

**Nwankwo v New York-Presbyterian**

2016 NY Slip Op 30155(U)

January 25, 2016

Supreme Court, New York County

Docket Number: 150800/12

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 11

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SAMUEL NWANKWO, FRANK NWANKWO,  
BENJAMIN NWANKWO, and DINAH  
NWANKWO,

Index No. 150800/12

Plaintiffs,  
-against-

NEW YORK- PRESBYTERIAN,  
Defendant.  
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**Joan A. Madden, J.:**

Defendant New York Presbyterian Hospital s/h/a New York-Presbyterian (NYPH) moves, by order to show cause, for an order dismissing the claims brought by plaintiffs Samuel Nwankwo, Frank Nwankwo and Benjamin Nwankwo on the ground that they lack capacity to sue, and dismissing the claim for negligent infliction of emotional distress for failure to state a cause of action or, in the alternative, directing the parties interested in the estate of Dinah Nwankwo to show cause why the action insofar as it is submitted on her behalf should not be dismissed for failure to timely effect substitution of a personal representative. Plaintiffs oppose the motion.

Background

This action seeks damages for NYPH’s alleged negligence in the mishandling of the corpse of Joshua Nwankwo (“the decedent”), who died at NYPH’s hospital on July 14, 2011, and for the negligent infliction of emotional distress. At the time of his death, Mr. Nwankwo was unmarried, had no domestic partner, or children. Plaintiff Dinah Nwankwo, who is now deceased, was the decedent’s mother. Plaintiffs Samuel Nwankwo, Frank Nwankwo and

Benjamin Nwankwo are the decedent's brothers.

After Ms. Nwankwo died, the action was stayed on April 24, 2014, pending the appointment of an administrator for her estate. The remaining plaintiffs, who maintain that they were unable to obtain letters of administration from Nigeria, where Ms. Nwankwo was located when she died,<sup>1</sup> made an oral application to sever Ms. Nwankwo's claim. NYPH opposed the motion, arguing, *inter alia*, that Ms. Nwankwo was a necessary party to the action, as she is a next of kin, pursuant section 4-1.1 of the EPTL, and that severance would prejudice NYPH by forcing it to defend two cases in the event the letters of administration were obtained for Ms. Nwankwo. By decision made on the record on January 22, 2015, this court granted the motion to sever, but noted that it makes "no determination with respect to whether the siblings who are plaintiffs in this action have a cause of action."

NYPH now move to dismiss, arguing that the remaining plaintiffs have no capacity to sue since the right of sepulcher, that is the right to immediate possession of a decedent's body for preservation and burial, is limited to decedent's mother (and now her estate) as next of kin, citing Gostkowski v. the Roman Catholic Church of the Sacred Hearths of Jesus and Mary, 262 NY 320 (1933). Moreover, NYPH argues that any attempt by plaintiffs to rely on Public Health Law § 4201 is unavailing as that provision simply authorizes persons lower in the hierarchy of priority of next of kin to control disposition of the body. In this connection, NYPH argues that Shepherd v. Whitestar Development Corp., 113 AD3d 1078 (4<sup>th</sup> Dept 2014) is not controlling since, in that

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<sup>1</sup>While NYPH argues that dismissal is warranted on the ground that plaintiffs' have not produced a death certification or other official proof of Ms. Nwankwo's death. However, this argument is moot as in opposition to the motion, plaintiffs submit a certified copy of the death certificate

case, the individual with priority had not sought to exercise such priority whereas, here, Ms. Nwankwo, who had priority as next of kin, was named as a plaintiff. Furthermore, NYPH argues that dismissal is warranted based on plaintiffs' failure to timely substitute Ms. Nwankwo's estate for Ms. Nwankwo as plaintiff. NYPH also argues that the claim for the negligent infliction of emotional distress must be dismissed for failure to state a cause of action.

In opposition, plaintiffs argue that they are entitled to proceed based on Public Health Law § 4201 since Ms. Nwankwo is not "reasonably available" to pursue the claim. Plaintiffs further argue that the case law relied on by NYPH is inapplicable since, in those cases, unlike the circumstances here, the next of kin, was reasonably available.

In reply, NYPH argues, *inter alia*, that when Ms. Nwankwo died here exclusive right to bring this action did not abate but, instead, passed to her estate.

### Discussion

"It is well established that 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, and that damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body." Melfi v. Mount Sinai Hospital, 64 AD3d 26, 31 (1<sup>st</sup> Dept 2009)(internal citations omitted). "A claim based on a violation of the right is designed to compensate the next of kin for the emotional suffering and mental anguish which they experience from the interference with their ability to properly bury their decedent .... The likelihood of emotional injury is deemed so inherently genuine in such cases that neither proof of the plaintiffs' accompanying physical harm nor of a specific medical diagnosis and course of treatment is essential to a successful prosecution of the claim." Shipley v. City of New York, 80 AD3d 171,

177 (2d Dept 2010)(internal citation omitted).

Section 4201(2)(a) of the Public Health Law provides, in relevant part, “the following person in descending priority have the right to control the disposition of the remains of [ ] decedent... (iv) either of the decedent’s surviving parents, (v) any of the decedent’s surviving siblings eighteen years and older...” It has been held that the rights afforded under the Public Health Law with respect to pursuing a claim for loss of sepulcher “is one of priority and not of standing.” Shepherd v. Whitestar Development Corp., 113 AD3d at 1080; see also, Rugova v. City of New York, 132 AD3d 220, 231 (1<sup>st</sup> Dept 2015)(rejecting defendant’s argument that family members of the decedent did not have standing to bring the action and claim damages, citing, *inter alia*, Public Health Law § 4201[2][a][iv][v] which permits the decedent’s surviving parents and siblings eighteen years or older to bring a claim for loss of sepulcher). In addition, as noted by the court in Shepherd, supra, Public Health Law § 4201(2)(b) provides “for the transfer of priority with respect to disposition of decedent’s remains in the event that ‘a person designated to control the disposition of a decedent's remains ... is not reasonably available, [is] unwilling or [is] not competent to serve.’” Id.

Applying these principles to the instant case, the court finds that contrary to NYPH’s position, plaintiffs’ siblings have standing to bring this action. Moreover, while the decedent’s mother, as a surviving parent, had priority under Public Health Law § 4201[2][iv], her death effectively transfers the priority to plaintiffs’ brothers. In this connection, the court rejects NYPH’s unsubstantiated position that Public Health Law has no relevance to the issue of a party’s right to pursue a claim for loss of sepulcher, particularly as the case law is to the contrary.

In addition, NYPH’s attempt to distinguish Shepherd from the instant case on the ground

that this action was initially commenced by a next of kin is unavailing, particularly in light of the provision in the Public Health Law providing for the transfer of priority with respect to the right to control disposition of remains in the event the person designated to control the disposition of remains is unavailable. Indeed, NYPH's interpretation of the law is unsupported by the case law on which it relies including Gostkowski supra. While the Court of Appeals in that case wrote that the surviving spouse has the "sole right to sue, *during his or her lifetime*, for damages due to interference with the dead body," it also noted that if the next of kin "neglect[s] to exercise such right...[o]thers may act."<sup>2</sup> 262 NY at 325 (emphasis added).

Next, NYPH's argument that the action should be dismissed based on the failure to substitute Ms. Nwankwo with a representative of her estate is without merit. In general, the death of a party divests the court of jurisdiction to conduct proceedings in an action, and "[t]he action is stayed as to him or her pending substitution of a legal representative, and any determination rendered without such a substitution is generally deemed a nullity." Stancu v Cheon Hyang Oh, 74 AD3d 1322 (2d Dept 2010); CPLR 1015, 1021; Lugo v GE Capital Auto Lease, 36 AD3d 409 (1<sup>st</sup> Dept 2007).

However, when a cause of action in favor of a party survives the death of another party, and does not affect the merits of a case, the action can proceed without substitution of a representative for the deceased party. (CPLR 1015 [b]; see also, Paterno v. Cyc, LLC, 46 AD3d 788 (2d Dept 2007)(plaintiff was not required to appoint a substitute for deceased co-plaintiff in

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<sup>2</sup>NYPH's reliance on Lubin v. Sydenham Hospital, Inc., 181 Misc 870 (Sup Ct NY Co. 1943), is also misplaced as the case simply holds that an action does not abate upon the death of a plaintiff, who sues for the violation of the right to sepulture.

an action for injury to property where the merits were not affected by the death of co-plaintiff); Bon Temps Agency, Ltd v. Hickey, 5 AD3d 157 (1<sup>st</sup> Dept 2004)(trial court erred in staying action upon death of defendant partner where his co-partner was also named a defendant and therefore the right sought to be enforced survived defendant's death); Bova v. Vinciguerra, 139 AD2d 797 (3d Dept 1988)(noting that "if the cause of action survives to a co-plaintiff... the action can proceed without a substitution with the death simply being noted on the record").

Here, for the reasons stated herein, plaintiffs have standing to pursue this action in the absence of their deceased mother as a plaintiff, and thus their failure to appoint a substitute for her, does not provide grounds for dismissal of this action.

Finally, however, as plaintiffs have not stated a claim for negligent infliction of emotional distress which is independent from the emotional distress recoverable for loss of sepulcher, that aspect of NYPH's motion seeking to dismiss the second cause of action is granted. See Shepherd v. Whitestar Development Corp., 113 AD3d at 1081.

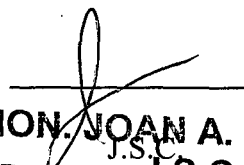
#### Conclusion

In view of the above, it is

ORDERED that NYPH's motion is granted to the extent of dismissing the second cause of action for the negligent infliction of emotion distress, and is otherwise denied; and it is further

ORDERED that a status conference shall be held on February 4, 2015 at 10:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: January 25, 2016

  
**HON. JOAN A. MADDEN**  
 J.S.C.