Tarantino v Bethel Springvale Nursing Home Inc.
2024 NY Slip Op 35236(U)
April 12, 2024
Supreme Court, Westchester County
Docket Number: Index No. 58714/2022
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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ROCCO TARANTINO, as Administrator of the Estate of CARMINE ANTONIO TARANTINO, deceased,

Index No. 58714/2022

Plaintiff,

DECISION & ORDER

– against –

Motion Seq. no. 1

BETHEL SPRINGVALE NURSING HOME INC. d/b/a BETHEL NURSING & REHABILITATION CENTER,

Defendant.

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The following papers, filed on NYSCEF as documents number 19-45 and 50-71, were read on this motion by defendant for an order (1) dismissing the complaint with prejudice, pursuant to CPLR 3211(a)(1) and (7), for failure to state a cause of action and pursuant to the immunity defense provided by the New York Emergency or Disaster Treatment Protection Act ("EDTPA") (Public Health Law Article 30-D, §§ 3080-3082), (2) dismissing the complaint pursuant to the Federal Public Readiness and Emergency Preparedness Act ("PREP Act") (42 USC 247d-6d), and (3) for such other and further relief as this Court deems just and proper.

Papers Considered

1. Notice of Motion/Affirmation in Support of Robert J. Christiano, Esq./ Exhibits A-Y
2. Affirmation in Opposition of Thomas Gallivan, Esq./Exhibits 1-18/Affidavit of Service
3. Affirmation in Reply of Robert J. Christiano, Esq./Exhibit Z

FACTUAL AND RELEVANT PROCEDURAL BACKGROUND

Plaintiff commenced this action seeking damages for the personal injuries and death of plaintiff's decedent, Carmine Antonio Tarantino, who was a resident of defendant Bethel Springvale Nursing Home Inc. before his death from the COVID-19 virus on April 11, 2020. In the amended complaint, plaintiff's first cause of action alleges violations of Public Health Law §§ 2801-d and 2803, as well as certain state and federal regulations and statutes that set minimum practice standards for nursing homes in New York. Plaintiff's second and third causes of action allege wrongful death and gross negligence.

In the amended complaint, plaintiff alleges that defendant willfully and recklessly failed to take proper precautions to prevent the spread of infections prior to and during the COVID-19 pandemic, resulting in the death of several nursing home residents, including plaintiff's decedent. Plaintiff alleges, in relevant part, that, from April 4, 2019 through April 11, 2020, defendant intentionally and with reckless disregard for the rights and well-being of plaintiff's decedent, failed to timely and properly isolate residents known to be infected with COVID-19, failed to properly and timely test residents and staff for COVID-19, failed to appropriately train its staff in the use of PPE and infection control interventions, and failed to ensure staff members exposed to residents infected with COVID-19 did not work with residents not infected with COVID-19, resulting in plaintiff's decedent being infected with COVID-19 leading to his untimely death on April 11, 2020. Further, plaintiff alleges that defendant failed to provide adequate care to plaintiff's decedent and failed to timely and properly recognize and act upon plaintiff's decedent's signs and symptoms of infection from COVID-19, including fever, hypertension, tachypnea, and hypoxia. Moreover, in relevant part, plaintiff alleges in the amended complaint that defendant failed, prior to and during the COVID-19 pandemic, to provide proper infection protections and control procedures.

Defendant's Motion to Dismiss

Defendant now moves, pre-answer, for an order dismissing the complaint, pursuant to CPLR 3211(a)(1) and (7), based upon the immunity defense provided by New York's EDTPA and the Federal PREP ACT. Defendant also seeks dismissal of the gross negligence cause of action, pursuant to CPLR 3211(a)(7), based on the failure to state a cause of action.

When enacted, the EDTPA provided hospitals, nursing homes and health care professionals, among others, were immune from potential liability arising from actions related to the care of patients with COVID-19, with certain exceptions such as providing care in bad faith (former Public Health Law Art 30-D). Defendant acknowledges that the EDTPA was repealed on April 6, 2021, but asserts that the repeal was not retroactive. Therefore, defendant asserts that it is entitled to immunity as a matter of law with respect to plaintiff's action since it acted in good faith.

Moreover, defendant argues that it is immune to civil liability under the PREP Act as it is covered under the Act and followed the guidance of the authorities having jurisdiction when administering and using covered countermeasures in responding to the COVID-19 public health emergency. Defendant asserts that the PREP Act provides immunity to it as a licensed nursing home which administered and used "covered countermeasure[s]," including a COVID-19 infection control program utilizing PPE, diagnostic/screening countermeasures, sanitizers and disinfectants.

In support of the motion and allegation of good faith, defendant relies upon the affidavit of Judith Wheat, defendant's Director of Nursing from November 2019 to November 2022 (Exhibit A). Defendant also submits its Pre-COVID Infectious Disease Protocols and defendant's "Interim Policy for Suspected or Confirmed Coronavirus (COVID-19)/COVID 19/Infection Control Manual, reflecting "[o]ngoing CMS/CDS/DOH updated guidance," dated March 13, 2020 (hereinafter "Interim Policy and Infection Control Manual") (Defendant's Exhibits D and O). Defendant also submits multiple directives, protocols and memos from the various governmental agencies with respect to COVID-19 (Defendant's Exhibits E-N, P-T, V-W). Finally, defendants submit decedent's medical records (Defendant's Exhibit C).

Defendant specifically relies upon Wheat's assertions in her affidavit that defendant had infection control policies and procedures prior to the COVID-19 pandemic, enacted a plan and policies in response to the pandemic, and followed all guidance and instructions from the government agencies, including the New York State Department of Health ("NYS DOH"), CMS, CDC, WHO and the Westchester County Department of Health. In her affidavit, Wheat also avers that, pursuant to the governmental guidelines and directives as to COVID-19, stopped regular visitations, stopped communal dining, socially distanced residents, cleaned surfaces every shift, and held morning meetings for department heads about any new information from the CDC or

DOH ensuring that defendant was following all Infection Prevention criteria and governmental mandates. According to Wheat, all residents were screened daily for elevated temperatures and signs and symptoms of respiratory illness. Wheat also avers that all residents were given masks to wear if a COVID-19 infection was suspected. Wheat further avers in her affidavit that, pursuant to the NYS DOH directives, residents with a respiratory illness were presumed to be COVID-19 positive and testing was not required, and defendant could not refuse to admit a COVID-19 positive individual. Finally, Wheat avers that the CDC and NYS DOH issued guidance on the shortage of PPE and for extending the life of PPE, including wearing the same eye protection for multiple patients and allowed limited re-use of facemasks.

As to decedent, Wheat avers the following, which is also set forth in decedent's medical records:

Decedent was moved on February 3, 2020 to a long-term dementia unit due to his confusion, poor cognition, poor concentration and lack of interest in activities. Decedent's vital signs were monitored from March 18, 2020 to April 5, 2020. On March 26, 2020, a physician ordered COVID-19 monitoring for decedent, including monitoring blood pressure, oxygenation, respiration and temperature, which were performed. Staff wore PPE when providing care to decedent. On March 30, 2020, decedent developed a fever without respiratory symptoms or shortness of breath. A nurse practitioner ordered a chest x-ray, nasal swab for flu, an antibiotic for 6 days, monitoring of temperature and respiratory symptoms and droplet and isolation precautions. Decedent was also given Tylenol and the medication was noted to be effective. The flu test was negative. Defendant did not have COVID-19 tests available.

On April 1, 2020, decedent's chest x-ray was reported to be negative, decedent had no respiratory symptoms, decedent was started on oxygen supplementation and Tamiflu, and his symptoms were monitored. On April 2, 2020, a nurse practitioner evaluated decedent and noted no respiratory symptoms but noted that labs were abnormal and discontinued one of decedent's medications and ordered iv hydration, continued oxygen supplementation, monitoring and precautions. Subsequently, on April 6, 2020, decedent removed his nasal cannula, which provided the oxygen supplementation, and his oxygen level was desaturated to 60%. Decedent's saturation increased to 90% upon placement of a non-rebreather mask. He was then evaluated by a nurse practitioner for labored breathing and transferred to the hospital.

Decedent's medical records also note that decedent tested positive for COVID-19 at the hospital.

Finally, defendant contends that plaintiff's allegations as to gross negligence should be dismissed for failure to state a cause of action since the allegations are vague and conclusory. Defendant asserts that there are no material distinctions between the negligence and gross negligence claims since plaintiff relies on the same alleged conduct. Defendant further asserts that bare legal conclusions are not entitled to every favorable inference on a motion to dismiss.

Plaintiff's Opposition to the Motion

In opposition, plaintiff initially contends that dismissal is not warranted since the repeal of the EDTPA was intended to be retroactive as evidenced by the legislative history and an affidavit of the bill sponsor. Further, plaintiff contends that, even if the repeal is not retroactive, defendant did not demonstrate that plaintiff's decedent's care was impacted by COVID-19. Plaintiff also contends that defendant did not address whether it provided health care services in good faith as required by former Public Health Law § 3082(1)(c) to be entitled to immunity. Further, plaintiff asserts that the amended complaint alleges that defendant failed to prepare pre-COVID for a virus such as COVID-19, which it contends is not covered by the EDTPA immunity. Additionally, plaintiff contends that the motion is premature since it was brought before discovery and there are factual issues to be determined such as whether defendant took proper precautions to protect decedent, whether defendant followed government health advisories and instructions, whether decedent's treatment was impacted by COVID, and when and how decedent contracted COVID.

As to defendant's branch of the motion seeking dismissal of the gross negligence cause of action for failure to state a cause of action, plaintiff asserts that the complaint alleges the requisite elements. Plaintiff specifically asserts that the allegations smack of intentional wrongdoing or evince reckless misconduct as to the rights of others. Further, plaintiff contends that it is premature to dismiss the gross negligence cause of action as questions of fact exist. Plaintiff, therefore, contends that the dismissal of the gross negligence cause of action is not warranted.

Plaintiff also contends that the wrongful death cause of action cannot be dismissed insofar as Article I, section 16 of the Constitution provides that a right of action to recover damages for injuries resulting in death cannot be abrogated.

Finally, as to the PREP Act, plaintiff contends that it is not applicable to the causes of action alleged in this action since plaintiff's claims do not arise out of covered counter measures. Plaintiff argues that the complaint alleges negligence, recklessness and carelessness unrelated to the administration, prioritizing and purposeful allocation of a drug, biological product, or device within the meaning of the PREP Act. Plaintiff asserts that the complaint instead alleges defendant failed to implement infection control, which is not covered by the PREP Act.

Defendant's Reply

In reply, defendant contends that it is entitled to dismissal under the EDTPA and the PREP Act. Defendant argues that since the statute repealing the EDTPA language is clear and unambiguous, the extrinsic evidence relied on by plaintiff should not be considered. Defendant notes that the language of the statute repealing the EDTPA states that the statute should take place "immediately," which defendant asserts indicates a prospective application. Further, defendant argues that the PREP Act's immunity applies to the present action since plaintiff's allegations include insufficient protective equipment, as well as decisions as to isolation which are based on testing and screening, all of which are counter measures. Defendant reiterates that plaintiff failed to allege specific factual allegations of gross negligence.

DISCUSSION

Defendant moves for dismissal under both CPLR 3211(a)(1) and CPLR 3211(a)(7).

Pursuant to CPLR 3211(a)(1), a complaint may be dismissed where a "defense is founded upon documentary evidence." To prevail under this provision of the statute, "the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Teitler v Max J Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *see Leon v Martinez*, 84 NY2d 83, 88 [1994]). If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*Peter F. Gaito Architecture, LLC v Simone Dev Corp*, 46 AD3d 530 [2d Dept 2007]). To qualify as "documentary" evidence, the evidence must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds and contracts

(*Fontanetta v Doe,* 73 AD3d 78, 84-86 [2d Dept 2010]). Letters, affidavits, notes, and deposition transcripts are generally not documentary (*id.* at 85-86).

CPLR 3211(a)(7) provides that "upon a motion to dismiss for failure to state a cause of action, the sole criterion is whether the subject pleading states a cause of action, and if, from the four comers of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Esposito v Nolo*, 90 AD3d 825 [2d Dept 2011]; *see Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

However, "[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)" (*Sokol v Leader*, 74 AD3d at 1181; *see Mera v New York City Health & Hosps Corp*, 220 AD3d 668, 669 [2d Dept 2023]). "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' " (*Sokol v Leader*, 74 AD3d at 1181-1182, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Cordell Marble Falls, LLC v Kelly*, 191 AD3d 760, 762 [2d Dept 2021]). "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, 142 [2017]; *see Mera v New York City Health & Hosps Corp*, 220 AD3d at 669).

On this motion, defendant demonstrates entitlement to the dismissal of the amended complaint pursuant to CPLR 3211 and the immunity defense provided under the EDTPA.

The EDTPA provided, with certain exceptions, that hospitals, nursing homes and health care professionals, among others, were immune from potential liability arising from "'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 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" (*Mera v New York City Health & Hosps. Corp.*, 220 AD3d at 669 [2d Dept 2023], quoting Public Health Law former § 3082 [1]).

The EDTPA was signed into law on April 3, 2020, but the legislature expressly provided that the immunity was retroactive to March 7, 2020 (Public Health Law former Art 30-D, §§ 1, 2). Thereafter, as acknowledged by the parties, the EDTPA was repealed on April 6, 2021, after decedent's death. Accordingly, the EDTPA would be applicable to the present action if the repeal was not retroactive.

Defendant correctly contends that the repeal of the EDTPA was not retroactive. At the time of the parties' submissions on this motion, the Appellate Division of the Fourth Department was the only appellate court to have considered the issue. In *Ruth v Elderwood at Amherst* (209 AD3d 1281, 1285-91 [4th Dept 2022]), the Fourth Department, after a thorough analysis, held that the repeal of the EDTPA does not apply retroactively. Subsequently, both the Appellate Divisions of the First and Third Departments also held that the repeal of the EDTPA does not apply retroactively (*Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475 [1st Dept 2024]; *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104 [3d Dept 2023]).

