

Musso v Owens Funeral Home, Inc.
2022 NY Slip Op 30897(U)
March 14, 2022
Supreme Court, Kings County
Docket Number: Index No. 509576/2021
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of March, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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ROBERT J. MUSSO, ESQ., as Chapter 7 Bankruptcy Trustee for the Estate of ANDRE TURNER,

Plaintiff,

DECISION / ORDER

- against -

Index No. 509576/2021

OWENS FUNERAL HOME, INC., ISAIAH OWENS, individually and as owner and operator of OWENS FUNERAL HOME, INC., ANDREW CLECKLEY, individually and as an owner and/or agent of OWENS FUNERAL HOME, INC., NORTH SHORE-LONG ISLAND JEWISH MEDICAL CENTER, NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., NORTH SHORE-LONG ISLAND JEWISH MEDICAL CARE, PLLC, NORTH SHORE-LONG ISLAND JEWISH MEDICAL GROUP (collectively referred to as "Hospital"), KATHLEEN BARRETT, individually and as an employee and/or agent of Hospital, ALEXANDER SINCLAIR, individually and as an employee and/or agent of Hospital, and "JOHN DOE No. 1" through "JOHN DOE No. 10" inclusive, the names of the last 10 Defendants Being fictitious, the true names of said Defendants Being unknown to plaintiff(s),

Mot. Seq. 1, 2 & 4

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affidavits (Affirmations) Annexed _____

4-11; 13-19; 46-51

Opposing Affidavits (Affirmations) _____

20-24; 30-43; 52-53

Reply Affidavits (Affirmations) _____

45; 54

Upon the foregoing papers, defendants North Shore-Long Island Jewish Medical Center, North Shore-Long Island Jewish Health System, Inc., North Shore-Long Island Jewish Medical Care, PLLC, North Shore - Long Island Jewish Medical Group (hereinafter collectively referred to as “North Shore Defendants”), Kathleen Barrett (Barrett) and Alexander Sinclair (Sinclair, and with the North Shore Defendants and Barrett, “the Hospital Defendants”) move, under motion (mot.) sequence (seq.) one, for an order: (a) dismissing the complaint pursuant to CPLR 3211(a)(5), on the grounds that it is time-barred; or in the alternative, (b) dismissing the complaint pursuant to CPLR 3211(a)(4) on the grounds that plaintiff has asserted an identical cause of action against North Shore in a pending lawsuit in Nassau County Supreme Court under Index Number 606377/2016; (c) imposing sanctions against plaintiff for commencing a frivolous lawsuit pursuant to 22 NYCRR 130-1.1; and (d) granting movants a protective order prohibiting the plaintiff from commencing any further actions against the Hospital defendants related to the improper handling and release of the body of the decedent, James Turner, without obtaining prior court approval.

Plaintiff moves, under mot. seq. two, for an order pursuant to CPLR 3212, granting him summary judgment against the Hospital Defendants and defendant Owens Funeral Home (but not Isiah Owens or Andrew Cleckley) on the issue of liability.

Plaintiff also moves to renew his prior motion, under mot. seq. four, for a default judgment against defendants Owens Funeral Home, Inc. (Owens Funeral Home), Isaiah Owens (Owens) and Andrew Cleckley (Cleckley, and together with Owens Funeral Home

and Owens, “the Owens Defendants”), said defendants having neither appeared nor moved with respect to the verified complaint, and the time to do so having expired.

Background

On April 23, 2021, plaintiff Robert J. Musso, Esq., as Bankruptcy Trustee for the Estate of Andre Turner (plaintiff)¹ commenced this action, alleging, among other things, that the Hospital Defendants improperly released the remains of a decedent, 89-year-old James Turner, to Owens Funeral Home following his death, thus depriving his next of kin of their right to immediate possession of the deceased’s body. According to the complaint, on or about December 20, 2011, the decedent’s son, Andre Turner (Turner), arranged for nonparty Unity Funeral Chapels, Inc. (Unity) to retrieve decedent’s body for purposes of preparation and burial. However, the Hospital Defendants could not release the decedent’s body to Unity, as they had already released the body to Owens Funeral Home. Plaintiff also alleges that Owens Funeral Home embalmed the decedent’s body without any authorization from his next of kin, resulting in damage and mutilation, thereby violating the family’s common law right of sepulcher, that is, the right to find peace and comfort in burying a family member.²

¹ Appointed 6/27/19 in re-opened Chapter 7 Bankruptcy Case 12-42757 (USBC EDNY)

² See *The World of the Dead, The Right of Sepulcher, and The Power of Information - Court of Appeals of New York, Shipley v City of New York* (decided June 10, 2015), 32 Touro L. Rev. 785 (2016).

Prior Action

On or about February 12, 2012, Andre Turner, along with decedent's other family members and next of kin, Shatima Turner, Buster Turner, Dexter Turner, Yul Turner, Gail Turner, Yolanda Dove, and Eugene Turner, commenced an action in the Supreme Court, Bronx County, against the Owens Defendants and the Hospital Defendants, seeking, *inter alia*, to recover damages for violation of their common-law right of sepulcher, as well as claimed violations of the New York Public Health Law. North Shore employees Barrett and Sinclair were not named as Hospital Defendants in the Bronx action. Venue was placed in Bronx County, based on the residence of one of the plaintiffs, Shatima Turner. However, pursuant to an order dated February 4, 2015, the court dismissed the claims of Shatima Turner, who was decedent's granddaughter, as she was not a distributee and thus was an improper party (*id.*). Thereafter, by decision dated June 24, 2015, the court granted North Shore's unopposed motion to change venue to Nassau County, based on North Shore's principal place of business, and the county where the incident occurred (*see id.*). Plaintiffs' attorney appealed, and the court pointed out that plaintiffs did not oppose the motion, so the order could not be appealed (*Turner et al v Owens* 149 AD 3d 639 (1st Dept 2017)).

Currently, the first action is pending in Nassau County Supreme Court under Index Number 606377/2016 (Nassau County Action). The Hospital Defendants represent in their motion papers that the Nassau County Action is currently stayed, but do not provide a reason for the stay. A review of the matter on the New York State Courts E-Filing

System indicates that the case is still marked “active,” that the case has been active since its inception, and the last activity was a motion decision dated September 8, 2021.

The Hospital Defendants’ Motion to Dismiss

With the instant motion, (Seq # 1) the Hospital Defendants move pre-answer to dismiss plaintiff’s complaint as against them, arguing that (1) it is time-barred and (2) they cannot be sued in two identical actions with different plaintiffs, for violation of the family’s right of sepulcher with regard to one decedent, given the pending action in Nassau County.

According to the Hospital Defendants, the instant action is time-barred because plaintiff’s causes of action accrued on either December 30, 2011, when plaintiff learned that decedent’s body had been released to Owens Funeral Home, or on December 31, 2011, when Unity had decedent’s body brought to its premises. The instant action was filed on April 23, 2021, so nearly ten years have passed, which movants claim is beyond the statute of limitations period for any of plaintiff’s claims. In addition, the Hospital Defendants argue that the complaint should be dismissed because North Shore is a defendant in the Nassau County Action, which arises out of the same facts and alleges similar claims and theories of liability. The Hospital Defendants also state that plaintiff’s counsel has indicated, although they fail to specify when or where, that Robert Musso is a party to the Nassau County Action, as he is in the caption as the trustee for Turner in his “prior motion” in the Nassau County Action.³

³ Robert J. Musso is the trustee for Turner’s bankruptcy estate, Turner having filed a voluntary petition for Chapter 7 bankruptcy in April 2012 (see NYSCEF Doc Nos. 17, 22). Andre Turner is not currently a plaintiff in the Nassau County Action, as he was dismissed as a plaintiff by the Second Department Appellate Division decision dated December 2, 2020, *Turner, et al v Owens*,

The Hospital Defendants also seek costs and sanctions against plaintiff, and argue that plaintiff, an attorney appointed as a Bankruptcy Trustee, instituted the instant Kings County action solely to harass them. They submit that plaintiff knew, when he commenced this action, that there was a pending action in Nassau County, as the parties had participated in a court conference before the Hon. Thomas Rademaker on April 21, 2021. Additionally, defendants aver that the Nassau County Action has been in existence for approximately nine years and that all depositions have been completed. As such, the Hospital Defendants contend that plaintiff is not interested in the resolution of this litigation on the merits but would rather spend time commencing frivolous lawsuits and engaging in meaningless motion practice, which is prejudicing the Hospital Defendants in terms of time and resources spent to defend against these allegedly frivolous claims.

Plaintiff's Motion for Summary Judgment

Although plaintiff submits an affirmation in opposition to the Hospital Defendants' motion to dismiss, plaintiff does not address their substantive arguments. Rather, plaintiff requests in his affirmation in opposition that the court grant plaintiff's motion for summary judgment on the issue of liability as against the named defendants. Plaintiff also moves, by way of a separate motion, for said relief.

Plaintiff mentions that, on November 22, 2013 (when the prior action was pending in Bronx County), the Hon. Laura G. Douglass granted plaintiffs' motion for summary

189 AD 3d 914, on the grounds that he did not have standing to sue, because of his Bankruptcy Court filing. What the Hospital Defendants are referring to is not clear. Perhaps they mean the 2018 order which was reversed on appeal, discussed in Footnote # 4.

judgment on the issue of liability against Owens Funeral Home. That order is at Doc 16 in this action. Plaintiff also mentions that by decision dated December 2, 2020 (hereinafter the “2020 Appellate Division decision”), the Appellate Division, Second Department reversed the decision of the lower court and granted defendants’ motion to dismiss the claims of plaintiff Andre Turner in the complaint, but that the court expressly afforded Turner the right to recommence the action under CPLR 205.⁴

Plaintiff argues that summary judgment is warranted because the Hospital Defendants negligently released decedent’s body to defendant Cleckley at the Owens Funeral Home. In support, plaintiff relies on Cleckley’s deposition testimony, given in the Nassau County Action, wherein he states that he did not obtain his funeral director’s license until July of 2012. According to plaintiff, North Shore’s own company policy requires that the license of a funeral director be verified before releasing a body to him or her, but that the relevant release form indicates that Barrett, who was the hospital clerk at the relevant time, did not verify Cleckley’s funeral director’s license, nor could she verify it, since Cleckley did not have one at the time that he picked up decedent’s body.

⁴ A review of the 2020 Appellate Division decision indicates that in the Nassau County Action, on or around July 11, 2018, the Owens Defendants moved to dismiss Turner’s complaint on the grounds that Turner lacked capacity to sue as a result of his 2012 bankruptcy filing in which he failed to list the Nassau County Action as an asset. The lower court denied the Owens Defendants’ motion to dismiss on said basis “without prejudice” and granted that part of plaintiffs’ cross-motion which was for leave to substitute the bankruptcy trustee as a party subject to its direction that Turner was to immediately serve the order on the bankruptcy trustee and petition the Bankruptcy Court for permission to substitute the trustee as a plaintiff in this action. On appeal, the Appellate Division reversed the lower court’s decision holding that, under the circumstances, dismissal of Turner’s complaint should have been granted but that “the trustee, if he or she should choose to re-commence the case in his or her own name, will enjoy the protection offered by CPLR 205” (NYSCEF Doc Nos. 17, 22).

In opposition to plaintiff's motion for summary judgment, the Hospital Defendants argue that the claims asserted herein are identical to those lodged in the Nassau County Action. Further, that the Hon. Alexander Hunter, by decision dated August 6, 2013, granted North Shore's motion for summary judgment in the first action to the extent that all of the plaintiffs' causes of action, with the exception of plaintiffs' common-law right of sepulcher cause of action, were dismissed. Although the Nassau County Action does not specifically name Barrett and/or Sinclair as defendants, the Hospital Defendants state that Barrett and Sinclair were employees of North Shore and all claims as to the care and treatment rendered by North Shore, including its staff, were previously addressed by the August 6, 2013 decision. As such, the Hospital Defendants contend that plaintiff is collaterally estopped from relitigating issues that were already adjudicated in the prior action.

In addition, the Hospital Defendants argue that they did not unlawfully interfere with plaintiffs' immediate possession of the decedent's remains because Cleckley, a registered resident under the supervision of Isaiah Owens (a licensed and registered funeral director), was authorized to take charge of decedent's body. The Hospital Defendants also contend that Barrett followed North Shore protocol on December 30, 2011, since she checked that Cleckley produced his current certificate of registration in the form of his New York State Funeral Director License resident registration number, which showed that he was personally entitled to practice as a registered resident of Owens Funeral Home in accordance with the relevant statutes.

Lastly, the Hospital Defendants argue that they cannot be responsible for the alleged mutilation or damage to decedent's body because plaintiff fails to delineate how the release of the decedent's body led to the claimed mutilation.

Based on the foregoing, the Hospital Defendants contend that plaintiff's motion for summary judgment must be denied.

The court notes that the motion seeks summary judgment against Owens Funeral Home as well, but as it has not answered the complaint and issue has not been joined, summary judgment cannot be granted as against it.

In reply, plaintiff asserts that no prior action exists between the parties because neither plaintiff nor North Shore's employees, Barrett and Sinclair, are parties to the Nassau action. Moreover, he argues that the 2020 Appellate Division decision, although granting defendants' motion to dismiss Andre Turner's complaint, specifically afforded Turner's Bankruptcy Trustee the right to recommence the action under CPLR 205. Plaintiff further contends that collateral estoppel or issue preclusion are not applicable since North Shore's motion for summary judgment was denied with respect to plaintiffs' common law sepulcher claims and thus must still be litigated.

Plaintiff's Motion to Renew His Motion for a Default Judgment

Under motion sequence 4, plaintiff seeks to renew his motion for a default judgment against the Owens Defendants for their failure to answer or appear in this action.

On or around July 7, 2021, plaintiff moved for a default judgment against the Owens Defendants in Mot. Seq # 3. By short form order dated September 20, 2021, this court denied plaintiff's motion with leave to renew due to plaintiff's failure to submit an affidavit

containing “admissible proof of the facts constituting the claim’ or an affidavit of additional service of the summons by first class mail, required pursuant to CPLR 3215(f) and CPLR 3215(g)(4)(i), respectively” (NYSCEF Doc No. 44).

With the instant motion, plaintiff asserts that on May 6, 2021, personal service was effectuated upon Owens Funeral Home and Owens, and on April 30, 2021, upon Cleckley. Further, that additional service of the summons by first class mail was made at least twenty days before the entry of judgment upon (a) Owens Funeral Home at its last known address on or about September 27, 2021; (b) Owens on or about May 7, 2021, at his last known address and (c) Cleckley on or about May 3, 2021 at his last known address. Plaintiff also proffers an affidavit of facts from Andre Turner in support of his motion for a default judgment.

The Hospital Defendants partially oppose plaintiff’s motion to the extent that said motion can be construed as also seeking a default judgment against North Shore or its employees Barrett and Sinclair. The Hospital Defendants state that, on May 17, 2021, this pre-answer motion to dismiss pursuant to CLPR 3211(a) was filed on behalf of these defendants in lieu of filing an answer and, as such, these defendants have appeared in this action and plaintiff’s motion for a default, as it relates to the Hospital Defendants, should be denied.

Discussion

Under CPLR 205(a), “[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a

final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.”

Here, pursuant to the 2020 Appellate Division decision which is dated December 2, 2020, Turner’s complaint was dismissed but the appellate court specifically provided that the bankruptcy trustee could re-commence Turner’s action under CPLR 205. Since the instant action was commenced by the filing of the summons and complaint on April 23, 2021, less than six months from the dismissal, the requirements of CPLR 205(a) have been satisfied and thus, this action is timely.

The court points out that the Bankruptcy Court, subsequent to the Appellate Division decision, in an order dated April 21, 2021, appointed the law firm for the plaintiffs in the Nassau County Action as Special Counsel to the Trustee, and, in pertinent part, directed: “ORDERED, that the Special Counsel shall within 30 days of the entry of this order, make a motion on notice to the Trustee and Debtor returnable in the Court or forum in which the rights of sepulcher claim is pending to substitute the Trustee, Robert J. Musso, as the successor in interest to the Debtor in the state court action so that the caption shall identify the plaintiff as “Robert J. Musso, Trustee of the Estate of Andre Deval Turner,” or shall prepare and file in the Court or forum in which the claim is pending, a stipulation providing for the substitution or Robert J. Musso, as successor in interest of the Debtor.”

Turning to that part of the Hospital Defendant's pre-answer motion which seeks dismissal under CPLR 3211(a)(4), "a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*DAIJ, Inc. v Roth*, 85 AD3d 959, 959 [2d Dept 2011] [citations omitted]). A primary concern where two simultaneous actions are pending is the "potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction" (*White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 93 [1st Dept 1997] [citations omitted]). "New York courts generally follow the first-in-time rule, which instructs that 'the court which has first taken jurisdiction is the one in which the matter should be determined, and it is a violation of the rules of comity to interfere'" (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 7 [1st Dept 2007] [citations omitted]).

Here, plaintiff does not dispute that the instant action arises from the same facts and circumstances as the Nassau County Action. Plaintiff merely contends that the two actions are not identical because Andre Turner is not a plaintiff, nor are Barrett and Sinclair defendants, in the Nassau County Action. However, substantial, not complete, identity of parties is all that is required to invoke CPLR 3211(a)(4) (*see White Light Prods. v On The Scene Prods.*, 231 AD2d at 93-94). The presence of additional parties will not necessarily defeat a motion pursuant to CPLR 3211(a)(4) since the critical element is that both suits arise out of the same subject matter or series of alleged wrongs (*see Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009]). In any case, Barrett and Sinclair are being sued based on conduct that occurred during the course of their

employment with North Shore and thus they do not meaningfully represent “additional parties.” Moreover, plaintiff’s decision to file this action in Kings County to pursue claims which are already pending in Nassau County was improper, particularly in light of the specific terms of the order issued by the Bankruptcy Court. The Nassau County Action has been pending since 2012 and discovery is purportedly complete. While plaintiff’s choice to commence this action here in Kings County is unexplained, a new action would be time-barred if this motion to dismiss was granted and he was forced to recommence the lawsuit in Nassau County. That outcome is not appropriate, nor would it be equitable. It would prejudice Andre Turner’s Bankruptcy Estate, seemingly because the Trustee’s attorney made an error.

Under the authority of CPLR 3211(a)(4), the court may make such order as justice requires. Therefore, in lieu of dismissing the action, as sought by the Hospital Defendants, the court finds it appropriate to *sua sponte* transfer this matter to Nassau County and consolidate it with the pending Nassau County Action. The court notes that plaintiff Musso obtained an order from the Bankruptcy Court permitting him to retain the same attorneys as represent the other plaintiffs in the Nassau County Action. That order was issued April 20, 2021, retroactive to April 6, 2021. The court may order consolidation in resolving this motion made pursuant to CPLR 3211(a)(4) even though neither party has requested such relief (*see John J. Campagna, Jr., Inc. v Dune Alpin Farm Assocs.*, 81 AD2d 633, 634 [2d Dept 1981]; *see generally* NY Const, art VI, §19 (g); *see also* Seigel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:15 and 17) [Note: online version]. To best serve the interests of judicial economy while still preserving the

rights of the parties, this action shall be transferred and consolidated with the action currently pending in Nassau County. A separate Consolidation Order is issued simultaneously herewith.

In light of the court's denying dismissal of plaintiff's complaint, and in light of the Bankruptcy Court's Order, that part of the Hospital Defendants' motion seeking sanctions against plaintiff for commencing a "frivolous lawsuit" pursuant to 22 NYCRR 130-1.1, and seeking a protective order prohibiting plaintiff from commencing any more actions, is denied. While under the circumstances, plaintiff's decision to file his case in Kings County instead of bringing a motion in Nassau County, was improper, it cannot be said that such conduct warrants sanctions under 22 NYCRR 130-1.1.

Plaintiff's motion for partial summary judgment on the issue of liability, (seq 2) and his renewed motion for a default judgment against the Owens Defendants (seq 4) are both denied without prejudice to renew in the consolidated action in Nassau County to the extent that said motions are procedurally proper and are made by filing either or both on or before May 17, 2022. It is noted that the Owens Defendants are not in default in the Nassau County Action.

Conclusions

Based on the foregoing, it is hereby

ORDERED the Hospital Defendants' motion to dismiss plaintiff's complaint as against them is granted solely to the extent that this action shall be consolidated with the action already pending in Nassau County, but the motion is otherwise denied; it is further

ORDERED that the above-captioned action is hereby consolidated with *Shatima Turner, et. al., v. Owens Funeral Home, Inc., et. al.*, under Index No. 606377/2016, pursuant to the Consolidation Order issued simultaneously herewith. Plaintiff shall serve copies of these orders, with notice of entry, on all parties to the original action in Nassau County, so as to provide notice of the consolidation; it is further

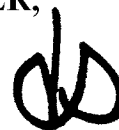
ORDERED that the Hospital Defendants shall answer this complaint within 30 days, by filing an amended answer in the Nassau County Action; it is further

ORDERED that plaintiff's motions for summary judgment and for a default judgment against the Owens Defendants are both denied with leave to renew on or before May 17, 2022 in the Nassau County action.

As the court directed in its September 20, 2021 order on Mot. Seq. # 3, the caption is amended to clarify that plaintiff is "Robert J. Musso, Esq., Chapter 7 Bankruptcy Trustee for the Estate of Andre Turner." This is reflected in the new caption for the consolidated action on the Consolidation Order.

Any arguments not explicitly addressed herein were considered and deemed to be without merit. This constitutes the decision and order of the court.

ENTER,



Hon. Debra Silber, J.S.C.