

**Morrison v Wartburg Home of the Evangelical
Lutheran Church**

2024 NY Slip Op 35238(U)

April 11, 2024

Supreme Court, Westchester County

Docket Number: Index No. 59754/2022

Judge: Janet C. Malone

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notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MARGARET MORRISON, as Administratrix of
the Estate of EMMA MARAIA, Deceased,

DECISION AND ORDER

Plaintiff,

Index No. 59754/2022

– against –

Motion Sequence 1

THE WARTBURG HOME OF THE EVANGELICAL
LUTHERAN CHURCH D/B/A THE WARTBURG HOME
A/K/A WARTBURG SKILLED NURSING FACILITY,

Defendant.

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MALONE, J.

Defendant filed a Notice of Motion (the “Motion”) seeking an Order: (1) pursuant to CPLR § 3211(a)(1) and (7), dismissing this Complaint with prejudice for failure to state a cause of action and pursuant to the immunity defenses provided by the Emergency Disaster Treatment and Prevention Act (“EDTPA” codified as N.Y. Public Health Law § § 3080-3082 or Article 30-D); (2) dismissing the Complaint due to Public Readiness and Emergency Preparedness Act (“PREP Act,” 42 U.S.C. 247d-6d); (3) dismissing the claim with prejudice pursuant to CPLR 3211(a)(5) due to the Statute of Limitations; and (4) dismissing the Complaint pursuant to CPLR 3211(a)(3) due to lack of capacity for the plaintiff to bring an action, and (e) granting such other and further relief as this Court deems just and proper. The plaintiff opposes the Motion.

The following papers were considered by the Court in determining the Motion:

<u>PAPERS</u>	<u>NYSCEF DOC. NO.</u>
Notice of Motion, affirmation in support, exhibits A through X	12-38
Affirmation in opposition, exhibits 1-20	46-66
Affirmation in reply, exhibits Y-Z	69-71

Upon review and consideration of the foregoing papers, the Court determines the Motion as follows:

This action for, *inter alia*, nursing home abuse and wrongful death arises out of the death of plaintiff's decedent in April 2020, after her infection with COVID-19 while she was in defendant's care. On April 25, 2022, plaintiff commenced this action by filing a summons and verified complaint, followed by an amended complaint on July 28, 2022 (NYSCEF Doc. No. 2) seeking damages for (1) violation of Public Health Law § 2801-d; (2) wrongful death; and (3) gross negligence.

By Notice of Motion filed on February 27, 2023, defendant seeks an order dismissing the complaint pursuant to CPLR 3211(a)(1) and (7). Defendant contends that it is immune from liability pursuant to the New York Emergency Disaster Treatment and Prevention Act (EDTPA, NY Pub. Health Law Article 30-D) and the federal Public Readiness and Emergency Preparedness Act (PREP Act, 42 USC § 247d-6d).

In opposition, plaintiff contends that the EDTPA was retroactively repealed, such that it affords defendant no immunity. Plaintiff further contends that, even if the EDTPA did apply, it must be strictly construed such that the evidence submitted on defendant's motion is insufficient to warrant dismissal at this stage, and it does not apply to certain causes of action in the complaint. Finally, plaintiff contends that the claims asserted do not fall within the scope of the PREP Act and do not fall within the scope of Executive Order 202.10.

In reply, defendant contends that the PREP Act does in fact apply here and provides a broad immunity, and that repeal of the EDTPA was prospective only, and that this issue has been settled in the Appellate Division, Fourth Department. Defendant submits that the medical records and Affidavit submitted on the motion are sufficient to establish that plaintiff's claims fall within the scope of the EDTPA and the PREP Act, and that the complaint fails to establish conduct claimed to constitute gross negligence.

ANALYSIS

As is relevant here, CPLR 3211(a) permits any party to move for a judgment of dismissal on one or more causes of action asserted against that party on the grounds that a defense is founded upon documentary evidence and/or the pleading fails to state a cause of action (CPLR 3211 [a][1] and [7]).

"A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be appropriately granted only where the

documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case. Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence (*First Choice Plumbing Corp. v Miller Law Offs, PLLC*, 164 A.D.3d 756, 757-758 [2d Dept. 2018][internal citations omitted]).

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 corners 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. Noto*, 90 A.D.3d 825 [2d Dept 2011]; *Sokol v. Leader*, 74 A.D.3d 1180 [2d Dept 2010]).

The Appellate Division, Fourth Department has provided a thorough analysis of the immunity claimed here, noting that the "EDTPA initially provided, with certain exceptions, 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 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 v. Elderwood at Amherst*, 209 A.D.3d 1281, 1282 [4th Dept 2022], quoting Public Health Law former § 3082 [1]). "Health care facilities included nursing homes, and health care professionals included individual medical providers as well as administrators and executives of health care facilities" (*Id.*, citing former §§ 3081[3], [4]).

"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 former § 3081 [5]). “The immunity conferred by EDTPA did not apply, however, ‘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’” (*Id.*, citing former § 3082 [2]). The EDTPA was repealed on April 6, 2021; however, “the repeal of EDTPA does not apply retroactively” (*Id.* at 1291).

A similar analysis of the issues presented on the instant motion was recently provided by the Appellate Division, Third Department. Concluding, as the Fourth Department had in *Ruth*, that the legislative history of the repeal of the EDTPA weighs against retroactive application, the Fourth Department held a defendant nursing home immune from liability in connection with the COVID-19 related death of its resident in April 2020 (*Whitehead v. Pine Haven Operating LLC*, 222 A.D.3d 104, [3d Dept 2023]). The Court examined the sponsoring memoranda and the legislative floor debates, noting that “the Assembly sponsor indicated his personal belief that the repeal should be retroactive but acknowledged that the bill as drafted contained no retroactivity language and repeatedly stated that the matter would ultimately be left to the courts to resolve, an assertion echoed by several of his colleagues” (*Id.* at 108). This Court thus finds plaintiff’s submission of an Affidavit of the Assembly sponsor prepared in connection with a different case (Exhibit 10) unpersuasive.

Although the Second Department has not explicitly addressed the issue of retroactivity, it has held, in an action commenced after the repeal of the EDTPA, that the immunity therein applies to bar the complaint of a plaintiff whose decedent died from COVID-19 in April 2020 (*Mera v. New York City Health & Hosps. Corp.*, 220 A.D.3d 668, 670 [2d Dept 2023], citing *Ruth*, 209 A.D.3d 1281). Insofar as the Second Department’s opinion in *Mera* does not explicitly address the retroactivity issue, the Court notes that, in the absence of contrary authority from the Court of Appeals or the Second Department, this Court is bound by the holdings of the Fourth Department in *Ruth* and the Third Department in *Whitehead* (see *Maple Med., LLP v. Scott*, 191 A.D.3d 81 [2d Dept 2020]; see also *Hasan v. Terrace Acquisitions II, LLC*, 79 Misc3d 1021 [Sup Ct, NY County, May 18, 2023, Capella, J.] [noting Fourth Department’s holding in *Ruth* is binding as a matter of

law]). Plaintiff's assertion that the repeal of the EDTPA should be applied retroactively thus is rejected.

Plaintiff further argues the EDTPA was not intended to apply blanket immunity to healthcare facilities, as evidenced by a Report by Attorney General Letitia James who asserts that the EDTPA's intent "was to support health care professionals making impossible health care decisions in good faith during this unprecedented crisis." (Pl. Exh. 5 at 39). Nonetheless, no competent evidence has been set forth here specific to The Wartburg Home's conduct to support the Attorney General Report's general findings that facilities may have deliberately used the cloak of immunity to intentionally, *inter alia*, fail to timely test residents and staff members and fail to train staff members in the use of PPE.

