STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

THOMAS N. WHITEHEAD, as Executor of the Estate of JANIS H. TIPPLE, Deceased,

Plaintiff,

-against-

PINE HAVEN OPERATING LLC d/b/a PINE HAVEN NURSING AND REHABILITATION CENTER, PINE HAVEN NURSING AND REHABILITATION CENTER, ABC CORPORATION AND ABC PARTNERSHIP,

Defendants.

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
Index No. E012022017995

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DECISION/ORDER

Zwack, J.:

In this negligence action, the defendants seek to renew and reargue the Court's June 8, 2022 Decision and Order, which denied their pre-answer motion to dismiss the complaint. The Court found, and the defendants disagree, that the plaintiff's allegations were not barred under both state and federal law by the Public Readiness and Emergency Preparedness Act ("PREP Act"), 85 Fed Reg. 15198, 42 USC 247-69[a][1]; the New York Emergency or Disaster Treatment Protection Act ("EDTPA"); Public Health Law Article 30, 3080-3082), and New York Executive Order 202.10 (all of which granted nursing homes and medical providers immunity from suit in cases where damages and death occurred as a result of COVID-19, and its countermeasures and treatments). The defendants re-argue their position that the PREP Act provides them immunity, and renew on the basis of subsequent additional case law that was not available at the time of submission on the motion to dismiss.

The plaintiff, Thomas Whitehead, as Executor of the Estate of Janis Tipple, alleges negligence, negligence per se, wrongful death, and nursing home malpractice against the defendants, Pine Haven Operating, LLC d/b/a Pine Haven Nursing and Rehabilitation Center, Pine Haven Nursing and Rehabilitation Center, ABC Corporation and ABC Partnership, which lead to the death from COVID-19 of the deceased Janis Tipple. The defendants moved pre-answer to dismiss the complaint, asserting the defenses of lack of subject matter

jurisdiction (CPLR 3211(a)(2); or, in the alternative, that the complaint fails to state a cause of action (CPLR 3211(a)(7); or to dismiss the plaintiff's cause of action for negligence per se (CPLR 3211(a)(7). The defendants asserted that the plaintiff's allegations distill into claims that are barred under both state and federal law by the Public Readiness and Emergency Preparedness Act ("PREP Act"), 85 Fed Reg. 15198, 42 USC 247-69[a][1]; the New York Emergency or Disaster Treatment Protection Act ("EDTPA"); Public Health Law Article 30, 3080-3082), and New York Executive Order 202.10 (all of which granted nursing homes and medical providers immunity from suit in cases where damages and death occurred as a result of COVID-19, and its countermeasures and treatments). With respect to the plaintiff's allegations of negligence per se (Third Cause of Action), the defendants argue, albeit a violation of a state statute may constitute negligence per se, a violation of an ordinance or regulations is only some evidence of negligence and not negligence per se.

The plaintiff opposed, asserting that the complaint is not pre-empted by the PREP Act, because it does not allege damages arising from, or related to, "the administration of" a "covered countermeasure" for COVID-19 or the selective administration of a "covered countermeasure." According to the plaintiff, the claims in the complaint relate to defendants' glaring omissions in failing to act to prevent injury and death to the decedent. The plaintiff further argues that a nursing home is not a "covered person-program planner" under the PREP Act and therefore the Act is not applicable. More particularly, the complaint alleges that the defendants "failed to take proper steps to protect the

residents and/or patients at their facilities from the COVID-19 virus" (paragraphs 261-262) and lists eleven COVID-19 countermeasures which the defendants failed to undertake (paragraphs 263-273). The plaintiff asserts that the decedent's death was a "direct result of the defendants' failure to take measures to protect her at the nursing home from the deadly COVID-19 virus, and their negligence, gross negligence, and nursing home malpractice" (paragraph 275). The complaint seeks damages, including punitive damages, for violations of the PHL §§2801-d and 2803, negligent medical care, negligence per se, conscious pain and suffering, as well as wrongful death.

For the reasons that follow the Court denies the defendants' motion to renew and re-argue.

