

Estate of Russell v St Johnland Nursing Ctr. Inc.

2024 NY Slip Op 34837(U)

July 10, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 204711/2022

Judge: Maureen T. Liccione

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This opinion is uncorrected and not selected for official publication.

Short Form Order

Index No. 204711/2022

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY

P R E S E N T:

Hon. Maureen T. Liccione

Justice Supreme Court

-----x
THE ESTATE OF ANNA RUSSELL, by her
Administrator, ANGELA RUSSELL,

Plaintiffs,

-against-

ST JOHNLAND NURSING CENTER INC., ABC
CORPORATION, ABC PARTNERSHIP,

Defendants.
-----x

Mot. Seq. No. 001 – MG/CaseDisp
Orig. Return Date: 01/19/2024
Mot. Submit Date: 04/17/2024

PLAINTIFF’S ATTORNEY

NAPOLI SHKOLNIK, PLLC
400 Broadhollow Road, Suite 305
Melville, NY 11747

DEFENDANT’S ATTORNEY

HALL BOOTH SMITH, PC
366 Madison Avenue, 5th Fl
New York, NY 10017

Upon the reading and consideration of NYSCEF document numbers 1- it is hereby:

ORDERED that Defendants’ motion to dismiss (motion sequence 001) is granted in all respects; and it is further

ORDERED and ADJUDGED that the complaint is dismissed.

This is an action by Angela Russell, the administrator of the Estate of Anna Russell, (Plaintiff) against St. Johnland Nursing Center Inc. and two other “fictitious[ly] nam[ed]” entities (Defendant) arising from the Covid-19 related death of the decedent, Anna Russell (Decedent) on April 8, 2020 while she was a resident and patient at the Defendant facility. The complaint alleges causes of action for violations of New York State Public Health Law (PHL) §§ 2801-d and 2803-c, negligence, conscious pain and suffering, wrongful death, gross negligence, medical malpractice, and nursing home malpractice. Defendant has made a pre answer motion to dismiss the complaint pursuant to CPLR 3211 (a) (2) for lack of subject matter jurisdiction and CPLR (a) (7) for failure to state a cause of action. Plaintiff has opposed the motion.

Defendant’s motion argues that it is immune from liability: pursuant to the federal Public Readiness and Emergency Preparedness Act (“PREP Act”), 42 U.S.C. §§ 247d-6d and 247d-6e; the New York Emergency or Disaster Treatment Protection Act (“EDTPA”), PHL §§ 3080-3082;

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New York Executive Order 202.10; that Plaintiff's allegations of willful conduct and gross negligence, which are exceptions to the immunity provisions of the EDTPA and Executive Order 202.10, are insufficient as a matter of law to survive dismissal; and that Plaintiff has failed to state a cause of action for negligence per se.

In determining a motion to dismiss pursuant to CPLR 3211(a) (7) the pleadings are afforded a liberal construction, the facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83 [1994]; *106 N. Broadway, LLC v Lawrence*, 189 AD3d 733 [2d Dept 2020]. "A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7)" (*Cordell Marble Falls, LLC v Kelly*, 191 AD3d 760, 761–762 [2d Dept 2021]; *see* CPLR 3211[c]). "If the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one'" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]) "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 [2017]).

Here, Defendant has submitted the affidavit of Vivian Johnson, RN (Johnson Affidavit), as well as the Decedent's medical record for the period of time prior to her passing, from March 26, 2020 until April 8, 2020. Contrary to Plaintiff's contentions, this evidence is acceptable in support of this motion to dismiss (*see Mera v New York City Health & Hosps. Corp.*, 220 AD3d 668 [2d Dept 2023]; *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104 [3d Dept 2023]).

Defendant's Immunity under the EDTPA

The EDTPA became effective on March 7, 2020 and conferred immunity for health care services rendered in response to the Covid 19 pandemic, with limited exceptions. The EDTPA was eventually repealed in April 2021. It is well established that the repeal of the EDTPA did not apply retroactively (*Damon v Clove Lakes Healthcare & Rehab. Ctr., Inc.*, No. 150031/22, 2024 WL 2837452, at *2 [2d Dept, June 5, 2024]; *Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475 [1st Dept 2024]; *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104 [3d Dept 2023]; *Ruth v Elderwood at Amherst*, 209 AD3d 1281 [4th Dept 2022]; *see also Mera v New York City Health & Hosps. Corp.*).

EDTPA initially provided that “any 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 as long as three conditions were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; the alleged act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives and; the services were arranged or provided in good faith” (*Ruth*, 209 AD3d 1281, 1282 [4th Dept 2022], quoting PHL former § 3082 [1]). “The health care services covered by the immunity provision included: those related to the diagnosis, prevention, or treatment of COVID-19; the assessment or care of an individual with a confirmed or suspected case of COVID-19; and the care of any other individual who presented at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration” (*id.* at 1282-1283, citing PHL former § 3081 [5]).

Here, the Defendant’s motion papers establish that the conditions for application of the immunity provisions were met in accordance with the requirements set forth in the *Ruth*, *Whitehead and Mera* Appellate Division guidance (*Estate of Alechko v Sprain Brook Manor, Rehab, LLC*, 81 Misc3d 1242(A) [Sup Ct, Westchester County 2024]). Defendant submitted excerpts of Decedent’s medical records, Defendant's COVID-19 protocols for prevention, monitoring and treatment, related government guidance and protocols, as well as the Johnson Affidavit. In particular, the Johnson Affidavit establishes that the care and treatment afforded the Decedent was “provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives; and the services were arranged or provided in good faith” (*id.*, quoting *Ruth*, 209 AD3d at 1282; cf *Damon*, 2024 WL 2837452).

While “the immunity conferred by EDTPA did not apply ‘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’” (*Ruth*, citing former § 3082 [2]), the Johnson Affidavit and the medical records submitted by Defendant in support of the motion to dismiss the complaint establish the level of care provided the Decedent, in contrast to the conclusory allegations contained in the

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complaint (*Whitehead*, 222 AD3d 104). Defendant took appropriate measure to prevent the transmission of Covid-19, to comply with all government rules and guidance and rendered appropriate treatment to the Decedent, all of which establishes the Plaintiff does not have a viable cause of action for gross negligence or reckless misconduct (*id.*)

In view of the foregoing, it is unnecessary to address Plaintiff's cause of action alleging violations of the federal PREP Act. The parties' remaining contentions are unnecessary to this determination.

The foregoing constitutes the judgment, decision and order of the Court.

ENTER

DATE: July 10, 2024
Riverhead, NY


HON. MAUREEN T. LICCIONE, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION