

Damiani v WSNCH N., Inc.
2023 NY Slip Op 35241(U)
October 18, 2023
Supreme Court, Queens County
Docket Number: Index No. 712896/2022
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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CHRISTINA DAMIANI, as Administrator of the Estate
Of ROBERT DAMIANI, deceased,

Plaintiff,

-against-

WSNCH NORTH, INC. d/b/a ST. JOSEPH'S
HOSPITAL, CATHOLIC HEALTH SYSTEM OF
LONG ISLAND, INC., and HENDON GARDEN
CENTER, LLC d/b/a BEACH GARDENS REHAB
AND NURSING CENTER,

Defendants.
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Index No. 712896/2022

Part 6

Motion Date: March 29, 2023

Sequence No. 1



The following papers numbered EF-23 to EF-62 read on this motion by defendants WSNCH NORTH, INC. d/b/a ST. JOSEPH'S HOSPITAL and CATHOLIC HEALTH SYSTEM OF LONG ISLAND, INC. to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(7).

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....EF23-EF48
Affirmation in Opposition, Exhibits.....EF49-EF55
Reply Affirmation, Exhibits.....EF57-EF62

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This motion was reassigned to this Court on October 5, 2023 upon the retirement of the Honorable Peter O'Donoghue. Defendants WSNCH North, Inc. d/b/a St. Joseph's Hospital and Catholic Health System of Long Island, Inc.'s motion to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(7) is denied without prejudice, to be renewed upon the completion of discovery. Plaintiff commenced this action for malpractice, negligence and wrongful death sustained while plaintiff decedent was a patient at defendants' facility from February 5, 2021 through February 21, 2021. Plaintiff filed the Summons and Complaint on June 20, 2022, and issue was joined on October 7, 2022.

Defendants argue that plaintiff's Complaint should be dismissed, as they are entitled to immunity under the Emergency or Disaster Treatment Protection Act (EDTPA) and PREP Act. Defendants argue that plaintiff decedent was admitted to their hospital for the treatment of COVID-19 and therefore are immune from liability under EDTPA. They further argue that all of plaintiff decedent's medical care was inescapably impacted by defendants' response to the COVID-19 pandemic, and therefore defendants' decisions and actions were performed in support of the state's directives regarding the pandemic. Further, defendants argue that plaintiff's Complaint does not plead an exception to the immunity imposed under EDTPA, and merely included conclusory allegations without specific facts constituting willful misconduct or gross negligence. They argue that any claims regarding resource and staffing shortages were clearly a direct result of the pandemic and do not constitute gross misconduct. Defendants further argue that plaintiff's claims are barred under the federal PREP Act, which provides immunity to defendants for claims of loss related to administration or use of approved countermeasures. As plaintiff failed to demonstrate willful conduct by defendants in providing medical care to plaintiff decedent, defendants are entitled to dismissal under the PREP Act. Therefore, defendants argue that even assuming plaintiff's claims are true, dismissal is warranted under CPLR §3211(a)(7), as they meet the requirements for immunity in accordance with EDTPA and the PREP Act.

Plaintiff opposes defendants' motion, arguing that the medical malpractice and negligence claims are unrelated to the COVID-19 pandemic. Plaintiff's Complaint alleges defendants departed from good and accepted medical standards in rendering medical care to plaintiff decedent from February 5, 2021 through February 21, 2021, which resulted in pressure ulcers. Plaintiff argues that the medical records show that upon admission plaintiff decedent did not have any skin breakdown or pressure injuries. She argues that defendants failed to implement proper turning and positioning of plaintiff decedent, which is demonstrated through the medical records, and resulted in pressure ulcers as of February 17, 2021. Therefore, plaintiff argues that none of her medical malpractice or negligence claims involve COVID-19 but rather solely relate to the occurrence of pressure ulcers while plaintiff decedent was under defendants' care. Finally, plaintiff argues that this motion was made prematurely, as no discovery has occurred that would be relevant to the issues of immunity.

On a motion to dismiss pursuant to CPLR §3211(a)(7), the Court is required to afford the pleadings a liberal construction, accept the facts alleged in the complaint as true, provide plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Board of Mgrs. Of 136 St. Marks Place Condominium v. St. Marks Place Condominiums II, LLC*, 128 A.D.3d 877, 878 [2d Dept. 2015].) Furthermore,

whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss, rather, the Court merely examines the adequacy of the pleadings. (*EBC Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11 [2005]; *see also Cortlandt Street Recovery Corp. v. Bonderman*, 31 N.Y.3d 30 [2018].)

The PREP Act was activated on March 17, 2020 by the Secretary of Health and Human Services in response to the public health emergency caused by the COVID-19 virus. (*See* 42 U.S.C. §247d-6d[d].) In activating this statute, the Secretary further issued a declaration that activation was retroactive to February 4, 2020. Liability protections for pandemic countermeasures taken by certain “covered persons” in response to a declaration of a public health emergency by the Secretary are specifically provided for in the PREP Act, with the sole exception to immunity being for death or serious physical injury proximately caused by willful misconduct. (42 USC §247d-6d[d][1].) On March 23, 2020, then-Governor Cuomo issued Executive Order 210.10, which, among other items, granted physicians, licensed nurses and medical facilities immunity from civil liability for any injury or death occurring directly as a result of an action or omission by a medical professional in the course of providing medical services in support of the COVID-19 outbreak, unless said injury or death was caused by gross negligence.

On April 6, 2020, the New York legislature passed the Emergency or Disaster Treatment Protection Act (hereinafter referred to as “EDTPA”), which codified the above provision, and was in effect from March 7, 2020 through April 2021. (*Public Health Law* §3082). EDTPA specifically stated that health care providers would be immune from liability if three elements are met: (1) 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; (2) 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 (3) the health care facility or health care professional is arranging for or providing health care services in good faith. (*Public Health Law* §3082.)

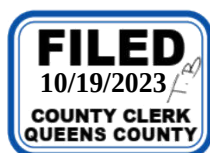
Defendants’ motion to dismiss pursuant to CPLR §3211(a)(7) is denied, as defendants failed to demonstrate that, when viewing the Complaint in the most favorable light to plaintiff, there is not a valid claim for medical malpractice, negligence and wrongful death with regard to defendants’ medical care and treatment provided to plaintiff decedent. It is noted that there is no appellate law that directly addresses this issue, and the trial court decisions have been determined in a fact-specific manner. Here, looking at the plain language of the Complaint, there is no reference to COVID-19 infection, and plaintiff strictly addresses allegations of malpractice with

regard to implementing a pressure care plan to prevent pressure ulcers, including turning and positioning of plaintiff decedent. Defendants present an interesting, and as-of-yet undetermined issue, that being whether EDTPA and the PREP Act absolve defendants of all claims for any medical care and treatment provided during the applicable time frame, because all medical care and treatment would have been impacted by the COVID-19 pandemic. Plaintiff presents an interesting counterargument, in that did the legislature intend for all medical providers to be immune from all liability for any medical care provided during the applicable timeframe, regardless of whether said medical care was demonstrably impacted by the COVID-19 pandemic. Ultimately, the issue at hand requires a determination of whether the medical care and treatment given to plaintiff decedent by defendants was impacted by COVID-19 pandemic guidelines, procedures, state rules and regulations, a fact-specific analysis that cannot be resolved based upon plaintiff's Complaint in a motion to dismiss under CPLR §3211 but may be determined in a summary judgment motion under CPLR §3212 once discovery is complete.

Accordingly, defendants' motion to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(7) is denied without prejudice, and may be renewed upon the completion of discovery.

This constitutes the decision and Order of the Court.

Dated: October 18, 2023





Hon. Tracy Catapano-Fox, J.S.C.