

**Thomas v Concourse Rehabilitation & Nursing Ctr.,
Inc.**

2024 NY Slip Op 34984(U)

July 15, 2024

Supreme Court, Bronx County

Docket Number: Index No. 814415/2022E

Judge: Alicia Gerez

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19A

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LISA THOMAS, as Administratrix of the Estate of
FRANCIS SPIGNER, Deceased,

Index No. 814415/2022E

Plaintiff,

Hon. ALICIA GEREZ,

- against -

Acting Justice of the Supreme Court

CONCOURSE REHABILITATION AND NURSING
CENTER, INC.

Defendant.

-----X
The following papers numbered 8 to 51 were read on these motions (Seq. No. 001) for TO DISMISS noticed on April 3, 2024 duly submitted as Nos. _____ on the Motion Calendar of

Sequence No.	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	8-29
Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	31-49
Reply Affidavit	50-51

The instant motion is decided in accordance with the annexed memorandum decision.

Dated: 7/15/24

Hon. Alicia Gerez
ALICIA GEREZ, A.J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
LISA THOMAS, as Administratrix of the Estate of
FRANCIS SPIGNER, Deceased,

Plaintiff,

DECISION and ORDER
Index No. 814415/2022E

- against -

CONCOURSE REHABILITATION AND NURSING
CENTER, INC.,

Defendant.

-----X
HON. ALICIA GEREZ

Upon the foregoing papers, defendant CONCOURSE REHABILITATION AND NURSING CENTER, INC., (“Concourse”) moves to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7) asserting that Concourse is immune from liability under New York’s Emergency or Disaster Treatment Protection Act (“EDTPA”), pursuant to N.Y. Pub. Health Law § 3082(1) and under federal Public Readiness and Emergency Preparedness Act (“Prep Act”), 42 U.S.C. § 247d-6d. After review of the papers, together with the opposition submitted thereto; review of the Court file; and upon due deliberation, the motion is decided as follows.

Plaintiff’s decedent, FRANCIS SPIGNER hereinafter referred to as “plaintiff,” seeks to recover for damages arising from the defendant facility’s alleged mismanagement of the COVID-19 pandemic. Plaintiff alleges the defendant facility failed to implement a proper infection and control policy, causing the plaintiff to contract COVID-19 in April of 2020, resulting in injury and death after her discharge from Concourse on March 15, 2021. Plaintiff commenced this action by the filing of the summons and complaint on September 28, 2022. Defendant maintains that the allegations contained in the complaint trigger immunity under EDTPA and the federal Prep Act and require dismissal of the action.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action

cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

On April 6, 2020, New York State passed the EDTPA which was made retroactive to March 7, 2020, and provided immunity to health care workers and facilities from liability that may result from the treatment of individuals with COVID-19. EDTPA was codified in the PHL Article 30-D at §§ 3080-3082.

PHL § 3082 provided that:

1. Notwithstanding any law to the contrary... 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**, if:

- (a) 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;
- (b) 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
- (c) the health care facility or health care professional is arranging for or providing health care services in good faith

(emphasis added).

The immunity conferred by the EDTPA does 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 worker or facility.

In opposition, plaintiff argues that the defendant was willful, intentional, reckless, and grossly negligent in their actions and omissions during plaintiff’s admission through on or about April 9, 2020. Plaintiff also maintains that the EDTPA was repealed on April 6, 2021, and this repeal was retroactive and therefore cannot provide any immunity to the defendant.

Recently, the First Department found that this repeal was not retroactive, but prospective, and thus this Court follows said precedent (*Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475 [1st Dept

2024)). Here, plaintiff was a patient at the defendant nursing home facility at the very height of the COVID-19 pandemic in New York and are clearly covered by PHL § 3082.

Defendant argues that plaintiff's confirmed case of COVID-19 demonstrates that her care was impacted by COVID-19 measures, and they are therefore entitled to immunity under the statute. Defendant provided the affidavit of Jean Claude Laborde, a registered nurse practitioner, and also the Director of Nursing at Concourse since January 2019, who worked personally with plaintiff during the proscribed period. Prior to being the Director of Nursing, Nurse Laborde was a nurse practitioner with Concourse starting in 2008. Nurse Laborde describes how the plaintiff's care was impacted by Concourse's response to the COVID-19 outbreak and was in line with directives received from various state and federal agencies. In the affidavit Nurse Laborde explains that Concourse had a Prevention Policy which identified specific procedures to be implemented to prevent the spread of COVID-19 within the facility such as increased screening for staff and visitors. The prevention policy described proper PPE use, hygiene, quarantine procedures, screening and triage, and so on. Additionally, Nurse Laborde also describes the testing policy utilized at Concourse which comported with New York State Department of Health guidelines or the Centers for Medicare and Medicaid Services, whichever was stricter. Importantly, Nurse Laborde noted that it is evident from a glance at the plaintiff's medical chart that decisions regarding her care were impacted by the pandemic. For example, Nurse Laborde cites to an entry in plaintiff's chart from Dr. Jonathan Chang on May 4, 2020, which states "evaluation for presence of non-essential medications in light of current pandemic situation and the need for reprioritization of efforts."

Considering the foregoing, the Court finds that defendant has met its burden and is entitled to the immunity from liability conferred by the EDPTA. Defendant has proffered competent evidence including the plaintiff's medical records to show how plaintiff's care was impacted by the defendant facility's response to the COVID-19 pandemic and further established that it acted in good faith.

Plaintiff argues that they have met the exception to immunity under the EDPTA when defendant was grossly negligent in their care of plaintiff. To properly state a cause of action for gross negligence, the complaint must allege facts that demonstrate and/or rise to the level of willful or wanton negligence or recklessness (*Rosenberg v Mallilo*, 39 AD3d 335 [1st Dept 2007]; *Mancuso v Rubin*, 52 AD3d 580 [2nd Dept 2008]). Despite submission of a redacted expert report, plaintiff's allegations of gross negligence fail to rise to the level necessary for a finding. Conclusory allegations consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009], see *JDI Display Am., Inc. v Jaco Electronics, Inc.*, 188 AD3d 844, 845 [2d Dept 2020]). While plaintiff's alleged facts may demonstrate negligence, they do not rise to the level of willful conduct that evidences a high degree of moral culpability (*Rey v Park*, 262 AD2d 624 [2nd Dept 1999]). Plaintiff failed to plead any harmful conduct that constituted gross negligence. Furthermore, plaintiff did not include any affidavits from individuals with personal knowledge that would demonstrate a claim for gross negligence despite the complaint's defects (*Leon v. Martinez*, 84 NY2d 83, 88 [1994]). While plaintiff does point to issues with the defendant facility prior to the pandemic, this does not obviate or disqualify from immunity under the EDPTA when the alleged injury occurred during the period protected by the statute.

Accordingly, it is hereby


ORDERED that defendant CONCOURSE REHABILITATION AND NURSING CENTER, INC.'s motion to dismiss the complaint is GRANTED; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 7/15/24

ENTER


Hon. Alicia Gerez, A.J.S.C.