SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, **PART 34**

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MATOS, JESSICA

- against -

CHIONG, BRIAN BOBBY, M.D., et al

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Index №. **30027/2020E**

Hon. **JOHN R. HIGGITT**, J.S.C.

The following papers in the NYSCEF System were read on this motion to **REARGUE/RENEW/ RESETTLE**, duly submitted as No. ___ on the Motion Calendar of **February 26, 2021**

	DOCUMENTS NUMBERED
Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed	33-41
Notice of Cross Motion – Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavits and Exhibits	42
Replying Affidavits and Exhibits	43

Upon the January 29, 2021 notice of motion of defendants Chiong and St. Barnabas Hospital ("the St. Barnabas defendants") and the affirmation, affidavits and exhibits submitted in support thereof; plaintiff's February 18, 2021 affirmation in opposition; the St. Barnabas defendants' February 25, 2021 affirmation in reply; and due deliberation; the St. Barnabas defendants' motion seeking leave to renew and reargue the December 9, 2020 decision and order of the undersigned and, upon such renewal and/or reargument, to grant their motion to dismiss the complaint as against them and all cross claims against them, is denied.

The St. Barnabas defendants previously moved for an order dismissing the complaint pursuant to CPLR 3211(a)(7), arguing that they are entitled to qualified immunity under Public Health Law §§ 3080 and 3082.[1] They assert that the claims against them are barred, in whole or in part, because they rendered care to numerous patients affected by the coronavirus pandemic before and after the effective date of Public Health Law § 3082.

In the challenged order, the undersigned denied the motion because their proof did not conclusively establish a defense to plaintiff's claims as a matter of law (*see Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 571 [2005]). Absent from their proof was any demonstration that the "treatment of [plaintiff was] impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives" (Public Health Law § 3082[1][a]). While they submitted two affidavits, neither affiant directly addressed, let alone established, whether the care rendered *to plaintiff* -- not merely any care they rendered during the effective period of Public Health Law § 3082 -- was in any way impacted by the pandemic or the moving defendants' response thereto. Notably, the statute does not qualify how treatment must be affected -- whether positively, negatively, or otherwise -- it merely requires that treatment be "impacted."

[1] Article 30-D of the Public Health Law, the Emergency or Disaster Treatment Protection Act, consisting of Public Health Law §§ 3080-3082, was enacted by L 2020, ch 56, § 1 (Part GGG), effective April 3, 2020, in response to the coronavirus pandemic. Public Health Law §§ 3081 and 3082 were amended by L 2020, ch 134, §§ 1 and 2, respectively, effective August 3, 2020. The article was repealed, effective April 6, 2021, by L 2021, ch 96, § 1. Public Health Law § 3080 expresses the purpose of the article; Public Health Law § 3081 defines various terms. Relevant here is the article's provision immunizing health care facilities and health care professionals from civil and criminal liability under certain circumstances (*see* Public Health Law § 3082[1]).

Check one: □ Case Disposed in Entirety ■ Case Still Active
Motion is: □ Granted ■ Denied □ GIP □ Other
Check if appropriate: □ Schedule Appearance □ Fiduciary Appointment □ Settle Order □ Submit Order

In support of that aspect of the motion as seeks leave to reargue the prior order, the moving defendants assert that the court overlooked the New York State Assembly Memorandum submitted in support of the August 2020 amendments, which prospectively limited the covered care to that related to the diagnosis, prevention, or treatment of COVID-19 or the assessment or care of an individual with a confirmed or suspected case of COVID-19. In the version of Public Health Law § 3082 in effect at the time of the treatment rendered to plaintiff, the covered care also extended to "the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration."

The memorandum was submitted in support of the original motion, and was considered by the undersigned. The undersigned considered the changes to the law and the reasons therefor, specifically making reference to "the version of Public Health Law § 3081 in effect at the time of plaintiff's alleged treatment and care." The motion, however, was not denied because plaintiff, not alleged to have been receiving treatment due to COVID-19, was not receiving covered care. The motion was denied because the party seeking immunity was required to demonstrate (both before and after the statute was amended) that "the treatment *of the individual* is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives" (Public Health Law § 3082[1][b] [emphasis added]). As previously stated, a CPLR 3211(a)(7) motion supported by documentary evidence must conclusively demonstrate the defense as a matter of law, and the moving defendants' proof did not do this. The Assembly Memorandum does not change this fact. Accordingly, the moving defendants failed to establish that the court overlooked or misapprehended a matter of fact or law in deciding the prior motion (*see* CPLR 2221[d][2]).

