

**Burrell v Downtown Brooklyn Rehabilitation Ctr.**

2023 NY Slip Op 34607(U)

October 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 510588/2022

Judge: Rupert V. Barry

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 13

-----X  
SOPHIA BURRELL, as the Administratrix of  
the Estate of MARTHA CODNER, Deceased,

Plaintiff(s),

Cal. No.: 49 (Motion Seq.  
No.: 3)

- against -

Cal. No.: 50 (Motion Seq.  
No.: 4)

DOWNTOWN BROOKLYN REHABILITATION  
CENTER,

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Defendant(s),

**DECISION & ORDER**

-----X  
Defendant, DOWNTOWN BROOKLYN REHABILITATION CENTER (hereinafter  
"Downtown"), having moved this Court, in Motion sequence No. 3, for an Order: (1) pursuant to  
CPLR § 3211(a)(1) and (7) dismissing the Complaint for failure to state a cause of action pursuant  
to the immunity defenses provided by the Emergency Disaster Treatment and Prevention Act  
("EDTPA" codified as N.Y. Public Health Law §§ 3080-3082 or Article 30-D) and Public  
Readiness and Emergency Preparedness Act ("PREP Act", 42 U.S.C. 247d-6d).

Plaintiff, SOPHIA BURRELL, as the Administratrix of the Estate of MARTHA CODNER  
(hereinafter "Plaintiff"), having cross-moved this Court, in Motion Seq. No. 4, for an Order: (1)  
Pursuant to C.P.L.R. § 2201, staying the instant matter pending determination of the Article 78  
Proceeding involving the COVID-19 Actions Against Nursing Homes.

**Upon reading all the papers (NYSCEF Documents Nos.: 29-81) and having conducted  
oral arguments, on October 25, 2023, this Court finds following:**

The EDTPA applies to the facts of this case and this action must be dismissed. The  
decedent was a resident of Downtown from September 19, 2019, until April 12, 2020, and passed  
away due to complications of COVID-19 at another facility on April 14, 2020. The EDTPA was

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in effect on March 7, 2020, and provided immunity from civil liability to healthcare facilities. "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" (NY PHL § 3080; *Ruth v. Elderwood*, 209 AD3d 1281 [4th Dept 2022]). Although the EDTPA was repealed on August 6, 2023, the repeal was not retroactive (*Id.* at 1287). Therefore, the care and treatment at issue in this case are covered by the EDTPA.

The only claims ineligible for immunity under the EDTPA are claims for intentional criminal misconduct or, infliction of harm, gross negligence, or reckless misconduct (*see Ruth, supra*). The text of NY PHL § 3080 provides that immunity is available where "(a) the health care facility or health care professional is providing health care services in accordance with applicable law, or where appropriate pursuant to a COVID-19 emergency rule" or "(c) the health care facility or health care professional is providing health care services in good faith" (Public Health Law § 3082; *see Mera v. New York City Health & Hospitals Corporation*, 220 AD3d 668 [2d Dept 2023]). Further, a court may consider evidentiary material to determine "whether a proponent of the pleading has a cause of action, whether or not he has stated one" and dismissal is appropriate where such materials "establish conclusively that the plaintiff has no cause of action" (*Sokol v. Leader*, 74 AD3d 1180, 1182 [2d Dept 2010] [internal quotations omitted], *citing Rovello v. Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Here, the Affidavit of Downtown's Assistant Administrator Vlad Formenko (Def. Exh. A paras. 17 - 35.), as well as Downtown's written policies (Def. Exh. J - Z), demonstrates that Downtown responded to the COVID-19 pandemic by updating their policies in response to the directives issued by the Center for Disease Control and the New York State Department of Health.

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In February through April 2020, Downtown Brooklyn crafted policies to prevent, mitigate, and treat Covid-19 exposure based upon the applicable rules and guidelines, educated the staff about these policies, and reinforced these policies with postings and handouts (Def. Exh. A para. 35). Given these facts, and recognizing that these claims arose after March 7, 2020, the immunity provision of the EDTPA must apply to this case.

Plaintiff's cross-motion argues that this case should be stayed pending the outcome of the Article 78 Proceeding involving the COVID-19 Actions Against Nursing Homes. Plaintiff argues that this matter should be transferred to Nassau County Supreme Court pursuant to the "Final Order of Coordination" issued by the Litigation Coordination Panel on October 19, 2022. The Order applied to the COVID-19 litigation against nursing homes. It directs that "any actions that allege similar causes of action against nursing homes and residential healthcare facilities, as defined by PHL § 2801(2) and (3), and which remain active, but are not listed in the [above] caption or appendix ... shall ... be coordinated pursuant to the Uniform Civil Rules 202.69" (Pltf. Exh. 12). 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). There is a stay on enforcement of the "Final Order of Coordination" pending the Article 78 Proceeding. Absent a written decision from the Panel directing coordination, this matter remains before this Court. Therefore, there is no need for a stay pending the outcome of the Article 78 proceeding. Accordingly, it is hereby

**ORDERED**, that Defendant's motion to dismiss (Motion Seq. No.: 3) is GRANTED, and Plaintiff's complaint is dismissed with prejudice, and the clerk is directed to enter judgment accordingly, and it is hereby,

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**ORDERED**, that Plaintiff's cross-motion staying the instant matter pending determination of the Article 78 Proceeding involving the COVID-19 Actions Against Nursing Homes (Motion Seq. No.: 4) is DENIED.

This constitutes the decision and order of this Court.

\*All applications not specifically addressed herein are Denied.

Dated: October 25, 2023

  
HON. RUPERT V. BARRY, A.J.S.C.

HON. RUPERT BARRY

KINGS COUNTY CLERK  
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