

Bento v Cold Spring Hills Ctr. for Nursing & Rehabilitation
2024 NY Slip Op 35591(U)
April 26, 2024
Supreme Court, Nassau County
Docket Number: Index No. 604373/2023
Judge: Catherine Rizzo
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SUPREME COURT - STATE OF NEW YORK

Present:

Hon. Catherine Rizzo
Acting Justice of the Supreme Court

X

JACK BENTO, as Administrator of the Estate of
BARBARA A. BENTO, deceased,

Plaintiff,

TRIAL/IAS PART 44
NASSAU COUNTY

INDEX NO.: 604373/2023**-against-**

MOTION SUBMISSION
DATE: 2/6/24

COLD SPRING HILLS CENTER FOR NURSING AND
REHABILITATION, COLD SPRING ACQUISITION,
LLC, HUNTINGTON HOSPITAL, HUNTINGTON
HOSPITAL DOLAN FAMILY HEALTH CENTER, INC.,
AND HUNTINGTON HOSPITAL ASSOCIATIONS,

MOTION SEQUENCE
NO.: 001, 002

Defendants.X

The following e-filed documents for Motion Sequence 001 and 002 listed by NYSCEF and attachments and exhibits thereto have been read on this motion:

Motion Sequence 001

Notice of Motion and Affidavits/Affirmations..... X
Memorandum of Law in Support of Motion..... X
Affidavits/Affirmations in Opposition..... X
Reply Affidavit/Affirmation..... X

Motion Sequence 002

Notice of Motion and Affidavits/Affirmations..... X
Memorandum of Law in Support of Motion..... X
Affidavits/Affirmations in Opposition..... X
Reply Affidavit/Affirmation..... X

The defendants Cold Spring Acquisition, LLC s/h/a and d/b/a Cold Spring Hills Center for Nursing and Rehabilitation and Cold Spring Acquisition, LLC (collectively, "Cold Spring") move this Court for an order dismissing the plaintiff's Verified Complaint pursuant to CPLR §3211(a)(7) and 3211(a)(1) and staying disclosure pending the determination of the instant motion pursuant to CPR §3214. The plaintiff opposes the motion and cross moves for an order granting the plaintiff leave to amend the Summons and Verified Complaint annexed as Exhibit M to the plaintiff's moving papers. Cold Spring opposes the motion and submits a reply to the plaintiff's opposition. The plaintiff submits a reply.

The plaintiff initiated this proceeding by way of Summons and Verified Complaint alleging causes of action sounding in violations of the New York Public Health Law ("Public Health Law") §§2801-c and 2801-d, negligence, medical malpractice, gross negligence and reckless conduct and wrongful death. The plaintiff alleges that decedent plaintiff Barbara A. Bento ("Bento") was a patient at Cold Spring's facility between March 31, 2020 and April 30, 2020 after having been discharged from defendant Huntington Hospital, Huntington Hospital Dolan Family Health Center, Inc. and Huntington Hospital Association (collectively, "Huntington Hospital"). During this time, the plaintiff claims that Bento developed numerous injuries due to Cold Spring's alleged negligent, intentional and reckless acts in violation of applicable statutes, which resulted in Bento's death. Specifically, the plaintiff claims that Cold Spring, among other things, failed to properly test, diagnose, provide proper medication, care for, turn and position, prevent bedsores and treat Bento, failed to use reasonable care in the services and care rendered for Bento, failed to properly medicate Bento, failed to promote healing of Bento's pressure sores, failed to perform indicated procedures and/or improperly performing said indicated procedures, and failed to take a proper history and physical examination of plaintiff decedent's medical condition prior to instituting treatment.

It is well established that with respect to a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the Court starts with the presumption that the allegations contained in the plaintiffs' pleadings are true. (*Becker v. Schwartz*, 46 NY2d 401, 408). A motion for failure to state a cause of action "will fail if from [the] complaint's four corners, [its] factual allegations are discerned which taken together manifest any cause of action cognizable of law, regardless of whether the plaintiff will ultimately prevail on the merits." (*Gruen v. County of Suffolk*, 187 AD2d 560).

However, while the criteria in determining whether a complaint will withstand a motion pursuant to CPLR §3211(a)(7) is whether the pleadings state a cause of action discerned from the four corners of the pleadings, (*Guggenheimer v. Ginsburg*, 43 NY2d 268), the court is required to determine whether the proponent of the pleading has a cause of action, and not whether the proponent has merely stated a cause of action. (*Meyer v. Guinta*, 262 AD2d 463). The test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved, and whether the requisite elements of any cause of action known to our law can be discerned from its averments." (*Moore v. Johnson*, 147 AD2d 621). Unless the defendants can demonstrate that there is no factual issue as claimed by the plaintiffs, the motion to dismiss should be denied. (*S&J Serv. Ctr., Inc. v. Commerce Commercial Group, Inc.*, 178 A.D.3d 977, 979).

The Emergency or Disaster Treatment Protection Act ("EDTPA") provides an immunity for facilities regarding the diagnosis, prevention, or treatment of COVID-19 as well as the assessment and care as well as those present at such facilities, except where an act or omission

constitutes willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm. (see Public Health Law §3082). The EDTPA was repealed on April 6, 2022 and has been determined that the repeal was not retroactive. (see *Ruth v. Elderwood At Amherst*, 209 AD3d 1281; *Mera v. NY City Health & Hosps. Corp.*, 220 AD3d 668; *Martinez v. NYC Health & Hosps. Corp.*, ___ AD3d ___, 2024 NY Slip Op 00186).

The Public Readiness and Emergency Preparedness Act ("PREP Act") is invoked when the Secretary of Health and Human Services determines that a disease or a health condition exists that constitutes a health emergency. (42 U.S.C. §247-d-6d(b)). Immunity under the PREP Act applies to any loss or claim that has a causal relationship to the administration to or use by a "covered person" arising out of or relating to the administration of a covered countermeasure, with the exception being "death or serious physical injury proximately caused by willful misconduct. (42 U.S.C. §247-6d(a)(1)). The PREP Act does not define the terms "administration" and "use," but Declaration under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 states that "administration" of covered countermeasures "means the physical provision of countermeasures to recipients, or activities and decisions directly relating to public and private delivery, distribution and dispensing of countermeasures to recipients, management and operation of countermeasure programs, or management and operation of locations for the purpose of distributing and dispensing countermeasures." (85 Fed. Reg. 15. 198).

Here, Cold Spring argues that the plaintiff's causes of action should be dismissed as the defendants are entitled to immunity under the PREP Act and/or EDTPA. The defendant submits the affidavit of Chenelle Bright, RN ("Bright"), who served at Cold Spring's wound care nurse at the time Bento was admitted to Cold Spring. Bright states that Bento's "care was impacted by the strain on staffing experienced by the facility due to the COVID-19 pandemic, PPE countermeasures, changes made in regard to resident monitoring (manner, timing, frequency, and duration), and isolation precautions that were in effect in response to the COVID-19 pandemic." Specifically, Bright attests that Cold Spring's staffing was limited and the staff in place were reassigned and restricted during the onset of the pandemic while Bento was a patient at Cold Spring, which impacted the frequency, manner, and duration of resident monitoring of patients. The amount of time staff was able to spend with patients was reduced in part because COVID positive patients were segregated from COVID negative patients and, as so, staff were required to completely remove and change their PPE equipment including N95 masks, face shields, and isolation gowns.

With respect to Bento, Bright states that when Bento was COVID positive when she was admitted to Cold Spring. In addition, Bright noted that Bento had an intact blood-filled blister that was maroon bruised and measured 3.5 x 1.2x 0.0. There was dry dressing in place and there was no pain reported during the assessment. Bright recommended that Bento be turned side to side every two hours with the use of a positioning pillow and to be followed by wound care weekly. However, due to Cold Spring's limited staffing due to the pandemic, Bright states it became impossible to provide care for all residents with pressure ulcers or wounds due to COVID-19 precautions, reassignment of staff to care for infected patients and staff members who became infected with COVID-19. As a result, Bright indicates that only patients who had stage 3 or 4 ulcers could be treated on a weekly basis, which Bento did not have.

In opposition to Cold Spring's motion and in support of the cross motion, the plaintiff argues that the defendant's application should be denied the EDTPA does not apply to the

plaintiff's causes of action, Cold Spring has failed to establish that the development of Bento's pressure ulcer, infections, malnutrition, dehydration, respiratory injuries and death was directly related to Cold Spring's COVID-19 response, and the EDTPA was retroactively repealed in its entirety and does not offer Cold Spring any immunity. Specifically, the plaintiff maintains that the EDTPA was not intended to offer blanket immunity to healthcare facilities such as the Cold Spring's facility. However, it has now been repeatedly held that the repeal of the EDTPA was not retroactive and, as such, Cold Spring is entitled to the benefit of immunity under the EDTPA. (*see Ruth*, supra; *Mera*, supra; *Martinez*, supra). As to the plaintiff's cause of action for gross negligence, the plaintiff's allegations are conclusory, vague and fail to allege facts that rise to the level of willful conduct that demonstrates a high degree of moral culpability. (*see* 79 Misc.3d 1021). Considering Cold Spring cared for and treated Bento during the period in which Cold Spring was entitled to immunity and the Verified Complaint fails to sufficiently allege a cause of action sounding in gross negligence, dismissal of the plaintiff's Verified Complaint as and against Cold Spring is warranted under these circumstances.

With respect to the plaintiffs' cross motion for leave to amend the Verified Complaint and replead those causes of action that have been dismissed, it is well settled that "[u]nder CPLR [§]3025(b), leave to amend a pleading shall be freely given." (*Astro Air Corp. v. L.D. Wenger Constr. Co.*, 178 AD3d 765, 766). However, in light of the discussion above whereby it has been established that Cold Spring is entitled to immunity, the plaintiffs' application to amend the Verified Complaint is moot.

In light of the foregoing, it is hereby

ORDERED, that defendants Cold Spring Acquisition, LLC s/h/a and d/b/a Cold Spring Hills Center for Nursing and Rehabilitation and Cold Spring Acquisition, LLC's motion (Motion Sequence 01) for an order dismissing the plaintiff's Verified Complaint as and against them is granted, and it is further

ORDERED, that the Verified Complaint as and against defendants Cold Spring Acquisition, LLC s/h/a and d/b/a Cold Spring Hills Center for Nursing and Rehabilitation and Cold Spring Acquisition, LLC is dismissed, and it is further

ORDERED, that that Counsel for the plaintiff and the remaining defendants are directed to participate in a Preliminary Conference to be held on May 14, 2024. Counsel shall refer to the court's website (<http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml>) for the fillable Preliminary Conference form with instructions on how to fill it out and how to return it. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. .

This constitutes the decision and order of the Court.

Dated: April 26, 2024

ENTER:


HON. CATHERINE RIZZO, A.J.S.C.

ENTERED

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Apr 30 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE