a summons and complaint in Supreme Court, Bronx County, asserting claims for negligent infliction of emotional distress arising from the mishandling of decedent's body. (Weiser Aff., Exh. C). Sometime thereafter, City joined issue with service of its answer and successfully moved to change venue to New York County. (*Id.*, Exhs. D, E).

On or about January 21, 2009, City commenced a third-party action against McCall's with the filing of a third-party summons and complaint, asserting a claim for indemnification. (*Id.*, Exh. F).

On or about February 2, 2009, Manica, individually and as administratrix of the estate of Margaret, Edith, Termaine Blow, decedent's brother-in-law, and Paul Gilchrist, decedent's brother, commenced an action against McCall's with the filing of a summons and complaint in Supreme Court, Bronx County, asserting claims for negligent and intentional infliction of emotional distress arising from the mishandling of decedent's body. (*Id.*, Exh. H). Sometime thereafter, McCall's joined issue with service of its answer and successfully moved to change venue to New York County and to consolidate the action with the 2006 matter. (*Id.*, Exh. J).

On April 3, 2009, McCall's joined issue on the third-party complaint with service of its answer. (*Id.*, Exh. G).

At an examination before trial (EBT) held on December 3, 2009, Blow testified that he saw decedent's body at the funeral on March 30. (Franzblau, Exh. E).

At an EBT held on December 17, 2009, Robert B. Kearney, principal mortuary technician at the Medical Examiner's Office, testified that the general procedure for handing a body requires

that it be refrigerated upon its arrival at the morgue and that it remain refrigerated there until it is retrieved, except for when it is autopsied, and that City's records do not reflect that anything was wrong with decedent's body when it was released to McCall's. (Weiser Aff., Exh. Q).

At an EBT held the same day, Shawn'te C. Harvell, a licensed funeral director at McCall's, testified that James Robinson, the McCall's employee who retrieved the body and transported it to the funeral home, called him before he arrived at McCall's and said that it was decomposing, and that he then called Margaret to tell her same and ask her to view the body before finalizing the funeral arrangements. (*Id.*, Exh. S). He explained that the body was taken to the preparation room immediately upon arrival, that it was decomposing and emitting a "terrible" odor, and that although bodies are typically embalmed soon after reaching the preparation room, they waited for decedent's family to view the body before embalming it. (*Id.*). According to him, the family arrived at the funeral home within an hour of the phone call and said that the body had not been "like this" when they last saw it. (*Id.*). Although the embalming process began soon after the family left, the odor was present during the wake and funeral. (*Id.*).

On January 7, 2010, McCall's commenced a second third-party action against City with the filing of a third-party summons and complaint, asserting a claim for indemnification. (*Id.*, Exh. K). On or about January 25, 2010, City joined issue with service of its answer. (*Id.*, Exh L).

At an EBT held on September 24, 2010, Carolyn Faison, mortuary technician at the Medical Examiner's Office, testified that on March 22, 2006, decedent's body was placed in an elevator for the family's viewing, and that it remained there until Lyle Sasso, who was hired by McCall's to transport the body to the funeral home, came to retrieve it. (*Id.*, Exh. O). When she retrieved the body from the elevator, she detected no smell or any sign of decay, and Sasso said

nothing to her about it. (*Id.*). According to her, it is not "standard procedure for [a body] to be on the elevator for that period of time," that the elevator is not refrigerated, and that the body should have been taken off the elevator and refrigerated after being viewed. (*Id.*).

At an EBT held on October 2010, Robinson testified that he went to the medical examiner's office to retrieve decedent's body, that it took two hours to locate it there, that a female receptionist told him that the body had been found in an elevator, that he noticed "tissue gas," which causes the body to "decompose rapidly if not embalmed . . . or refrigerated," on decedent's face, that he complained to the receptionist about it, and that he called McCall's receptionist and manager and told them that the body had to be embalmed immediately. (*Id.*, Exh. T). According to him, it took 15 to 20 minutes to drive to McCall's, and immediately on arrival, he took the body to the preparation room and told Eli Simmons, a licensed funeral director there, that it had to be embalmed "right now" because of the tissue gas. (*Id.*). When the body was removed from the bag in which it was transported, he noticed skin slippage and decomposition. (*Id.*).

At an EBT held on October 24, 2010, Simmons testified that he first saw decedent's body just after Robinson had brought it to the preparation room and had unzipped the bag in which it was transported, that Robinson had said nothing to him about the body's condition, that he noticed a "terrible" smell when he unzipped the bag, that he alerted Harvell of the odor and the areas of the body that had started to decompose, and that he waited to begin the embalming process until he received authorization from Harvell to do so, which occurred after decedent's family viewed the body that day. (*Id.*, Exh. R). According to him, the vans used by McCall's to transport bodies are not refrigerated and that there is no refrigerated storage at the funeral home.

