

Adler v Troy

2023 NY Slip Op 33804(U)

October 18, 2023

Supreme Court, New York County

Docket Number: Index No. 805376/2021

Judge: Kathy J. King

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHY J. KING **PART** **06**

Justice

-----X

SETH ADLER, AS ADMINISTRATOR OF THE ESTATE OF
THE ESTATE OF MICHELE ADLER, DECEASED, and
SETH ADLER, Individually,

INDEX NO. 805376/2021

MOTION DATE 08/19/2022

MOTION SEQ. NO. 003

- v -

KEVIN TROY, M.D., CAITLIN BURKE, N.P., ELIZABETH
YOO, M.D., MOUNT SINAI MEDICAL CENTER, SEAN
LIU, M.D. and LUIS R. DEPALO, M.D.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 64, 65, 66

were read on this motion to/for

DISMISS

Upon the foregoing papers, defendants KEVIN TROY, M.D., CAITLIN BURKE, NP, ELIZABETH YOO, M.D., SEAN LIU, M.D., LOUIS R. DEPALO, M.D., and MOUNT SINAI MEDICAL CENTER (“defendants”) move for an order pursuant to CPLR 3211(a)(2), dismissing this action for lack of subject matter jurisdiction; or, in the alternative, pursuant to CPLR 3211(a)(7), dismissing this action for failure to state a cause of action pursuant to the federal Public Readiness and Emergency Preparedness Act (“PREP Act”), 42 U.S.C. §§ 247d-6d, 247d-6e, and the New York Emergency or Disaster Treatment Protection Act (“EDTPA”), Public Health Law Article 30-D, P.H.L. §§ 3080-3082.

Plaintiffs oppose the motion.

**PLAINTIFF’S COMPLAINT AND
THE INSTANT MOTION TO DISMISS**

Plaintiffs’ amended complaint sounds in medical malpractice and seeks damages for personal injuries and for the wrongful death of plaintiff’s decedent (“decedent”), while she was

under a course of continuous treatment by defendants commencing on or about March 10, 2020. Plaintiff's decedent passed away on April 21, 2020. The complaint alleges that each of the individual defendants was duly licensed to practice medicine in New York, and that defendant Mt. Sinai owned and operated a "fully-accredited" hospital, and was vicariously liable for all employees therein.

Plaintiff's decedent was a 54-year-old woman with a history of CVID (Common Variable Immunodeficiency), a primary immune deficiency disease characterized by low levels of protective antibodies and an increased risk of infection. She also had immune thrombocytopenic purpura, a rare blood disorder, for which she presented to defendants on March 10, 2020. The complaint alleges that defendants "had a duty to protect immunocompromised patients and keep contagious and/or compromised patients segregated from other patients" and "were required to establish an effective infection control program for the prevention, control, investigation and reporting of all communicable disease and increased incidence of infections as per NYCRR §405.11." Further, the complaint alleges that based on the medical history of plaintiff's decedent, defendants were reckless upon admitting plaintiff's decedent to Mount Sinai on or about March 10, 2020, and said recklessness compromised her already compromised lung function, causing her to contract COVID-19, and die within weeks after being on a ventilator.

Defendants contend that this action should be dismissed under the PREP Act because it provides broad immunity "from suit" with respect to any claim "relat[ed] to" the manner in which a defendant uses or administers "covered countermeasures"—including PPE, COVID-19 tests, medical devices used in the treatment of COVID-19 patients, and medical devices used for diagnosing COVID-19—in response to COVID-19. Immunity extends to resource allocation

decisions and decisions pertaining to the operation and management of a facility where countermeasures are used or administered in response to COVID-19, such as a hospital.

In opposition, plaintiff asserts that defendants are not entitled to PREP Act immunity because the amended complaint does not allege that decedent's illness or death was caused by, or related to, "the administration to or the use by an individual of a covered countermeasure" (42 USC § 247d-6d [a] [1]). Rather, plaintiffs contend that the complaint arises from defendants' failure to implement an effective infection control program, and segregate immunocompromised patients, such as the decedent, from contagious patients with Covid-19. Plaintiff asserts that this failure to act, which is alleged to have caused the decedent's death, does not fall within the scope of the PREP Act.

Defendants contend that the action should also be dismissed under the EDTPA since it provides immunized health care facilities and health care professionals in New York from liability relating to the treatment of patients during the state of emergency declared for COVID-19.

DISCUSSION

It is well settled that "[o]n a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction in the light most favorable to the plaintiff (*see Leon v Martinez*, 84 NY2d 83 (1994)). However, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss."

Under CPLR § 3211(a)(2) a party to may move to dismiss a cause of action where "the court has no jurisdiction of the subject matter of the cause of action." In this regard, "[w]here a cause of action is preempted by federal law, a party may move, pursuant to CPLR § 3211(a) (2), to dismiss the cause of action on the ground that the court lacks subject matter jurisdiction"

(*Astro Ready Mix, LLC v MTA Long Is. R.R.*, 217 AD3d 816, 817 [2d Dept 2023]). “[I]n assessing motions pursuant to CPLR § 3211(a)(7), any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence, as the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 601 [2017] [internal quotation marks and citations omitted]).

The Prep Act

Congress enacted the PREP Act in 2005, in response to the 2003 SARS epidemic, in order “[t]o encourage the expeditious development of medical countermeasures during a public health emergency by granting the Secretary of the Department of Health and Human Services (“HHS Secretary”) the “authority to publish a declaration that (1) announces a disease or health condition is a public emergency and (2) defines appropriate covered countermeasures” (42 USC § 247d-6d [b][1]). The PREP Act authorizes the HHS Secretary to act swiftly to provide civil immunity to individuals and companies participating in the country’s response to a public health emergency (42 U.S.C. § 247d-6d [b][1]).

Once implemented, the PREP Act provides the following limited immunity:

...[A] covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or *resulting from the administration to or the use by an individual of a Covered Countermeasure* if a declaration [is issued by the HHS Secretary] with respect to such countermeasure. (42 USC § 247d-6d [a] [1], [a][2][B] [emphasis added]).

The immunity applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure. Once the HHS Secretary issues a declaration invoking the PREP Act, no court shall have subject matter jurisdiction to review that determination (42 USC § 247d-6d [b][7]).

The only exception to the PREP Act's grant of immunity is "for death or serious physical injury proximately caused by willful misconduct" (42 USC § 247d-6d [d] [1]), defined as an act or omission that is taken (i) intentionally to achieve a wrongful purpose; (ii) knowingly without legal or factual justification; and (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit (42 USC § 247d-6d [c] [1] [A]).

In response to COVID-19, the HHS Secretary issued a Declaration invoking the PREP Act (*see* Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198 [Mar. 17, 2020][“Declaration”]). This Declaration broadly defines “covered countermeasures” to include virtually any FDA approved or authorized “drug” or “device” used to treat or diagnose COVID-19 or mitigate its spread. It also includes a wide array of products, such as various forms of PPE, hand sanitizers, COVID-19 tests, and any medical device that would be used for treating a COVID-19 patient, such as ventilators, or for determining whether an individual is symptomatic, such as thermometers and pulse oximeters.

The Declaration provides immunity for “recommended activities,” which include the “use” or “administration” of “covered countermeasures” (85 Fed. Reg. at 15201). “Use” is not defined under the PREP Act or the Declaration. However, the Declaration further broadly defines “administration” to include not only the physical provision of covered countermeasures to recipients, but also to all related activities and decisions as well as management and operation of facilities where countermeasures are being used and distributed to individuals. This includes decisions regarding the allocation of countermeasure resources across multiple people.

The Declaration, as amended, also provides that covered countermeasures include any products used to treat or diagnose COVID-19, or used to mitigate the harms that COVID-19

might otherwise cause, so long as that product is an antiviral, drug, biologic, respiratory protective device, or other device.

It is undisputed that defendants are a covered person within the meaning of the PREP Act. The issue for the Court to decide is whether plaintiff's claim "aris[es] out of," "relate[s] to," and "result[s] from" the administration or use of such products, and is preempted by the PREP Act and subsequent declarations.

While defendants argue that plaintiffs' claims involve defendants' protocols for preventing COVID-19 which would include the use and administration of covered countermeasures, the Court finds that plaintiff's claim for loss arises from defendants' failure to implement an effective infection control program and segregate immunocompromised patients, such as plaintiff's decedent, and falls outside the scope of the PREP Act.

The developing body of case law in "failure to act" cases have held that immunity applies only where a covered countermeasure is in scarce supply and is not administered due to prioritization or purposeful allocation. (*see Cacace v Grandell Rehab. & Nursing Ctr., Inc.*, Sup Ct, Nassau County, March 8, 2023, Cozzens, J., index No. 610351/2021, at *3 ["The PREP Act provides no protection or immunity for claims based on Defendant's inaction. Plaintiff has not pleaded that Defendant's failures to act involve some sort of purposeful allocation of limited personal protective equipment, medicine, respiratory devices etc. to other residents"]; *Whitehead v Pine Haven Operating LLC*, 75 Misc 3d 985, 991 [Sup Ct, Columbia County 2022] ["Allegations such as those set forth in this complaint (failing to enforce social distancing, failing to timely restrict visitors, failing to insure all residents and staff wore face coverings, failing to screen staff and visitors, and failing to discontinue group activities) do not amount to the administration of countermeasures under the PREP Act"]; *see also Dupervil v Alliance Health*

Operations, LLC, 516 F Supp 3d 238, 255 [ED NY 2021] [“the crux of Plaintiff’s claims is that his father died because Defendants failed to take certain steps . . . These alleged failures cannot be said to be administering — or even prioritizing or purposefully allocating — a drug, biological product, or device to an individual within the meaning of the PREP Act such that Plaintiffs’ claims are completely preempted”], *remand order vacated and appeal dismissed sub nom. Dupervil v All. Health Operations, LLC*, 2022 WL 3756009, 2022 US App LEXIS 24708, [2d Cir 2022]¹; *Shapnik v Hebrew Home for the Aged at Riverdale*, 535 F Supp 3d at 322 [“The Court thus joins the growing consensus among courts across the country that state-law claims of negligence and wrongful death brought against a nursing home for failure to protect against the spread of COVID-19, like those that Plaintiff[s] allege[], are not properly characterized as federal-law claims under the PREP Act”][quotation marks and citations omitted]).

Here, plaintiffs’ amended complaint alleges that defendants are liable for failing to isolate the decedent, a vulnerable patient under their care, from patients with COVID-19. This constitutes a failure to act, but it does not involve the prioritization or purposeful allocation of a covered countermeasure. In other words, plaintiffs are not alleging that covered countermeasures -such as personal protective equipment (“PPE”), Covid-19 testing, or vaccines - were used, delivered, or dispensed to others at the decedent’s expense.

HHS Advisory Opinion 21-01 explicitly states that it was issued in response to a growing number of cases alleging that patients contracted Covid-19 at a healthcare facility because the facility failed to provide its staff with PPE, failed to teach staff how to properly use PPE, and/or

¹ District Courts have noted that “[t]he opinion in *Dupervil* was vacated because the underlying state action was voluntarily dismissed, not for any fault with its reasoning” (*Druckman v Morningside Acquisition I LLC*, 2022 U.S. Dist. LEXIS 216022, *5-6 [SD NY 2022]; see *Fisher v Rome Ctr. LLC*, 2022 U.S. Dist. LEXIS 206682, 2022 WL 16949603, at *6 [ND NY 2022][“*Dupervil*’s vacatur is not sufficient reason to discount its relevance or persuasiveness on the merits”]).

failed to ensure that staff used the PPE that it had been given. The opinion goes on to explain that the non-use of a covered countermeasure, such as PPE, may be sufficient to trigger the PREP Act where the decision not to use the countermeasure is the outcome of a “conscious decision-making” process.

The Court agrees that defendants have not established that the acts or omissions at issue here fall under the umbrella of a conscious decision not to use a covered countermeasure. Defendants’ failure to isolate decedent from patients with the virus may well have been the result of a “conscious decision-making” process, however, the decision not to allocate separate bed space for vulnerable, immunocompromised patients (whether part of a conscious decision-making process or not, or even if unavoidable under the circumstances) does not involve, or relate to, the use or non-use of a “covered countermeasure” (*see Cacace v Grandell Rehab. & Nursing Ctr., Inc.*, Sup Ct, Nassau County, July 25, 2022, Cozzens, J., index No. 610351/2021 at *2 [“Immunity under the PREP Act applies to any loss or claim that has a causal relationship to the administration to or use . . . of a covered countermeasure”]; *Walsh v SSC Westchester Operating Company, LLC*, 592 F Supp 3d 737, 744-745 [ND Ill 2022] [“PREP’s immunity provision requires a causal connection between the injury and the use or administration of covered countermeasures”]).

In light of the foregoing, the Court finds that defendants are not entitled to dismissal of the amended complaint pursuant to CPLR § 3211 on the ground that the Court lacks subject matter jurisdiction, or on the ground that the claims set forth in this action fall within the scope of the immunity provision of the PREP Act.

The Emergency or Disaster Treatment Protection Act (EDTPA)

Codified in Public Health Law Sections 3080 through 3082, the EDTPA² was intended “to promote the public health, safety and welfare of all citizens by broadly protecting the health care facilities and health care professionals in this state from liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with the public health emergency”.

Section 3082 (1) of the EDTPA provides immunity from liability with respect to claims related to COVID-19 as follows:

[A]ny 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, if:

- (a) the health care facility or health care professional is arranging for or providing health care services pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law;
- (b) the act or omission occurs in the course of arranging for or providing health care services and 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; and
- (c) the health care facility or health care professional is arranging for or providing health care services in good faith.

The only exception under the statute is for injuries caused by “willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm” (Public Health former § 3082 (2)).

² Enacted on April 3, 2020, the EDTPA was “deemed to have been in full force and effect on or after March 7, 2020,” the date former Governor Andrew Cuomo issued Executive Order No. 202, declaring a state of disaster emergency for the State of New York (Laws 2020, ch 56, § 2 [Part GGG]; *see* 9 NYCRR § 8.202).

It is well-settled that defendant bears the burden, in the first instance, to establish that the three criteria in Public Health Law former § 3080 (1) are satisfied (*see e.g. Costiera v MMR Care Corp*, Sup Ct, Nassau County, January 17, 2023, Muraca, J., index No. 609159/2021); *Back v Facey*, 78 Misc 3d 426, 434-435 [Sup Ct, St. Lawrence County 2023]; *Crampton v Garnet Health*, 73 Misc 3d 543, 557-558 [Sup Ct, Orange County 2021]). If the defendant is successful in doing so, the burden then shifts to the plaintiff to establish that his or her claim falls within the immunity exception set forth in Public Health Law former § 3080 (2) (*see Crampton v Garnet Health*, 73 Misc 3d at 558).

Here, the services provided clearly constitute “health care services” under Public Health Law former § 3081 (5) (c), in that plaintiffs allege that decedent presented at the facility during the period of the Covid-19 emergency declaration. The “act or omission” at issue in this case is defendants’ alleged decision to place the decedent, an immunocompromised individual with compromised lung function, in a room with a patient who had Covid-19. Since this decision occurred “in the course of arranging for or providing health care services,” the first part of Public Health Law former § 3080 (1) (b) is satisfied.

As to the second part of section 3080 (1) (b), plaintiffs’ assert that defendants have not submitted any evidence on this motion demonstrating that placing the decedent in a room with a person suffering from the virus was a decision made, or an action taken, in response to, or as a result of, the outbreak and in support of the state’s directives, and therefore they failed to establish that they are immune under the EDTPA. A number of trial courts have held that a defendant cannot meet this burden without proffering an affidavit of an individual with personal knowledge, or other admissible evidence (*see Costiera v MMR Care Corp.*, Sup Ct, Nassau County, January 17, 2023, Muraca, J., index No. 609159/2021 [and cases cited therein]).

However, in this particular case, no affidavit is necessary because plaintiffs' own allegations establish this connection. Plaintiffs are alleging "that a wrong was committed by defendants who, despite being notified of the critical importance of having an adequate infectious disease response in place to combat COVID-19, and despite having a duty to protect immunocompromised patients, like decedent, and keep contagious and/or compromised patients with COVID-19 segregated from other patients, failed to do so, thereby causing the decedent to sustain severe injuries and damages and suffer a wrongful COVID-19 related death on April 21, 2020." That being the case, decedent's treatment was indisputably impacted by "activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives" in that it involved the room placement and bed allocation of Covid-19 patients at their facility (Public Health Law former § 3080 [1] [b]). Notably, the EDTPA does not require the use of covered countermeasures to afford immunity from liability.

Plaintiffs contend that even assuming defendants have established that the three criteria in Public Health Law former § 3080 (1) (a)-(c) are applicable, he sufficiently pleaded that his claims fall within Public Health Law former § 3080 (2), which states that health care facilities and providers will *not* be afforded immunity 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.

This section also provides that "acts, omissions or decisions resulting from a resource or staffing shortage shall not be considered to be willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm," and are therefore immune from liability (Public Health Law former § 3080 [2]).

In this respect, the amended complaint alleges that:

- a. Decedent, Michele Adler, came under defendants' care on or about March 10, 2020 for certain medical care and treatment;
- b. On or about February 6, 2020, defendant MT. SINAI MEDICAL CENTER received notification from Centers for Medicare & Medicaid Services that COVID-19 can rapidly appear and spread and that it is critical to have an adequate infectious disease response in place;
- c. Defendants were required to establish an effective infection control program for the prevention, control, investigation and reporting of all communicable disease and increased incidence of infections as per NYCRR §405.11;
- d. Defendant...had a duty to protect immunocompromised patients and keep contagious and/or compromised patients segregated from other patients;
- e. The foregoing treatment and management of the decedent, MICHELE ADLER, by the defendants...was performed in a careless, negligent and improper manner and not in accordance with the good and accepted standards of medical care and practice, thereby causing the decedent to sustain severe injuries and damages;
- f. Defendants failed to promulgate, enforce, abide by, or follow federal guidelines, infectious disease protocols, appropriate rules, regulations, guidelines, procedures, policies, or protocols with respect to the performing, rendering or providing of care and treatment to and/or for the decedent herein;
- g. By reason of the foregoing, the decedent sustained serious personal injuries and other medical conditions which resulted in severe and excruciating conscious pain, suffering and fear of impending death from the time of the commencement of the medical malpractice herein, up to the moment of decedent's wrongful death which resulted from the injuries sustained by reason of the negligence and malpractice of the defendants;
- h. The foregoing injuries and damages to the decedent, MICHELE ADLER, were caused solely by virtue of the carelessness, negligence and malpractice on the part of the defendants and without any negligence on the part of the decedent contributing thereto;
- i. Defendant acted in so reckless a manner or failed to act in circumstances where an act was clearly required, so as to indicate disregard of the consequences of their actions or inactions; and
- j. That as a result of the injuries sustained by the decedent as a result of the negligence and malpractice of the defendants, the decedent was caused to suffer a wrongful death on April 21, 2020.

However, these generalized statements are not supported by any specific factual allegations of conduct on the part of defendants that, if true, constitute “an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm” (Public Health Law former § 3080 [2]).

Plaintiffs maintain that the very act of failing to segregate an immunocompromised patient from a contagious patient with Covid-19, despite being warned of the critical importance of having an infection control response to the virus in place, in and of itself, constitutes such conduct. However, this assertion, without any allegations of fact concerning the circumstances surrounding defendants’ failure, is not sufficient.

Plaintiffs contend that even assuming the amended complaint fails to sufficiently allege that the exception to immunity applies, defendants’ argument that there are no allegations to support the application of the exception is premature. Plaintiffs assert that discovery is needed in order to elaborate on the contention that the exception to immunity set forth in Public Health Law former § 3080 (2) applies.

In this regard, CPLR § 3211 (d) provides:

Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

The party opposing the motion to dismiss “need only demonstrate that facts ‘may exist’ whereby to defeat the motion. It need not be demonstrated that they *do* exist” (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 515 [1974] [emphasis in original]).

Here, plaintiffs have a reasonable basis for believing that with discovery regarding the circumstances under which the failure to segregate the decedent from Covid-19 patients


occurred, he may be able to develop facts sufficient to demonstrate that the exception to immunity under Public Health Law former § 3080 (2) applies. Indeed, at this pre-answer stage of the litigation, the essential facts concerning the circumstances and reasons underlying this decision are within the possession and control of defendants (*see G.T. v Roman Catholic Diocese of Brooklyn, N.Y.*, 211 AD3d 413, 413 [1st Dept 2022]). As such, defendants’ motion to dismiss the amended complaint is denied on this basis as “facts essential to justify opposition may exist but cannot . . . be stated” (*see* CPLR § 3211[d]).

In accordance with the foregoing, it is hereby

ORDERED that defendants’ motion to dismiss the amended complaint is denied with leave to renew upon completion of discovery on the issue noted herein, which discovery shall commence without delay (Mot. Seq. No. 003); and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference on November 16, 2023, at 10:00 a.m. in Part 6, Room 351, 60 Centre Street, New York, New York.

This constitutes the Decision and Order of the Court.

<u>10/18/2023</u> DATE			 KATHY S. KING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE