

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

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ELIZABETH COMBIER,

Plaintiff,

- against -

FRED ANDERSON, et al.,

Defendants.
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: Index No.
115354-1999

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**MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Preliminary Statement

Plaintiff Elizabeth Combiel, by her attorney, Jonathan M. Landsman, respectfully submits this memorandum of law in opposition to defendants' motion for summary judgment.

Statement of the Case

This is a bitter dispute between plaintiff and her longtime family church. Plaintiff has already received a favorable ruling within the Church adjudicatory system to the effect that defendants wrongfully removed her from the active membership list of the Church days after her mother's death in March 1998.

There are many material facts in dispute. As is shown in the accompanying affidavit of Elizabeth Combiel, there are factual disputes concerning such issues as motives and intentions of defendants, and whether various actions were in fact taken.

The facts, viewed in the light most favorable to plaintiff, show that defendants intentionally took a series of malicious actions against plaintiff to retaliate against her for her

outspoken advocacy within the Church; to coerce her into allowing her late mother's second will to be invalidated, so that the Church might receive financial benefits from the first will; and to coerce her into taking certain actions with respect to her sister that the Church wanted her to take.

The facts, viewed in the light most favorable to plaintiff, show that defendants wrongfully interfered with plaintiff's right to possess the cremated remains of her late mother, and engaged in a series of outrageous acts, with the purpose of inflicting emotional distress on plaintiff.

For the reasons set forth below, and in the accompanying Combier aff., the Court should deny this motion.

Argument

POINT I

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES DUE TO DEFENDANTS' UNDISPUTED INTERFERENCE WITH PLAINTIFF'S RIGHT TO OBTAIN POSSESSION OF THE CREMATED REMAINS OF HER LATE MOTHER

This Court should deny defendants' motion for summary judgment because based on the undisputed factual record herein, it is plaintiff who is entitled to judgment against defendants with respect to the unlawful interference with plaintiff's right to obtain possession of the cremated remains of her late mother.

The Evidentiary Record on this Motion

Plaintiff's pro se Complaint specifically alleges that defendant Charles Amstein wrongfully withheld the cremated ashes of plaintiff's mother from plaintiff. (Complaint, para. 17.) The Complaint further alleged that this and other conduct of defendants was outrageous and caused plaintiff emotional harm,

mental distress and anguish. (Complaint, paras. 29, 31, 33, 35.) The Complaint further alleged that the other defendants are liable for failure to supervise Amstein in proper fashion. (Complaint, paras. 30, 32, 34, 36.)

The Complaint shows that plaintiff's mother, Julia Elizabeth Taschereau, died on March 16, 1998. (Complaint, para. 11.) Plaintiff, as next of kin and executor of her mother's 1997 will (Complaint, para. 12), arranged for the cremation of her mother. The cremated remains were delivered by the funeral home to plaintiff's apartment building on March 22, 1998. (Plaintiff's Answers to Interrogatories, answer to question 4(B) (Exhibit C to defendants' motion), and Combier aff.) Plaintiff was too distraught to keep the ashes in her apartment at that time, and asked defendant Amstein to pick up the ashes and keep them until plaintiff was emotionally ready to have custody of them. (Interrogatory answers, 4(B).) Defendant Amstein picked up the ashes and kept them at the Church.

Thereafter, on ~~August 1~~^{July 31}, 1998, plaintiff, as next of kin and executor of the Estate, called Amstein and asked him to return the ashes to her. Plaintiff wanted to have a memorial service for her mother at that time.

However, as stated in plaintiff's Bill of Particulars, plaintiff was informed on August 1, 1998 that Amstein would not return the ashes until plaintiff's sister said that plaintiff had reconciled with the sister and that plaintiff could receive the ashes. (Bill of Particulars (Exhibit D to defendants' motion),

p. 2.)

Plaintiff's answers to interrogatories, at answer nos. 3 and 4, provide similar verification on this aspect of plaintiff's claim. Defendants attach the interrogatory answers as Exhibit C to their motion papers. Interrogatory answer no. 4 expressly states that Amstein refused to return the ashes to plaintiff until her sister approved. Answer no. 4 expressly states that Amstein did not return the ashes to plaintiff until seven days had passed after plaintiff's ~~August 1~~^{July 31}, 1998 demand.

Exhibit K to defendants' motion papers is a letter dated August 7, 1998 from Amstein to plaintiff, admitting that Amstein "delayed bringing" the ashes to plaintiff.

Defendants' motion papers further provide evidentiary detail on plaintiff's claim concerning the wrongful withholding of the ashes. See Moving Affirmation of Adam Greenberg, Esq., dated March 21, 2003, at para. 17, referring to sworn deposition testimony of the plaintiff.

Later in defendants' motion papers, defendants provide confirmation from defendants that Amstein did not immediately comply with plaintiff's request that Amstein return the cremated remains to plaintiff. Rather, defendants admit, Amstein delayed doing so because he wanted to speak with plaintiff's sister first and obtain her approval. (Greenberg aff., para. 22, citing to Amstein's own deposition testimony.)

Thus, it is undisputed that defendants withheld the ashes from plaintiff for approximately one week in August 1998. During

this one-week period, plaintiff was deprived of her right to have possession of the cremated remains of her mother.

Defendants' conduct, including the withholding of the ashes, caused plaintiff emotional injury and distress. This is proven by the March 28, 2002 report of Marlene Tedeski, at p. 3.

(Exhibit 3 to Combier aff.)

The Law Entitles Plaintiff to Judgment in Her Favor

Under long-established common law principles, plaintiff is entitled to judgment against defendants due to their unlawful interference with plaintiff's right to possess her mother's ashes as next of kin.

As is stated in the Restatement of Torts:

One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.

Restatement, Torts, 2nd, Section 468 (1979). Recoverable damages include "mental distress suffered by the one entitled to disposition of the body." Id., comment f, at p. 276.

A leading treatise elaborates on this cause of action as follows:

Damages may be recovered for the wrongful withholding of the remains of a dead body which has been cremated.

* * *

The one in whom the right to control vests has the right and power to dispose of the remains without services, with public services, or with services attended by invited guests only. Although common decency requires that a person who has the custody of a body for burial and the right to control the burial permit the relatives and friends of the decedent to call at the premises or be present at the funeral for

the purpose of paying their respects if the circumstances permit, this is a matter of social propriety rather than of legal right. Thus, friends or relatives other than the one entitled to custody of a body and the right to control the burial have no legal right to be present at a funeral or burial services.

* * *

[T]he courts have generally recognized that interference with the right of a person to bury the body of his spouse or kin is an actionable wrong, whether by mutilation of the body after death, the withholding of a body, or the conveyance of a communication which delays the person so entitled, to possession of the body, or disturbing it otherwise. Furthermore, the rights to possession, custody and control of the body for the purposes of burial are within the protection of the law, and a willful violator of such rights may become liable to respond in damages.

* * *

Damages may be obtained for the wrongful withholding of a corpse which prevents its proper burial, or where an undertaker withholds a body to secure payments for services performed, after a request or direction has been made by persons with the right to custody that it be released.

* * *

A surviving spouse is entitled to possession of the ashes of the deceased spouse's dead body, and may recover damages if those ashes are wrongfully withheld.

22A Am Jur 2d: "Dead Bodies," secs. 11, 14, 35, 40, 41 (1998 & Supp 2000) (citations omitted).

Another treatise states the law as follows:

It is generally recognized that the breach of any duty, or the unlawful invasion of any right, which exists as to a dead body is a tort for which an action for damages will lie. Such an action may be maintained for the unlawful violation of the right to custody of a body, or for the unlawful invasion of the right to bury a body and preserve the remains. ...

A cause of action for the violation of a right which exists as to a dead body, or for mishandling or

improper treatment of a dead body, is primarily for the mental suffering which has been caused

* * *

An unlawful and unwarranted interference with the exercise of the right of burial, even though the interference is only temporary, is a tort which gives rise to a cause of action. So the withholding of the body of the deceased human being from those who have a right to the possession of the body for the purpose of proper interment is an injury which will give a cause of action against the person holding such body.

25A CJS, "Dead Bodies," at secs. 8(1), 8(2) (1966 & Supp 1999) (citations omitted). See also 48 ALR 3rd 240, "Liability in Damages for Withholding Corpse from Relatives."

New York law follows the above-stated common law principles, and applies said principles to cremated remains of the deceased.

As a leading treatise on New York law states:

The surviving spouse or next of kin of a deceased person, in that order, has the right to receive or take custody of the body in the condition it was in when death occurred, in the absence of a contrary direction by the decedent. . . . The right to the dead body and its disposition are cognizable in equity without being subject to ecclesiastical or sacerdotal authority.

* * *

The right to take custody of a dead body and to bury or otherwise to dispose of it in a decent manner is a legal right which the courts must recognize and protect. An invasion of the right to dispose of the remains of another is an actionable tort, and may also involve a violation of constitutional rights. The surviving next of kin have a right to immediate possession of a decedent's body for preservation and burial, and damages will be awarded against anyone who unlawfully interferes with the right or improperly deals with the decedent's body. Thus, damages may be recovered where a person wrongfully withholds possession of a dead body and refuses to deliver it to the proper party.

The right of the surviving spouse or next of kin to

possession of a body is of such character that at least some damage is inferred from a violation thereof.

* * *

The right of action for interference with possession of a dead body is held by the person who is entitled to custody or possession of the body for the purpose or burial or other disposal of the body.

* * *

A person or institution who negligently or willfully deprives the person entitled to the remains of a deceased relative for the purpose of disposing of them is liable in damages for mental suffering. The damages recoverable are those stemming from injury to the feelings of the relatives and their mental suffering resulting directly or approximately from the wrongful act of deprivation, and may be recovered though no actual or pecuniary damages be proven. ... [W]here the next of kin of a deceased person have been deprived of possession of the decedent's dead body, the body has been mishandled, or their right of custody and burial have been interfered with, the test of their recovery rights is not the extent of the mishandling or interference with their rights, but how much it has affected the feelings and emotions of the surviving kin.

18 NY Jur 2d: "Cemeteries and Dead Bodies," at secs. 73, 88, 90, 91 (1999 & Supp 2001) (citations omitted).

The Court of Appeals, the Appellate Division and trial courts have followed the above-stated principles in a variety of cases involving interference with next of kin's rights to the custody of the remains of the deceased.

In Darcy v. Presbyterian Hospital, 202 NY 259, 263 (1911), the Court of Appeals held that surviving next of kin could sue for "wounded feelings and mental distress" due to the unauthorized autopsy on the deceased.

In Finley v. Atlantic Transport Co., 220 NY 249 (1917), the

Court of Appeals held that the son of the deceased could sue a steamship company for mental anguish for casting the father's body into the sea after the father died on board. The Court held:

The plaintiff had a legal right to the possession of the body for burial and any unlawful interference with that right was an actionable wrong. The right preserved to the plaintiff was a common-law right, and the direct and proximate consequence of an actionable wrong is a subject for compensation. Whenever there is a breach of a contract for the invasion of a legal right the law infers some damage. (Larson v. Chase, 47 Minn. 307, 310.) In that case the action was to recover damages for the unlawful mutilation and dissection of a dead body, the only damages claimed being mental anguish, suffering and nervous shock. Such damages were held properly recoverable. The case of Larson v. Chase was cited and approved in Darcy v. Presbyterian Hospital, NY, (202 NY 259, 263).

220 NY at 258. The Court further noted that "[a]s the son of the deceased he had a right to receive the body for burial, and no reason exists why he should be obliged to join other next of kin in an action wherein he seeks compensation personal to himself." 220 NY at 258.

In Johnson v. State of New York, 37 NY 2d 378 (1975), the Court of Appeals held that the daughter of a state hospital patient could recover for emotional harm sustained as a result of the hospital's having falsely told her that her mother had died. The Court rejected the argument that the daughter could not recover for emotional distress because there was no bodily harm or threat of bodily harm to the claimant. The Court noted that in cases involving death of a loved one (or reported death of a loved one), "there exists 'an especial likelihood of genuine and

serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.'" Id. at 382 (citation omitted).

Thus, in the case at bar, plaintiff may recover for her emotional damages resulting from the wrongful withholding of the cremated remains of her mother by the defendants.

The Appellate Division, First Department, held that a wife could recover damages for the wrongful withholding of her husband's cremated remains. Stahl v. William Necker, Inc., 184 App Div 85, 171 NYS 728 (1st Dep't 1918). In that action, the wife alleged that the defendant refused to give her the remains until she paid her bill for the funeral arrangements and cremation. Explaining the law relevant to the case, the Appellate Division wrote:

The court charged the jury that the plaintiff had the right to the solace and comfort of disposing of the remains of her husband, and if, by any act of omission or commission, defendant had deprived her of that right, she was entitled to damages resulting therefrom. Such instruction to the jury was undoubtedly correct.

171 NYS at 731. Further, the Court held:

The law seems to be well settled in this state that, in the absence of a testamentary disposition to the contrary, a surviving husband or wife or the next of kin have the right to possession for the purpose of burial or other disposition which they may see fit to make of the body of a deceased relative. They are entitled to such right of possession as a solace and comfort in their time of distress. One who deprives a party thus entitled to the remains of a departed relative from the solace and comfort arising from the privilege of such burial or disposition as they may desire to make is liable in damages for the mental suffering and anguish to the surviving relative by reason of such deprivation.

171 NYS at 732. Accord, Booth v. Huff, 273 AD 2d 576 (3rd Dep't 2000) (holding that plaintiff daughters could sue defendant girlfriend with respect to disposition of plaintiffs' father's cremated ashes and that defendant was not entitled to summary judgment).

In the case at bar, Amstein refused to deliver plaintiff's mother's ashes to plaintiff in timely fashion. Rather, Amstein withheld delivery for one week while he attempted to force plaintiff to reconcile with her sister and coerce plaintiff into doing what her sister wanted in the will contest pending in Surrogate's Court. (See Plaintiff's Answers to Interrogatories, answer no. 4(B), and Plaintiff's Bill of Particulars, p. 2.)

Amstein's conduct violated the above-described case law and Section 4219 of the New York State Public Health Law, which provides:

A person who arrests or attaches the dead body of a human being upon any debt or demand whatsoever, or detains or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor.

Based Stahl and Booth and Public Health Law Sec. 4219, plaintiff herein can recover damages from defendants herein due to defendants' wrongful withholding of the ashes of plaintiff's mother from plaintiff in August 1998. Accord, Quiroz v. Latulip, 145 AD 2d 978, 979 (4th Dep't 1988) (noting that "relatives of a decedent have a cause of action for mental anguish against anyone interfering with their right to obtain immediate possession of the body for burial"), and Massaro v. Charles J. O'Shea Funeral

Home, Inc., 292 AD 2d 349, 351 (2nd Dep't 2002) (holding that "the next-of-kin may ... recover where one 'improperly deals with the decedent's body'," that plaintiff need not seek "any medical treatment or psychological counseling for his alleged injuries" and that defendants' motions for summary judgment dismissing claims of next-of-kin were properly denied).

Failure to return the ashes of next-of-kin resulted in damages in Schmidt v. Schmidt, 49 Misc 2d 498 (Sup Ct New York County 1966). Plaintiff's husband died and was cremated in 1950. Plaintiff consented to the ashes remaining at the home of her husband's mother and brother. In 1960, the mother died, and plaintiff then wanted her husband's ashes delivered to her. The defendant brother-in-law refused, and plaintiff sued. "The court finds that there has been a wrongful detention of the ashes of plaintiff's husband, and she has, not unnaturally, been distressed." 49 Misc 2d at 499.

Even a brief interference with the right of next-of-kin to obtain possession of the body or remains is actionable. In Gratton v. Baldwinsville Academy, 49 Misc 2d 329 (Sup Ct Onondaga County 1966), plaintiffs' daughter drowned in defendant's swimming pool. Plaintiff parents went to the school and asked to see and take possession of their daughter's body. The school refused the request for at least a few minutes. The Court held that plaintiffs could sue, writing:

Even assuming, for purposes of this motion only, that the plaintiff mother was deprived of the right to view her child for some three or four minutes, brief though the period of deprivation may have been, while the

power to do so was in the hands of the school board authorities, in this court's opinion, it still would be sufficient for a court to grant damages for such denial. The cause of action for emotional upsetness and disturbance certainly does exist in this State.

49 Misc 2d at 330 (citations omitted).

In Cercelli v. Wein, 60 Misc 2d 345 (Civ Ct New York County 1969), the Court held that the next of kin could sue a hotel for the hotel's failure to discover the body of the decedent for four days after death at the hotel. As the Court wrote:

Under old common law, the living had a right to the remains of their deceased kin, within a reasonable time following death, for the purpose of providing proper burial. This right, characterized under common law as the right of sepulcher, if denied, even carried criminal punishment to the infractors. ... [T]he right to burial and the preservation of the remains have been regarded as a legal right. Deprivation of this right of possession and of the common law right of sepulcher, as we regard it today ... has been held to constitute an actionable cause. ...

In the same context as that stated above, it has been held that the surviving kin have the absolute right to immediate possession of the decedent's remains so as to preserve it for proper burial. The withholding of said remains by anyone, for even a very short period of time, constitutes an actionable cause.

* * *

As can be seen, therefore, under almost every culture, civilized and otherwise, the dead must be treated by decent burial in the hands of the living.

60 Misc 2d at 346-347 (citations omitted).

Thus, any argument by defendants that Amstein's withholding of the remains for one week is not actionable is wrong as a matter of law. Under Gratton and Cercelli, supra, a delay of a few minutes or a few days is in fact actionable.

In Correa v. Maimonides Medical Center, 165 Misc 2d 614 (Sup

Ct Kings County 1995), the court held that defendants were liable for losing the body of plaintiffs' stillborn infant. The Court rejected the argument that the above-stated legal doctrine did not apply to bodies of stillborn infants. Reaffirming the longstanding common law principles, the Court held:

The right to the remains of one's deceased kin for the purpose of providing proper burial has long been recognized as a legal right. ...

"The law is well settled that the surviving next of kin have a 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." This right, characterized as the right of sepulcher under common law, continues to be recognized by the courts notwithstanding the passage of many hundreds of years.

165 Misc 2d at 617 (citations omitted). Accord, Lott v. State of New York, 32 Misc 2d 296, 297 (Ct of Claims 1962) (awarding damages for "temporary deprivation of the right to the bodies" of decedents and related wrongs); Weingast v. State of New York, 44 Misc 2d 824, 826 (Ct of Claims 1964) (awarding damages for interference with right to immediate possession of decedent's body for purposes of burial); Lubin v. Sydenham Hospital, Inc., 42 NYS 2d 654, 656 (Sup Ct New York County 1943).

In Correa, the Court further allowed recovery "for emotional distress without accompanying physical injury" in cases such as this involving the "mishandling of the corpse of a close relative." 165 Misc 2d at 619. Further, "In decisions affecting this type of action, the courts are not primarily concerned with the extent of the physical mishandling or injury to the body per