The record reflects that plaintiff's claim falls within the scope of the EDTPA. The EDTPA defines "health care facility" inclusive of a nursing home. The services here were rendered "in accordance with applicable law" because The Wartburg Home was licensed to operate and provide services under New York law. Further, this Court finds that plaintiff failed to establish that services provided to the decedent were "impacted" by Wartburg's response to COVID-19.

Specifically, The Wartburg Home offers the Affidavit of Bridget Zimmermann, MBA, LNHA, the administrator of The Wartburg Home (NYSCEF Doc. No. 14) to discuss the impacts of Wartburg's decisions. Ms. Zimmermann contends that the facility developed and implemented programs to plan for the prevention, mitigation, and treatment of COVID-19, which included the development of protocols and policies and in-service education, including but not limited to standard precautions, contact precautions, droplet precautions, and strict isolation. The facility also closely followed recommendations made by the Center for Disease Control and the New York State Department of Health. Ms. Zimmermann's affidavit and decedent's medical records further confirmed that (1) as of February 16, 2020, the decedent was diagnosed with Respiratory Syncytial Virus ("RSV") then showed improvement and recovered; (2) the facility monitored decedent's vital signs through April as a precaution against COVID-19; (3) on April 8 and April 10, 2020, a physician evaluated the decedent who was afebrile without a cough and had stable vital signs; (4) on April 15, 2020, decedent tested positive for COVID-19 and was moved to a separate COVID-19 isolating unit within the facility; (5) from April 15 through April 20, 2020 the decedent showed a clear chest with no respiratory distress and had one episode of a low grade fever; (6) and on April

21, 2020, decedent was transferred to Mount Vernon/Montefiore Hospital within 20 minutes of observation of difficulty breathing.

Plaintiff further argues that even if immunity were applicable, the elements of gross negligence and reckless misconduct have been sufficiently pled, and are not subject to statutory immunity. The EDTPA applies to services rendered “in good faith” and creates an exception for “willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.” Public Health Law § 3082(1)(c)(2). To constitute gross negligence, a party’s conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others” (*Dolphin Holdings, Ltd. v. Gander & White Shipping, Inc.*, 122 A.D.3d 901, 902 [2d Dept 2014]).

This Court finds that plaintiff’s complaint fails to contain any specific factual allegation in support of willful misconduct or gross negligence on the part of the defendant (*J. Petrocelli Contracting, Inc. v. Morganti Group, Inc.*, 137 A.D.3d 1082 [2d Dept 2016]). In the absence of any specific facts to support a claim of gross negligence, the claim is insufficiently pleaded.

Furthermore, the evidence submitted in support of defendant’s motion, specifically the affidavit of Bridget Zimmermann, MBA, LNHA, and medical records of plaintiff’s decedent, conclusively establishes that plaintiff does not have a viable cause of action for gross negligence or intentional or reckless misconduct, as defendant took extensive measures to prevent the transmission of COVID-19 and to comply with all applicable government rules and guidance, and defendant rendered prompt treatment by moving decedent to a separate isolating unit upon receiving a positive COVID-19 test and thereafter transferred plaintiff’s decedent to Mount Vernon/Montefiore Hospital within approximately 20 minutes of the first signs of respiratory distress.

In light of the foregoing, this Court determines that The Wartburg Home is entitled to the immunity from liability conferred by EDTPA and the branch of the motion seeking dismissal of the Complaint is granted.

[INTENTIONALLY LEFT BLANK]

CONCLUSION

All other arguments raised on these motions and evidence submitted by the parties in connection thereto have been considered by this Court notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby,

ORDERED that defendant's motion is granted, and defendants shall have judgment dismissing the complaint, without prejudice, and the Clerk shall enter judgment accordingly; and it is further,

ORDERED that, within ten (10) days of the date hereof, defendant shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff, and shall file proof of said service via NYSCEF.

The foregoing shall constitute the Decision and Order of the Court in this matter.

Dated: White Plains, New York

April 11, 2024

ENTER:



HON. JANET C. MALONE, J.S.C.