

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Gladys Venson, individually and as)
next of kin of Mary Armstead, deceased,)
)
Plaintiff,)

v.)

No. 20 L 5810

Advocate South Suburban Hazelcrest, a)
not-for profit corporation by and through)
its agents and employees,)
)
Defendant.)

MEMORANDUM OPINION AND ORDER

A December 17, 2020 memorandum opinion and order granted the defendant's motion to dismiss the plaintiff's complaint with and without prejudice as to various counts. This court explained the complaint's many insufficiencies and identified how the plaintiff should address them. The plaintiff's amended complaint resolves some of the insufficiencies, but others remain; consequently, the defendants' renewed motion to dismiss is granted, in part, and denied, in part.

Facts

On September 11, 2017, Mary Armstead executed an Illinois statutory short form power of attorney for health care in favor of her daughter, Gladys Venson. Advocate Health Care supplied the printed power of attorney form. Armstead checked the box indicating that Venson was authorized to "[m]ake decisions for me only when I cannot make them for myself. The physician(s) taking care of me will determine when I lack this ability." The scope of the power of attorney included, "[c]arrying out the plans I have already made, or, if I have not done so, making decisions

about my body or remains, including organ, tissue or whole body donation, autopsy, cremation, and burial.”

On June 1, 2018, Mary Armstead was a patient at Advocate South Suburban Hospital Hazel Crest. On that day, Armstead underwent an above-the-knee amputation of her right leg because of complications from gangrene and ischemia. In conjunction with the surgery, Venson, signed Advocate’s “Permission for Limb Disposal” form on Armstead’s behalf, checking the box: “I elect to contact a funeral director of my choice and arrange for the burial and/or cremation of these remains at my expense.” The form indicated Venson’s intent for the Burton Funeral Home to manage the disposition of the amputated limb. Although the form is plainly on Armstead’s behalf, Venson signed on the line, “Signature of Consenting Party,” and wrote, “Daughter,” on the next line, “Relationship, if other than Patient.”

On January 17, 2019, Armstead died. The funeral home later contacted Advocate to retrieve the limb so it could be buried with Armstead’s remains. Advocate told Barton that Advocate had previously disposed of the limb. When Venson learned Advocate had disposed of her mother’s limb, she collapsed in a state of shock. On January 26, 2019, Armstead was buried without the amputated limb.

On May 20, 2020, Venson filed a five-count complaint against Advocate. On September 3, 2020, Advocate filed a motion to dismiss, and the parties fully briefed the motion. On December 17, 2020, this court issued a written memorandum opinion and order granting, in part, and denying, in part, Advocate’s motion, and giving Venson the right to file an amended complaint. The December 17, 2020 ruling is incorporated by reference into this memorandum opinion and order.

On January 15, 2021, Venson filed a three-count, first amended complaint. Count one is a cause of action under the

Crematory Regulation Act.¹ 410 ILCS 18/1 – 100. Venson alleges she was an authorizing agent as defined in the statute for the cremation of Armstead's remains, and claims Advocate breached its statutory duty by failing to obtain her authorization for cremating Armstead's amputated limb. Count two is a cause of action for negligence. In this count, Venson alleges that, during her 20 years of employment with Advocate, the hospital had a policy of keeping amputated limbs for one year. Venson attaches to her complaint a certified affidavit averring to her knowledge of that policy. Venson claims, among other things, Advocate breached its duty to her by failing to keep Armstead's amputated limb according to Advocate's policy. Had the policy been followed, Armstead's amputated limb would not have been disposed of before the funeral home sought to retrieve the limb. Count three is a cause of action for tortious interference with the right to possess a corpse. Here, Venson alleges she had a quasi-property right to make decisions about the disposition of Armstead's amputated limb. She claims Advocate breached its duty by, among other things, failing to keep the amputated limb for one year according to its policy.

On February 11, 2021, Advocate filed a motion to dismiss the first amended complaint. Advocate argues Venson has failed to allege facts sufficient to establish severe emotional distress as a result of Advocate's violation of the Crematory Regulation Act. Advocate further argues Venson cannot state a claim for negligence since she had no property right to Armstead's leg while Armstead was still alive. In support of its position, Advocate attached its surgical specimen policy. The policy does not mention Advocate's retention of amputated body parts. Finally, Advocate argues Venson cannot state a claim for tortious interference with the right to possession of a corpse because Armstead's amputated leg is not a corpse within the meaning of the tort. Venson responded to the motion, and Advocate filed a reply.

¹ Advocate admits that a portion of its facility holds and cremates remains. Advocate may, therefore, be a "crematory" under the statutory definition. See 410 ILCS 18/5.

Analysis

The Code of Civil Procedure authorizes a combined motion to dismiss under sections 2-615 and 2-619. *See* 735 ILCS 5/2-619.1. Section 2-615 allows a party to object to a pleading or portion of it as “substantially insufficient in law[.]” 735 ILCS 5/2-615. A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on facially apparent defects. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). In reviewing the sufficiency of a complaint, courts accept all well-pleaded facts, and all reasonable inferences drawn from those facts, as true. *Id.* Courts also construe the allegations in the light most favorable to the plaintiff. *Id.* Thus, a court should not dismiss a cause of action unless it is “clearly apparent” that no set of proven facts would entitle recovery. *Id.*

As a fact-pleading jurisdiction, Illinois requires plaintiffs to allege sufficient facts to bring a claim within a legally recognized cause of action. *Id.* at 429-30. Plaintiffs need not prove their case, but must allege sufficient facts to state all the elements of their causes of action. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (1st Dist. 2008). Mere conclusions are insufficient. *Marshall*, 222 Ill. 2d at 430.

A section 2-619 motion to dismiss admits the legal sufficiency of a complaint, but raises defects, defenses, or some other affirmative matter appearing on the face or by external submissions, that defeat the plaintiff's claim. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of easily proven factual issues. *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 115 (1993). When considering a section 2-619 motion, a court must construe all pleadings and supporting matter in the light most favorable to the non-movant. *Doe v. University of Chi. Med. Ctr.*, 2015 IL App (1st) 133735, ¶ 35. Dismissal is appropriate only if no set of provable facts support a cause of action. *Id.*

Section 2-619(a)(9) authorizes the dismissal of a complaint if affirmative matter outside the pleading bars the claim asserted by avoiding the legal effect or defeating the claim. *Doe*, 2015 IL App (1st) 133735, ¶ 37. “Affirmative matter” encompasses any type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of fact contained or inferred from the complaint. *Id.* ¶ 38. The affirmative matter must do more than contest or refute a well-pleaded fact and be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Id.* ¶¶ 37, 39.

Count One – Crematory Regulation Act

Venson’s cause of action under the Crematory Regulation Act alleges she had authority to determine the disposition of Armstead’s amputated leg pursuant to the September 11, 2017 power of attorney. That document is directed mainly to health decisions while Armstead was still alive, but the plain language encompasses Venson’s authority to address post-mortem decisions, including cremation and burial of Venson’s body and remains. Venson’s authority to make cremation and burial decisions was, however, triggered only after Armstead’s physicians found her incapable of making decisions for herself.

A fundamental problem with both Venson’s complaint and Advocate’s motion is that neither party has established that Advocate cremated Armstead’s amputated leg as opposed to disposing of it in some other way. If Advocate disposed of the limb other than by cremation, the statute is plainly inapplicable. Since the predicate fact of how Advocate disposed of the amputated leg is missing, count one, as it is currently pleaded, cannot stand.

Count Two – Negligence

Advocate makes three arguments directed against Venson’s negligence claim. First, Advocate argues that Venson had no property right to Armstead’s leg. Since the disposal of the

amputated leg during Armstead's life would have been her injury, Venson cannot claim an injury through a non-transferable quasi-property right. Second, Advocate argues the limb disposal form does not provide a basis for Venson's claim of a duty. Rather, the form indicates Venson took responsibility to arrange for the limb's disposal and contains no expression of Venson's wishes or Advocate's assumption of custody. Third, Advocate argues its surgical specimen policy does not require Advocate to maintain amputated limbs for one year.

Advocate's arguments fail at this point in the litigation based on the limb disposal form and Venson's affidavit. It is plain the limb disposal form placed the onus on Venson to contact a funeral director to arrange for the disposition of Armstead's amputated leg. Yet the form does not indicate how long Advocate would keep the limb or what Advocate would do with the limb after the retention period had expired.

It is also evident the limb disposal form, by itself, does not support an inference that Advocate assumed a duty of custody of the limb for any specified period of time. Yet Venson avers, based on her 20 years of employment with Advocate, the hospital had a policy of retaining amputated body parts for one year. Advocate counters that its surgical specimen policy makes no mention of a retention period for amputated body parts. That omission is unhelpful because Advocate had to retain the amputated leg for some period of time, and Venson's affidavit provides a fair inference that Advocate may have followed an unwritten retention policy. Barring a written or unwritten policy, it is also possible to infer that Advocate disposed of amputated limbs on a wholly arbitrary basis. In short, although duty is normally a question of law for the court, *see Choate v. Indiana Harbor Belt R.R.*, 2012 IL 112948, ¶ 22, it becomes a question of fact if the record is in dispute. *McKinney v. Hobart Bros. Co.*, 2018 IL App (4th) 170333, ¶ 60 (citing *Kokoyachuk v. Aeroquip Corp.*, 172 Ill. App. 3d 432, 439 (1st Dist. 1988)). Here, the record must be clarified before this court may determine the validity of the negligence cause of action.

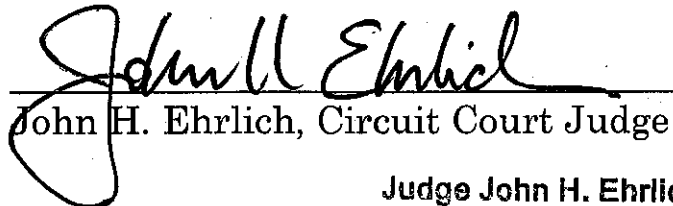
Count Three – Tortious Interference with the Right to Possess a Corpse

This court previously explained the nature and scope of this tort. Venson has failed to provide any allegations indicating the tort encompasses amputated body parts as opposed to human remains. Plainly, Armstead's partially amputated leg was not a corpse since Armstead was alive after the surgery. Further, Venson's claim of a quasi-property right does not alter the application of the tort to a corpse, not a body part. It is plain that no amount of pleading will bring Venson's cause of action within the rubric of this tort.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendant's motion to dismiss is granted, in part, and denied, in part;
2. The motion is granted as to count one, and count one is dismissed without prejudice and with leave for Venson to amend her complaint if the evidentiary record eventually indicates Advocate cremated Armstead's amputated leg;
3. The motion is denied as to count two;
4. The motion is granted as to count three with prejudice; and
5. Advocate shall answer the remaining portions of the complaint by June 2, 2021.


John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075