

**Nguyen v Menorah Ctr. for Rehabilitation & Nursing
Care**

2025 NY Slip Op 32075(U)

June 5, 2025

Supreme Court, Kings County

Docket Number: Index No. 503208/2024

Judge: Carolyn E. Wade

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At an IAS Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, 11201 on the 5th day of June, 2025

PRESENT: Hon. Carolyn E. Wade, J.S.C

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THANH NGUYEN as Administrator of the Estate of
ELIZABETH HO-NGUYEN,

Index No.: 503208/2024

Motion Seq. No.: 1

Plaintiff,

-against-

DECISION &
ORDER ON MOTION

MENORAH CENTER FOR REHABILITATION AND
NURSING CARE,

Defendant.
-----X

The following papers were read on Defendant Menorah Center for Rehabilitation and Nursing Care's (hereinafter "Menorah Center") Motion to Dismiss (Mot. Seq. 001):

PAPERS:

DOC NOS.

Defendant's Notice of Motion to Dismiss and Supporting Papers

NYSCEF Docs.
6-36

Affirmation in Opposition to Motion and Supporting Papers

NYSCEF Docs.
41-58

Defendant's Reply Affirmation

NYSCEF Docs.
61-66

Plaintiff, Thanh Nguyen, brings this action as the Administrator of the Estate of Elizabeth Ho-Nguyen against Defendant, Menorah Center, a nursing home in which Elizabeth Ho-Nguyen was a patient. Plaintiff's Complaint alleged: first cause of action of Public Health Law violations; second cause of action of nursing home malpractice; third cause of action of gross negligence; and fourth cause of action for wrongful death in connection with Elizabeth Ho-Nguyen's April 27, 2020, through at least July 31, 2020, admission to Menorah Center.

In Mot. Seq. 001, Defendant, Menorah Center, moves to dismiss the complaint in its entirety pursuant to New York CPLR §3211(a)(7) on the grounds that Defendant is entitled to immunity under New York's Emergency or Disaster Treatment Protection Act ("EDTPA"), N.Y. Pub. Health Law former art 30-D, §§ 3080-82, repealed by L 2021, ch 96, § 1, which, as relevant here, immunized healthcare facilities from civil liability for certain acts or omissions in the treatment of patients during the period of the COVID-19

emergency declaration. Defendant also sought dismissal of the wrongful death cause of action under CPLR §3211(a)(5).

Relevant Facts

Ms. Ho-Nguyen was admitted to Menorah Center in June 2019 as a transfer from a facility located in Pennsylvania. Her chart indicates that she was 95 years of age with a past medical history that included osteoarthritis, hypertension, GERD, heart disease, hyperlipidemia, anemia, osteoporosis and dementia. She was admitted to Menorah Center for long term care.

Pursuant to the Complaint, plaintiff's only claims of injury are based on the allegation that Ms. Ho-Nguyen contracted COVID-19 during the pandemic, while a resident at Menorah Center. The only specific dates of nursing malpractice are March 1, 2020, through April 12, 2020.

In March of 2020, Governor Andrew Cuomo issued an Executive Order declaring a disaster emergency for the State of New York due to the COVID-19 pandemic.

Counsel for the defendant contends that because Menorah Center can establish that it is entitled to immunity under the EDTPA, this action must be dismissed in its entirety.

Plaintiff's Untimely Opposition

Defendant's Motion (Seq. 001) was filed on March 26, 2024. Plaintiff's opposition was initially due May 29, 2024, this Court having set the return date to June 5, 2024. On June 3, 2024, at the request of plaintiff's counsel, and with the Defendant's consent (NYSCEF Doc. 38), this Court adjourned the motion, setting a new return date of September 25, 2024, with plaintiff's opposition due September 18, 2024.

Following the entry of a subsequent stipulation (NYSCEF Doc. 40), this Court adjourned the motion, setting January 15, 2025, as the return date with plaintiff's opposition due January 8, 2025. Per this Court's part rules and the CPLR, plaintiff filed an untimely opposition on the evening of January 10, 2025. Plaintiff's counsel did not seek leave from the Court for the late filing. In the opposition papers, plaintiff's counsel did not show good cause for the late filing.

Absent a showing of good cause, courts have the discretion to reject untimely opposition papers (*See Kurman v. Messados*, 51 AD 3d 982, 982 [2d Dept 2008] [refusing to consider plaintiffs untimely opposition to defense's summary judgment motion as plaintiff failed to set forth a reasonable excuse for the delay]; *Aneke v. Parks*, 197 AD 3d 601, 602 [2d Dept 2021] [striking plaintiffs opposition papers to summary judgment motion as untimely]).

Plaintiff's untimely submission, despite the benefit of ten months to prepare, is therefore rejected (*See Brill v. City of New York*, 2 NY 3d 646, 652 [2004]).

Plaintiff's Wrongful Death Claim is Dismissed

Plaintiff's wrongful death claim has already been dismissed, with prejudice, in a prior filing (Index No.: 523053/2023) between the same parties. *See* Exhibit L to Defendant's Motion (NYSCEF Doc. 19).

Discussion

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory. Watts v. City of New York, 186 AD 3d 1577, 1578 [2d Dept. 2020]; CPLR 3026.

"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 AD 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.

This Court finds that by its submissions in support of its motion, the Defendant has established the three conditions required for the application of EDTPA immunity. Specifically, the Defendant submitted the affidavit of Faina Vasserman, a Registered Nurse and Director of Nursing, who had direct knowledge of the measures undertaken to arrange for and provide health care services pursuant to the COVID-19 Declaration of Public Health Emergency and guidance issued by public health authorities; the decedent's chart; and New York State Executive Orders.

Defendant falls within the definition of a “health care facility” as a skilled nursing facility. During the period of negligence alleged in the Complaint, March 1, 2020, through April 12, 2020, and prior thereto, Defendant has shown that services were being rendered to the decedent “in accordance with applicable law” as Defendant was licensed to operate and provide services under New York law and was providing health care services to the decedent under the COVID-19 emergency orders in good faith. *See Mera v. N.Y. City Health and Hospital Corp.*, Index No. 712032/21 (N.Y. App. Div. 2d Dept Oct. 4, 2023); *Martinez v. NYC Health and Hosp. Corp.*, Index No. 713092/21 (2d Dept. Jan. 17, 2024); *Ruth v. Elderwood at Amherst*, 209 A.D.3d 1281 (4th Dept. 2022); *Whitehead v. Pine Haven Operating LLC*, No. 535767, 2023 WL 8262460 (3d Dept. Nov. 30, 2023); *Hasan v. Terrace Acquisitions II, LLC*, 203 NYS3d 325 (1st Dept 2024).


The evidence presented by Defendant also clearly shows that plaintiff’s decedent’s care and treatment was impacted as a result of the pandemic. The medical chart and policies in place during the COVID-19 pandemic, provided by Defendant, show implementation of isolation of residents, required admission of all patients despite COVID status per the NYS DOH, testing and monitoring targeted towards COVID, 1:1 staff providing cares, suspension of communal activities and dining, suspension of visitation, suspension of out on pass privileges, virtual care planning, COVID-19 focused care planning goals, and use of PPE. *See* Defendant’s Exhibit M (NYSCEF Docs. 20-22) and Q (NYSCEF Doc. 26); *See also Crampton v. Garnet Health*, 73 Misc 3d 543, 557-558 (Supreme Court, Orange County 2021) (the degree of “impact” needed to trigger immunity need be only minimal).

The only exception to immunity afforded under the EDTPA is willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm. N.Y. Pub. Health Law § 3082(2). The Complaint here, however, fails to plead a specific cause of action for gross negligence, reckless misconduct, or intentional infliction of harm. Instead, the Complaint presents allegations are not factually specific, do not directly relate to Decedent’s care, and are vague, speculative, and conclusory. *Alechko v. Sprain Brook Manor Rehab. LLC*, Index No. 59472/2022 (Sup. Ct. Westchester County, Feb. 2, 2024); *Crampton v. Garnet Health*, 2021 NY Slip Op 21242 [73 Misc 3d 543]; *Riback v. Margulis*, 43 AD3d 1023 (2d Dept. 2007); *Rios v. Tiny Giants Daycare, Inc.*, 135 AD3d 845 (2d Dept. 2016); *Mancuso v. Rubin*, 52 AD3d 580 (2d Dept. 2008).

Therefore, Defendant’s Motion (Seq. 001) is GRANTED and it is hereby ORDERED that the Complaint is dismissed in its entirety.

This constitutes the Decision and Order of the Court.

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 KINGS COUNTY CLERK


 Hon. Carolyn Wade, J.S.C.
 Hon. Carolyn E. Wade
 Supreme Court Justice
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