The Second Department has not directly addressed the issue of the retroactivity of the repeal of the EDPTA. However, in *Mera v New York City Health & Hosps Corp* (220 AD3d at 670), the Second Department favorably cited *Ruth v Elderwood at Amherst* (209 AD3d 1281) in holding that defendant hospital was immune from liability under the EDTPA and entitled to dismissal of the complaint under CPLR 3211(a)(7). Moreover, in the absence of any precedents on the issue by the Second Department or the Court of Appeals, the doctrine of stare decisis requires this court to follow the precedents set by the Appellate Division of the other departments (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]).

Accordingly, plaintiff's argument as to retroactivity of the repeal of the EDTPA is without merit.

In applying the EDPTA to the present action, defendant is entitled to immunity under the statute with respect to the cause of action alleging violations of Public Health Law §§ 2801-d and 2803, as well as certain other state and federal regulations and statutes that set minimum practice standards for nursing homes, and the wrongful death cause of action. The documents submitted by defendant, when considered in support of that branch of the motion seeking dismissal pursuant

to CPLR 3211(a)(7), establish that the facts alleged by plaintiff as to the foregoing causes of action do not allow for an enforceable right of recovery in light of the immunity conferred by the EDTPA. Notably, the documents demonstrate that defendant provided health care services to decedent under the COVID-19 emergency orders and applicable law before he was infected and when he started exhibiting symptoms of COVID-19. Decedent was transferred to the hospital where the illness was confirmed. Notably, the foregoing documents establish that defendant followed the directives of NYS DOH and CMS with respect to COVID-19, such that decedent's care was "impacted by" defendant's response to the COVID-19 pandemic and defendant's care of decedent was provided in "good faith" (*see Whitehead v Pine Haven Operating LLC*, 222 AD3d 104).

In view of the foregoing, defendant has met the burden of demonstrating that it provided the subject health care services to decedent during the COVID-19 pandemic pursuant to governmental directives, guidance and policies, that the health care provided was impacted as a result of the COVID-19 pandemic and the State's directives, and that it provided the health care services in good faith. Defendant, therefore, demonstrated that plaintiff's first and second causes of action are barred by the EDPTA immunity insofar as the allegations and inferences from those causes of action do not allow for an enforceable right of recovery, and dismissal under CPLR 3211(a)(7) is warranted.

Arguably, pursuant to the holding in *Hasan v Terrace Acquisitions II, LLC* (224 AD3d 475), defendant is also entitled to dismissal of the first and second causes of action pursuant to CPLR 3211(a)(1) based on the documentary evidence. The documentary evidence, including defendant's Interim Policy and Infection Control Manual, the governmental policies and directives as to COVID-19, and decedent's medical records, establishes defendant's immunity under the EDTPA. Additionally, with respect to plaintiff's allegation that defendant did not provide pre-COVID infection protections and control procedures, defendant's submission of its Pre-COVID Infections Disease Protocols demonstrates a defense to the allegation.

Plaintiff's contention that the EDTPA cannot provide immunity with respect to a wrongful death cause of action based upon language set forth in Article I, § 16 of the New York Constitution is without merit. As argued by defendant, plaintiff provides no statutory authority or case law that supports plaintiff's contention.

With respect to the cause of action for gross negligence, to which the EDTPA immunity does not apply, defendant also demonstrated entitlement to dismissal. "To constitute gross negligence, a party's conduct must 'smack[] of intentional wrongdoing' or 'evince[ ] a reckless indifference to the rights of others'" (Bennett v State Farm Fire & Cas Co, 161 AD3d 926, 929 [2d Dept 2018][citations omitted]). Here, plaintiff's cause of action for gross negligence, as in *Whitehead v Pine Haven Operating LLC* (222 AD3d 104), consists only of bare legal conclusions without supporting facts sufficient to distinguish the claimed gross negligence from plaintiff's other causes of action (*id.*). Plaintiff's gross negligence cause of action, therefore, unsuccessfully seeks to plead the same facts, but in such a manner as to avoid the immunity bar of the EDPTA. Accordingly, plaintiff's gross negligence cause of action must also be dismissed (*id.*).

Having reached the foregoing determinations, the Court need not address the parties' remaining contentions.

In view of the foregoing, it is hereby

ORDERED that defendant's motion is granted and the complaint is dismissed; and it is further

ORDERED that defendant shall serve a copy of this decision and order with notice of entry within ten (10) days of entry, and file proof of service on NYSCEF within seven (7) days of service; and it is further

ORDERED that, upon submission by defendant, the Clerk of the Court may enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
April 12, 2024

HON. WILLIAM J. GIACOMO, J.S.C.