At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18 day of December, 2024.

P R E S E N T:

HON. ELLEN M. SPODEK,
Justice.

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DENISE ERIKSON, as the Executor of the Estate of GERALD CAPRIOTTI,

Plaintiff,

- against -

VINSENT ROBINSON, KENOL JOSECITE, and CARELINK, INC.,

Defendants.

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DECISION AND ORDER

Index No. 507808/22

Mot. Seq. Nos. 2-3

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Cross Motion, Affirmations (Affidavits), and Exhibits Annexed	32-49; 52-63
Affirmations (Affidavits) in Opposition and Exhibits Annexed	68-69;
Reply Affirmations	70-75; 77-84

KINGS COUNTY CLERK FILED 2024 DEC 20 A 10:00

In this action to recover damages for negligence and wrongful death, defendants Vinsent Robinson ("Robinson"), Kenol Josecite ("KJ"), and Carelink, Inc. ("Carelink" and, collectively with Robinson and KJ, "defendants") jointly move, pre-answer, for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the Amended Verified Complaint, dated May 20, 2022 ("Amended Complaint"), of plaintiff Denise Erikson as the executor of the estate of her late father, Gerald Capriotti ("plaintiff"), on the grounds that defendants are immune from suit and liability pursuant to: (1) New York's Emergency or Disaster Treatment Protection Act, Public Health Law ("PHL") former article 30-D, §§ 3080-3082 (repealed by L 2021, ch 96, § 1) (PHL former §§ 3080-3082) ("EDTPA"); and/or (2) the

federal Public Readiness and Emergency Preparedness Act, 42 USC § 247d-6d and 42 USC § 247d-6e ("PREP Act") (Seq. No. 2). Defendants' motion is supported by the affirmation of Ena Bailey, the president and principal owner of Carelink, dated March 14, 2022 (the "Bailey Affirmation").

Plaintiff opposes and cross-moves for leave, pursuant to CPLR 3025 (b), to serve her proposed Second Amended Verified Complaint, dated July 25, 2024 ("Second Amended Complaint") (Seq. No. 3). Plaintiff's opposition and cross-motion are supported by her own affirmation, dated July 23, 2024 ("Plaintiff's Affirmation"), the expert affirmation of Jacqueline Clancy, R.N., dated July 24, 2024 (the "Nurse Clancy's Affirmation), and the physician's expert affirmation of Kenneth Ackerman, M.D., dated July 23, 2024 (the "Physician's Affirmation").

Summary

From March 30, 2020 through April 20, 2020, plaintiff's decedent Gerald Caprioti (the "patient"), age 85, was receiving live-in home health care from two licensed home health aides then employed by Carelink: defendant KJ from April 7, 2020 through April 10, 2020, and nonparty Sharlene Baker ("Baker") from March 30, 2020 through April 20, 2020. During the relevant period, neither KJ nor Baker wore a face mask when working with the patient.

In the course of KJ's work shifts from April 7th through April 10th, plaintiff (then visiting her father) observed KJ as being "visibly ill with symptoms: he was tired, did not look well[;], at one point[, he] was resting his head down on the kitchen table, and he had

a cough later in the week."[1] One week later on Friday, April 17, 2020, plaintiff learned that KJ had been hospitalized. The same day, plaintiff's husband had both the patient and Baker tested for COVID-19 at an urgent-care clinic. On Monday, April 20, 2020, the test results for both the patient and Baker were reported as positive for COVID-19. Later in the day, the patient was hospitalized for COVID-19. Five days later on April 25th, the patient passed away at a hospice from cardiac arrest as a result of pneumonia from a COVID-19 infection.