There is no doubt that the Legislature's actions were taken in response to a global health crisis unparalleled in our lifetimes, were intended to address the burdens of health care providers who had been stretched unbearably thinly, and were intended to alleviate one concern (i.e., liability) that must exist in the back of the minds of all those who endeavor to keep us healthy and heal us when we are not. However,

> "When presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature. We have long held that the *statutory text is the clearest indicator of legislative intent*, and that a court should construe unambiguous language to give effect to its plain meaning. In the absence of a statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase. Where the statutory language is unambiguous, a court need not resort to legislative history. Further, a statute must be construed as a whole and its various sections must be considered together and with reference to each other (*Matter of Walsh v N.Y. State Comptroller*, 34 NY3d 520, 524 [2019] [citations and quotation marks omitted]).

Moreover, a statute conferring immunity must be strictly construed (*Brown v Bowery Sav. Bank*, 51 NY2d 411, 415 [1980]), and the party seeking its protections "must conform strictly with its conditions" (*Zaldin v Concord Hotel*, 48 NY2d 107, 113 [1979]).

Considering these principles, together with the standard of proof required on a CPLR 3211(a)(7) motion, the moving defendants' showing on the prior motion was insufficient to demonstrate entitlement to dismissal of the complaint on the basis of the application of Public Health Law § 3082.

In support of that aspect of the motion as seeks renewal of the prior order, the moving defendants submit a new, more detailed affidavit of defendant Chiong. A motion for leave to renew "shall contain

reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]). Even where the newly submitted evidence was available at the time of the original motion, the court has discretion to "relax this requirement . . . in the interest of justice" (*Atiencia v MBBCO II, LLC*, 75 AD3d 424, 425 [1st Dept 2010]). However, "[w]hile the statutory prescription to present new evidence 'need not be applied to defeat substantive fairness,' such treatment is available only in a 'rare case,' such as where liberality is warranted as a matter of judicial policy, and then *only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance*" (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010] [citations omitted and emphasis added]). The moving defendants did not present such an excuse (*see e.g. Wang v LaFrieda*, 189 AD3d 732 [1st Dept 2020]; *cf. Global Liberty Ins. Co. v Laruenceau*, 187 AD3d 570 [1st Dept 2020]). "Renewal is granted sparingly and is not a second chance freely given to parties who have failed to exercise due diligence in making their first factual presentation" (*Wade v Giacobbe*, 176 AD3d 641, 641 [1st Dept 2019], *lv dism* 35 NY3d 937 [2020]).

Even were this an occasion that "warranted a grant of leave to renew in the interest of justice so as not to defeat substantive fairness" (*S.V.L. v PBM, LLC*, 191 AD3d 564, 566 [1st Dept 2021] [citation and quotation marks omitted]), the new affidavit would not require a different result. Like the original Chiong affidavit, the new affidavit fails to *conclusively* establish, as it must, that plaintiff's care -- "the treatment of the individual" – was "impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives" (Public Health Law § 3082[1][b]).

Contrary to the moving defendants' assertion, the undersigned did not effectuate a change in the law.[2] The undersigned merely reiterated and applied the language of the statute which, being unambiguous, must be "[applied] … as it is written" (*Zaldin*, 48 NY2d at 113).

Accordingly, it is

ORDERED, that the St. Barnabas defendants' motion seeking leave to renew and reargue the December 9, 2020 decision and order of the undersigned and, upon such renewal and/or reargument, to grant their motion to dismiss the complaint as against them and all cross claims against them, is denied.

This constitutes the decision and order of the court.

Dated: May 27, 2021

Hon. John R. Higgitt, J.S.C.

[2] To the extent the moving defendants assert that the prior decision constitutes a change in the law, it is circular to assert that it would also "change the prior determination" (CPLR 2221[e][2]). Accordingly, the prior decision, itself, is not a sufficient basis to warrant renewal (*see Matter of Miller v N.Y.C. Office of Administrative Trials & Hearings*, 182 AD3d 460 [1st Dept 2020]).