

**Brandenburg v St. Michael's Cemetery**

2010 NY Slip Op 33996(U)

April 12, 2010

Supreme Court, Queens County

Docket Number: 5732 2008

Judge: Frederick D.R. Sampson

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D. R. SAMPSON IA Part 31  
Justice

\_\_\_\_\_ x  
HELEN BRANDENBURG, et al.

Index  
Number 5732 2008

- against -

Motion  
Date January 28, 2010

ST. MICHAEL'S CEMETERY, et al. x

Motion  
Cal. Number 4

Motion Seq. No. 3

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QUEENS COUNTY CLERK  
FILED

The following papers numbered 1 to 9 read on this motion by defendants for summary judgment dismissing plaintiffs' complaint pursuant to CPLR 3212.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-7
Reply Affidavits.....	8-9

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

Plaintiffs allege that the decedent, Vandy Brandenburg, died of congestive heart failure on March 6, 2007; that the decedent's wife, plaintiff Helen Brandenburg (Helen) made the funeral arrangement with the assistance of Patricia Morris from Florence Funeral Home; that the funeral was held on March 15, 2007; that the interment took place on March 16, 2007, at defendant St. Michael's Cemetery (the Cemetery); that during the interment, the decedent was placed in a mausoleum, crypt G-98, even though Helen had purchased crypt G-103; and that after the Brandenburg family discover the error, the decedent was moved to crypt G-103. Based upon the allegations, plaintiffs (Helen and the decedent's nine children) interposed causes of action for breach of contract, negligent infliction of emotional distress, intentional infliction of emotional distress, violation of Public Health Law §§ 4216 and 4218, seeking money damages and punitive damages. Issue was

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joined via defendants' service of an answer, asserting various affirmative defenses. Defendants move for summary judgment to dismiss plaintiffs' complaint.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In support of the motion, defendants submitted the deposition testimony of Dennis Werner and all ten plaintiffs.

Mr. Werner testified that he has been the general manager of the Cemetery since 2000; that in 2007, a crypt located at St. Anthony's Mausoleum 2, G-103, was purchased for the decedent; that the decedent's funeral service was held on March 15, 2007; that the decedent was interred at the Cemetery in crypt G-98; that thereafter a member of the Brandenburg family asked where the decedent's crypt was located; that upon being contacted by plaintiffs, an employee of the Cemetery consulted the mausoleum map, and observed that the decedent had been mistakenly placed in the wrong location; that the crypt where decedent was mistakenly placed had been previously sold to another individual; and that Mr. Werner then instructed the Cemetery staff to move the decedent to his intended resting place; and that the Cemetery employees moved the decedent to the proper location, at crypt G-103.

The tort of intentional infliction of emotional distress has four elements: (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, 121 [1993]). Regarding the first element, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*id.* at 122 [internal quotation marks omitted]; see *Benyo v Sikorjak*, 50 AD3d 1074, 1077 [2008]). As a matter of law, the alleged conduct of defendants does not meet this standard (compare *Leibowitz v Bank Leumi Trust Co.*, 152 AD2d 169, 182 [1989]; *Harville v Lowville Cent. School Dist.*, 245 AD2d 1106 [1997]; *Bell v Slepakoff*, 224 AD2d 567, 568 [1996]; *Lincoln First Bank v Barstro & Assoc. Contr., Inc.*, 49 AD2d 1025, 1025-1026 [1975], and *Eves v Ray*, 42 AD3d 481, 483 [2007]; *Nigro v Pickett*, 39 AD3d 720, 721-722 [2007]; *Mitchell v Giambruno*, 35 AD3d 1040, 1041-1042 [2006]; *Cavallaro v Pozzi*, 28 AD3d 1075,

1078 [2006]; *Bunker v Testa*, 234 AD2d 1004, 1005 [1996]; *see also Conradt v NBC Universal, Inc.*, 536 F Supp 2d 380, 397 [2008]). The causes of action for intentional infliction of emotional distress may, thus, be dismissed.

Defendants have also satisfied their prima facie burden as to the defenses for alleged violations of Public Health Law §§ 4216 and 4218, as Mr. Werner's testimony demonstrates that there was an absence of "malice or wantonness" on the part of defendants, and that "that the purpose of the disinterment here was to rectify an error and relocate decedent's remains to the family plot" (*Estate of LaMore v Sumner*, 46 AD3d 1262, 1265 [2007]).

Although not asserted in their answer, plaintiffs' bill of particulars asserts "impairment of the right of sepulcher." Even if this were considered, *arguendo*, part of plaintiffs' pleadings, there is still a failure to adequately plead a cause of action sounding in violation of the right of sepulcher, which requires an interference with the next of kin's immediate possession of decedent's body, and that the interference has caused mental anguish, as there are no allegations of unauthorized autopsy, inadvertent disposal of the remains, or failure to notify next of kin of the death (*see Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 39 [2009]).

Nor is there any merit to plaintiffs' claims of negligent infliction of emotional distress, as there are no allegations or evidence that the decedent's corpse was mishandled in any way (*see Shultes v Kane*, 50 AD3d 1277 [2008]; *Sarlo v Fairchild Sons, Inc.*, 256 AD2d 322 [1998]; *cf. Massaro v Charles J. O'Shea Funeral Home*, 292 AD2d 349 [2002]; *Thompson v Duncan Bros. Funeral Homes, Inc.*, 116 Misc 2d 227, 230 [1982]; *Lott v State of New York*, 32 Misc 2d 296 [1962]).

Moreover, the contract between plaintiffs and the Cemetery provides, in pertinent part, "[i]t is expressly agreed that the Cemetery's liability for any errors arising from negligence or failure to exercise due care in carrying out its obligations under this Contract shall in no event exceed the Cemetery's cost to correct such errors and shall in no event extend to claims or emotional damages or other consequential damages of whatever kind." Therefore, plaintiffs cannot recover for emotional damages resulting from the breach of that contract, and, absent a duty upon which liability can be based, there is no recovery for mental distress resulting from the breach of a contract-related duty (*see Battan v Geico General Ins. Co.*, 296 AD2d 469 [2002]).

Concerning the prayers for punitive damages, "the pleading elements required to state a claim for punitive damages as an additional and exemplary remedy when the claim arises from a breach of contract. They are: (1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be egregious; (3) the egregious conduct must

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be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally. Where a lawsuit has its genesis in the contractual relationship between the parties, the threshold task for a court considering defendant's motion to dismiss a cause of action for punitive damages is to identify a tort independent of the contract" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995] [internal citations and quotation marks omitted]). The complaint fails to identify a tort independent of the contract, Mr. Werner's testimony demonstrates that defendants' conduct was not egregious (*see Walker v Sheldon*, 10 NY2d 401, 404-405 [1961]), and there is neither allegation nor evidence that defendants' conduct was part of a pattern directed at the public generally. The claim for punitive damages must therefore be dismissed. And as plaintiffs do not allege damages other than emotional or punitive, their causes of action sounding in breach of contract must be dismissed.

Defendants do not specifically address the causes of action alleging violations of Not-for-Profit Corporation Law § 1510. "A body interred in a lot in a cemetery owned or operated by a corporation incorporated by or under a general or special law may be removed therefrom, with the consent of the corporation, and the written consent of the owners of the lot, and of the surviving wife, husband, children, if of full age, and parents of the deceased. If the consent of any such person or of the corporation can not be obtained, permission by the county court of the county, or by the supreme court in the district, where the cemetery is situated, shall be sufficient. Notice of application for such permission must be given, at least eight days prior thereto, personally, or, at least sixteen days prior thereto, by mail, to the corporation or to the persons not consenting, and to every other person or corporation on whom service of notice may be required by the court" (Not-for-Profit Corporation Law § 1510 [e]). The court, however, has discretion whether to sanction disinterment under the statute (*Corporation of the Roslyn Presbyterian Church & Congregation v Perlman*, 193 Misc 2d 60, 62 [2002]). Exercise of that discretion is warranted here because the evidence demonstrates that there was no dispute as to who purchased which crypt (*see Evergreen Cemetery Assn. v Jurgensen*, 34 AD2d 709, 710 [1970]), and the rectification of the error was a "good and substantial reason" for disinterment (*Matter of Pring v Cemetery*, 54 AD3d 766 [2008]).

Accordingly, defendants' motion is granted in its entirety. Plaintiffs' complaint is hereby dismissed.

Dated: April 12, 2010

  
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J.S.C.

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