(*Id.*).

Court records reflect that on June 8, 2009, plaintiffs filed their note of issue.

II. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A. McCall's motion

1. Contentions

McCall's asserts that there is no evidence demonstrating that it mishandled decedent's body, as it did what it was hired to do, which was to retrieve the body, embalm it, and conduct the funeral. (Weiser Aff.). Moreover, it claims that Manica, as administratrix of the deceased's mother's estate, is the only proper plaintiff as it would be unjust to permit more than one family member to recover for mental pain and anguish arising out of the mishandling of a decedent's body, and jurors would be confused by a verdict sheet reflecting that different plaintiffs are asserting claims against different defendants. (*Id.*).

In opposition, City argues that there exist material issues of fact as to whether McCall's conduct contributed to the body's decomposition, as the vehicle in which McCall's transported

the body was not refrigerated, time had elapsed between the body's arrival at McCall's and its embalming, Faison noticed no smell when McCall's retrieved the body, Robinson reported no problem with the body to Simmons, and City records reflect no problem with the body's condition when McCall's retrieved it. (Affirmation of Stacey L. Cohen, ACC, in Opposition, dated Nov. 16, 2011). However, City agrees that Manica is the only proper plaintiff in this matter and join in that part of McCall's motion. (*Id.*).

In opposition, plaintiffs also contend that there exist triable factual issues as to whether McCall's conduct contributed to the body's composition, absent any evidence demonstrating that McCall's properly handled the body once in its possession, and Faison testified that she noticed neither an odor nor decomposition when McCall's retrieved it. (Franzblau Aff.). Additionally, they claim that there is no limit to the number of persons who may assert a claim for negligent or intentional infliction of emotional distress and that they have standing to assert claims against McCall's for negligent handling of a corpse, as all of them except for Blow qualify as next of kin, and triable factual issues exist as to whether he may recover, as he saw and smelled the body. (*Id.*).

In reply, McCall's observes that City and plaintiffs speculate as to whether its conduct, such as transporting the body in an unrefrigerated vehicle and waiting a few hours before embalming it, contributed to the body's decomposition. (Affirmation of David Weiser, Esq., in Reply, dated Nov. 29, 2011).

2. Analysis

a. Complaint

1. Standing

Although a decedent's next of kin may not bring separate actions for emotional pain and suffering arising out of the mishandling of the decedent's body, they may join together as plaintiffs in the same action. (*See Brown v Broome County,* 8 NY2d 330 [1960]; *Gostkowski v Roman Catholic Church of the Sacred Hearts of Jesus & Mary*, 262 NY 320 [1933]; *Wainwright v New York City Health & Hosps. Corp.*, 61 AD3d 852 [2d Dept 2009]. Only a decedent's next of kin may recover for negligent infliction of emotional distress arising out of the mishandling of body. (*Jorbel v Kopko*, 31 AD3d 611 [2d Dept 2006]; *Massaro v Charles J. O'Shea Funeral Home, Inc.*, 292 AD2d 349 [2d Dept 2001]).

Pursuant to EPTL 1-2.5 and 2-1.1, next of kin are distributees, those entitled to take a share of the decedent's estate. The persons who may do so are set forth in EPTL 4-1.1, which include the decedent's spouse and persons of common ancestry. Accordingly, as Blow is the only plaintiff with whom decedent shares no common ancestry, absent any authority for the proposition that juror confusion is considered in determining standing, all plaintiffs, except for Blow, have standing to assert claims for negligent infliction of emotional distress. (*See Massaro*, 292 AD2d 349 [dismissing plaintiffs' claims for negligent infliction of emotional distress, as they are not decedent's next of kin]).

2. Merits

"A cause of action for negligent infliction of emotional distress generally requires [a] plaintiff 'to show a breach of a duty to her which unreasonably endangered her physical safety, or

caused her to fear for her own safety,' but an 'exception permits recovery for emotional harm to a close relative resulting from negligent mishandling of a corpse.'" (*Schultes v Kane*, 50 AD3d 1277, [3d Dept 2008]). In order to state a cause of action for intentional infliction of emotional distress, a plaintiff must demonstrate: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." (*Howell v New York Post. Co.*, 81 NY2d 115, 212 [1993]).

Here, although it is undisputed that decedent's body remained in the unrefrigerated elevator for two days before McCall's retrieved it, Faison's testimony conflicts with Robinson's as to whether the body showed signs of decomposition when retrieved, who retrieved it, and whether a complaint about it was registered. Moreover, although Simmons, Robinson, and Harvell testified that the body showed signs of decomposition on arrival at McCall's, McCall's offers no evidence demonstrating that the body did not further decompose in transit or while in the preparation room before being embalmed. Accordingly, as there exist triable issues as to whether McCall's conduct caused the body to decompose, and thus, caused plaintiffs' emotional distress, McCall's has failed to establish, *prima facie,* entitlement to summary judgment on either plaintiff's negligent or intentional infliction of emotional distress claims.

b. Third-party complaint

"Common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing a plaintiff's injuries." (*Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]). As McCall's has failed to demonstrate that its conduct did not cause plaintiffs' emotional distress, it is not entitled to

summary judgment on City's third-party complaint.

B. Plaintiffs' cross-motion

1. Contentions

Plaintiffs claim that there exist no triable issues of fact as to whether City was negligent in handling the body, as it is undisputed that the body remained unrefrigerated for two days and that it decomposition and a strong odor were apparent when McCall's retrieved it. (Franzblau Aff.).

In opposition, City argues that plaintiffs' cross-motion is untimely, as it was filed more than 60 days after they filed their note of issue, and the issues they raise are not identical to those raised by McCall's. (Affirmation of Stacey L. Cohen, ACC, in Opposition, dated Nov. 28, 2011). In any event, it observes that plaintiff's cross-motion must be denied as it improperly seeks relief against a non-moving party and there exist triable factual issues as to whether plaintiffs' delay in burying the body contributed to its decomposition. (*Id.*).

In reply, plaintiffs assert that they have good cause for failing to file their motion within 60 days of filing their note of issue, as they needed time to analyze the numerous deposition transcripts and complex legal issues, and they argue that they only delayed three and one-half months in filing their motion. (Affirmation of Mitchell Franzbrau, Esq., in Reply, dated Dec. 19, 2011). Moreover, they claim that if their motion is untimely, so too is City's opposition, as City effectively cross-moves for affirmative relief in joining in McCall's arguments on plaintiffs' standing. (*Id.*). And they deny that only one family member may assert a claim negligent handling of a corpse. (*Id.*).

2. Analysis

Pursuant to CPLR 3212, the deadline for filing a motion for summary judgment is 120 days after the filing of the note of issue (*Brill v City of New York*, 2 NY3d 648, 651 [2004]), although the court may require a shorter deadline (CPLR 3212[a]). My part rules require that motions for summary judgment be filed within 60 days of the filing of the note of issue.

Before the court may consider an untimely motion, the moving party must demonstrate good cause for the delay, or "a satisfactory explanation for the untimeliness." (*Brill*, 2 NY3d at 652. "No excuse at all, or a perfunctory excuse, cannot be good cause," and the motion's merit or absence of prejudice resulting from the delay is immaterial. (*Id.*).

Here, as a cross-motion may be made seeking relief against the moving party only (CPLR 2215), plaintiffs' motion is not a cross-motion and is thus untimely. (*See Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2d Dept 2005] ["cross-motion" seeking relief against non-moving party not proper cross-motion and could not "piggyback" on primary summary judgment motion for purposes of filing deadline]). Plaintiffs' claim that the matter is too complex to permit timely filing of a summary judgment motion is weak given McCall's timely filing, and absent good cause, the length of their delay is immaterial. (*See Derby v Bitan*, 89 AD3d 891 [2d Dept 2011] [where party failed to provide good cause for one-day delay in filing summary judgment motion, motion denied as untimely]). As City's opposition is not an application for affirmative relief, it has no bearing on the procedural propriety of plaintiffs' motion.

Even if timely, the testimony about the state of decedent's body when it was retrieved from the Medical Examiners Office is conflicting, and thus, plaintiffs have failed to demonstrate, *prima facie,* entitlement to summary judgment.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant McCall's Bronxwood Funeral Home, Inc.'s motion for summary judgment is granted as to plaintiff Termaine Blow's claim for negligent infliction of emotional distress only; and it is further

ORDERED, that defendant McCall's Bronxwood Funeral Home, Inc.'s motion for summary judgment is otherwise denied; and it is further

ORDERED, that plaintiffs' cross-motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC

FILED
APR 25 2012
COUNTY CLERK'S OFFICE
NEW YORK

BARBARA JAFFE
J.S.C.

DATED: April 23, 2012
New York, New York

APR 23 2012