As a preliminary matter, the Justices of the State New York Litigation Coordination Panel, in an application titled In re COVID Litigation Against Nursing Homes, determined that the instant case, together with dozens of other actions brought by individuals and estate representatives across the State of New York against nursing homes alleging malfeasance and resulting COVID deaths, would be coordinated at the pre-trial stage through summary judgment motion practice. This case, which is on appeal, is also now consolidated under the Order. This said, the Court deems it appropriate to determine the pending renewal and re-argument motion.

"A motion for leave to re-argue is addressed to the sound discretion of the motion court. Such a motion must be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior

motion, but shall not include any matters of fact not offered on the prior motion" (*A.R. Conelly, Inc. v New York City Charter High School for Architecture, Eng'g and Constr. Indus.*, 206 AD3d 787, 788-789 [2d Dept 2022]). A "motion for re-argument is not designed to provide an unsuccessful party with successive opportunities to re-argue issues previously decided (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014]).

Here, the defendants argue that the Court misinterpreted the PREP Act and subject matter jurisdiction. The Court agrees with defendants' argument that if it found that these negligence claims were pre-empted by federal law, this Court could dismiss the same for lack of subject matter jurisdiction. However, the Court determined, and declines to change its determination, that the PREP Act does not afford federal courts exclusive subject matter jurisdiction over what has been pled here as a state claim (*Dupervil v Alliance Health Operations, LLC*, 516 F Supp 3d 238 [ED NY 2021]). To reiterate, the PREP Act applies, and preempts state claims and confers immunity, only where the allegations are that the defendant dispensed or administered countermeasures improperly, causing injury (*Parker v St. Lawrence County Pub. Health Dept.*, 102 AD3d 140, 141-42 [3d Dept 2012]). Allegations such as those set forth in this complaint (failing to enforce social distancing, failing to timely restrict visitors, failing to ensure all residents and staff wore face coverings, failure to screen staff and visitors, and failing to discontinue group activities) do not amount to the administration of countermeasures under the PREP Act. Here, there are no allegations that the decedent was injured by administration of the vaccine, or the administration of

treatment, or the use of a diagnostic test, or use of any personal protective equipment, all of which would fall under the Prep Act. The complaint does not allege that the defendants failed to properly administer vaccines, or biological agents, or drugs or devices, which would have therefore triggered the PREP Act's immunity provisions, but rather that the decedent died because the defendants negligently failed to protect her from contracting the disease by "failing to enforce social distancing," "failed to cancel group activities," "failed to timely restrict visitors," "failed to adequately screen visitors," and more (*Dupervil,* 516 F Supp 3d 238).

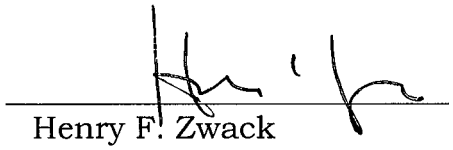
Certainly, a motion for renewal can be made based upon a change in the law since the complained of decision and order was issued "that would change the prior determination" (CPLR 2221[e][2]; *Jackson v Westminister House Owners Inc.*, 52 AD3d 404, 405 [1st Dept 2008]). This said, the defendants have failed to demonstrate a controlling change in the law. The trial court level cases the defendants cite, which are not binding on this Court, and which were made after this Court's determination, demonstrate only the divergence which exists at the trial court level on the retroactivity of the EDTPA and the applicability of the PREP Act to these state negligence claims. This dichotomy of trial court rulings is what the New York State Litigation Panel hopes to resolve by coordinating these cases at the pre-trial level.

Accordingly, it is

ORDERED, that the motion to re-argue and renew is denied.

This constitutes the Decision and Order of the Court. This original Decision and Order is filed by the Court on NYSCEF, which shall constitute filing and entry under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to Notice of Entry.

Dated: November 29, 2022
Troy, New York



Henry F. Zwack
Acting Supreme Court Justice

Papers considered, as filed with NYSCEF:

1. Documents #60 through #72 and #80.