

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

JANE S. SOLOMON

PRESENT: \_\_\_\_\_  
Justice

PART 55

Speranza

INDEX NO. 400530/06

MOTION DATE 7/24/06

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -

Repro Lab, Inc.

The following papers, numbered 1 to 6 were read on this motion to/for rejection

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-4</u>
<u>5-6</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the annexed memorandum decision, order and declaratory judgment.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B).

Dated: 10/13/06

J.S.  
JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55.

MARY SPERANZA and ANTONIO SPERANZA, as  
Administrators of the Estate of MARK  
M. SPERANZA, deceased,

DECISION, ORDER and  
DECLARATORY JUDGMENT

Plaintiffs,

Index No. 400532/06

-against-

REPROLAB INC.,

Defendant.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel for the party whose representative must appear in person at the Judgment Clerk's Desk (Room 415A).

Jane S. Solomon, J.:

This motion for a preliminary injunction arises from the underlying declaratory judgment action brought by the parents of the late Mark Speranza, in their capacity as the administrators of his estate. On or about July 30, 1997, Mark deposited a number of semen samples for storage with defendant tissue bank. Mark died on January 28, 1998. Mark's parents now seek possession of those samples, so as to use them in the artificial insemination of a surrogate mother. The motion seeks to enjoin defendant from destroying the samples. The parties have stipulated that defendant will not destroy the samples pending the determination of this motion and the entry of an order thereon.

Subpart 52-8 of the New York State Department of Health regulations (10 NYCRR 52-8.8 [b]) requires that reproductive tissue banks, such as defendant, obtain written informed consent from client-depositors, including, in the case of male depositors, specific instructions for disposition of frozen semen

upon the depositor's death. At the time that Mark deposited the samples, he specified that they were to be destroyed at his death. The form upon which he so specified constitutes a contract between him and defendant, and it provides that the agreement as to the ultimate disposition of the specimens "shall be binding upon the parties and their respective assigns, heirs, executors and administrators." Grillo Aff., ¶ 3, and Exh. A. 10 NYCRR § 52-8.8 (b) also requires that reproductive tissue banks "maintain and adhere to written procedures for ensuring that the client-depositor's instructions are followed." Upon Mark's death, however, plaintiff Mary Speranza persuaded non-party Awilda Grillo, the president of defendant company, not to destroy the specimens at that time. Plaintiffs have now paid storage charges for eight years, while gradually coming to the decision to use the samples for the purpose described above.

The considerations taken into account in deciding whether to grant preliminary injunctive relief are present, here, in an unusually stark fashion. The harm that plaintiffs seek to avert, to wit, the destruction of the semen samples, would be utterly irremediable. At the same time, the likelihood of plaintiffs' success on the merits is almost nil. Were this solely a private dispute, a court might well reform the contract, holding that, having failed to comply with Mark's instructions and having accepted storage charges from plaintiffs for eight years, defendant has put the specimens at plaintiffs' command. Ms. Grillo, who does not argue to the contrary, takes the

position that, against his better judgment, he was prevailed upon by Mark's bereaved mother not to destroy the samples, and that he would like nothing better than to have the court direct him as to their disposition.

However, as Ms. Grillo points out, there is a problem as to the merits, in addition to that of overriding Mark's instructions. 10 NYCRR § 52-8.6 (g) provides that:

A client-depositor who wishes to direct stored semen for use by a specific recipient, other than his current or active regular sexual partner, shall first be fully evaluated and tested in accordance with the requirements of ... subdivisions (b), (c), (d), and (f) of this section. Tissue from such client-depositors shall not be released unless stored for at least six months prior to such testing.

The tests required by this subpart include blood tests which, obviously, cannot now be performed. Consequently, defendant cannot lawfully release the semen samples to plaintiffs, and the court will not order the performance of an unlawful act. In these circumstances, the court will search the record, and upon such search, issue a declaratory judgment.

Accordingly, it is hereby

ORDERED that the motion for a preliminary injunction is denied; and it is further

ADJUDGED and DECLARED that plaintiffs have no legal right to the semen specimens of their deceased son that are in the possession of defendant; and it is further

ADJUDGED and DECLARED that said specimens are not assets of the Estate of Mark Speranza; and it is further

ORDERED that this order and declaratory judgment is stayed for 30 days after entry thereof.

Dated: October 13, 2006

ENTER:



J.S.C.

**JANE S. SOLOMON**

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**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).