Brown v Northern Manhattan Nursing Home Inc.
2024 NY Slip Op 31739(U)
May 13, 2024
Supreme Court, New York County
Docket Number: Index No. 153922/2023
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	HON. DAKOTA D. RAMSEUR, *Justice*	PART	34M

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RONALD BROWN

Plaintiff,

- v -

NORTHERN MANHATTAN NURSING HOME INC. D/B/A NORTHERN MANHATTAN REHABILITATION AND NURSING CENTER,

Defendant.

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INDEX NO.	153922/2023
MOTION DATE	11/08/2023
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for DISMISS.

In May 2023, plaintiff Ronald Brown, as proposed administrator of the Estate of Mary Ollie, commenced this wrongful death action against Northern Manhattan Nursing Home Inc. (hereinafter, "Northern Manhattan"). Plaintiff alleges that his mother, Mary Ollie, was a resident of defendant's nursing home from March 30, 2019, to April 11, 2020, when she passed away after contracting the COVID-19 virus. Plaintiff alleges that the nursing home failed to take proper precautions to prevent the spread of infections, and that, as a result of these unsafe and inadequate healthcare policies, she contracted the virus. In motion sequence 001, Northern Manhattan moves pre-answer for dismissal pursuant to CPLR 3211 (a) (7). Plaintiff opposes the motion in its entirety. For the following reasons, Northern Manhattan's motion is denied.

BACKGROUND

At the beginning of the COVID-19 pandemic, in March 2020, then-governor Andrew Cuomo signed Executive Order No. 202.10, which, in relevant part, provides:

> "[A]ll physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered professional nurses, and licensed practical nurses shall be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission by such medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such medical professional." (9 NYCRRS § 8.202.10.)

On April 3, 2020, the New York State Legislature enacted the Emergency or Disaster Treatment Protection Act ("EDTPA"). The Act provided that hospitals, nursing homes, and health care professions were immune from potential liability arising from actions related to the care of patients with COVID-19.The EDTPA took effect immediately and, by its express terms, created immunity for these health care providers for any acts and omissions related to COVID-19 treatment retroactive to March 7, 2020, when Cuomo declared a state of emergency. (*See Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475, 476 [1st Dept 2024].) As with Executive Order 202.10, the immunity conferred by EDTPA did not apply where the complained-of harm was caused by acts or omissions constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility. (*See* Public Health Law former § 3082 [2]; *Ruth v Elderwood at Amherst*, 209 AD3d 1281, 1283 [4th Dept 2022].) Approximately one year later, on April 6, 2021, the legislature repealed EDTPA effective immediately. Until recently, however, the question of whether the repeal of EDTPA applied retroactively to causes of action that accrued while the EDTPA was in effect remained open and subject to some controversy. In *Hasan*, the First Department weighed in and joined the Third (*Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 109 [3d Dept 2023]) and the Fourth Departments (*Ruth v Elderwood at Amherst*, 209 AD3d at 1291) in holding that EDTPA's repeal was not intended to apply retroactively. (*Hasan*, 224 AD3d at 476.) [1]

In light of this background, Northern Manhattan contends that dismissal is warranted here because (1) it is entitled to the immunity EDTPA conferred on health care providers (since its repeal does not apply retroactively), (2) all of plaintiff's factual allegations concern acts and omissions that Northern Manhattan undertook while Ollie was a resident and in an attempt to contain a COVID-19 outbreak at their facility, and (3) plaintiff has not alleged facts that demonstrate it was grossly negligence in its maintaining its facility during the pandemic. In opposition, plaintiff argues that the EDTPA does not shield Ollie's wrongful death and gross negligence claims, which, according to her, were adequately pled.[2]

DISCUSSION

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) The Court is not required to accept factual allegations that consist of bare legal conclusions or that are inherently incredible. (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016].) A courts' inquiry is limited to assessing the legal sufficiency of the plaintiff's pleadings; accordingly, its only function is to determine whether the facts as alleged fit within a

[1] In *Mera v New York City Health & Hosps. Corp.* (220 AD3d 668, 669 [2d Dept 2023]), the Second Department determined that the defendant was shielded from liability by EDTPA for a COVID-19 related death that occurred at their health care facility on April 5, 2020—just six days before plaintiff's death. However, the Court did not explicitly address whether the repeal of EDTPA applied retroactively.
[2] This motion was deemed fully submitted prior to *Hasan v Terrace Acquisitions*. As such, in their opposition to this motion, plaintiff did, in fact, argue that the EDTPA's repeal applied retroactively and, thus, Northern Manhattan was not entitled to its protections. As discussed above, this argument is now moot in light of *Hasan*.

cognizable legal theory. (*JF Capital Advisors*, 25 NY3d at 764; *Skill Games, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

In light of *Hasan v Terrace Acquisitions*, Northern Manhattan has demonstrated entitlement to immunity pursuant to EDTPA for acts of ordinary negligence connected to their treatment of plaintiff from March 7, 2020, to April 11, 2020, when she passed away. Thus, the only remaining issue is whether plaintiff has plead a cause of action for gross negligence. Gross negligence causes of action "differ in kind, not only in degree, from claims of ordinary negligence." (*Bennett v State Farm Fire & Cas. Co.*, 161 AD3d 926, 929 [2d Dept 2018], citing *Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823 [1993].) To constitute gross negligence as opposed to ordinary negligence, "a party's conduct must 'smack of intentional wrongdoing' or 'evince a reckless indifference to the rights of others.'" (*Bennett*, 161 AD3d at 929.) Put slightly differently, "a party is grossly negligent when it fails to exercise even slight care or slight diligence." (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014]; *see also Bothmer v Schooler, Weinstein, Minsky & Lester, P.C.*, 266 AD2d 154, 154 [1st Dept 1999].)

Plaintiff alleges that, on February 6, 2020, Northern Manhattan received notice via the Centers for Medicare & Medicaid Services that coronavirus infections "can rapidly appear and spread" and that it was critical for nursing homes to be prepared for the virus' imminent spread by having sufficient personal protective equipment available (NYSCEF doc. no. 1 at ¶ 32, complaint); even though it had this notice, Northern Manhattan failed to timely and properly isolate residents known to be infected with COVID-19, failed to properly test residents and staff for the virus, failed to train its staff to use the PPE and infection control interventions, and failed to ensure staff members who had been exposed COVID-19 were not working with residents (*id.* at ¶ 35, 38.) Further, plaintiff alleges that defendants co-mingled residents who were infected with the virus and those who were not. (*Id.* at ¶ 39.) In terms of plaintiff's treatment, specifically, she alleges that Northern Manhattan failed to timely and properly recognize symptoms of infection from COVID-19, including fever hypertension, tachypnea, and hypoxia. (*Id.* at ¶ 36.) Because each of these actions *may* rise to the level of gross negligence and defendant has failed to show conclusively that plaintiff's allegations are without merit (*see Dolphin Holdings*, 122 AD3d at 902), Northern Manhattan is not entitled to dismissal under CPLR 3211 (a) (7).

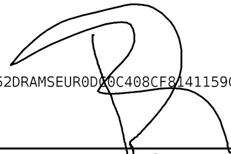
Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendant Northern Manhattan Nursing Home Inc.'s motion to dismiss pursuant to CPLR 3211 (a) (7) is denied; and it is further

ORDERED that the parties shall appear at 60 Centre Street, New York, New York on June 10, 2024, at 9:30 a.m. for a preliminary conference with the Court; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.



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5/13/2024		DAKOTA D. RAMSEUR, J.S.C.
DATE		

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
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