

<b>Dixon v City of New York</b>
2012 NY Slip Op 33177(U)
August 17, 2012
Sup Ct, 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,  
Plaintiffs,  
- against -

Index  
Number: 18033/05  
Motion  
Date: 8/7/12

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

Motion  
Cal. Number: 16

Defendants.

Motion Seq. No.: 5

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The following papers numbered 1 to 9 read on this motion by plaintiffs for summary judgment on the issue of liability.

Papers  
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiffs for summary judgment on the issue of liability is denied. Plaintiffs previously moved twice for the same 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, and by motion on February 21, 2012, which motion was denied pursuant to the order of this Court issued on February 22, 2012.

Plaintiffs' asserted causes of action against the City for wrongful autopsy and negligent infliction of emotional distress for interference with their right of sepulcher. An autopsy had been performed by the Office of the Chief Medical Examiner of the City of New York (OCME) upon the body of plaintiffs' 11-year-old son, who had been struck and killed by an automobile. Plaintiffs allege that it was not until after the body had been returned to them and had been buried that they discovered by examining the autopsy report

that was provided to them that the child's brain and spinal cord had been removed for examination and not returned with the body. Plaintiffs served a notice of claim and commenced the underlying action alleging damages for wrongful autopsy and for negligent infliction of emotional distress allegedly sustained as a result of of the interference with their right of sepulcher, including the trauma of having to disinter the body, reunite it with its brain and spinal cord and re-inter it.

The City moved to dismiss the complaint upon the ground that plaintiffs failed to serve a timely notice of claim. Plaintiffs cross-moved for summary judgment.

Pursuant to its order of February 26, 2009, this Court granted the motion solely to the extent of dismissing plaintiffs' claim of negligent autopsy as being untimely and denying the motion in all other respects and denied the cross-motion. This Court held that the cause of action for wrongful autopsy accrued on the date of the autopsy and was untimely as measured from that date, but that the cause of action for negligent infliction of emotional distress accrued on the date of discovery by plaintiffs that the body of their child had been returned to them minus its brain and spine and was timely as measured from the date of discovery. Prompted by the City's tangential contention that it is protected by governmental immunity against a claim of negligent infliction of emotional distress arising from the actions of OCME, thus implicating the Court's subject-matter jurisdiction which may be raised at any time, even on the Court's own initiative, this Court, sua sponte, also raised and decided the issue of subject-matter jurisdiction in this matter. Specifically, it held that OCME's failure to restore the brain and spine to the body and to inform plaintiffs that the body had been released to them without these organs was a ministerial failure rather than a discretionary one and, therefore, plaintiffs' emotional distress cause of action is not barred by sovereign immunity and is covered by the State's waiver of the City's immunity from suit under the Court of Claims Act.

This Court also denied plaintiffs' cross-motion, stating, "Cross-motion by plaintiffs for summary judgment is also denied. There has been no discovery conducted in this matter and plaintiffs fail to proffer evidence in admissible form eliminating all issues of fact. The issue of OCME's alleged negligence remains a question for the jury to decide."

The City filed a notice of appeal and the Appellate Division, Second Department, affirmed this Court's order of February 26, 2009 (Dixon v City of New York, 76 AD 3d 1043 [2<sup>nd</sup> Dept 2010]). Plaintiffs did not cross-appeal this Court's order denying their cross-motion

for summary judgment on the issue of liability.

In affirming this Court's prior order, the Appellate Division, Second Department, held, with respect to the issue of governmental immunity, "The defendants' remaining contention that the complaint was subject to dismissal on the ground of governmental immunity is without merit (see Shipley v City of New York, 80 AD 3d 171, 908 N.Y.S. 2d 425 [decided herewith])." The Shipley case involved a similar fact pattern in which the body of a child who had been killed in an automobile accident was autopsied by OCME and returned to his parents for burial without informing them that their son's brain had been removed and retained for further examination. The Appellate Division, Second Department, held that the complaint articulated a cause of action against the City for the violation of the right of sepulcher, stating, inter alia, that the medical examiner has the 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 burial once the purpose for which those remains were retained was accomplished and that its breach of that duty was a ministerial failure. The Appellate Division, thus, affirmed the trial court's order holding that there were questions of fact to be determined at trial regarding whether the City violated the plaintiffs' right to sepulcher and denying the City's motion for summary judgment.

Plaintiffs thereafter moved again for the same relief on February 21, 2012, which motion was again denied by this Court pursuant to its February 22, 2012 order, upon the grounds that the motion was in derogation of the doctrine of the law of the case and the rule against making successive motions for summary judgment.

Apparently undeterred, and in complete disregard of this Court's order of February 22, 2012, plaintiffs now move for summary judgment, again, for the third time, proffering the same unmeritorious argument that the holding in Shipley supports the granting of summary judgment to plaintiffs on the issue of liability based upon the violation of the right of sepulcher. Once again, this Court denies plaintiffs' motion, for the same reasons as heretofore stated in its two prior orders. As heretofore noted, hereinabove and in the order of February 22, 2012, Shipley did not state that the plaintiffs were entitled to summary judgment on liability on the issue of the City's violation of their right of sepulcher, but merely that they stated a cause of action therefor, for substantially the same reasons as this Court articulated in its order of February 26, 2009. Indeed, not only did the Appellate Division not hold or indicate that the plaintiffs were entitled to summary judgment, but on the contrary, agreed with the trial court that there were issues of fact concerning the plaintiff's cause of

action for sepulcher to be determined at trial.

Accordingly, the motion is, once again, denied.

The Court cautions plaintiffs' counsel against making any further motions for the same or similar relief. Any further motions for the same or similar relief may result in the matter being set down for a hearing on the imposition of sanctions against plaintiffs' counsel pursuant to 22 NYCRR §130-1.1 for engaging in frivolous motion practice.

Dated: August 17, 2012

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KEVIN J. KERRIGAN, J.S.C.