

Cohen v Marcus L. Bianconi Funeral Home, Ltd.

2012 NY Slip Op 33184(U)

September 10, 2012

Supreme Court, New York County

Docket Number: 4716/12

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 17
ELISSE REIDBORD COHEN,

Plaintiff(s),

-against-

INDEX # 4716/12
Motion Seq. 1
Motion Date 6.29.12
Submit Date 7.20.12

MARCUS L. BIANCONI FUNERAL HOME, LIMITED,
MARCUS L. BIANCONI, JR., LEWIS T. BIANCONI,
ROSE M. BIANCONI, and CAROL BIANCONI,

XXX

Defendant(s).

-----X

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3
Memoranda of Law	4,5,6

Motion by the attorneys for the defendants for an order pursuant to CPLR 3211(a)(3) and (7) dismissing the complaint is **GRANTED**. That part of the application for an order pursuant to 22 NYCRR § 130-1.1 and/or CPLR 8303-a awarding the defendants' attorney's fees and costs is **DENIED**.

The plaintiff Elisse Reidbord Cohen (Cohen) is the sister of Charles Reidbord (Charles or decedent) who died of cancer at Memorial Sloan Kettering Cancer Center in New York, New York, on October 18, 2011. Defendant Carol Biaconi (Carol) is the surviving spouse of Charles

to whom she was married for almost 20 years. Carol's 87 year-old mother Rose Bianconi, Carol's two brothers, Lewis Bianconi and Marcus L. Bianconi, Jr. and Marcus L. Bianconi Funeral Home Limited where Marcus and Lewis are funeral directors are all joined as party defendants.

Plaintiff alleges that the defendants acting in concert, cremated the remains of Charles against his express wishes and his individual and moral beliefs. The gravamen of the action is that Charles' widow caused the plaintiff emotional distress by choosing to have Charles – a Jew who was inter-married to Carol, his Italian Catholic wife – cremated, rather than buried in an Orthodox Jewish Cemetery.

The plaintiff lacks standing to bring this action.

CPLR 3211(a)(3) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party asserting the cause of action has no legal capacity to sue.” Defendants argue that based on PHL Health Law (PHL) § 4201 the plaintiff lacks standing to bring this action.

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 otherwise disposition of the remains. *See Shiplex v City of New York*, 80 AD3d 171; *Melfi v Mount Sinai*, 64 AD3d 26.

PHL Health Law § 4201, entitled “Disposition of Remains; responsibility therefor,” addresses two broad aspects of the care, disposal, transportation, burial, cremation, or embalming of the body of a deceased person: one regarding who shall have the right to control, the disposition of a decedent's remains, and the second regarding the liability of others in carrying out the directions of a person who represents that he or she is entitled to control the disposition of remains. PHL § 4201 underwent significant revisions by amendments effective August 2, 2006, August 1, 2007 and October 25, 2009 respectively (*see* L 2005, ch 768 § 1; L 2006, ch 76, § 1; L 2007, ch 401, § 1; L 2009, ch 348 § 4).

First, the statute identifies, in descending priority, those persons who shall have the right to dispose of a decedent's remains (*see* PHL § 4201[2][a]). This hierarchy of individuals with the right to dispose of deceased persons' remains was established in response to the tragic events of September 11, 2001 (*see* Mem of St of NY Dept of Health, Bill Jacket, L 2005, ch 768, at 9). Highest priority is given to the person designated in a written instrument (*see* PHL § 4201[2][a]) executed by the decedent prior to death, duly witnessed, and accepted by the designee in a form substantially similar to the template set forth in PHL § 4201(3). In the absence of a written instrument of designation, a decedent's remains shall be disposed of in the manner directed by the following persons in descending order: the surviving spouse or surviving domestic partner, any of the decedent's surviving children 18 years of age or older, either of decedent's surviving parents; any of the decedent's surviving siblings 18 years of age or older; a court-appointed guardian, a person 18 years of age or older entitled to share in the estate with the person closest

in relationship having the highest priority, a duly-appointed fiduciary of the estate, a close friend or other relative of the decedent reasonably familiar with the decedent's wishes, and a chief fiscal officer of a county or duly-appointed public administrator (*see* PHL § 4201[2][a][i]-[x]). If an enumerated individual is not reasonably available, is unwilling, or not competent to serve, and is not expected to become reasonably available, willing, or competent, then those persons of equal priority or, if there be none, those persons of the next succeeding priority shall have the right to control the disposition of the decedent's remains (PHL § 4201[2][b]); *Mack v Brown et al.*, 82 AD3d 133, 138-139).

The second broad directive of PHL § 4201 is the legal protection against civil liability it confers upon a person either identifying the decedent, representing himself or herself as authorized to control the decedent's remains, or disposing of the remains (*see* PHL § 4201[6][a]-[c]; § 4201[7]). The statutory immunity from civil liability requires, as a condition precedent, that the persons acted "reasonably" and in "good faith" (PHL § 4201[7]). The PHL § 4201[7] specifically provides, *inter alia*, that no cemetery organization, crematory, or funeral firm shall be 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." However, to be entitled to the protection of the statute, the cemetery organization, crematory, or funeral firm must also establish that it requested and received a written statement that the decedent's agent is designated by a will or written instrument executed pursuant to the statute or, alternatively, that the designee has no knowledge of a will or written instrument directing the disposition of the of the decedent's remains and that such person possesses statutory priority to control the decedent's remains (*see* PHL § 4201[7]). *See Mack v Brown et al.*, *supra* at pp.138-139.

The decedent did not leave a written direction in the form required by PHL § 420(2)(a)(i). Therefore, the only person who has the right to make a decision regarding the disposition of the decedent's remains is the surviving spouse, the defendant Carol. *In re Kelly*, 16 AD3d 587. This right may be "waived" to other persons who will then have control over the burial and funeral arrangements. In *In re Salomon*, 196 Misc 2d 599 (Sup Ct Nassau County 2003), the nominated executor was successful in obtaining a court order preventing the surviving spouse from having decedent's remains cremated and for delivery of the remains to a Jewish chapel for burial in accordance with Jewish tradition. The evidence indicated that the decedent and the spouse had been estranged and that the decedent, because of his religious beliefs, would not want to have been cremated. *In Maurer v Thibeault*, 20 Misc 3d 631 (Sup Ct Court and County 2008) the decedent, prior to her death, had commenced a divorce action against her husband and obtained an order of protection; she died while the divorce action was still pending. The decedent's death was being investigated as a homicide. The court held that the husband was not deemed a surviving spouse at the time of the decedent's death entitled to determine the disposition of her remains under PHL § 4201. The court found that the decedent's mother met her burden of demonstrating that she was the proper party to control the disposition of her daughter's remains. The court held that the degree of the decedent's animosity toward her estranged husband provided a strong indication that she would not have wanted him to have control over her remains. Even if he were free from culpability regarding the decedent's death, he would still be

incompetent to control the remains under the circumstances presented. The court found that the moral and individual beliefs and wishes of the decedent would be fulfilled by having her mother have control over the remains. In *In re Grace D. (Louis V.P.)* 31 Misc 3d 622 (Sup Ct Nassau County 2011), the court recognized that the written testamentary wishes of the decedent regarding the disposition of his own remains is paramount, prevailing over any wishes of the next-of-kin.

Absent a duly executed written document that has evidentiary probative value, only Carol, the surviving spouse, has standing. The plaintiff does not have standing to bring this action. Moreover, there is absolutely no indication that the defendant surviving spouse had committed any act during the marriage to preclude her from being the sole person to determine the disposition of the decedent to whom she was married almost 20 years. The previous cases involve situations where the surviving spouse, because of some egregious conduct, was deemed to have waived the absolute right to sepulcher.

To permit a surviving relative, the plaintiff herein, to make a determination as to the disposition of the decedent, would allow her to wrongfully engage in a course of conduct that was contrary to what the decedent may have condoned. The intent of PHL § 4201 was to prevent such a situation from occurring. The plaintiff's complaint is replete with self-serving hearsay allegations based on alleged conversations with the deceased. In reaching its decision, the court need not consider these self-serving allegations or the assertions in the reply papers by the decedent's treating psychiatrist, that the plaintiff and her deceased brother had a strained relationship and that his sister's behavior was adversely affecting his marriage. He was very upset by it to the very end and struggled with his attempts to have his sister not "pull him back." Moreover, based on the clear intent of the PHL, as it applies to the within action, the court need not give any weight to the psychiatrist's opinion that "Charles had a very close relationship with his wife who he felt was the only positive in his life and [believed] that he would be extremely disturbed by the lawsuit leveled against Ms. Reidbord."

The court has considered the plaintiff's remaining arguments and finds them without merit.

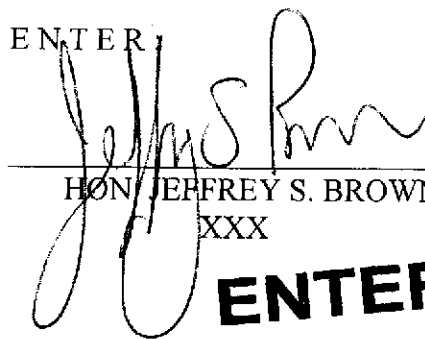
The plaintiff lacks standing to bring this lawsuit. The complaint is dismissed in its entirety. The defendant's application for an order pursuant to 22 NYCRR § 130-1.1 or CPLR 8303(a) awarding the defendants' attorneys' fees and costs at this stage of the proceedings is **DENIED**.

All proceedings under Index No. 4716/2012 are terminated.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 10, 2012

ENTER



HON. JEFFREY S. BROWN, JSC
XXX

ENTERED

SEP 12 2012

NASSAU COUNTY
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