Estate of Nixon v Pharney Group, LLC
2024 NY Slip Op 35343(U)
July 11, 2024
Supreme Court, Westchester County
Docket Number: Index No. 55407/2023
Judge: Linda S. Jamieson
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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. LINDA S. JAMIESON

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THE ESTATE OF LINDA NIXON a/k/a LINDA S. NIXON, by her Administratrix, ALETA EUBANKS,

Index No.55407/2023

Plaintiff,

DECISION AND ORDER

-against-

PHARNEY GROUP, LLC d/b/a TARRYTOWN REHABILITATION AND NURSING CENTER; ABC CORPORATION; ABC PARTNERSHIP,

Defendants.

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The following papers numbered 1 to 5 were read on this motion:

Paper	Number
Notice of Motion, Affirmations and Exhibits	1
Memorandum of Law	2
Affirmations and Exhibits in Opposition	3
Reply Affirmation and Exhibits	4
Reply Memorandum of Law	5

Defendant Pharney Group, LLC d/b/a Tarrytown Rehabilitation and Nursing Center[1] brings its motion seeking to dismiss the complaint with prejudice, for failure to state a cause of

[1] The ABC defendants are fictitious names, used by plaintiff as a placeholder. As plaintiff never identified or served another defendant, movant is the only defendant.

action, and pursuant to the immunity defenses provided by the Emergency Disaster Treatment and Prevention Act (the "EDTPA") (Public Health Law §§ 3080-3082) and the Public Readiness and Emergency Preparedness Act (the "PREP Act") (42 USC § 247d-6d).

Background

This case arises out of decedent's stay at defendant's facility from November 3, 2020 through her transfer to Phelps Hospital on January 12, 2021, where she died on January 17, 2021. Plaintiff asserts in her papers submitted on this motion that defendant was negligent not only because decedent fatally contracted Covid, but also that "While at Tarrytown, Linda Nixon was constantly neglected. Per her daughter and health care proxy, she was left in her disposable adult diapers for very long periods of time, and she would ask her daughter, Aleta, to call Tarrytown to get a nurse or CNA to change her. When Aleta called, there was either no answer or they would say they would get to her mother when they could. Linda Nixon had asthma and had to beg staff to bring her inhaler. She developed painful ulcers and wounds on her buttocks and her daughter was told she suffered two falls before her final transfer to Phelps Memorial Hospital." The Court notes that **none** of these allegations are even mentioned in the complaint. Nor are any of these allegations referenced in the medical records produced by defendant, aside from the two falls (which occurred after

decedent contracted Covid, on the day before and the day of decedent's transfer to the hospital, January 11 and 12, 2021). A review of plaintiff's affidavit shows that there is no detail about any of this alleged negligence.

In support of its motion, defendant submits to the Court the affidavit of the Regional Director of Nursing for defendant, Jennifer Mazzetti. Ms. Mazzetti states that she has been in this role since 2016; was "actively involved in ensuring the facility's response to the COVID-19 pandemic and the implementation of policies and procedures;" and "oversaw the continuous COVID-19 education and trainings in place for all staff at Tarrytown Rehabilitation from the start of the COVID-19 pandemic and as it continued." Ms. Mazzetti further stated in her affidavit that she "references exhibits attached to the attorney affirmation of Steven V. DeBraccio, Esq., that consist of records and documents [that she] received and reviewed personally," and that she can "attest to their authenticity as being true and accurate copies of documents that I received." Ms. Mazzetti further states that the documents "submitted with that affirmation were maintained in the ordinary course of business of defendant, and it is within the business of defendant to maintain and keep documents related to the operation of defendant's facility, such as those documents submitted as exhibits to the attorney affirmation submitted in

support of this motion." Ms. Mazzetti specifically refers throughout her affidavit to defendant's Covid prevention and control policies and procedures, as well as the redacted medical records of decedent from defendant's facility.

In its opposition papers, plaintiff asserts that "The uncertified and incomplete medical chart extract submitted by defendant is not admissible in form [sic]" because "C.P.L.R. §4518 states that: "All records, writings and other things referred to in sections 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician," which these records do not.

However, decedent's medical records are **not** those "referred to in sections 2306 and 2307." CPLR § 2306 is for medical records produced pursuant to a subpoena, and section 2307 is for subpoenas to a library, department or bureau of a municipal corporation or of the state.[2] Instead, the applicable section is CPLR § 4518(a), which is for records produced in the usual

[2] Even if these records were produced pursuant to CPLR § 2306, they would be admissible because they are authenticated by the "head of the hospital, laboratory, department . . . . or by an employee designated for that purpose."

course of business. There is no dispute that decedent's nursing records from defendant nursing home are those kept in the ordinary course of business. Accordingly, the Court finds that they are admissible. *See Country-Wide Ins. Co. v. Metro Pain Specialists Pro. Corp.*, 211 A.D.3d 403, 403-04, 179 N.Y.S.3d 215, 216 (1st Dept. 2022) ("the affidavit by the no-fault claim supervisor, who had personal knowledge of the claim file and the procedures for processing no-fault claims, was sufficient to lay a foundation for admission of the documents as business records under CPLR 4518(a).").

The medical records and Ms. Mazzetti's affidavit show that decedent was tested for Covid, and quarantined for two weeks, upon her admission on November 3, 2020. Thereafter, she was tested another nine times: in November 2020, the 8th, 13th, 19th, 25th and 29th; and in December 2020, the 4th, 20th, 27th and 31st. Each time, the results were negative. On January 8, 2020, decedent received the Covid vaccine (with her consent). The very next day, however, decedent tested positive and was put under Covid protocol orders.[3]

[3] Plaintiff states in her affidavit that "Most of the time, Tarrytown did not provide my mother with a mask to cover her face. I saw my mom wearing a mask three times at the facility, the rest of the time, she wore no mask. I have a video of her in her room with no mask." Plaintiff does not explain where decedent was when she was maskless, or if there were other maskless people around; she does not state whether her mother was alone in her room in the video when she was maskless; she does not state when these maskless incidents

According to the records submitted to the Court, after decedent tested positive, until she was transferred to the hospital, decedent's temperatures ranged between 97.1 and 97.4 degrees; she was alert and responsive; she had no headaches; she had no sore throats; and no cough. According to the Mazzetti affidavit, decedent "was also to be monitored for signs and symptoms of fever, chills, cough, shortness of breath, headache, difficulty breathing, sore throat, fatigue, body aches/pains, loss of taste or smell, or pink eye." It appears that decedent had none of these symptoms throughout her illness, aside from difficulty breathing/low oxygen, as discussed below.

Specifically, on January 11, 2021, decedent's oxygen saturation dipped to 88%, so she was placed on oxygen. The next day, decedent's oxygen saturation fluctuated quite a bit. Defendant continued to give her oxygen, and notified Dr. Lawrence Goldstein, who ordered that decedent continue on oxygen and be monitored. According to the Mazzetti affidavit, by 11:30 a.m., "it was noted that her oxygen saturation kept declining to 60%, and she refused to wear her nasal cannula. Dr. Goldstein was notified and ordered that decedent be transferred to Phelps

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occurred; nor, importantly, does she state whether her mother was ever offered a mask, but chose not to wear it.

Hospital, and she was at 10:45[4] via emergency medical services." Decedent died there five days later, of Covid.

Analysis

On a motion to dismiss, the facts alleged in the complaint are "typically accepted as true and the plaintiff is accorded every favorable inference. However, where the movant provides evidence extrinsic to the complaint in support of the motion, a court need not assume the truthfulness of the pleaded allegations. Instead, the criterion is whether the proponent of the pleading actually has a cause of action, not whether he or she has properly stated one." *Whitehead v. Pine Haven Operating LLC*, 222 A.D.3d 104, 109, 201 N.Y.S.3d 697, 702 (3d Dept. 2023). On this motion, defendant does provide extrinsic evidence in support of its motion, as discussed above.

Defendant claims that not only did it take all necessary steps to tend to decedent, but that it is immune from this lawsuit based on two different statutes, one of which is a state law, and one of which is federal. The Court first examines the state statute, the now-repealed EDTPA. As the Third Department has explained, "Effective March 7, 2020, the EDTPA recognized

[4] Obviously, the Mazzetti affidavit is confused about the timing: decedent could not have been transferred at 10:45 a.m. if her oxygen was noted to be at 60% at 11:30 a.m. It appears from the medical records that the note was made at 11:30 a.m., but that the transfer occurred at 10:45 a.m.

the public health emergency brought on by the novel coronavirus responsible for causing COVID-19 and sought to broadly protect the health care facilities and health care professionals in this state from liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with the public health emergency. Thus, the EDTPA conferred immunity for health care services rendered in response to the COVID-19 pandemic, with limited exceptions." *Whitehead v. Pine Haven Operating LLC*, 222 A.D.3d 104, 106, 201 N.Y.S.3d 697, 700 (3d Dept. 2023).

The Second Department explained that the EDTPA applied if "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 A.D.3d 668, 669-70, 197 N.Y.S.3d 278, 280 (2d Dept. 2023). It did 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 facility . . . providing health care services, provided, however, that acts, omissions or decisions

resulting from a resource or staffing shortage shall not be considered to be willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm."

Defendant argues that the "complaint falls well within the scope of the EDTPA, even as it was narrowed in scope in August 2020." A review of the complaint shows that it alleges that defendant failed to, among other things, provide proper staffing, use PPE when providing care and treatment, properly isolate residents, and screen any and all persons entering defendant's facility. As defendant states, "plaintiff also alleged that diagnosis of COVID-19 was delayed unreasonably, not conducted with sufficient promptness, and that 'by reason of the . . . decedent's medical condition, which was . . . not properly or timely diagnosed or treated by defendants, ... decedent was caused to sustain severe and serious personal injuries, . . . [and] death."

Defendant contends that decedent's "diagnosis and treatment at defendant's facility was impacted by the facility's response to the COVID-19 pandemic. As noted in Mazzetti's affidavit, the facility was undergoing significant COVID-19 testing and conservation of PPE, which was still being used by staff when caring for residents. She tested negative for COVID-19 10 times from November 3, 2020 to December 31, 2020. Any failure of

COVID-19 testing to detect decedent's COVID-19 infection constitutes a failure of diagnosis, which is covered under the EDTPA. Moreover, as to treatment, she was quarantined, consistently monitored for signs and symptoms, and prescribed oxygen therapy for her breathing issues." Because of her oxygen levels (her only Covid symptom), decedent was transferred to the hospital three days after her first positive test result – where she died five days later. The Court agrees that the action "clearly falls under diagnosis and treatment of COVID-19."

None of the exceptions apply. Although plaintiff alleges that defendant fell short in 28 different ways, some of them are plainly boilerplate or copied from another matter and not relevant here; for example, plaintiff alleges that defendant "Disregarded the health of Linda Nixon by failing to communicate to his [sic] physician the need to test Linda Nixon for COVID-19 after Linda Nixon presented with COVID-19 symptoms, including, but not limited to, fever, cough, general but articulable malaise, and shortness of breath, intentionally, recklessly and/or repeatedly failed to test Linda Nixon for COVID-19." In fact, not only was decedent tested ten times over the course of her admission to the facility, but there is no evidence (or even any allegation) that she had any symptoms of Covid prior to her positive test on January 9, 2021. For another example, plaintiff alleges that defendant "Failed to limit access to the

Tarrytown facility to any and all individuals that were not [sic] essential employees and/or nursing staff personnel." Yet in her affidavit on this motion, plaintiff states the exact opposite, stating that "During her admission at Tarrytown, the nursing home facility was still in lockdown, so I was not able to visit my mother."

To the extent that in her opposition papers, plaintiff refers to ulcers, wounds, issues with decedent being kept in her adult diaper or needing her inhaler, and falls, the Court notes that none of these allegations are even referenced in the complaint, nor are they mentioned with any details in plaintiff's affidavit. The Court thus finds that these allegations are insufficient to survive this motion to dismiss. As the Court of Appeals has explained, "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations — claims consisting of bare legal conclusions with no factual specificity — are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

With respect to the specific causes of action, defendant correctly points out in its reply papers that plaintiff failed even to mention the fourth cause of action, for negligence per se, in its opposition papers, let alone oppose that aspect of

the motion that sought to dismiss it. The fourth cause of action is thus dismissed.

The Court also summarily dismisses the second cause of action, for pre-pandemic negligence. This claim alleges, in relevant part, that "Prior to the beginning of the COVID-19 pandemic in February/March 2020, defendants failed to take the proper steps to protect the residents and/or patients at their facilities from foreseeable events and outbreaks, such as COVID-19" and that "defendants failed to have proper policies and procedures in place, and to take steps to have preparations in place, such as proper staffing levels, proper infectious disease policies and procedures, proper available PPE, and other such steps which would have mitigated or completely avoided its effects." Plaintiff further alleges that defendant "failed to appropriately separate residents in accordance with local, state, and federal guidance. Defendants failed to monitor local, state, and federal health guidance on the coronavirus for maintaining the safety of its residents. Because of defendants' failures in this regard, LINDA NIXON, a resident/patient, died on January 17, 2021. LINDA NIXON's death as a resident/patient was a direct result of defendants' failures to take measures to protect her at the nursing home facility from the deadly COVID-19 virus, and because of their negligence, gross negligence, and nursing home malpractice."

This cause of action appears to be written for a patient who died at the beginning of the pandemic, not the decedent in this action. Plaintiff ignores the crucial fact that decedent was not admitted to the facility until November 2020. In its moving papers, defendant pointed out that plaintiff fails to allege proximate cause between the alleged pre-pandemic negligence and decedent's admission in November 2020, and her eventual death in January 2021. Despite this, however, plaintiff entirely fails to allege any proximate cause in her opposition papers. The second cause of action is thus dismissed.

With respect to the seventh cause of action, for gross negligence, the Court adopts the findings of the Court in a recent Westchester County Decision and Order (which involved the same lawyers as in this action), *Est. of Alechko by Dingee v. Sprain Brook Manor Rehab, LLC*, 81 Misc. 3d 1242(A), 203 N.Y.S.3d 865 (West. Co. 2024): "Because plaintiff's complaint fails to distinguish conduct which is claimed to constitute gross negligence from that which is merely ordinary negligence and does not contain any specific factual allegation in support of any claim of intentional and/or reckless conduct, the claim which plaintiff attempted to plead outside the scope of the EDTPA immunity must also be dismissed. The Seventh cause of action merely recasts plaintiff's vague and conclusory

allegations, previously pleaded as ordinary negligence, as intentional or reckless acts or omissions constituting gross negligence. These sorts of allegations do not rise to the level of willful conduct that evidences a high degree of moral culpability. In the absence of any specific facts to support a claim of gross negligence, the claim is insufficiently pleaded."

So here, too, plaintiff takes the same allegations set forth in the negligence claims and simply adds the words "intentionally, recklessly and/or repeatedly" in some combination to each. This is inadequate; "in order to state a cause of action for gross negligence, the complaint must allege *facts* that demonstrate and/or rises to the level of willful or wanton negligence or recklessness. . . . Here, plaintiff's complaint is replete with conclusory and vague allegations, and is devoid of any facts that would constitute gross negligence" or "rise to the level of willful conduct that evidences a high degree of moral culpability." *Hasan v. Terrace Acquisions II, LLC*, 79 Misc. 3d 1021, 1023-24, 194 N.Y.S.3d 445, 447 (Sup. Ct. Bronx Co. 2023) (noting that "there are no affidavits from individuals with personal knowledge included in the opposition papers to somehow demonstrate that plaintiff does have a claim for gross negligence despite the complaint's defects.") (emphasis in original), *aff'd*, 224 A.D.3d 475, 203 N.Y.S.3d 325 (1st Dept. 2024).

With respect to the remaining causes of action, except for those concerning prevention (as discussed below), the Court reviews the Decision and Order in *Est. of Alechko by Dingee v. Sprain Brook Manor Rehab, LLC*, 81 Misc. 3d 1242(A), 203 N.Y.S.3d 865 (Sup. Ct. West. Co. 2024). In that case, just as here, defendant "submitted the medical records of plaintiff's decedent, defendant's protocols for COVID-19 prevention, monitoring and treatment and the government guidance and protocols related thereto, and the Affidavit of defendant's Director of Nursing. . . ." As in *Est. of Alechko by Dingee*, the Mazzetti affidavit here "establishes that the care and treatment at issue in this action was 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, and thus that plaintiff's claims are in large part barred by the statutory immunity afforded by the EDTPA." As a result, in *Est. of Alechko by Dingee*, the Court dismissed the "First (violation of Public Health Law §§ 2801-d and 2803-c), Second (negligence), Third (negligence), Fourth (negligence per se), Fifth (conscious pain and suffering), Sixth (wrongful death) and Eighth (nursing

home malpractice and professional negligence)" causes of action.[5] The Court notes that these causes of action are set forth, in the exact same order, in the complaint in this action. The Court finds that the same result is appropriate here, except to the extent that the remaining claims concern prevention.

The EDTPA does not address all of the claims that plaintiff raises, however. Although plaintiff appears to concede that EDTPA may apply to some of her claims, she correctly points out that even if that were the case, its "immunity provisions do not preclude plaintiff's allegations based on Tarrytown's failure to protect and prevent Linda Nixon from contracting COVID-19. Inasmuch as plaintiff properly alleged negligence related to infection control and prevention, and the EDTPA's amendment narrowed the scope of immunity to exclude prevention from 'health care services' eligible for immunity, the EDTPA does not preclude plaintiff's claims."

Defendant admits that this is true ("the EDTPA would not immunize against prevention-based claims") but argues that any claims not covered by the EDTPA are covered by the federal statute at issue, the PREP Act. Specifically, defendant contends that "the PREP Act enables the Secretary of HHS to

[5] In that action, the decedent died in April 2020, when the EDTPA included claims for failing to prevent Covid infections. That is not the case here, when decedent died after prevention claims were removed from the EDTPA.

declare that a public health emergency exists and to take such action as may be appropriate to lead the national response, including by providing civil immunity to individuals and companies participating in the country's response to the public health emergency (42 USC § 247d-6d [b] [1])." Defendant further states that this statute "provides 'covered persons' immunity 'from suit and liability under Federal and State law with respect to claims for loss caused by, arising out of, relating to, or resulting from the administration' or 'use' of a 'covered countermeasure' (id. § 247d-6d [a] [1]). This would apply to all claims, be they prevention-, diagnosis-, or treatment-based claims."

Plaintiff disagrees, stating that "The PREP Act does not provide blanket immunity merely on account of a nursing home facility having used or administered covered countermeasures in order to prevent the spread of COVID-19 within their premises. A plaintiff's claim of injury must have some 'causal relationship' to the use or administration of a covered countermeasure to trigger immunity. Just like every other nursing home defendant, The Citadel´s [sic] argument for PREP Act immunity relies on facts and inferences outside of the pleadings. The Citadel [sic] basically wants the Court to conclude that general allegations of negligence and gross negligence leading to COVID-19 infection are so inherently

intertwined with screening practices and PPE allocation that they must be claims of injury relating to the use of covered countermeasures, regardless of whether the complaint states it or not." Plaintiff further asserts that "for purposes of the PREP Act, the term 'covered countermeasure' is narrowly defined as a qualified pandemic or epidemic product; a security countermeasure; a drug, biological product, or device; or a respiratory protective device that is approved by the National Institute for Occupational Safety and Health, and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title. 42 USC § 247d-6d(i)(1). Plaintiff's complaint does not allege any injury arising from the administration of any product or drug nor to the selective allocation or administration of a specific product or drug to the plaintiff's decedent."

A review of the complaint shows that plaintiff alleges that decedent's "death as a resident/patient was a direct result of defendants' [sic] failures to take measures to protect her at the nursing home facility from the deadly COVID-19 virus," such as its failure "to have proper policies and procedures in place, and to take steps to have preparations in place, such as proper staffing levels, proper infectious disease policies and procedures, proper available PPE, and other such steps which would have mitigated or completely avoided its effects."

The Second Department has explained that "Under the PREP Act, the scope of immunity applies to any claim for loss that has **a causal relationship** with the administration to or use by an individual of a covered countermeasure. . . ." *Kluska v. Montefiore St. Luke's Cornwall*, 227 A.D.3d 690, 692, 211 N.Y.S.3d 422, 424 (2d Dept. 2024) (emphasis added). Defendant asserts that its "COVID-19 infection control countermeasure program included countermeasure such as, among other things, PPE, N95 masks, thermometers, pulse oximeters, COVID-19 tests, and COVID-19 vaccines, all of which have been deemed covered countermeasures. Thus, by alleging that defendant failed to take proper measures to prevent decedent from contracting COVID-19, plaintiff's allegations amount to those of improper use, misuse, and improper allocation and administration of PPE and screening countermeasures that comprise defendant's countermeasure program, which allegedly caused decedent to contract COVID-19."

The Court would agree with defendant if it provided any evidence to the Court that decedent contracted Covid because of a **causal relationship** with any of those covered countermeasures. Yet the Mazzetti affidavit does not do so; instead, it does not assert any causal relationship with any covered countermeasure and decedent's infection. *See, e.g., Est. of Pierro by Stazzone v. Carmel Richmond Healthcare & Rehab. Ctr.*, 81 Misc. 3d 1085, 1096, 204 N.Y.S.3d 715, 723 (Sup. Ct. Rich. Co. 2023)

(where plaintiff alleged claims "arising from Defendants' alleged failure to implement an effective infection control program and effectively isolate persons exhibiting symptoms," Court held that accepting "facts as alleged in the complaint as true and according those facts the benefit of every possible favorable inference, these claims would fall outside the scope of the PREP Act and rendering any immunity provided by it inapplicable.").

The Court thus finds that to the extent any of the remaining causes of action concern defendant's alleged failure to prevent decedent from contracting Covid, they survive this motion to dismiss. All other aspects of the remaining claims are dismissed in their entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
July 11, 2024

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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