

Panzella v Oasis Rehabilitation & Nursing, LLC
2024 NY Slip Op 35671(U)
December 16, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 628992/2023
Judge: Christopher Modelewski
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SHORT FORM ORDER

Index No. 628992/2023SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY***PRESENT:***HON. CHRISTOPHER MODELEWSKI
Justice of the Supreme CourtMOTION DATE 09/12/2024 (001)
ADJ. DATE 11/04/2024
Mot Seq. 001-MG-----X
MARIE C. PANZELLA, as Administrator of the
Estate of MARIE LEHECKA,*Plaintiff(s),*

- against -

OASIS REHABILITATION AND NURSING,
LLC; ISSAC LAUFER; ABC CORPORATION;
ABC PARTNERSHIP,*Defendant(s).*
-----XNAPOLI SHKOLNIK PLLC
Attorneys for Plaintiff
400 Broadhollow Road, Suite 305
Melville, New York 11747BARKER PATTERSON NICHOLS, LLP
Attorneys for Defendants Oasis Rehabilitation &
Nursing, LLC and Issac Laufer
115 East Stevens Avenue, Suite 206
Valhalla, New York 10595

Upon the E-file document list numbered 16 to 98 read and considered on the motion by defendants Oasis Rehabilitation and Nursing, LLC and Issac Laufer, for an order pursuant to CPLR 3211 (a)(7) dismissing the complaint on the ground that defendants are immune from liability under the Emergency or Disaster Treatment Protection Act, NY Public Health Law §§3080, 3081, and 3082, pursuant to CPLR 3211 (a)(1) and 3211 (a)(7) dismissing the complaint on the ground that defendants are immune from liability under the federal Public Readiness and Emergency Preparedness Act, 42 U.S.C. §247d-6d, *et. seq.*, and pursuant to 3211 (a)(5) on the ground that the claims against defendant Issac Laufer are barred by the statute of limitations; it is

ORDERED that the motion by defendants Oasis Rehabilitation and Nursing, LLC and Issac Laufer, for an order pursuant to CPLR 3211 (a)(7) dismissing the complaint on the ground that defendants are immune from liability under the Emergency or Disaster Treatment Protection Act, NY Public Health Law §§3080, 3081, and 3082, pursuant to CPLR 3211 (a)(1) and 3211 (a)(7) dismissing the complaint on the ground that defendants are immune from liability under the federal Public Readiness and Emergency Preparedness Act, 42 U.S.C. §247d-6d, *et. seq.*, and pursuant to 3211 (a)(5) on the ground that the claims against defendant Issac Laufer are barred by the statute of limitations is granted, for the reasons set forth herein.

Plaintiff, as administrator of the Estate of Marie Lehecka, commenced this action on November 21, 2023, by the filing of a summons and complaint alleging damages for the severe and permanent personal injuries and wrongful death of Marie Lehecka, the decedent, who contracted COVID-19 and

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passed away on May 5, 2020.¹ An amended summons and amended complaint were filed on November 29, 2023 (the “complaint”). It is alleged in the complaint that Ms. Lehecka was a resident at defendants’ nursing home known as Oasis Rehabilitation and Nursing located in Suffolk County, New York (“Oasis”), from on or around February 14, 2020 until on or about April 21, 2020 and that she was infected with and contracted COVID-19 while a resident at Oasis. The complaint further alleges that Ms. Lehecka died as a result of defendants’ failure to protect its residents including Ms. Lehecka, from the COVID-19 virus, before, during and throughout the COVID-19 outbreak and pandemic. Defendant Issac Laufer (“Laufer”) is sued herein as the majority shareholder of defendant Oasis and the complaint alleges that he “failed to allocate adequate funds to purchase necessary PPE and facilitate Covid-19 prevention policies.” Defendants Oasis and Laufer now move to dismiss the complaint pursuant to CPLR 3211 (a)(7), asserting that they are immune from liability for the causes of action alleged in the complaint under the Emergency or Disaster Treatment Protection Act (Public Health Law former Article 30-D, sections 3080-3082 [repealed by L.2021, ch. 96 §1] (the “EDTPA”), the federal Public Readiness and Emergency Preparedness Act, 42 U.S.C. §247d-6d, *et. seq.*, (“PREP”), and as to defendant Laufer, that the claims asserted are barred by the statute of limitations. There is no dispute that Ms. Lehecka was a resident at Oasis during the applicable time period under the EDTPA. Plaintiff opposes the motion asserting that defendants have not conclusively established that they are entitled to EDTPA immunity, that PREP does not preempt cognizable state law claims that are not subject to immunity under the EDTPA, that defendants’ motion is premature in the absence of discovery, that there are questions of fact for the jury to decide, and that the claims against defendant Laufer are not barred by the statute of limitations under the relation-back doctrine because defendant Laufer is united in interest with Oasis. Plaintiff also asserts that defendant was grossly negligent in its care and treatment of the decedent. Defendant replies and plaintiff files a sur-reply.

In determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Matneja v Zito*, 163 AD3d 800, 801, 81 NYS3d 174 [2d Dept 2018]; *see also Rosenblum v Island Custom Stairs, Inc.*, 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015]; *Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization*, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting *Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). The test of the sufficiency of a pleading is “whether it gives sufficient notice of the transaction, 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” (*Hampshire Prop. v BTA Bldg. & Developing, Inc.*, 122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], quoting *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *see also JPMorgan Chase v J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], quoting *Moore v Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [1989]). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, “conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts” (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; *see also DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v Interboro Mut. Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979];

¹ Plaintiff commenced a prior action on May 5, 2022, which was dismissed pursuant to CPLR 3211 (a)(3) by order dated May 25, 2023 (Reilly, J.). No claims were asserted against defendant Issac Laufer in this prior action.

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Greschler v Greschler, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]). Thus, “factual allegations which are flatly contradicted by the record are not presumed to be true, and ‘[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a) (7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action’” (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 915, 891 NYS2d 445 [2d Dept 2009], quoting *Peter F. Gaito Architecture, LLC v Simone Dev Corp.*, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]). “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, 141-42, 53 NYS3d 598 [2017]).

As the Second Department recently ruled, under the EDTPA, health care facilities are immune 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 and 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. 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 presented at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration.

(*Mera v New York City Health & Hosps. Corp.*, 220 AD3d 668, 669, 197 NYS3d 278 [2d Dept 2023][internal quotations and citations omitted]). In *Mera*, the Second Department found that the defendants were immune from liability for the decedent’s death from COVID-19 (see also *Martinez v NYC Health & Hospitals Corp.*, 223 AD3d 731, 203 NYS3d 653 [2d Dept 2024]). Furthermore, in *Mera* and *Martinez*, the Second Department cited to the decision rendered by the Fourth Department in *Ruth v Elderwood at Amherst*, 209 AD3d 1281, 175 NYS3d 811 (4th Dept 2022), which ruled that the defendant health care facility was immune from liability under the EDTPA for the decedent’s death (*Ruth v Elderwood at Amherst*, 209 AD3d at 1291, 175 NYS3d 811). Likewise, the First and Third Departments have made similar rulings under the EDTPA (see *Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475, 203 NYS3d 325 [1st Dept 2024]; *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 201 NYS3d 697 [3d Dept 2023]). Indeed, this Court also has determined that a health care facility was immune from liability under the EDTPA (see *Karen Young, as Executrix of the Estate of Karen Copp, Deceased v Nyack Operating, LLC d/b/a Nyack Ridge Rehabilitation and Nursing Center*, Index No. 609269/2022 [Sup Ct. Suffolk County February 29, 2024]).

Here, defendants are entitled to immunity under the EDTPA for the acts and omissions alleged in the complaint, as defendants have conclusively established that the services to Ms. Lehecka were arranged for or provided pursuant to a COVID-19 emergency rule, that the acts or omissions alleged in the complaint were impacted by decisions or activities that were in response to or as a result of the

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COVID-19 outbreak and were in support of the State's directives, and that the services were arranged or provided in good faith (see *Martinez v NYC Health & Hospitals Corp.*, *supra*; *Hasan v Terrace Acquisitions II, LLC*, *supra*; *Whitehead v Pine Haven Operating LLC*, *supra*; *Ruth v Elderwood at Amherst*, *supra*; *Alechko v Sprain Brook Manor Rehab*, 81 Misc3d 1242, 203 NYS3d 865 [Sup Ct. Westchester County 2024]; cf *Holder v Jacob*, 231 AD3d 78, 216 NYS3d 134 [1st Dept 2024]). In particular, the evidence submitted by defendants conclusively establishes that the care and treatment provided to Ms. Lehecka was impacted by acts and decisions on the part of Oasis staff in response to and as a result of COVID-19 and in an attempt to prevent Ms. Lehecka from being exposed to COVID-19 and then to treat her COVID-19 infection. The affirmation of Monica Garcia, RN, the director of nursing at Oasis since 2020, explains in detail Ms. Lehecka's care and treatment as a person under investigation for COVID-19 while she was a resident at Oasis. Ms. Garcia submits the medical records of Ms. Lehecka from Oasis that support the efforts made by Oasis to prepare for and address the impact of COVID-19 on Ms. Lehecka's care and treatment, in accordance with the Oasis COVID-19 protocols for prevention, monitoring and treatment that were implemented pursuant to public health directives.

Furthermore, plaintiff's allegations of gross negligence, careless, reckless, and willful misconduct, are insufficient to exempt defendants from immunity under the EDTPA, as the 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" (*Estate of Alechko v Sprain Brook Manor Rehab, LLC*, 81 Misc3d 1242, 1242, 203 NYS3d 865; see also *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 109, 201 NYS3d 697 [3d Dept 2023])[complaint alleging bare legal conclusions of gross negligence lacking factual specificity were insufficient]; *Kalogiannis v New York Center for Rehabilitation & Nursing*, 80 Misc3d 1219, 1219, 196 NYS3d 918 [Sup Ct. Queens County 2023])[complaint "failed to plead specific allegations that rise to the level of gross negligence, which differ in kind, not only degree, from claims of ordinary negligence"]; *Cameron v Cobble Hill Health Ctr., Inc.*, 2024 WL 198419, 2024 NY Slip Op. 30249 [Sup Ct. New York County 2024]; *Crompton v Garnet Health*, 73 Misc3d 543, 559-560, 155 NYS3d 699 [Sup Ct. Orange County 2021]). Plaintiff's arguments in opposition seek to expand defendants' burden to establish immunity under the EDTPA, which is not supported by caselaw, and any arguments regarding the need for discovery are conclusory and speculative. The Court has considered the remaining contentions of plaintiff and find that they lack merit. Because defendants are immune from liability under the EDTPA, the Court need not consider whether PREP applies.

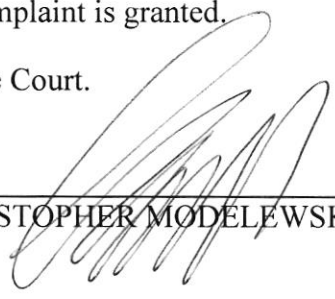
As to the claims asserted against defendant Laufer, they are barred by the applicable statute of limitations. The statute of limitations began to run on November 3, 2020, the date the COVID-19 tolling period expired (see *McLaughlin v Snowlift, Inc.*, 214 AD3d 720, 185 NYS3d 212 [2d Dept 2023]). Thus, plaintiff had two years from that date to commence a wrongful death action (N.Y. EPTL §5-4.1) and three years therefrom to commence a negligence action (CPLR 214). This action was commenced on November 21, 2024, more than three years from November 3, 2020. In opposition, plaintiff has not satisfied its burden for the application of the relation-back doctrine, including that defendant Laufer is united in interest with Oasis and that he knew or should have known that an action would have been brought against him (see *Roco G.C. Corp. v Bridge View Tower, LLC*, 166 AD3d 1031, 1033-1034, 89 NYS3d 201, 204 [2d Dept 2018]).

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Accordingly, the defendants' motion to dismiss the complaint is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: December 16, 2024



HON. CHRISTOPHER MODELEWSKI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION