

Stanley v City of New York

2020 NY Slip Op 34253(U)

December 23, 2020

Supreme Court, New York County

Docket Number: 151098/2020

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. DAKOTA D. RAMSEUR</u>	PART	IAS MOTION 5
	<i>Justice</i>		
-----X		INDEX NO.	<u>151098/2020</u>
NAKEMIA STANLEY,		MOTION DATE	<u>11/6/20</u>
Plaintiff,		MOTION SEQ. NO.	<u>001</u>

- v -

THE CITY OF NEW YORK, OFFICE OF THE CHIEF
 MEDICAL EXAMINER, OFFICE OF THE CHIEF MEDICAL
 EXAMINER DEPUTY DIRECTOR OF FORENSIC
 INVESTIGATIONS ADEN NAKA, OFFICE OF THE CHIEF
 MEDICAL EXAMINER SPECIAL COUNSEL, LITIGATION
 AND POLICY LESLIE KAMELHAR,
 Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number, were read on this motion to dismiss: 7-17, 19-24.

Plaintiff Nakemia Stanley commenced this action against Defendants City of New York, Office of the Chief Medical Examiner (“OCME”) and various OCME employees (collectively the “City” or, when referring only to the latter, the “individual Defendants”) for loss of sepulcher, intentional and negligent infliction of emotional distress, negligence, due process and equal protection violations, and New York City Human Rights Law violations stemming from the City’s alleged failure to comply with Decedent Shawn Kamari Frederick, Sr.’s desire for Plaintiff to control the disposition of Frederick’s remains. The City moves, pursuant to CPLR 3211(a)(7), to dismiss the Complaint for failure to state a claim. Plaintiff opposes. For the reasons below, after oral argument and additional submissions,¹ the City’s motion is granted in part solely to the extent that the intentional and negligent infliction of emotional distress claims are dismissed.

BACKGROUND

Frederick, a transgender Muslim man, wished, upon his death, to avoid any bodily alterations such as autopsy or preservation; as well as misgendering or reference to Frederick’s “deadname” (*Complaint* ¶¶ 9-11).² Frederick, whose family rejected and denied his transgender and Muslim identities, did not want his family to “have any access to or control over his body after death”; (*Complaint* ¶¶ 9-10). To effectuate these wishes, on November 6, 2018, Frederick executed a Department of Health DOH-5211 “Appointment of Agent to Control Disposition of Remains” form designating Plaintiff, Frederick’s partner, to control the disposition of

¹ Defendants emailed additional documents relating to the release of Frederick’s body on November 6, 2020.
² As a noun, “The name that a transgender person was given at birth and no longer uses upon transitioning” (*see* <https://www.merriam-webster.com/dictionary/deadname>).

Frederick's body after death and setting forth one special directive: Frederick's "wish ... to be cremated" (*NYSCEF 11/City Exh C* [the "5211"]; *Complaint* ¶¶ 5-9).

Frederick passed away on November 26, 2018 (*Complaint* ¶ 12). That day, Plaintiff's prior counsel provided the 5211 to the hospital and, upon transfer of Frederick's body to OCME later that day, by fax to OCME's legal department, which has never disputed the receipt or validity of the 5211 (*Complaint* ¶¶ 29-34; *NYSCEF 12* [the "OSC"] at p 19; *City Reply Affirm* ¶ 3 [citing as "undisputed" that OCME received the 5211 on November 26]). Plaintiff began scheduling Frederick's cremation for the first days of December 2018, at First Avenue Funeral Services ("First Avenue Funeral"; *Complaint* ¶ 35). OCME performed an autopsy on November 28, 2018 (*City Reply Affirm* ¶ 3).

On or about November 30, 2018, Plaintiff became aware that OCME had released Frederick's body to his biological family and Brooklyn Funeral Home & Cremation Service ("Brooklyn Funeral Home"), the biological family's chosen funeral home (*Complaint* ¶¶ 36, 39; *OSC* at p 24). Plaintiff learned from a Facebook post that Frederick's biological family had scheduled a Christian funeral service, with a public viewing, for December 2, 2018, and that the invitation referred to Frederick by his dead name and with incorrect pronouns (*Complaint* ¶ 38; *OSC* at p 24). At or about the same time that Plaintiff learned what had happened, Plaintiff, eight months pregnant with twins at the time, began to experience contractions and had to be taken to the hospital by ambulance (*Complaint* ¶¶ 12, 28, 41-42). Plaintiff lost the pregnancy (*Complaint* ¶ 62).

After Plaintiff's prior counsel contacted OCME, OCME arranged to transport Frederick's body from Brooklyn Funeral Home to an OCME morgue (*Complaint* ¶ 43). Having re-secured the remains, OCME nevertheless placed a "hold" on Frederick's body (*Complaint* ¶ 44). From November 30, 2018 to December 11, 2018, Plaintiff's prior counsel repeatedly contacted the individual Defendants, who insisted that Plaintiff had to obtain the biological family's consent before Frederick's remains could be released and discouraged litigation (*Complaint* ¶¶ 48-49, 53 ["Don't file the OSC yet."]). On December 11, 2018, Plaintiff filed the OSC in Supreme Court, New York County (Index No. 101795/2018 [Kotler, J.]). The parties appeared on December 18, 2018 and resolved the order to show cause by stipulation which granted Plaintiff control over Frederick's remains and directed OCME to release his remains to a funeral home of Plaintiff's choosing (*Complaint* ¶¶ 55-56). Frederick was cremated on December 26, 2018 (*Complaint* ¶ 56).

Plaintiff subsequently commenced this action, alleging in sum and substance that despite taking every necessary procedural step to effectuate their wishes, Frederick's wish to entrust his remains to his chosen family, rather than to his biological family, was not respected as it would have been had Frederick been cisgender. Specifically, Plaintiff alleges five causes of action: (1) violation of Plaintiff's right to sepulcher; (2) negligent and intentional infliction of emotional distress; (3) violation of the New York City Human Rights Law; (4) violation of Plaintiff's federal constitutional due process rights; (5) violation of Plaintiff's federal constitutional equal protection rights (*Complaint* ¶ 70, *et seq.*). Plaintiff also seeks punitive damages (*id.*).

The City now moves, pursuant to CPLR 3211(a)(7), to dismiss the entire Complaint for failure to state a cause of action. Plaintiff opposes.

DISCUSSION

In considering a motion to dismiss the court must construe the complaint liberally and accept the pleaded facts as true to determine whether the facts fit into any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375, 754 NYS2d 245 [1st Dept 2003]). The court must accept not only the material allegations of the complaint, but also whatever can be reasonably inferred therefrom in favor of the pleader (*see P.T. Bank*, 301 AD2d at 375).

I. Loss of sepulcher

The City argues that its refusal to release Frederick's body pending resolution of the dispute between Plaintiff and Frederick's biological family was mandated by statute, and thus cannot be the basis for a loss of sepulcher claim (*NYSCEF 8 [City Affirm]* ¶ 6). In opposition, Plaintiff argues that she had the "highest possible priority right to the possession of the decedent's remains," and therefore that the City's release of Frederick's body to his biological family, and later the hold on Frederick's body preventing further release to Plaintiff, were unjustified.

"The common-law right of sepulcher affords the deceased's next of kin an "absolute right to the immediate possession of a decedent's body for preservation and burial . . . , and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body" (*Shiplely v City of NY*, 25 NY3d 645, 653 [2015], citing *Mack v Brown*, 82 AD3d 133, 137 [2d Dept 2011]). "The right itself is less a quasi-property right and more the legal right of the surviving next of kin to find 'solace and comfort' in the ritual of burial" (*Shiplely*, 25 NY3d 645, 653 [2015]; *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 31 [1st Dept 2009] [containing lengthy discussion of history of right of sepulcher claims]). "If a violation of the right of sepulcher is established, the next of kin may be compensated for the emotional suffering and mental anguish which they experienced as a result" (*see Shiplely*, 80 AD3d 171). "In order to recover for such emotional injuries, it must be shown that the injuries were "the natural and proximate consequence of some wrongful act or neglect on the part of the one sought to be charged" (*Mack v Brown*, 82 AD3d 133, 138 [2d Dept 2011]; *Shiplely*, 25 NY3d at 653 ["Damages are limited to the emotional suffering, mental anguish and psychological injuries and physical consequences thereof experienced by the next of kin as a result of the interference with the right of sepulcher."]).

"To establish a cause of action for interference with the right of sepulcher, [a] plaintiff must establish that: (1) plaintiff is the decedent's next of kin; (2) plaintiff had a right to possession of the remains; (3) defendant interfered with plaintiff's right to immediate possession of the decedent's body; (4) the interference was unauthorized; (5) plaintiff was aware of the interference; and (6) the interference caused plaintiff mental anguish, which is generally presumed" (*Shepherd v Whitestar Dev. Corp.*, 113 AD3d 1078, 1080 [4th Dept 2014], citing *PJI 3:6; Melfi*, 64 AD3d 26). The fifth and sixth elements are undisputed.

With respect to the first and second elements, PHL § 4201(a) sets forth, in descending priority, a hierarchy of individuals with the right to control the disposition of a decedent's remains, beginning with "the person designated in a written instrument executed pursuant to [PHL § 4201(3)]" (*Mack v Brown*, 82 AD3d 133, 138 [2d Dept 2011] [noting that the hierarchy "was established in response to the tragic events of September 11, 2001"]; see also *Kijak v Columbia Presbyt. Hosp.*, 2013 US Dist LEXIS 134965, at *27 [SDNY Sep. 20, 2013] [PHL § 4201 has supplemented that right in setting forth a prioritized list of individuals who presumptively have the right to direct the disposition of a decedent's remains.]). It is undisputed that Frederick's duly executed, witnessed, and delivered 5211 is a verbatim reflection of the language in PHL § 4201(3), and therefore that Plaintiff had the unquestionable, sole authority to determine the disposition of Frederick's body.

With respect to the third element, the City argues that any delay in the release of Frederick's body was brief, and in any event inconsequential because "...Frederick's body was not disturbed, even during the brief time that it was not in possession and control of the defendants," and his wishes were ultimately effectuated (*City Reply Affirm* ¶¶ 8-9). However, an allegation of interference with the "absolute right to the immediate possession of a decedent's body for preservation and burial" is sufficient to state a claim (*Henderson v Kingsbrook Jewish Med. Ctr.*, 91 AD3d 720, 721 [2d Dept 2012] ["Although the delay in releasing the decedent's body was not inordinate and may ultimately be determined to have been reasonable and proper under all of the circumstances, whether the plaintiff can ultimately establish his allegations is not part of the calculus in determining a motion to dismiss."]; *Jones v City of NY*, 80 AD3d 516, 516 [1st Dept 2011] [evidence at trial established loss of sepulcher claim for several-day delay where, after informing plaintiff of her son's death, and body was identified, defendant nevertheless improperly released the body of the decedent to a funeral home which buried decedent, thereafter requiring exhumation and cremation because of the passage of time]; *Zhuangzi Li v NY Hosp. Med. Ctr. of Queens*, 147 AD3d 1115, 1117 [2d Dept 2017] [holding that the defendant hospital "created a right of sepulcher where one might not otherwise exist by affirmatively representing to the plaintiffs that the fetus would receive a burial"]; cf *Toppin v Town of Hempstead*, 121 AD3d 883, 884 [2d Dept 2014] ["The plaintiffs' sparse allegations that the defendants buried their decedent in the wrong grave and then re-interred him in the correct grave without their notice or consent failed to state a cause of action for violation of the common-law right of sepulcher"]).

While the City attempts to distinguish *Jones* on the basis that the *Jones* decedent's body had to be cremated against the decedent's wishes because of the incorrect burial, there are significant issues with this argument. First, the City cannot state conclusively—and certainly not at this juncture—what occurred when Frederick's body was not in OCME's possession. Second, as the First Department has stated, recovery for loss of sepulcher

has ostensibly been grounded on a violation of the relative's quasi-property right in the body. It has been noted that such a property right is little more than a fiction; in reality the personal feelings of the survivors are being protected... The law is not primarily concerned with the extent of physical injury to the bodily remains

but with whether there were any improper actions and whether such actions caused emotional or physical suffering to the living kin (*Melfi*, 64 AD3d at 37-38).

These two issues are fused together by the unique circumstances of this case; that is, as Plaintiff has alleged, regardless of any physical effects upon Frederick's body (or not), Plaintiff herself has alleged psychological harm stemming from OCME's improper release of Frederick's body, which then led to funeral planning by Plaintiff's biological family which misgendered and deadnamed Frederick against Frederick and Plaintiff's explicit wishes.

With respect to the fourth inquiry, whether the interference was unauthorized, in addition to setting forth the hierarchy, PHL § 4201 confers "legal protection against civil liability" for, as relevant here, "*reasonably and in good faith*... disposing of a decedent's remains if done with the *reasonable belief* that such disposal is consistent with this section" (PHL § 4201[6]; *Mack*, 82 AD3d at 139 [granting summary judgment to funeral home on the basis of affidavit stating that funeral home received cremation authorization from individual with marriage certificate who purported to be decedent's spouse, that decedent left no written instructions for disposal of cremated body, and that near relatives had not expressed any objections to cremation]).

As Plaintiff argues in opposition, the City's citation to *Mack* is distinguishable. In *Mack*, a case in which a decedent's first wife and children claimed loss of sepulcher against a hospital, funeral home, and decedent's second wife, the *Mack* court affirmed summary judgment dismissing the complaint against the defendant funeral home (*Mack*, 82 AD3d at 136). However, in that case, the Court found that the funeral home acted in good faith by releasing the decedent's body to the decedent's second wife and executor, who produced a recent certificate of marriage registration and the death certificate identifying the second wife (*Mack*, 82 AD3d at 140). Additionally, the Court accepted the funeral home's affidavit stating that "the decedent left no written instructions for the disposal of his cremated body, and that the decedent's near relatives had been informed of the proposed cremation but had expressed no objection to it (*Mack*, 82 AD3d at 140). The Second Department noted that the funeral home "had no reason to question [the second wife's] authority to act as the decedent's surviving spouse, particularly as the relevant documents were facially sufficient... To require [the funeral home] to conduct further examination or investigation ... would render meaningless the civil liability protections now afforded to it by [PHL] § 4201" (*Mack*, 82 AD3d at 140-42). Unlike *Mack*, on the date of Frederick's death, OCME possessed the 5211, the authenticity and conclusiveness of which are undisputed. Thus, the 5211 placed OCME on notice of Frederick's wishes and, as importantly, gave OCME no "reason to question" Plaintiff's priority. Despite this, OCME released the body to Plaintiff's biological family.

To the extent that the City ascribes the necessity of the OSC to Plaintiff's belated request for the release of Frederick's remains, thereby necessitating OCME's "hold" on Frederick's body after OCME re-acquired it, Public Health Law [PHL] 4201(8) requires that "[e]very dispute relating to the disposition of the remains of a decedent shall be resolved by a court of competent jurisdiction pursuant to a special proceeding under article four of the civil practice law and rules." However, the City's argument ignores that the hold, and therefore the OSC, were only required because OCME failed to initially heed the 5211's directives. Indeed, unlike *Mack*, it is

unclear from this record what Frederick's biological family said or produced to effectuate the release of Frederick's remains, particularly in light of the existence of the 5211, which would prioritize Plaintiff's claim; most importantly, the record does not shed light on OCME's procedures to ensure the priority of the 5211 (*Mack v Brown*, 82 AD3d at 141 ["The legislature... could not have intended for cemeteries, crematories, and funeral firms possessed of duly-executed authorizations, death certificates, and related documentation... to cross-examine grieving widows or widowers, children, parents, siblings, or others to confirm the validity of the familial or personal status claimed under the Public Health Law, or to conduct independent investigations of such persons to protect themselves from potential liability]).³

As Plaintiff argues in opposition, it is unclear why Frederick's body was released to his biological family in the first place, despite OCME having been twice—on the day of Frederick's death alone—provided with the 5211; in other words, OCME's unauthorized release of Frederick's body necessitated the OSC, leading to an unnecessary and distressing multi-week delay in effectuating Frederick's wishes. At minimum, however, there is no dispute that Frederick's body was released, without authority, to his biological family for some period of time. Accordingly, Plaintiff has stated a cause of action for loss of sepulcher, and that branch of the City's motion is denied.

II. Negligent and intentional infliction of emotional distress

The City argues that Plaintiff has not stated a claim for negligent infliction of emotional distress because Plaintiff failed to identify a breach of a duty owed directly to her which caused her to fear for her own safety (*City Affirm* ¶ 8). The City also argues that Plaintiff has not stated a claim for intentional infliction of emotional distress because "...OCME releasing, for a brief period of time, the body of Mr. Frederick to a funeral home designated by his mother... is not the type of act which could be considered atrocious or beyond all bounds of decency" (*id.*).

As an initial matter, causes of action for intentional and negligent infliction of emotional distress are not permitted if they essentially duplicate tort or contract causes of action (*Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]; *Drever v State of NY*, 45 Misc 3d 224, 236 [Ct Cl 2014] [dismissing IIED and NIED claims as duplicative of loss of sepulcher claim]). Additionally, with respect to the negligent infliction of emotional distress claim, while physical injury is not a necessary element, such a cause of action must generally be premised upon a breach of a duty owed directly to the plaintiff which either unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety (*E.B. v Liberation Pubs., Inc.*, 7 AD3d 566, 567 [2d Dept 2004]). To the extent that no duty is alleged here, the claim for negligent infliction of emotional distress must be dismissed (*see also Lauer v City of NY*, 95 NY2d 95, 102 [2000] [finding no general or special duty of medical examiner to father of deceased child to communicate accurate information regarding the cause of death]).

³ A post-argument submission from the City includes a "mortuary release document" in which the funeral director from the biological family's chosen funeral home certified only that Frederick's mother authorized the director to receive Frederick's remains. At oral argument, Corporation Counsel explained that the error appears to have been clerical. Neither is sufficient to warrant dismissal at this juncture, particularly because the latter statement is made through counsel and not a sworn affidavit.

Plaintiff does not specifically oppose the City's argument in this regard, except to argue against the City's request to dismiss "claims related to Plaintiff's loss of pregnancy" (*City Affirm* ¶ 12). As Plaintiff explains in opposition, (*Pl Opp* pp 21-22), Plaintiff's allegations are an application of the eggshell skull rule that relates primarily to damages; that is, Plaintiff argues that the City's actions, whether sounding in tort or loss of sepulcher, were the proximate cause of the loss of Plaintiff's pregnancy. Both parties cite *Broadnax v Gonzalez*, (2 NY3d 148, 153 [2004]), in support of their arguments—the City argues that *Broadnax* limits recovery for damages related to loss of pregnancy or stillbirth to medical malpractice actions, and Plaintiff argues that *Broadnax* represented a retreat from prior jurisprudence limiting causes of action for negligent infliction of emotional distress (*see Tebbutt v Virostek*, 65 NY2d 931, 932 [1985]).

Plaintiff has the better of the argument. As the *Broadnax* Court explicitly held in rejecting *Tebbutt*, "*Tebbutt* reflected [the Court's] longstanding reluctance to recognize causes of action for negligent infliction of emotional distress, *especially in cases where the plaintiff suffered no independent physical or economic injury.*" However, "if the fetus cannot bring suit, it must follow in the eyes of the law that any injury here was done to the mother" (*Broadnax*, 2 NY3d at 154, quoting *Tebbutt*, 65 NY2d at 940 [1985] [Kaye, C.J., dissenting]). As Plaintiff recognizes, a pregnant individual is not only the quintessential "eggshell plaintiff, but the source of the term" (*see* 75 Def. Couns. J. 36, citing *Dulieu v White & Sons*, 2 KB 669 [1901] [English case in which a pregnant woman suffered shock followed by illness and the premature birth of her child when a cart and runaway horses crashed through the pub where she was working]). Accordingly, while the emotional distress claims are dismissed, any claims of physical and emotional harm, including the loss of Plaintiff's pregnancy, are preserved.

III. NYCHRL claims

The City also seeks dismissal of Plaintiff's NYCHRL claims. First, the City argues that no notice of claim was filed. As Plaintiff argues in opposition, however, none is required for a Human Rights Law claim (*Margerum v City of Buffalo*, 24 NY3d 721, 727 [2015]). Accordingly, that branch of the City's motion is denied.

The City also argues that the Complaint fails to state a legally-cognizable claim because it does not adequately allege anti-transgender or anti-Muslim bias, and that the true cause of the delay was the "statutorily-required hold pending resolution of a dispute between plaintiff and Mr. Frederick's biological family." Plaintiff counters that she has pled discrimination because, in addition to gender, gender identity, sexual orientation, and religion, the NYCHRL prohibits discrimination against "partnership status."

