

**Silva-Rios v  
New York Presbyt. Columbia Med. Ctr.**

2024 NY Slip Op 35002(U)

July 8, 2024

Supreme Court, Bronx County

Docket Number: Index No. 806332/2021E

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

-----X  
YADIRA SILVA-RIOS,

Plaintiff,

- against -

NEW YORK PRESBYTERIAN COLUMBIA  
MEDICAL CENTER,

Defendant(s).

-----X

Index №. 806332/2021E

Hon. ALICIA GEREZ,  
Acting Justice of the Supreme Court

The following papers numbered 32 to 70 were read on these motions (**Seq. No. 002**) for TO DISMISS noticed on **March 1, 2024** duly submitted as **Nos.** on the Motion Calendar of

Sequence No.	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	32-56
Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	59-69
Reply Affidavit	70

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

Dated: 7/8/24

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

- |                              |  |  |
|------------------------------|--|--|
| 1. CHECK ONE.....            | <input type="checkbox"/> CASE DISPOSED IN ITS ENTIRETY | <input type="checkbox"/> CASE STILL ACTIVE |
| 2. MOTION IS.....            | <input type="checkbox"/> GRANTED                       | <input type="checkbox"/> DENIED            |
| 3. CHECK IF APPROPRIATE..... | <input type="checkbox"/> GRANTED IN PART               | <input type="checkbox"/> OTHER             |
|                              | <input type="checkbox"/> SETTLE ORDER                  | <input type="checkbox"/> SUBMIT ORDER      |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
YADIRA SILVA-RIOS,

Plaintiff,

DECISION and ORDER  
Index No. 806332/2021E

- against -

NEW YORK PRESBYTERIAN COLUMBIA  
MEDICAL CENTER,

Defendant(s).

-----X  
**HON. ALICIA GEREZ**

Upon the foregoing papers, defendant THE NEW YORK AND PRESBYTERIAN HOSPITAL s/h/a NEW YORK PRESBYTERIAN COLUMBIA MEDICAL CENTER (“NYPH”) makes the instant motion to dismiss the complaint pursuant to CPLR 3211(a)(2) & (7) contending NYPH 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, then 47 years old, presented to defendant NYPH on March 25, 2020, with complaints of left-sided chest pain, chills, and cough. Plaintiff tested positive for COVID-19. In the emergency room plaintiff had abnormal lab results prompting a transfer to the Cardiac Care Unit at NYPH’s Columbia Campus the following day. Medical records document that plaintiff had acute worsening liver and renal dysfunction and cardiogenic shock. Plaintiff also suffered COVID-19 induced hypoxic respiratory failure and multiorgan failure. As a result, plaintiff was sedated and put on mechanical ventilation among other precautions. To prevent skin breakdown, daily assessments of skin integrity were ordered along with turning and positioning of plaintiff every two hours.

A deep tissue injury was first documented on March 30, 2020, on both of plaintiff’s heels. Plaintiff continued to suffer from a compromised state, including but not limited to a spontaneous

adrenal bleed, cardiogenic shock, and was extubated and reintubated many times with difficulty due to plaintiff's condition.

A sacro-coccygeal pressure ulcer was documented on April 15, 2020. Plaintiff's prognosis continued to decline and her husband agreed to a DNR. By April 28, 2020, plaintiff continued to be intubated, was in a coma, tachycardic with abnormal liver function tests. The following day Nurse Lisa Cullinan documented more deep tissue injuries without open ulcers.

By May 1, 2020, plaintiff had a tracheostomy from COVID-19 induced respiratory failure. Plaintiff's sacral deep tissue injury continued to worsen. On May 28, 2020, plaintiff's DNR was rescinded by her family. By June 18, 2020, plaintiff had unstageable denuded skin on the perineum and bilateral buttocks.

On July 1, 2020, flowsheets indicate wounds at the perineum, right buttocks, and bilateral heels were heeled. Plaintiff was progressing and able to speak with family by July 2, 2020. Plaintiff was then moved to a step down unit on July 13, 2020 and some of her documented pressure injuries continued to heal.

Plaintiff was discharged to Brooklyn Methodist Hospital on July 24, 2020, where she continued to heal. A discharge from Brooklyn Methodist Hospital occurred on September 4, 2020.

Plaintiff commenced this action on May 7, 2021, with the filing of the summons and complaint alleging a failure to prevent and properly treat the development of pressure ulcers from March 26, 2020, through July 24, 2020, during the plaintiff's admission to NYPH. 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 maintains that the EDTPA was repealed on April 6, 2021, and this repeal was retroactive and therefore cannot provide any immunity to the defendant. They also allege that any immunity for health care services shall not apply when immunity for skin care was not specifically provided. Most recently, in the *Hasan* matter, the First Department found that this repeal was not retroactive (*Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475 [1st Dept 2024]).

Here, plaintiff was a patient at the defendant facility at the very height of the COVID-19 pandemic in New York and are clearly covered by PHL § 3082. Defendant has shown that the care rendered to plaintiff was impacted by the pandemic and they are therefore entitled to immunity under the statute.

Defendant provided the affidavit of Lisa Cullinan, R.N., WOCN, a nurse who worked personally with plaintiff during the relevant period at the defendant facility. Nurse Cullinan describes how the plaintiff's care was impacted by NYPH's response to the COVID-19 outbreak and the influx of acutely ill patients coupled with staffing shortages, supply shortages, and resources being reallocated. Nurse Cullinan avers that the pandemic "directly impacted every aspect of [plaintiff's] care..."

Defendant also provides the affirmation of Gisele P. Wolf-Klein, M.D., F.A.C.P, ("Dr. Wolf-Klein"), a board-certified internal and geriatric medicine specialist. Dr. Wolf-Klein relies on her personal experience in treating patients in the hospital setting during the COVID-19 pandemic in making her conclusion that plaintiff's hospitalization and treatment was entirely a result of a COVID-19 infection. The expert also concludes that plaintiff's injuries (pressure ulcers) "arose secondary to critical illness that required intubation and continuous mechanical ventilation due to plaintiff's respiratory distress that was a consequence of her COVID-19 infection..." The doctor further affirms that in all care provided to the plaintiff, no staff member of NYPH was grossly negligent or reckless.

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 as to 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.

As for plaintiff's gross negligence claims, the complaint alleges in broad language that, *inter alia*, the defendant herein was reckless, however the bill of particulars state that plaintiff is not claiming gross negligence or reckless conduct on the part of the defendant.

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]). 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]). 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]).

Accordingly, it is hereby

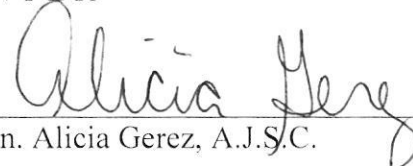
ORDERED that defendant NEW YORK PRESBYTERIAN COLUMBIA MEDICAL CENTER's motion to dismiss the complaint is GRANTED; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 7/8/24

ENTER

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