

**Dinunzio v Cobble Hill Health Ctr., Inc.**

2023 NY Slip Op 32787(U)

July 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 502562/2023

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the \_\_\_ day of \_\_\_\_\_ 2023.

JUL 26 2023

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 99

DECISION / ORDER

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JOSEPHINE DINUNZIO,

Index No.: 502562/2023

Plaintiff,

Mot. Seq.: 1

-against-

Mot. Cal.: 06/07/2023

COBBLE HILL HEALTH CENTER, INC.

Defendant.

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After oral argument, the following papers were read on this motion pursuant to CPLR § 2219(a):

<u>Papers</u>	<u>Numbered</u>
Motion Sequence #1	
Defendant Cobble Hill Health Center, Inc.'s Notice of Motion to Dismiss, filed February 28, 2023 (NYSCEF #6), Defendant Attorney Affirmation in Support of Motion, affirmed on February 28, 2023 (NYSCEF #7), Memorandum of Law in Support of Motion (NYSCEF #8), Exhibits (NYSCEF #9-13) .....	6-13
Plaintiff Josephine Dinunzio's Attorney Affirmation in Opposition to Motion, affirmed on March 13, 2023 (NYSCEF #21), Exhibits (NYSCEF #23-33) .....	21-33
Defendant's Attorney Affirmation in Reply, affirmed on June 5, 2023 (NYSCEF #35), Exhibits (NYSCEF #36-40) .....	35-40

Plaintiff commenced this action by filing a summons and complaint on January 25, 2023, alleging, *inter alia*, wrongful death, violations of New York Public Health Law § 2801-d and 2803-c, negligence, and gross negligence. Plaintiff also seeks punitive damages pursuant to Public Health Law § 2801-d.

The plaintiff, Josephine Dinunzio, is the sister of the decedent, Gerardo Sarni, who was admitted to the defendant's nursing care facility located at 380 Henry Street, Brooklyn, New York on September 17, 2018. The decedent became infected with SARS-CoV-2 and COVID-19 while at defendant's facility and developed respiratory distress and hypoxia, which resulted in his death on October 19, 2020.

Before the court is defendant's motion to dismiss all causes of action alleged in the complaint.

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For a CPLR § 3211(a)(7) motion to dismiss, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory.” (*Leon v. Martinez*, 84 N.Y.2d 83, 88 [Ct. of Ap. 1994] [internal citations omitted]). “The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 20 [Ct. of Ap. 1977]).

I. **Defendant Cobble Hill Health Center, Inc.’s Motion to Dismiss Plaintiff’s Cause of Action for Wrongful Death with Prejudice**

Defendant argues that plaintiff’s wrongful death claim should be dismissed with prejudice because the complaint was filed after the two-year statute of limitations.

The wrongful death statute, EPTL § 5-4.1, requires an action to be commenced within two years of a decedent’s death. However, on March 20, 2020, former Governor Cuomo issued Executive Order No. 202.8 that declared a Disaster Emergency in New York state in response to the COVID-19 pandemic and stated that “any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding . . . is hereby tolled.” Executive Order No. 202.67 extended the tolling period until November 3, 2020.

Here, the decedent passed away on October 19, 2020. Under the extended tolling period, plaintiff had until November 3, 2022 to file a wrongful death claim. However, the complaint was filed on January 25, 2023, more than two months outside of the two-year statute of limitations.

II. **Defendant Cobble Hill Health Center, Inc.’s Motion to Dismiss the Remainder of the Complaint in its Entirety with Prejudice**

A. **Defendant’s Liability Under the EDTPA**

Defendant Cobble Hill Health Center, Inc. argues that the remainder of the complaint should be dismissed under CPLR § 3211(a)(7) for failing to state a cause of action because defendant was immune from liability pursuant to the Emergency or Disaster Treatment Protection Act (“EDTPA”). Defendant further argues that the complaint fails to state a cause of action upon which relief may be granted because the allegations pertain solely to the diagnosis and/or treatment of COVID-19 in relation to the decedent during the time in which the EDTPA applied.

The EDTPA protected health care facilities and health care professionals from potential liability related to the treatment of individuals with COVID-19. The EDTPA “provided, with certain exceptions, that ‘any health care facility or health care professional shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services’ as long as three conditions were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; the act or omission was impacted by decisions or activities that were in

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response to or as a result of the COVID-19 outbreak and in support of the State's directives; and the services were arranged or provided in good faith. (*Ruth v. Elderwood at Amherst*, 209 A.D.3d 1281, 175 N.Y.S.3d 811, 816 [2d Dep't 2022] quoting Public Health Law former § 3082 [1]).

EDTPA immunity did not apply “if the harm or damages were caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional.” (Public Health Law former § 3082 [2]).

The EDTPA was signed into law on April 3, 2020, and codified as NY Public Health Law (“PHL”) §§ 3080, 3081, and 3082. The legislature specified that the EDTPA would “take effect immediately and shall be deemed to have been in full force and effect on or after March 7, 2020.” (L 2020, ch 56, § 1; part GGG, § 2). The EDTPA was then repealed by Senate Bill S5177 on April 6, 2021. Here, the EDTPA was still in effect on October 19, 2020, when the decedent passed away.

Plaintiff argues that their claims should not be dismissed under the EDTPA because the legislative intent was to repeal the act retroactively. Senate Bill S5177 does not include specific language about whether the repeal retroactively applies to claims related to events that occurred between March 7, 2020 and April 6, 2021 and the entire bill only consists of two sentences; Section 1 states “Article 30-d of the public health law is REPEALED,” and Section 2 states “[t]his act shall take effect immediately.” (NY Senate Bill S5177 [2021]).

While plaintiff correctly asserts that there was ambiguity in the legislative intent behind Senate Bill S5177, the 4th Department has ruled on this specific issue, the only appellate court to do so. In *Ruth v. Elderwood*, the court unequivocally held that “the repeal of EDTPA does not apply retroactively.” (*Ruth v. Elderwood at Amherst*, 209 A.D.3d 1281, 175 N.Y.S.3d 811 [4th Dep't 2022]). This court is bound by this decision because no other appellate division has determined the issue. (*Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 476 N.Y.S.2d 918 [2nd Dep't 1984] [holding that “*stare decisis* requires trial courts . . . to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule”]).

Accordingly, defendant qualifies for immunity pursuant to the EDTPA, and plaintiff's causes of action for violations of PHL § 2801-d and 2803-c and negligence are dismissed.

**B. Plaintiff's Claim for Gross Negligence**

An exception to the immunity provided by the EDTPA applies where there is a finding of gross negligence by the health care facility. (PHL Former § 3082[2]). “The immunity provided by subdivision 1 of this Section shall not apply if the harm or damages were caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional providing health care services, provided, however, that acts, omissions or decisions resulting from a resource or staffing shortage shall be not considered to be willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.” (PHL Former § 3082[2]).

Furthermore, PHL § 2801-d reflects: “where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient, punitive damages may be

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assessed.” Lastly, courts have found that gross negligence is “conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing.” (*Soja v. Keystone Trozze, LLC*, 106 A.D.3d 1168, 1170, 964 N.Y.S.2d 731 [3d Dep’t 2013]).

In *Ruth v. Elderwood*, where the appellate division ruled that the EDTPA provided immunity for a health care facility facing negligence claims, there was no claim for gross negligence. (*Ruth v. Elderwood at Amherst*, 209 A.D.3d 1281, 175 N.Y.S.3d 811 [4th Dep’t 2022]). Here, plaintiff claims gross negligence and details the following allegations listed in their complaint:

in implementing policies (including accepting COVID-19 positive patients and residents and failing to test patients, residents and staff) with the knowledge that the policies implemented would increase the risk of contracting disease, causing sickness and death in patients and residents, including plaintiff’s decedent;

in failing to provide proper infection prevention and control procedures;

in failing to take steps to prepare to prevent the spread of future infection;

in failing to maintain an infection control program with policies designed to provide a safe, sanitary, and comfortable environment in which residents vulnerable to infection reside and where their health care providers work;

in failing to have an infection control program which investigated, controlled and took action to prevent infections in the facility and to determine what procedures, such as isolation, should be utilized for an individual resident to prevent continued transmission of disease;

in failing to isolate residents and properly sterilize and store all equipment to prevent the spread of infection; and

in failing to safely and properly move, monitor, supervise, assist, and/or treat plaintiff decedent;

...

[the defendant] acted in so careless a manner as to show complete disregard for the rights and safety of others;

the defendant acted or failed to act knowing that their conduct would probably result in injury or damage; and

the defendant acted willfully, intentionally, recklessly and with gross negligence in regard to plaintiff decedent’s residents’ rights.

The factual allegations in the complaint, when taken together, allege reckless indifference to the rights of the decedent, or “smack[] of intentional wrongdoing.” (*Soja v. Keystone Trozze, LLC*, 106 A.D.3d 1168, 1170, 964 N.Y.S.2d 731 [3d Dep’t 2013]). Accordingly, plaintiff’s cause of action for gross negligence will not be dismissed.

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**C. The PREP Act Is Not at Issue in This Matter**

Plaintiff argued that their claims are not encompassed by the federal PREP Act, that defendant should receive no immunity under the PREP Act, and that the case should not be transferred to federal court. However, the defendant’s motion does not mention the federal PREP Act, it presents no defenses based on the PREP Act, and the defendant is not requesting that this matter be transferred. Since the defendant has not raised any issues under the PREP Act in their motion, the court finds that an analysis under the PREP Act is unnecessary.

**III. Request for Transfer to Nassau County is Denied**

Plaintiff argues that this matter should be transferred to Nassau County Supreme Court before Judge Sharon Gianelli pursuant to the “Final Order of Coordination” issued by the Litigation Coordinating Panel on October 19, 2022. The Order applied to COVID-19 litigation against nursing homes. It directed that "any actions that allege similar causes of action against nursing homes and residential health care facilities, as defined in PHL § 2801(2) and (3), and which remain active, but are not listed in the [above] caption or the appendix . . . shall . . . be coordinated pursuant to the Uniform Civil Rules 202.69.” (NYSCEF #36)

However, the application and decision to coordinate must be determined by the Coordination Panel. (N.Y. Comp. Codes R. & Regs. tit. 22 Section 202.69). Absent a written decision from the Panel directing coordination, this matter remains before this court.

Based on the foregoing, it is

**ORDERED** that defendant’s motion to dismiss plaintiff’s cause of action for wrongful death is **GRANTED**; and it is further

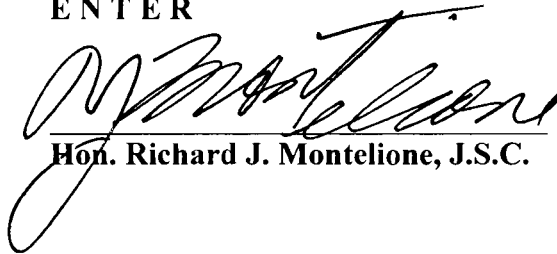
**ORDERED** that defendant’s motion to dismiss plaintiff’s cause of action for violations of New York Public Health Law § 2801-d and 2803-c is **GRANTED**; and it is further

**ORDERED** that defendant’s motion to dismiss plaintiff’s cause of action for negligence is **GRANTED**; and it is further

**ORDERED** that defendant’s motion to dismiss plaintiff’s cause of action for gross negligence is **DENIED**.

This constitutes the decision and order of the Court.

ENTER

  
Hon. Richard J. Montelione, J.S.C.

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KINGS COUNTY CLERK  
FILED