N.Y.C. Administrative Code § 8-107(4) prohibits places of public accommodation, including government agencies, to discriminate on the basis of, as relevant here, actual or perceived race, creed, color, national origin, age, gender, marital status, partnership status, and/or sexual orientation (*see Boureima v NY City Human Resources Admin.*, 128 AD3d 532, 533 [1st Dept 2015] [defining Human Rights Administration as provider of public accommodation]). The term "gender," for purposes of the NYCHRL, includes "actual or perceived sex, gender identity and gender expression, including a person's actual or perceived gender-related self-image, appearance, behavior, expression or other gender-related characteristic, regardless of the sex

assigned to that person at birth” (NYC Administrative Code § 8-102[23]; *Bumpus v NY City Tr. Auth.*, 18 Misc 3d 1131[A], 2008 NY Slip Op 50254[U], *4 [Sup Ct, Kings County 2008]; *aff’d other grounds* 66 AD3d 26 [2d Dept 2009]).

N.Y.C. Admin. Code § 8-130(a) provides that the NYCHRL “shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.” The same section recognizes cases which have “correctly understood and analyzed the liberal construction requirement,” including *Albunio v City of NY*, (16 NY3d 472, 477-478 [2011]), and its progeny, which recognize that the NYCHRL, since the Local Civil Rights Restoration Act of 2005, must be “construe[d]...broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible” (citing Local Law No. 85 [2005] of City of NY § 1). “The City’s Human Rights Law goes the additional step of prohibiting policies or practices which, though neutral on their face and neutral in intent, have an unjustified disparate impact upon one or more of the covered groups” (*Levin v Yeshiva Univ.*, 96 NY2d 484, 489 [2001]).

Indeed, even before the Restoration Act, this Court (Klein Heitler, J.) interpreted the NYCHRL broadly to encompass not only the direct objects of discrimination, but also to grant standing to “those who have been discriminated against by virtue of their association” with an individual of a protected class (*Bartman v Shenker*, 5 Misc 3d 856, 860-861 [Sup Ct, NY County 2004], citing Administrative Code § 8-107 [20] [“The provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation or alienage or citizenship status of a person with whom such person has a known relationship or association.”])⁴. Similarly, in 2018, the New York City Council added additional language to N.Y.C. Admin. Code § 8-102 extending the scope of standing yet further to a “person aggrieved” whose agent, acting on the principal’s behalf, is discriminated against (*see* N.Y.C. Local Law No. 63 Int. No. 1012-A [2018]).

Here, Plaintiff pleads: (1) that Plaintiff is the unmarried partner of a transgender Muslim man; and (2) that “Defendants treat the claims of [biological family members] and people who ‘only’ are appointed by the Public Health Law differently,” giving priority to one’s biological family and thereby artificially creating a dispute when an individual with a 5211 makes a claim (*Pl Opp* p 13-15). Plaintiff has alleged that she has the right, under the NYCHRL, to assert on her own behalf and for Decedent, that Defendants’ procedure and practice was either designed, or had the effect of, manufacturing a dispute regarding Decedent’s remains and delaying the effectuation of Decedent’s wishes despite the existence of the 5211.⁵ Plaintiff has also alleged

⁴ A 2020 amendment replaced “alienage” with “immigration” (New York City, N.Y., Local Law No. 58 Int. No. 1836-A [2020]).

⁵ Plaintiff has also alleged that Frederick was deadnamed—when used as a verb, this refers to the use of the incorrect name and pronouns. “Courts addressing the issue have almost uniformly found the practice hostile, objectively offensive, and degrading” (McNamarah, Chan Tov, *Misgendering as Misconduct*, 68 UCLA L. Rev. Disc. 40, 43 [2020], citing *G. G. ex rel. Grimm v Gloucester Cty. Sch. Bd.*, 822 F3d 709, 716 [4th Cir 2016] [finding misgendering “display[s] hostility”), *vacated*, 137 S Ct 1239 [2017] [mem.]; *Hampton v Baldwin*, No. 3:18-CV-550-

that this is disparate treatment which would not have been endured by a cisgender individual and/or couple. Accordingly, the pleadings are sufficient to withstand the City's motion to dismiss.

IV. Equal protection/due process claims

The City also seeks dismissal of Plaintiff's equal protection and due process claims, on essentially the same grounds as its NYCHRL argument. In opposition, Plaintiff argues with respect to the equal protection claim that she has adequately pled a "class of one" claim that she was treated differently than others similarly situated based on her membership in a protected class: the partner of a transgender, Muslim decedent estranged from his biological family. Plaintiff also argues, as to the due process claim, that the City violated here substantive due process rights by "interfer[ing] with her right to ensure that Mr. Frederick's end of life decisions were honored" (*Pl Opp* p 20).

As Plaintiff argues in opposition, the City's initial moving papers urging dismissal of Plaintiff's equal protection and due process claims comprise a single paragraph without citation to any precedent, a defect which the City attempts to—but cannot—remedy in reply (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion."]). Accordingly, this branch of the City's motion is denied.

V. Punitive damages

As the City argues, "...a municipality is not liable for punitive damages flowing from its employees' misconduct in the absence of express legislative authorization to the contrary" (*Krohn v NY City Police Dept.*, 2 NY3d 329, 336 [2004]). However, punitive damages may be awarded in a loss of sepulcher claim where there is a "conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton" (*Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 31 [1st Dept 2009] [reversing denial of motion to dismiss and granting motion to strike punitive damages claim where the hospital followed "extensive protocols...to make certain that a next of kin is located to claim the body of a deceased patient"]).

To the extent that Plaintiff argues, in opposition, that the punitive damages claim should not be dismissed against the individual defendants, the City correctly points out in reply that the case cited by Plaintiff also states that "Defendants, acting in their official capacities, are entitled to the same immunity as the City" unless it is alleged that they engaged in "sufficiently

NJR-RJD, 2018 WL 5830730, at *2 [S.D.Ill. Nov. 7, 2018] [quoting medical testimony that "misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating"]; *Prescott v Rady Children's Hosp.-San Diego*, 265 F Supp 3d 1090, 1096 [S.D. Cal. 2017] ["For a transgender person with gender dysphoria, being referred to by the wrong gender pronoun is often incredibly distressing."]; *Rumble v Fairview Health Servs.*, No. 14-CV-2037, 2015 U.S. Dist. LEXIS 31591, at *71 [D. Minn. Mar. 16, 2015] [rejecting defendant's characterization of misgendering as a "perceived slight[]" and concluding it was "objectively offensive behavior"]; *Doe v City of New York*, 976 NYS2d 360, 364 [Sup Ct NY County] [concluding purposeful misgendering as "not a light matter, but one which is laden with discriminatory intent"]. That said, there does not appear to be any evidence in the record that the named Defendants did so.

intentional or extreme misconduct” (*Hous. Works v Turner*, 179 F Supp 2d 177, 209 [SDNY 2001] [emphasis in original]). Here, Plaintiff has pled that the individual defendants were acting outside of their official capacity, but has alleged that they have acted intentionally, with “evil intent,” or with “reckless or callous indifference to federally protected rights of others” (*id.*). At this juncture, regardless of the ultimate outcome of the action, it is too early to dismiss the request for punitive damages based on Plaintiff’s allegations of discriminatory conduct on the part of individual OCME employees.

CONCLUSION/ORDER

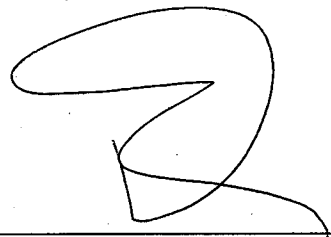
For the reasons above, it is

ORDERED that Defendants’ motion to dismiss is **GRANTED IN PART** solely to the extent that Plaintiff’s intentional and negligent infliction of emotional distress claims are severed and dismissed; and it is further

ORDERED that Plaintiff shall, within 30 days, e-file and serve a copy of this order with notice of entry; and it is further

ORDERED that the parties shall, within 30 days, email the Court (Samuel Wilkenfeld, swilkenf@nycourts.gov) to schedule a status/discovery conference.

This constitutes the decision and order of the Court.



12/23/2020
New York, NY

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE