

Aponte v Our Lady of Consolation Nursing & Rehabilitative Care Ctr.
2024 NY Slip Op 35712(U)
March 22, 2024
Supreme Court, Nassau County
Docket Number: Index No. 615293/2021
Judge: Conrad D. Singer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. CONRAD D. SINGER,
Justice

TRIAL PART: 20

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MARIA A. APONTE, as Administrator of the Estate of
OSVALDO APONTE,

Index No.: 615293/2021
Motion Seq. No.: 001
Motion Submitted: 12/21/2023

Plaintiffs,

DECISION AND ORDER ON
MOTION

-against-

OUR LADY OF CONSOLATION NURSING AND
REHABILITATIVE CARE CENTER, OUR LADY OF
CONSOLATION GERIATRIC CARE CENTER, and
CATHOLIC HEALTH SYSTEM OF LONG ISLAND, INC.,

XXX

Defendants.

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The following papers have been read on this motion:

Defendants’ Notice of Motion to Dismiss Complaint and Supporting Papers [Seq. 001].....X
Affirmation in Opposition to Motion and Supporting Papers [Seq. 001].....X
Defendants’ Reply Affirmation [Seq. 001].....X

Upon the foregoing papers, the Motion of the Defendants, Our Lady of Consolation Geriatric Care Center d/b/a Our Lady of Consolation Nursing & Rehabilitation s/h/a Our Lady of Consolation Nursing and Rehabilitative Care Center; Our Lady of Consolation Geriatric Care Center; and Catholic Health System of Long Island, Inc. [collectively, “OLOC” or “Defendants”], for an Order pursuant to CPLR § 3211[a][7], dismissing the Plaintiff’s Complaint on the ground that OLOC is immune from liability under New York’s Emergency or Disaster Treatment Protection Act [“EDTPA”] codified as N.Y. Public Health Law §§ 3080-3082 (formerly); and pursuant to CPLR §§ 3211(a)(2) and (a)(7), dismissing the Complaint on the ground that OLOC is immune from suit and liability under the federal Public Readiness and Emergency Preparedness [“PREP”] Act, 42 U.S.C. § 247d-6d, *et seq*, and the Court thus

lacks subject matter jurisdiction as the cause of action is defensively preempted by federal law, is determined as follows:

The Decedent, Osvaldo Aponte [“Decedent”], passed away on April 11, 2020. The Plaintiff, Maria A. Aponte, as Administrator of the Estate of Osvaldo Aponte [“Plaintiff”], is the administrator of the Decedent’s estate, and commenced this action against the Defendants, the nursing home/residential health care facility that treated the Decedent before his death.

The Plaintiff alleges that the Decedent was a patient-resident of OLOC from on or about August 7, 2019, through his death on or about April 11, 2020. The Plaintiff further alleges that during the Decedent’s admission at OLOC’s nursing home facility, and as a direct and proximate result of the Defendants’ acts and/or omissions and/or violation of applicable laws, statutes, rules, etc., he was infected with SARS-CoV-2 and contracted COVID-19, and suffered respiratory distress, hypoxia, and other injuries, which caused his death.

The Plaintiff’s Complaint asserts causes of action against the Defendants to recover damages for [1] violations of New York Public Health Law; [2] conscious pain and suffering-negligence; [3] conscious pain and suffering-gross negligence; and [4] wrongful death.

The Defendants have moved, in lieu of answering, for an Order dismissing the Plaintiff’s Complaint.

“In the context of a motion to dismiss pursuant to CPLR § 3211[(a)(7)], the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff [with] the benefit of every possible inference...Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss”. (*EBC I, Inc. v. Goldman, Sachs & Co*, 5 NY3d 11, 19 [2005]). “[W]hen evidentiary material is adduced in support of a motion to dismiss a complaint

pursuant to CPLR § 3211(a)(7), and the motion has not been converted to one for summary judgment, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one, and, ‘unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it...dismissal should not eventuate’. (*F&M General Contracting v. Oncel*, 132 AD3d 946, 947-948 [2d Dept 2015]).

OLOC contends, *inter alia*, that it is immune from civil liability pursuant to New York’s Emergency or Disaster Treatment Protection Act [“EDTPA”], codified at Public Health Law §§3080 – 3082 (formerly). “At the outset of the COVID–19 pandemic the New York State Legislature enacted the EDTPA with the stated purpose of ‘promot[ing] the public health, safety and welfare of all citizens by broadly protecting 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’. (*Mera v New York City Health and Hosps. Corp.*, 220 AD3d 668, 669 [2d Dept 2023] [quoting Public Health Law former Article 30-D, § 3080]).

“As is relevant here, the EDTPA initially provided, with certain exceptions, that a health care facility ‘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.” (*Mera.*, 220 AD3d at 669; quoting Public Health Law former § 3082[1]).

Additionally, “[t]he 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 669-670; quoting former § 3081[5]).

The EDTPA was repealed on April 6, 2021, i.e., approximately one year after it was first enacted. “[T]he legislation provided simply that EDTPA was repealed and that ‘this act shall take effect immediately’”. (*Ruth v Elderwood at Amherst*, 209 AD3d 1281, 1283 [4th Dept 2022] [citing to L. 2021, ch. 96, §§ 1-2]).

The Plaintiff opposes the Defendants’ motion and argues, *inter alia*, that the repeal of the EDTPA was retroactive and that the EDTPA is therefore inapplicable to this case. While the Second Department has not squarely addressed the issue of whether the repeal of the EDTPA was retroactive or prospective, it has recently applied the EDTPA and held that healthcare Defendants were immune from lawsuits arising from similar facts and circumstances. (*See, Martinez v NYC Health and Hosps. Corp.*, 223 AD3d 731, 732-33 [2d Dept 2024]; *Mera v New York City Health and Hosps. Corp.*, 220 AD3d 668, 670 [2d Dept 2023]).

Moreover, the Fourth Department [*Ruth v. Elderwood at Amherst*, 209 AD3d 1281, 1291 (4th Dept. 2022)]; Third Department [*Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 109 (3d Dept 2023)]; and First Department [*Hasan v Terrace Acquisitions II, LLC*, 203 NYS3d 325, 326 (1st Dept 2024)], have all held that the repeal of the EDTPA was not retroactive and that the repeal was prospective only. Therefore, and pursuant to this binding precedent [*Mtn. View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664-65 (2d Dept 1984)], the Court finds that the repeal of the EDTPA was not retrospective and was prospective only.

Having determined such, the Court will now turn to whether the Defendants have established that they are entitled to immunity under the EDTPA. Defendants' motion includes a supporting affirmation from Anne Nolte, M.D., a board-certified family physician employed by Catholic Health and Good Samaritan Hospital Medical Center, who volunteered to provide frontline care to COVID-19 positive patients at OLOC beginning on March 28, 2020. Dr. Nolte's affirmation cites to and relies upon various exhibits appended thereto, including the Decedent's certified medical records from OLOC and copies of OLOC Policies and Protocols. Based on the Plaintiff's allegations that the Decedent contracted, was treated for, and passed away from COVID-19 while at OLOC, and after reviewing the Defendants' motion submissions, including Dr. Nolte's affirmation, the Decedent's medical records, and OLOC's policies and procedures, the Court finds that Defendants are entitled to immunity pursuant to the EDTPA. (*See Mera v New York City Health and Hosps. Corp.*, 220 AD3d at 670).

The Plaintiff also argues that her cause of action based on gross negligence is not subject to the immunity afforded by the EDTPA. Indeed, the EDTPA does not grant health care facilities and/or professionals with immunity from civil liability in instances of "willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional." (*See former Public Health Law* § 3082). In this case, the Plaintiff's Complaint includes a cause of action for gross negligence, and alleges that the Defendants' actions constituted gross negligence, that their conduct was willful, and that they acted with reckless regard for potential consequences.

However, affording the Complaint a liberal reading, the Court finds that the Complaint fails to state a claim for "gross negligence". "Gross negligence 'differs in kind, not only degree, from claims of ordinary negligence'... To constitute gross negligence, a party's conduct must 'smack of intentional

wrongdoing' or 'evinced a reckless indifference to the rights of others'... 'Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence'". (*Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011] [internal citations omitted, internal quotes omitted, citations omitted]). In this case, the bare and conclusory allegations included in the Plaintiff's Complaint are not accepted as true by the Court, and they are insufficient to state a claim for gross negligence. (*See Doria v Masucci*, 230 AD2d 764, 765-66 [2d Dept 1996]).

As the Court finds that the Defendants are entitled to immunity under the EDTPA, and that the Complaint fails to state a cause of action for gross negligence, the Defendants' motion for an Order dismissing the Plaintiff's Complaint shall be **GRANTED**.

In light of these determinations, the parties' remaining contentions need not be reached.

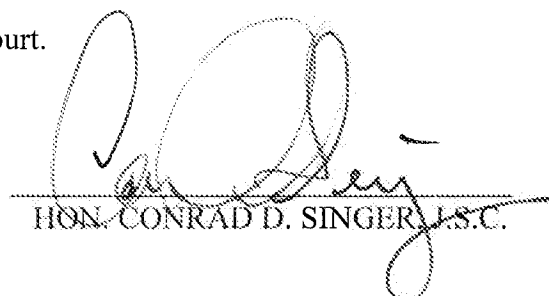
Accordingly, it is hereby:

ORDERED, that Defendants' motion for an Order pursuant to CPLR 3211 dismissing the Plaintiff's Complaint is **GRANTED**, and the Plaintiff's Complaint is hereby dismissed; and it is further,

ORDERED, that all other requests for relief not specifically addressed herein shall be deemed **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: March 22, 2024
Mineola, NY



HON. CONRAD D. SINGER, J.S.C.

ENTERED

Mar 25 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE