| **Arrington v Dharia** |
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| 2024 NY Slip Op 35021(U) |
| July 3, 2024 |
| Supreme Court, Queens County |
| Docket Number: Index No. 706330/21 |
| Judge: Kevin J. Kerrigan |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Melissa Arrington,

Plaintiff,

- against -

Prachi Dharia, M.D. and New York Health and Hospitals Corporation,

Defendants.

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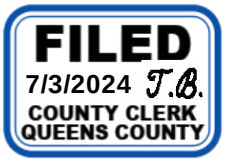
Index Number: 706330/21

Motion Date: 6/17/24

Motion Seq. No.: 4 and 5




The following papers numbered E115-E146, E210-E214, 147-206, and 215-226, read on this motion by Plaintiff for an order dismissing Defendants' affirmative defenses numbered 10-22 pursuant to CPLR §3211(b) and CPLR §3212(a) and read on this motion by Defendants for summary judgment.

| | Papers Numbered |
|---|---|
| Sequence #4 | |
| Notice of Motion-Affirmation-Exhibits-Memorandum of Law | E115-135 |
| Affirmation in Opposition-Exhibits-Memorandum of Law | E136-146 |
| Reply-Exhibits | E210-214 |
| Sequence #5 | |
| Notice of Motion-Affirmation-Exhibits-Memorandum of Law | E147-206 |
| Affirmation in Opposition-Exhibits-Memorandum of Law | E215-221 |
| Reply-Affirmation-Exhibits | E222-226 |

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Plaintiff for an order dismissing Defendant's affirmative defenses numbered 10-22 pursuant to CPLR §3211(b) and CPLR §3212(a) is granted solely with respect to the affirmative

defenses pursuant to the PREP Act and the Cares Act. However, in light of the granting of Defendants' motion pursuant to the EDTPA, the forgoing is deemed moot. The branch of the motion by Plaintiff to preclude Defendants from asserting that COVID-19 affects liability in this case is held in abeyance. Motion by Defendants for summary judgment is granted to the extent that all causes of action stemming from the care and treatment of Plaintiff from March 7, 2022 to May 22, 2020 are dismissed pursuant to the EDTPA. The branches of the motion for summary judgment as to the claims for lack of informed consent, negligent hiring and retention, and pursuant to the doctrine of res ipsa loquitur are granted. The branch the motion to strike paragraph 13 of Plaintiff's bill of particulars is denied.

The instant action sounds in medical malpractice stemming from the care and treatment of Plaintiff at Queens Hospital Center. During the relevant time period, Plaintiff was treating for marginal zone lymphoma at a separate facility by her Oncologist, Dr. Nikhil Uppal. On March 6, 2020, she followed up with Dr. Uppal after beginning on a new medication, Revlimid. Plaintiff presented to the Emergency Department at Queens Hospital Center with complaints of, inter alia, fever, chills, headache, and nausea. Her lab work revealed abnormalities, which she contends was indicative of the early onset of an infectious process. Plaintiff was discharged at approximately 3:00AM on March 7, 2020 without being evaluated by a physician. Plaintiff's condition worsened causing her to return to Queens Hospital Center on March 21, 2020 with complaints of fever, nausea, vomiting, and abdominal pain. She was intubated for respiratory failure and admitted to the hospital until May 22, 2020. Plaintiff ultimately suffered septic shock, organ failure, myocardial infarction, an anoxic brain injury, and required partial amputation to her hands and feet.

A review of the Defendants' answer provides that it contains several affirmative defenses related to the COVID-19 pandemic. Plaintiff avers that Defendants are not entitled to immunity afforded by then Governor Andrew Cuomo's Executive Order 202.8 or the Emergency or Disaster Treatment Protection Act ("EDTPA") because Plaintiff's illness had nothing to do with COVID-19. Additionally, the dates in question are solely March 6th and 7th of 2020, and prior to the time where hospitals were overwhelmed by COVID-19 patients and any lockdowns were in place. Indeed, at that time, New York City had very few confirmed cases of COVID-19 and no deaths had been recorded as a result of the virus yet. Based on the exhibits annexed to the motion, there were approximately 11 or 12 confirmed cases of COVID-19 during the relevant time

period. Plaintiff proffers evidence received during the course of discovery regarding Defendants' emergency room visits. On the relevant dates, Queens Hospital Center had between 232-256 patients seen in their emergency room. Plaintiff compares this number to an archived, pre-pandemic version which reflects substantially the same number of patients were seen in January of 2018. To that end, Plaintiff seeks to establish that at the relevant point in time, the hospital was not yet overwhelmed or impacted by the pandemic, such that they may claim immunity against Plaintiff's allegations.

In April of 2020, the EDTPA was codified by the New York State Legislature under the Public Health Law during the COVID-19 pandemic. The Act was retroactive to the initial emergency declaration made by former Governor Andrew Cuomo, to March 7, 2020. The EDTPA provided that, with certain exceptions, health care facilities shall have immunity from civil liability from any damages sustained as a result of an act or omission in the course of arranging for or providing health care services, so long as three conditions were met. First, the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law. Second, the act or omission was impacted by decisions or activities that were in response to or a result of the COVID-19 pandemic and in support of the State's directives. Third, the services were arranged or provided in good faith (see Public Health Law § 3082(1); Mera v. New York City Health & Hosps. Corp., 220 A.D.3d 668 [2d Dept. 2023]). The services covered by the immunity provision included those who presented at a health care facility during the period of the COVID-19 emergency declaration. It is undisputed that the Plaintiff was never treated for COVID-19 or suspected of contracting it. However, it is very apparent that the EDTPA does not require that the individual at issue present with COVID-19 symptoms or be treated for COVID-19 for a defendant to benefit from immunity. On August 30, 2020, the Act was amended and narrowed the scope of immunity to solely cover services relating to the diagnosis and treatment of COVID-19. On April 6, 2021, the Act was repealed (see former Public Health Law §3080; Public Health Law §30-D). The repeal of the Act did not apply retroactively (see Damon v. Clove Lakes Healthcare & Rehabilitation Ctr., Inc., 2024 N.Y. App. Div. LEXIS 3082 [2d Dept. 2024]).

At the outset, the Court acknowledges that, despite the evidence proffered by Plaintiff, the number of COVID-19 cases a facility may have been handling does not appear to circumvent the immunity afforded under the EDTPA. Indeed, Plaintiff failed to

cite to any authority to establish the forgoing. Rather, since the statute affords blanket immunity, the Court is required to strictly construe the statute and afford immunity where applicable (see Spearance v. Snyder, 73 Misc.3d 769 [NY Sup Ct Onondaga County 2021]; Lighthouse Baptist Church, Inc. v. Chemung Cnty, 2022 U.S. Dist. LEXIS 167797 [W.D.N.Y. 2022] quoting Brown v. Bowery Sav. Bank, 51 N.Y.2d 411 [1980]).

Plaintiff puts forth two distinct arguments against the application of the EDTPA. First, Plaintiff avers that the Defendants were not arranging or providing for health care services, and thus, the EDTPA cannot apply. Second, Plaintiff argues that the second condition, supra, cannot be met because Plaintiff's treatment was not impacted by decisions or activities that were in response to or a result of the COVID-19 pandemic. In contrast, Defendants contend they are entitled to summary judgment based upon, inter alia, the application of the EDTPA and the PREP Act.

In regard to the first argument against the application of the EDTPA, the relevant portion of the EDTPA provides that "health care services" means "services provided by a health care facility or health care professional, regardless of the location where those services are provided, that relate to:

> a) the diagnosis, prevention, or treatment of COVID-19;
>
> b) the assessment or care of an individual with a confirmed or suspected case of COVID-19; or
>
> c) the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration.

Subsection (c) is undisputably where the dispute lies. Plaintiff avers that she did not present to Queens Hospital during the "COVID-19 emergency declaration." The emergency declaration is defined as the time period where then former Governor Andrew Cuomo declared an emergency with Executive Order 202.8. That Executive Order was issued on March 7, 2020, and declared a State disaster emergency for the entire State of New York. As noted supra, the State Legislature subsequently codified the same. Per Plaintiff, since she first presented to Queens Hospital on March

6, 2020, her claim lies outside of the time frame set by the EDTPA and Executive Order 202.8, and subsection (c) is therefore inapplicable.

The Court must therefore determine how the term "presents" applies herein. Plaintiff avers that her "presentation" at the facility was on March 6, 2020, prior to EDTPA's enactment on March 7, 2020, or the time in which she "came forward as a patient." In contrast, Defendants aver that since Plaintiff was receiving treatment on the operative date, or March 7, 2020, her treatment falls within the parameters set forth by the EDTPA. Moreover, Defendants aver that the vast majority of Plaintiff's treatment did not occur until March 7, 2020, nor was she diagnosed until March 7, 2020. It appears that the interpretation of the term "presents" to this degree is a matter of first impression as it applies to the application of the EDTPA. This Court cannot conclude that the Defendants are stripped of the immunity afforded by the EDTPA merely because Plaintiff arrived at Queens Hospital Center on March 6, 2020. A plain reading of the EDTPA provides that its application was intended to include any individuals who were treated at health care facilities during the relevant time period. The Court sees no reason why the protection afforded by the EDTPA would be unceremoniously cut off based upon an individual's arrival to a specific facility when that patient continued to treat at the facility after the immunity period took effect. Rather, this Court opines that the proper application is simply as it is stated in the statute. Specifically, that the Defendants are solely entitled to immunity for any care and treatment beginning on March 7, 2020 and continuing through the effective time period. Any care or treatment prior to March 7, 2020 is considered outside the purview of the EDTPA and Defendants are therefore not entitled to immunity for that period. The application of the forgoing results in immunity for all claims except for those stemming from the care and treatment of Plaintiff on March 6, 2020.

Secondly, Plaintiff argues that the second condition under the EDTPA cannot be met, or whether Plaintiff's care was impacted by the pandemic. Plaintiff repeatedly contends that her care was not impacted by the pandemic, as the pandemic was in its beginning stages. In this regard, Plaintiff points to the testimony of Dr. Ricardo Lopez, Chief of Pulmonary and Director of Critical Care at Queens Hospital Center. Dr. Lopez confirmed that Plaintiff's chart contained no entries indicating that she had or was treated for COVID-19. Dr. Lopez went on to explain that the hospital was "ramping up preparation" for the pandemic at the time of Plaintiff's treatment. However, Dr. Lopez conceded that

Plaintiff's treatment was not impacted based on the pandemic. When asked whether her treatment on March 6th and 7th would have been the same in 2016, 2017, or 2018, as it was in 2020, Dr. Lopez answered "correct." However, Dr. Lopez also went on to testify that Plaintiff's treatment was impacted by the pandemic based on the hospital's preparation process. Dr. Lopez explained how the facility's screening process for patients changed at this time and discussed the process of creating isolation rooms.

Defendants annex the transcript of Defendant, Dr. Prachi Dharia, to further establish impact. Per Dr. Dharia, "COVID [was] in the background of every single patient" at this time. The hospital was required to screen all patients and determine if they had contact with a sick person or had recently traveled. This would determine whether the patient should be recommended for COVID-19 testing prior to treatment, which was done by the Department of Health at that point in time.

Defendants also annex the transcript of P.A. Charles Vollmoehller, who assessed Plaintiff in the emergency department. He testified that no COVID-19 tests were available at the facility during the relevant time period. Vollmoehller indicated that the inability to test the Plaintiff for COVID-19 was an issue. Defendants aver that this amounts to an impact.

Generally, there must be some evidence submitted that an individual's treatment was impacted by the facility's responses to the COVID-19 pandemic. Notably, whether the impact is "positive, negative, or neutral," is of no consequence, the party must merely demonstrate treatment be impacted (see Highsmith v. Woodhull Med. Ctr., 2024 N.Y. Misc. LEXIS 2344 [NY Sup Ct Kings County 2024]). While the impact must be established, the EDTPA does not requires a causal connection between the response by the facility and the harm suffered by the Plaintiff (see Garcia v. N.Y.C. Health & Hosps. Corp., 2022 N.Y. Misc. LEXIS 11143 [NY Sup Ct NY County 2022]). Accordingly, Plaintiff's repeated claims that the word "COVID" never appeared in her chart, and that she never treated for COVID-19, is of no consequence when considering whether the Defendants are entitled to immunity here.

Notwithstanding, the mere fact that a health care facility was dealing with the consequence of the COVID-19 pandemic does not automatically entitle it to immunity under the EDTPA. New York trial Courts have refused to apply the EDTPA in such circumstances (see Cuche v. E. Northport Residential Health Care Facility, Inc., 2024 NYLJ LEXIS 1692 [NY Sup Ct Nassau County 2024]; Yearwwood v. Richmond Ctr. for Rehab, 2024 NYLJ LEXIS 600 [NY Sup Ct Richmond

County 2024]; Spearance v. Snyder, 73 Misc.3d 769 [NY Sup Ct Onondaga County 2021]; Matos v. Chiong, 2020 N.Y. Misc. LEXIS 17716 [NY Sup Ct Bronx County 2020]). Defendants are required to put forth some evidence of impact. The Appellate Division, Third Department has opined that the screening of patients for COVID-19 qualifies as an impact (see Whitehead v. Pine Haven Operating, LLC, 222 A.D.3d 104 [3rd Dept. 2023]). In Whitehead, the decedent was a resident in a nursing home (see id.). The defendants put forth evidence that, inter alia, visitation was restricted at the facility, dining services were restricted, and precautions such COVID-19 screening and testing were implemented (see id.). Per the testimony of Dr. Lopez here, all patients during the relevant time period were screened for COVID-19, including the Plaintiff. Not only did the facility implement screening, but Dr. Lopez also testified that their entire intake process "evolved dramatically" at this time. Dr. Dharia similarly testified that Plaintiff was specifically not given a COVID-19 test upon admission based upon their limited availability and based upon her screening, where she indicated that she had not traveled or had contact with a sick person. Based on the forgoing, this Court cannot conclude that there was a lack of impact. The impact need not be negative (see supra). Indeed, it does not appear that the impact was negative here. However, the fact that the facility had implemented procedures to combat the impending surge, which included screening and testing, certainly qualifies as an impact.

The exceptions to the EDTPA include willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of emotional distress (see Mera, 220 A.D.3d at 670). Plaintiff did not plead any of the forgoing exceptions in her notice of claim or summons and complaint. Indeed, it appears that the claim of gross negligence is contained for the first time in her bill of particulars. It is well settled that a bill of particulars may not "add or substitute a new theory or cause of action" (Erickson v. Cross Ready Mix, Inc., 98 A.D.3d 717 [2d Dept. 2012]; Castleton v. Broadway Mall Props., Inc., 41 A.D.3d 410 [2d Dept. 2007]; Paterra v. Arc Dev. LLC, 136 A.D.3d 474 [1st Dept. 2016]; Melino v. Tougher Heating & Plumbing Co., 23 A.D.2d 616 [3r Dept. 1965]).

Accordingly, the branch of the underlying motion to dismiss Defendants' affirmatives defenses based upon the EDTPA is denied. The branch of the motion by Defendants to dismiss all causes of action stemming from treatment beginning on March 7, 2020, and through May 22, 2020, or the date of Plaintiff's discharge, is granted.

The Court turns to the issue of whether the Defendants are entitled to immunity pursuant to the Public Readiness and Emergency Preparedness Act ("PREP Act") and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Based on the finding supra that the Defendants are entitled to immunity for all causes of action beginning on March 7, 2020 pursuant to the EDTPA, the application of the PREP Act and CARES Act is essentially purely academic. However, for the purposes of completeness, the Court addresses it as follows. The branch of the motion to dismiss Defendants' affirmative defenses pursuant to the PREP Act and CARES Act is granted. The branch of the motion by Defendants for summary judgment pursuant to the PREP Act is denied.

The PREP Act, originally enacted in 2005, provides broad immunity from suit under Federal and State law "with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure during a public health emergency" (see 42 USC §247d-6d; Solomon v. St. Joseph Hosp., 62 F.4th 54 [2d Cir. 2023]). In response to the COVID-19 pandemic, the Health and Human Services Secretary issued a Declaration, invoking the PREP Act (see 85 FR 15198). The Declaration afforded immunity to a "covered person" for "recommended activities" related to countermeasures. The declaration defines "covered countermeasures" to include virtually any FDA approved or authorized drug or device to treat, diagnose, cure, prevent, or mitigate COVID-19, including use of products such as hand sanitizer, COVID-19 tests, and Personal Protective Equipment ("PPE"). The PREP Act contains one exception, which includes claims for "death or serious physical injury proximately caused by willful misconduct" (see 42 USC §247d-6d[d][1]). Notably, the Plaintiff did not plead the exception to the PREP Act nor does she claim it applies herein.

The PREP Act "does not explicitly define what it means to administer a countermeasure to an individual" (see Maney v. Brown, 91 F.4th 1296 [9th Cir. 2024]). The Ninth Circuit Court of Appeals recently held in Maney that the term "administration" does not require a direct link to an individual, and broadens the scope of immunity (see id. At 1300-1301). In Maney, several inmates from the State of Oregon sued based on their assignment of low priority COVID-19 vaccinations (see id.). The Court framed a broader scope of immunity under the PREP Act with regard to the administration of the vaccine (see id.). The Court opined that "administration" of the countermeasure (i.e., the vaccine) included "design, development, manufacture, and distribution" (see id.). It did not require a direct link to an individual, or in this case, injecting a particular person with the vaccine (see id.). While it appears

the Ninth Circuit broadened the applicability of immunity under the PREP Act, for immunity to attach, there must still be a claim for loss that arises out of, relates to, or results from the use of a countermeasure in order for the PREP Act to be trigger and immunity to apply.

Here, Plaintiff claims that since her treatment had nothing to do with COVID-19, the PREP Act cannot apply. Defendants assert that Plaintiff's claims implicitly trigger covered countermeasures which are subject to the PREP Act. The Court disagrees. Indeed, Plaintiff does not allege any injuries as a result of the Defendants implementation, or lack thereof, of countermeasures during the course of her treatment. There is nothing contained in the complaint to suggest otherwise. While the Ninth Circuit may have broadened the applicability of immunity, this Court cannot ascertain what countermeasures were implemented here which would trigger immunity. Defendants contend that the decision *not* to test Plaintiff qualifies as a countermeasure. It is also undisputed that Plaintiff was tested for COVID-19 several times and was placed in an isolation room during her admission to the hospital on March 21, 2020. As to her earlier visit on March 6, 2020, it is undisputed that the Plaintiff was screened for COVID-19. While these actions may qualify as countermeasures, it remains that there are no allegations contained in the complaint that link the Defendants' implementation of them to Plaintiff's loss. Indeed, numerous New York Courts have refused to apply immunity in similar situations, or where a plaintiff's state law claims did not fall within the PREP Act's scope because they "did not allege loss caused by, arising out of, relating to, or resulting from the administration of covered countermeasures..." (see Dupervil v. All. Health. Operations, LLC, 516 F.Supp.3d 238 [N.D.N.Y. 2021]). This Court notes that Dupervil was subsequently dismissed as moot by the Second Circuit after the appellee voluntarily dismissed the State law cause of action (see Dupervil v. All Health Operations, LLC, 2022 U.S. App. LEXIS 24708 [2d Cir. 2022]). However, subsequently, Federal Courts have continued to use the District Court decision in Dupervil as persuasive authority nonetheless (see Fisher v. Rome Ctr. LLC, 2022 U.S. Dist. LEXIS 206682 [N.D.N.Y. 2022]; Leroy v. Hume, 554 F.Supp.3d 470 [E.D.N.Y. 2021]).

Turning to the CARES Act, on March 27, 2020, former President Donald Trump signed the CARES Act into law. The Act provides that respiratory protective devices are covered countermeasures, thereby expanding the PREP Act. On April 15, 2020, the Secretary of Health and Human Services amended the Act to create a new category of countermeasures, including "any respiratory protective

device." In December of 2020, the CARES Act was again amended to cover "all qualified pandemic and epidemic products under the PREP Act" (see Dupervil, 516 F.Supp3d at 244-45 [rev'd on other grounds]). Thus, countermeasures may include respiratory devices ranging from face masks to respirators. Plaintiff again contends that the CARES Act is inapplicable since this action has nothing to do with COVID-19. In response, Defendants aver that since Plaintiff was placed on a ventilator during her March 21, 2020 hospitalization, and since a ventilator is a covered countermeasure, the CARES Act is applicable. The Court disagrees based on the same logic by which it rejected Defendants' arguments under the PREP Act. Plaintiff does not allege that her injuries were caused by, arose out of, related to, or resulted from the use of a ventilator, let alone any other respiratory device, during her care and treatment at Queens Hospital Center. Accordingly, no immunity may be triggered under the CARES Act by use of said countermeasures.

The branch of the motion by Defendants to dismiss Plaintiff's claim pursuant to the doctrine of res ipsa loquitur is granted, there appearing no opposition, and in light of Plaintiff's opposition indicating she has withdrawn said cause of action. The doctrine of res ipsa loquitur concerns circumstantial evidence which creates an inference of negligence and "does not automatically entitle the plaintiff to summary judgment or a directed verdict, even if the plaintiff's circumstantial evidence is unrefuted" (Morejon v Rais Construction Co., 7 N.Y.3d 203, 209 [2006]). Based on the facts and circumstances of this action, it does not appear that the doctrine is applicable.

The branch of the motion by Defendants to dismiss Plaintiff's cause of action for lack of informed consent is granted, there appearing no opposition, and in light of Plaintiff's opposition indicating she has withdrawn said cause of action. To establish a cause of action of lack of informed consent, a Plaintiff must establish that 1) that the person providing the professional treatment failed to properly disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, 2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and 3) that the lack of informed consent is a proximate cause of the injury (see Walker v. Saint Vincent Catholic Med. Ctrs., 114 A.D.3d 669 [2d Dept. 2014]). Here, the bill of particulars alleges that informed consent was not obtained for the administration of antibiotics and medication. Defendants

have established to the satisfaction of this Court that the administration of said medication did not rise to the level of an "affirmative violation of the plaintiff's physical integrity" (see Martin v. Hudson Val. Assoc., 13 A.D.3d 419 [2d Dept. 2004]). Moreover, Defendants provided unrebutted evidence that informed consent was obtained by Plaintiff's surrogates whilst she was unconscious.

The branch of the motion by Defendants to dismiss Plaintiff's causes of action for negligent hiring and retention is granted, there appearing no substantive opposition. There is no evidence presented, and Plaintiff does not contend in opposition, that Defendants failed to exercise due care in hiring its personnel and that such failure was a proximate cause of the Plaintiff's injuries.

The branch of the motion by Defendants to strike paragraph 13 of Plaintiff's bill of particulars is denied. Defendants aver that the bill of particulars improperly includes additional theories of liability and damages not contained in the notice of claim. As analyzed supra, a bill of particulars may not add or substitute new theories or causes of action. Similarly, a plaintiff suing a public entity must plead all theories of liability in his notice of claim (see Semprini v. Village of Southampton, 48 A.D.3d 543 [2d Dept. 2008]). A review of the notice of claim and the bill of particulars here does not reveal that Plaintiff has improperly sought to expand her causes of action. While comprehensive indeed, paragraph 13 appears to be a proper amplification of the theories contained in the notice of claim, which is permissible.

The sole surviving claim includes the allegation of medical malpractice stemming from the care and treatment of Plaintiff on March 6, 2020. The branch of the motion by Defendants for summary judgment on the remaining claim is denied.

As stated previously, on March 6, 2020, Plaintiff presented at Queens Hospital Center with complaints of a fever of 103 for two days, nausea, and chills. A physical exam, diagnostic testing including a chest x-ray and a CT scan of the head were performed. Labs and vital signs were also obtained. Plaintiff was discharged at approximately 3:42AM on March 7, 2020. As already indicated supra, Defendants are immune from liability for any claims of malpractice here, beginning on March 7, 2020.

In support of the motion, Defendants submit, inter alia, the affirmation of Mark Silberman, M.D., a physician Board Certified in Emergency Medicine, Critical Care Medicine, Pulmonary Medicine,

and Internal Medicine. Dr. Silberman opines that Defendants did not deviate from the accepted standard of care in the treatment of Plaintiff on March 6, 2020. Dr. Silberman refutes Plaintiff's allegations that she should have been admitted to the hospital after showing signs of "early sepsis" on March 6, 2020. Sepsis symptoms include high fever, high heart rate, and rapid respiratory rate. As sepsis progresses, a person may have difficulty breathing, confusion, dizziness, very low blood pressure, and organ failure. Plaintiff did not have complaints of difficulty breathing or other respiratory issues, or of tachycardia. Her body temperature was recorded as normal. Her white blood count was not elevated. Her white blood count could be described as borderline low, which could be associated with her lymphoma treatment, Revlimid. Since the Plaintiff's labwork was performed on March 7, 2020, and within the immunity period afforded by the EDTPA, the Court declines to consider the results. Dr. Silberman goes on to opine that none of Plaintiff's other symptoms raised a concern for early sepsis. Plaintiff's vital signs were also compared to prior visits to the facility on March 2, 2020 and February 24, 2020, and were consistent with her normal range.

In opposition, Plaintiff proffers the affirmation of Robert Glatter, M.D., a physician Board Certified in Emergency Medicine. Dr. Glatter opines that the Plaintiff should have been admitted upon her presentation to Queens Hospital Center on March 6, 2020. Initially, Dr. Glatter explains that the Plaintiff's underlying conditions were a cause of concern. Plaintiff was previously diagnosed with lymphoma, which caused her to be immunocompromised and immunosuppressed. Plaintiff was diagnosed with nephrotic syndrome, or a disorder which causes the kidneys to pass too much protein to the urine. Nephrotic syndrome is associated with additional complications, including an increased risk of infection. Plaintiff was diagnosed with Raynaud's disease, where the arteries which supply blood through the fingers to the skin become narrow and limit flow. There is an increased risk of stroke associated with the disease and susceptibility to peripheral ischemia. Finally, the Plaintiff was diagnosed with anemia, of a lack of sufficient healthy blood cells. Defendants were aware of the vast majority of Plaintiff's medical history. Plaintiff was prescribed Revlimid as a lymphoma treatment three days prior to her presentation at Queens Hospital Center. The drug is known to cause serious infections. It appears Plaintiff had followed up with her Oncologist, Dr. Nikhil Uppal, on March 6, 2020, approximately 5-6 hours prior to presenting at Queens Hospital. Based upon her complaints and lab results, Dr. Uppal discontinued Revlimid and indicated "plan for empiric levaquin." He also

advised her to go to the Emergency Department if her condition worsened. Per Dr. Glatter, Levaquin treats bacterial infections and is evidence of a concern for infection. Per the Emergency Department records, Defendants were aware of Plaintiff's diagnoses as well as the fact that she had been prescribed Revlimid. Thus, Plaintiff should have been deemed a high risk patient and immediately admitted to the hospital based on her complaints. Dr. Gatter goes on to describe the results of Plaintiff's labs and how they indicated the beginning stages of an infection. However, the Court notes that the labs were collected on March 7, 2020, and thus, subject to the immunity afforded by the EDTPA as discussed supra.

Plaintiff also submits the expert affirmation of Ashwin Malhotra, M.D., a physician Board Certified in Psychiatry and Neurology. Dr. Malhotra similarly opines that Plaintiff should have been admitted to Queens Hospital Center on March 6, 2020 given her medical history and symptoms. The fact that Plaintiff had begun treatment using Revlimid three days prior to her presentation at the Emergency Department, in conjunction with her other underlying medical issues, rendered her an immunocompromised patient. It was imperative that the Defendants, and specifically Dr. Dharia, fully appreciate the Plaintiff's underlying issues and properly rule out signs of an infection prior to her discharge. Similarly to Dr. Glatter, Dr. Malholtra describes the results of Plaintiff's lab work, which was collected on March 7, 2020, and is thus inadmissible. As to causation, Dr. Malhotra opines that failing to admit the Plaintiff directly resulted in her injuries.

Finally, Plaintiff submitted the expert affirmation of Dennis Miller, M.D., a physician Board Certified in Internal Medicine with a subspeciality of Infectious Disease in support of the underlying motion. Dr. Miller similarly opined that the Defendants departed from the standard of care by failing to admit Plaintiff to the hospital on March 6, 2020. Given her medical history and the symptoms she was exhibiting, Dr. Miller opines that she had an early onset of an infectious process. She should have been admitted and an infectious disease consult should have been ordered. The Defendants failure to have Plaintiff evaluated by a physician, failure to order an infectious disease consult, and failure to admit her, caused Plaintiff's condition to worsen, leading to her injuries.

In response, the Defendants aver that the attending Emergency Room Doctor, Dr. Dharia, did not have access to Plaintiff's oncology records. Her treatment was properly based on Plaintiff's presentation, her symptoms, and the physical examination which was

conducted on March 6, 2020. The results were normal. Based on that fact, and the fact that Plaintiff had improved during her stay, and was not showing signs of acute illness, the decision to discharge her was made. Defendants contend that the Plaintiff is impermissibly using the benefit of hindsight as a mechanism to avoid summary judgment here. Indeed, such reasoning is never permitted (see Ortiz v. Wyckoff Hgts. Med. Ctr., 149 A.D.3d 1093 [2d Dept. 2017]). Similarly, the use of speculative reasoning is never permitted (see id.). However, this Court does not agree that Plaintiff's experts have engaged in such reasoning. Plaintiff's experts set forth a proper basis for the notion that, given her extremely complicated history, the proper precaution would have been to admit Plaintiff to the hospital immediately. In a somewhat factually similar case, the Appellate Division, Third Department, found the same. In Lang, the Court found that there was ample information to support a jury's conclusion that the Defendant's failure to admit a plaintiff to the hospital constituted medical malpractice (see Lang v. Newman, 54 A.D.3d 483 [3rd Dept. 2008]). In that case, the Court accepted the evidence of plaintiff's expert, who opined that, had plaintiff been admitted to the hospital and observed rather than discharged, it would have become clear that he had suffered a stroke (see id.). Not so dissimilar, here, Plaintiff's experts opine that she would not have sustained such serious injury had the Defendants admitted and observed her, ordered additional testing, antibiotic therapy, anti-viral medication, consulted with infectious disease, hematology, and oncology physicians, along with Plaintiff's own Oncologist.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 [1985]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Defendants have failed to meet their buden. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (see Hutchinson v. New York City Health & Hosps. Corp., 172 A.D.3d 1037 [2d Dept. 2019]). Here, given the conflicting expert opinions proffered by Plaintiff and Defendants, and giving the Plaintiff every favorable inference, as this Court must, the branch of motion to dismiss the remaining cause of action must be denied. There remains a question of fact as to whether the Defendants deviated from the standard of care by failing to admit Plaintiff to Queens Hospital Center on March 6, 2020, given her presentation of symptoms and her underlying medical history, which was known to the Defendants.

Finally, the branch of the motion in limine by Plaintiff to preclude Defendants from continuing to assert that COVID-19 affects liability in this case is hereby held in abeyance up until the time of trial.

Accordingly, the motion by Plaintiff for an order dismissing Defendant's affirmative defenses numbered 10-22 pursuant to CPLR §3211(b) and CPLR §3212(a) is granted solely with respect to the affirmative defenses pursuant to the PREP Act and the Cares Act. However, in light of the granting of Defendants' motion pursuant to the EDTPA, the forgoing is deemed moot. The branch of the motion by Plaintiff to preclude Defendants from asserting that COVID-19 affects liability in this case is held in abeyance. Motion by Defendants for summary judgment is granted to the extent that all causes of action stemming from the care and treatment of Plaintiff from March 7, 2022 to May 22, 2020 are dismissed pursuant to the EDTPA. The branches of the motion for summary judgment as to the claims for lack of informed consent, negligent hiring and retention, and pursuant to the doctrine of res ipsa loquitur are granted. The branch the motion to strike paragraph 13 of Plaintiff's bill of particulars is denied.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: July 3, 2024

KEVIN J. KERRIGAN, J.S.C.