Plaintiff's opposition to defendants' motion to dismiss (and in support of her cross-motion for leave to amend) are extensive and detailed. Plaintiff avers that she observed that "Carelink . . . did not provide either [KJ or Baker] . . . adequate and proper personal protection equipment so as to protect the integrity of [the patient's] health."[2] Plaintiff further avers that "when [she] spoke to Carelink by telephone, there was never any instructions given to [her] about how Carelink was or was not providing its health aides with self-monitoring protocols, nor whether Carelink was in touch with the health aides each day to determine whether they had any symptoms of illness."[3] Lastly, the Physician's Affirmation opines that "[t]he cause of [the patient's] death and the pain and suffering he experienced in the days before his death . . . [were] directly and proximately caused by [his] exposure to the infected home workers, [KJ] and . . . Baker."[4]

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[1] Plaintiff's Affirmation, ¶ 4.

[2] Plaintiff's Affirmation, ¶ 9.

[3] Plaintiff's Affirmation, ¶ 9.

[4] Physician's Affirmation, ¶ 6.

Defendants' Pre-Answer Motion to Dismiss (Seq. No. 2)

The EDTPA

At the outset of the COVID-19 pandemic, the New York State Legislature enacted the EDTPA with the stated purpose of "promot[ing] 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."[5] Several provisions of the since-repealed EDTPA are relevant here.

First, the EDTPA immunity applied to (among others) a "health care facility" which was defined as "a hospital, nursing home, or other facility licensed or authorized to provide health care services for any individual under article twenty-eight of this chapter ['Hospitals'], article sixteen ["Regulation and Quality Control of Services for Individuals with Developmental Disabilities"] and article thirty[-]one ["Regulation and Quality Control of Services for the Mentally Disabled"] of the mental hygiene law or under a COVID-19 emergency rule."[6] Here, Carelink was (and still is) licensed or authorized to provide home health aide, personal care, and nursing services under PHL article 36 ("Home Care Services"), rather than under PHL article 28.[7] Thus, Carelink is outside the scope of (and is not covered by) the EDTPA immunity.

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[5] PHL former § 3080. The text of the relevant version of the since-repealed EDTPA is reproduced in NYSCEF Doc No. 58.

[6] PHL former § 3081 (3).

[7] Carelink's Home Care Service Agency License, effective January 3, 2006, expressly states that Carelink's license (footnote continued)

Second, the EDTPA immunity separately applied to (among others) a "health care professional" who was defined to include "a home care services worker as defined in [PHL § 3613]."[8] In turn, PHL § 3613 (1) (b), by incorporating PHL § 3602 (4), defined a "home care services worker" as "any person engaged in . . . providing home health aide services," which consisted of "simple health care tasks, personal hygiene services, housekeeping tasks essential to the patient's health and other related supportive services."[9] Here, KJ and Baker, each a "home care services worker," fit within the definition of a "health care professional" under PHL former § 3081 (4) (d). Although KJ and Baker are each a "health care professional" under PHL former § 3081 (4) (d), their status as such has nothing to do with Carelink which is a "health care facility." A "health care professional" and a "health care facility" are two separate, non-interchangeable, defined terms. *Accord Patrolmen's Benev. Assn of City of New York v City of New York*, 41 NY2d 205, 208-209 (1976) ("where[,] as here[,] the statute describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded") (internal quotation marks omitted).

This finding does not end the inquiry, however.

Under PHL former § 3082 (2), the statutory immunity would not apply to a "health care professional" "if the harm or damages were caused by [his or her] . . . gross negligence

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was issued under PHL article 36 ("Home Care Services"), rather than under PHL article 28 ("Hospitals").

[8] PHL former § 3081 (4) (d).

[9] KJ's and Baker's respective qualifications as Home Health Aides (effective as of March 5, 2015 for KJ and as of February 24, 2016 for Baker) are included in NYSCEF Doc Nos. 46 and 47.

[or] reckless misconduct" (with certain exceptions not relevant here). "To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others." *Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 (2d Dept 2011) (internal quotation marks and alterations omitted). Put slightly differently, "a party is grossly negligent when it fails to exercise even slight care or slight diligence." *Id.* (internal quotation marks and ellipsis omitted). "Generally, the question of gross negligence is a matter to be determined by the trier of fact." *Bennett v State Farm Fire and Cas. Co.*, 161 AD3d 926, 929 (2d Dept 2018).

Here, defendants' proffered evidence in the form of the Bailey Affirmation and Carelink's internal documents has failed to establish conclusively that the three general requirements for immunity (as set forth in PHL former § 3082 [1]) were satisfied. PHL former § 3082 (1) required that: "(a) the health care facility or health care professional [was] 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 occur[red] in the course of arranging for or providing health care services and the treatment of the individual [was] 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 [was] arranging for or providing health care services in good faith." *See Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 619 (2d Dept 2024); *see also Holder v Jacob*, 231 AD3d 78, 87-88 (1st Dept 2024). Further, the Bailey Affirmation is

insufficient (absent an affirmation from Robinson himself) to establish that he played no role in Carelink's business during the pandemic.

Conversely, plaintiff's averments in her affirmation in opposition and reinforced by the opinions of her experts, are sufficient to withstand the initial branch of defendants' motion to dismiss as predicated on the EDTPA. *See Murray v Staten Is. Care Ctr.*, 82 Misc 3d 1220(A), 2024 NY Slip Op 50347(U), *3-4 (Sup Ct, Richmond County 2024); *Brown v North Manhattan Nursing Home Inc.*, 2024 WL 2244769, *2 (Sup Ct, NY County 2024); *Michel v Prospect Park Operating, LLC*, 2024 NY Slip Op 31460(U), *4 (Sup Ct, Kings County 2024, Montelione, J.); *Harari v Shorefront Operating LLC*, 2024 NY Slip Op 31080(U), *3 (Sup Ct, Kings County 2024, Capell, J.); *Dinunzio v Cobble Hill Health Ctr., Inc.*, 2023 NY Slip Op 32787(U), *4 (Sup Ct, Kings County 2023, Montelione, J); *Messina v Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 78 Misc 3d 537, 543 (Sup Ct, Richmond County 2023).[10]

The PREP Act

"The PREP Act provides broad immunity '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

[10] *Cf. Martinez v NYC Health & Hosps. Corp.*, 223 AD3d 731, 732-733 (2d Dept 2024) ("As the complaint makes no allegations that the defendants' acts or omissions constituted willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm, none of the exceptions to the immunity provisions of EDTPA apply."); *Mera v New York City Health & Hosps. Corp.*, 220 AD3d 668, 670 (2d Dept 2023) (identical holding). Defendants' reliance on Justice Aaron D. Maslow's Decision and Order in *Bologna v Carmel Richmond Nursing Home, Inc.*, 82 Misc 3d 1235(A), 2024 NY Slip Op 50477(U) (Sup Ct, Kings County 2024) (annexed as an exhibit to defendants' moving papers), is unavailing. In *Bologna*, Justice Maslow thoroughly reviewed the reasons why the repeal of the EDTPA was not retroactive. In the course of his review, Justice Maslow footnoted that the plaintiff's allegations of gross negligence in that case were conclusory and insufficient. *See Bologna*, 2024 NY Slip Op 50477(U), * 11, n 2. Justice Maslow's footnote in *Bologna* hardly constitutes a clear (and precedential) holding that bars the doors to plaintiff's claims here.

from the administration to or the use by an individual of a covered countermeasure' during a public-health emergency." *Solomon v St. Joseph Hosp.*, 62 F4th 54, 58 (2d Cir 2023) (quoting 42 USC § 247d-6d[a] [1]). "The PREP Act gives the Secretary of the Department of Health and Human Services ('HHS Secretary') authority to publish a declaration that (1) announces a disease or health condition is a public emergency and (2) defines appropriate covered countermeasures." *Id.* (quoting 32 USC § 247d-6d[b][1]). "Effective February 4, 2020, the HHS Secretary declared 'COVID-19 . . . a public health emergency' and defined 'covered countermeasures' as any 'antiviral, drug, biologic, diagnostic, device, or vaccine used to treat, diagnose, cure, prevent, or mitigate COVID-19.'" *Id.* (quoting Declaration Under the PREP Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15198-01 [March 17, 2020]).

Recently, the Second Judicial Department held that the PREP Act does not confer immunity on a health care provider (nor deprive the state court of subject-matter jurisdiction) where the use of a "covered countermeasure" (a ventilator in that case) was incidental to a patient's treatment. *See Kluska v Montefiore St. Luke's Cornwall*, 227 AD3d 690, 692 (2d Dept 2024). In particular, the Second Judicial Department held:

> "The defendant's evidentiary submissions, which included the injured plaintiff's medical records, failed to establish that there is no significant dispute as to whether the injured plaintiff's pressure ulcers arose from the use of a ventilator, which the parties do not dispute is an approved countermeasure under the PREP Act. Accordingly, the Supreme Court properly determined that the defendant was not entitled to dismissal of the complaint pursuant to CPLR 3211 (a) (7)."

Kluska, 227 AD3d at 692.

Here, defendants have made absolutely no showing that plaintiff's claims are grounded (in whole or in part) on the use of a ventilator, antibiotics, or any other "covered countermeasure." Accordingly, the PREP Act does not apply to bar any of plaintiff's claims. *See Kluska*, 227 AD3d at 691-692; *Highsmith v Woodhull Med. Ctr.*, 83 Misc 3d 1203(A), 2024 NY Slip Op 50646(U), *5 (Sup Ct, Kings County 2024, Mallafre Melendez, J.); *Estate of Pierro v Carmel Richmond Healthcare & Rehabilitation Ctr.*, 81 Misc 3d 1085, 1096 (Sup Ct, Richmond County 2023).

Plaintiff's Cross-Motion for Leave to Amend (Seq. No. 3)

"Applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment . . . is palpably insufficient or patently devoid of merit." *TD Bank, N.A. v Keenan*, 221 AD3d 1040, 1041 (2d Dept 2023). "The burden of demonstrating . . . that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion." *Wells Fargo Bank, N.A. v Spatafore*, 183 AD3d 853, 853 (2d Dept 2020). "Whether to grant such leave is within the motion court's discretion, the exercise of which will not be lightly disturbed." *Pergament v Roach*, 41 AD3d 569, 572 (2d Dept 2007).

Here, the proposed Second Amended Complaint which expands on plaintiff's extant allegations of defendants' gross negligence and reckless misconduct is not palpably insufficient or palpably devoid of merit. *See Choudhari v Choudhari*, 220 AD3d 835, 838 (2d Dept 2023); *Toiny, LLC v Rahim*, 214 AD3d 1023, 1024 (2d Dept 2023). Moreover,

"[n]o evidentiary showing of merit is required under CPLR 3025 (b)." *Lucido v Mancuso*, 49 AD3d 220, 229 (2d Dept 2008), *appeals withdrawn* 12 NY3d 804 & 813 (2009).

The Court has considered the parties' remaining contentions and found them either academic or without merit in light of its determinations. All relief not expressly granted is denied.

Conclusion

Based on the foregoing, it is

ORDERED that in Seq. No. 2, defendants' pre-answer motion for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the Amended Complaint is denied in its entirety; and it is further

ORDERED that in Seq. No. 3, plaintiff's cross-motion for leave, pursuant to CPLR 3025 (b), to serve and file her proposed Second Amended Complaint is granted, and such complaint (in the form of Exhibit 7 to plaintiff's cross-motion at NYSCEF Doc No. 60) is hereby deemed served on all defendants; and it is further

ORDERED that, pursuant to CPLR 3211 (f), defendants' time to electronically answer the Second Amended Complaint is extended until twenty days after electronic service of this Decision and Order with notice of entry by plaintiff's counsel on defendants' counsel; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on defendants' counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

ENTER,

L.S.C.
HON. ELLEN M. SPODEK

KINGS COUNTY CLERK
FILED
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