

Adler v Troy

2024 NY Slip Op 33106(U)

September 3, 2024

Supreme Court, New York County

Docket Number: Index No. 805376/2021

Judge: Kathy J. King

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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

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SETH ADLER,

Plaintiff,

- v -

KEVIN TROY, CAITLIN BURKE, ELIZABETH YOO, MOUNT
SINAI MEDICAL CENTER, SEAN LIU, LUIS R. DEPALO

Defendant.

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INDEX NO. 805376/2021
MOTION DATE 12/13/2023
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

The 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, seek an order, pursuant to CPLR 2221, granting Defendants leave to renew and reargue this Court’s Decision and Order dated October 4, 2023 (“Decision and Order”), and upon renewal and reargument, granting Defendants’ motion to dismiss the complaint with prejudice on the ground that Defendants are immune from suit and liability under New York’s Emergency or Disaster Treatment Protection Act (“EDTPA”), Public Health Law (“PHL”) §§ 3080-82.

Plaintiffs oppose the motion.

In its Decision and Order, the Court denied Defendants’ motion to dismiss the amended complaint with leave to renew upon completion of discovery as to Plaintiffs’ claim that Defendants negligently failed to segregate Plaintiff’s decedent, who was immunocompromised, from a patient who had the Covid-19 virus. Plaintiffs argued that the exception to immunity, as set forth in PHL former 3080(2) applied, based on allegations in the amended complaint that

Defendants' acts and/or omissions constituted gross negligence and/or reckless misconduct. This Court further held that "these generalized statements [in the Plaintiffs' amended complaint] 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])." The Court noted that through discovery the Plaintiffs "may be able to develop facts sufficient to demonstrate that the exception to immunity under Public Health Law former § 3080 (2) applies."

A motion for leave to renew "shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR § 2221(e)(2)). Here, in support of the motion, Defendants point to numerous cases subsequent to the Court's October 4, 2023 Decision and Order that have held that dismissal of Plaintiff's complaint at the pleading stage, prior to discovery, is warranted under the immunity exception under PHL § 3080(2), where there are no facts provided beyond those sounding in ordinary negligence. The Defendants cite, *Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475 (1st Dept 2024), which affirmed the lower court's dismissal prior to discovery under the EDTPA. In *Hasan*, the Plaintiffs had alleged that the Defendant failed to isolate elderly immunocompromised residents from Covid-19 patients, and "acted willfully... recklessly and with gross negligence..." in doing so. In dismissing the action, the lower court held that to survive dismissal under the EDTPA, the complaint must allege "facts that demonstrate or rise to the level of willful or wanton negligence or recklessness" (*Hassan v Terrace Acquisitions, II, LLC*, 79 Misc 3d 1021, 1023 [Sup. Ct., Bronx County, May 18, 2023]).

Similarly, in *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 110-111 [3rd Dept 2023], the Third Department reversed the lower court's determination and dismissed the case,

holding that Plaintiff's cause of action for gross negligence consisted of "bare legal conclusions with no factual specificity" which was insufficient to withstand a motion to dismiss. Likewise, in *Martinez v NYC Health and Hospitals Corporation*, 223 AD3d 731 (2d Dept 2024) and *Mera v New York City Health and Hosps. Corp.*, 220 AD3d 668 (2d Dept 2023), the Second Department reversed the holding of the lower court and dismissed the complaint because Plaintiff failed to allege that the Defendants' acts or omissions constituted, inter alia, gross negligence or recklessness. (*see also Barbaro v Eger Health Care and Rehabilitation Center*, Index No. 150689/2022 [Supt. Ct., Richmond County, July 11, 2024]; *Alexander v. Grand South Point, LLC*, Index No. 612423/2022 [Sup. Ct., Nassau County, March 1, 2024]; *Kalogiannis v New York Center for Rehab. & Nursing*, Index No. 727013/2022 [Sup. Ct., Queens County, October 5, 2023]).

Applying the case law to the facts in this case, the Amended Complaint's boilerplate allegations of "grossly negligent" "willful" and "reckless" conduct in connection with Defendants' alleged failure to: establish an effective infection control program for the prevention of communicable diseases; protect immunocompromised patients and keep them segregated from other patients; and promulgate and enforce infectious disease protocols, leading to the death of Plaintiff's decedent from COVID-19, do not rise to the level of gross negligence or willful misconduct under the EDTPA.

Accordingly, it is hereby

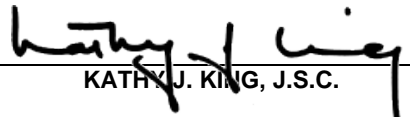
ORDERED, that the branch of Defendants' motion seeking leave to renew this Court's Decision and Order entered on October 4, 2023, pursuant to CPLR § 2221 (e)(2) is granted; and it is further

ORDERED, that upon renewal the Defendants' motion to dismiss the Plaintiffs' complaint with prejudice is granted; and it is further

ORDERED, that the branch of Defendants' motion seeking reargument, pursuant to CPLR § 2221(d)(2), is denied as moot.

This constitutes the Decision and Order of the Court.

9/3/2024
DATE


KATHY J. KING, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: