SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 158629/2024

MOTION DATE 04/25/2025

MOTION SEQ. NO. 001

The Estate of GERTRUDE MAS, also known as GERTRUDYS MAS, by her Administrator, NORMA ROSA,

Plaintiff,

- v -

ISABELLA GERIATRIC CENTER, INC., doing business as ISABELLA CENTER FOR REHABILITATION AND NURSING CARE, ABC CORPORATION, and ABC PARTNERSHIP (These names being fictitious as their true identities are presently unknown),

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for DISMISS.

In this action to recover damages pursuant to Public Health Law §§ 2801-d and 2803-c for purported violations of statutes and regulations governing nursing homes, and for medical malpractice and wrongful death, the defendant Isabella Geriatric Center, Inc., doing business as Isabella Center for Rehabilitation and Nursing Care (Isabella), moves pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it for lack of subject matter jurisdiction (CPLR 3211[a][2]) and for failure to state a cause of action (CPLR 3211[a][7]). The plaintiff opposes the motion. The motion is granted, inasmuch as the complaint fails to state a cause of action against Isabella by virtue of the immunity from civil liability conferred upon it by the Emergency or Disaster Treatment Protection Act (Public Health Law former §§ 3080-3082; hereinafter EDTPA).

The plaintiff, Norma Rosa, is the administrator for Gertrude Mas, also known as Gertrudys Mas, who was a resident of Isabella from approximately July 2010 until her death on April 19, 2020. In her complaint, which she filed on September 18, 2024, the plaintiff alleged that Isabella first became aware of the growing COVID-19 pandemic in or around January 2020, and that it failed to provide Mas with the appropriate care or with customary nursing and rehabilitation services during her time there. The plaintiff further alleged that Mas contracted COVID-19 while at Isabella, and that the facility failed to take the proper precautions to prevent and control the spread of infections, such as having sufficient or proper personal protective equipment (PPE) available, isolating residents, properly sterilizing and storing equipment, and actively screening everyone that entered the building for COVID-19 symptoms. The plaintiff alleged that, as a consequence of Isabella's failure, Mas also suffered loss of dignity and enjoyment of life from COVID-19.

In its motion, Isabella argued that the complaint should be dismissed insofar as asserted against it since EDTPA conferred immunity upon it from civil actions such as the plaintiff's action here. In opposition, the plaintiff argued that the EDTPA may not be invoked by the defendant since the act has since been repealed. Finally, the plaintiff argued that her claims for gross negligence and recklessness were not subject to statutory immunity.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" *(511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id*. at 152; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 884 [2013]; *Simkin v Blank*, 19 NY3d 46, 52 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Taxi Tours, Inc. v Go New York Tours, Inc.,* 41 NY3d 991, 993 [2024]; *Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v*

Martinez, 84 NY2d 83, 87-88 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc*., 10 AD3d 267, 270-271 [1st Dept 2004]; CPLR 3026). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d at 152 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Where, however, the court considers evidentiary material beyond the complaint, as it does here, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" (*id*.). Nonetheless, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

Initially, the court has subject matter jurisdiction over the claims asserted in this action. Subject matter jurisdiction

> "refers to the power of the court to hear the kind of case that is presently before it for adjudication (*Matter of Newham v Chile Exploration Co*., 232 NY 37; *Matter of Rougeron*, 17 NY2d 264; *Thrasher v United States Liab. Ins. Co*., 19 NY2d 159; *Hunt v Hunt*, 72 NY 217). Whether a court has subject matter jurisdiction is determined by the Constitution, statutes and (occasionally) the rules which confer jurisdiction. (Siegel, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, CPLR 3211, C3211:11, at 17), and not by the particular facts of any case. (*Hunt v Hunt*, *supra*.) The question to be resolved is whether the court has jurisdiction over the 'type' of case, not whether it has jurisdiction over 'this particular' case. (*1890 Realty Co. v Ford*, 121 Misc 2d 834; Treiman, *Subject Matter Jurisdiction in Summary Proceedings*, NYLJ, Mar. 2, 1990, at 1, col 1; *Hunt v Hunt*, *supra*.)"

(*New York County Dist. Attorney's Office v Oquendo*, 147 Misc 2d 125, 127-128 [Civ Ct, N.Y. County 1990]). Thus, subject matter jurisdiction

> "'refers to objections that are 'fundamental to the power of adjudication of a court.' 'Lack of jurisdiction' should not be used to mean merely 'that elements of a cause of action are absent,' but that the matter before the court was not the kind of matter on which the court had power to rule"

(*Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 203 [2013], quoting *Lacks v Lacks*, 41 NY2d 71, 74 [1976]; *see Garcia v Government Emps. Ins. Co.*, 130 AD3d 870, 871 [2d Dept 2015]). "Subject matter jurisdiction is a 'power to adjudge concerning the general question involved' in litigation, and 'is not dependent upon the state of facts which may appear in a particular case'" (*Henry v New Jersey Tr. Corp.*, 39 NY3d 361, 371 [2023], quoting *Hunt v Hunt*, 72 NY 217, 229 [1878]). Pursuant to NY Constitution, art VI, § 7(a), "[t]he supreme court shall have general original jurisdiction in law and equity. Crucially, immunity from suit is a waivable defense and, hence, cannot be the basis for the invocation of lack of subject matter jurisdiction (*Henry v New Jersey Tr. Corp.*, 39 NY3d at 369-372; *Gillis v Carmel Richmond Nursing Home, Inc.*, 83 Misc 3d 1256[A], 2024 NY Slip Op 50984[U], *5, 2024 NY Misc LEXIS 3283, *13 [Sup Ct, Richmond County, Jul. 29, 2024]). This court thus has subject matter jurisdiction over the instant medical malpractice action.

Nonetheless, the complaint fails to state a cause of action, inasmuch as, under the circumstances of this case, EDTPA confers immunity upon Isabella.

In March 2020, then-Governor Andrew Cuomo signed Executive Order No. 202 (9 NYCRR 8.202), declaring a disaster emergency in New York state, and Executive Order No. 202.10 (9 NYCRR 8.202.10), conferring, upon healthcare workers and facilities, immunity from civil liability for any injury or death alleged to have been sustained directly as a result of the provision of medical services in support of New York's response to the COVID-19 pandemic, except where such injury or death was caused by gross negligence or recklessness. On April 3, 2020, the Legislature passed EDTPA, granting certain enumerated healthcare facilities and healthcare professionals immunity from civil or criminal liability related to the care of patients with COVID-19, provided that:

> "the health care facility or health care professional is arranging for or providing health care services pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; the act or omission occurs in the course of arranging for or providing health care services and the treatment of the individual

> is impacted by the health care facility's or health care professional's decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives; and the health care facility or health care professional is arranging for or providing health care services in good faith"

(Public Health Law former § 3082[2]). The immunity did not apply where an act or omission constituted willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm (*id.*). EDTPA was effective retroactive to March 7, 2020, making it applicable to acts or omissions that occurred on or after that date. On April 6, 2021, the legislature repealed the EDTPA, with the repeal to take effect immediately.

With respect to the issue of whether the repeal of EDTPA was retroactive, thereby negating statutory immunity for acts or omissions that occurred between March 7, 2020, and April 6, 2021, the courts have consistently determined that it is not. As the Appellate Division, First Department, recently held in *Hasan v Terrace Acquisitions II, LLC* (224 AD3d 475, 477 [1st Dept 2024]), the statutory text does not contain retroactivity language, and multiple factors relevant to retroactivity analysis were deemed inapplicable. The Second Department adopted that analysis as well (*see Hyman v Richmond Univ. Med. Ctr.*, _____AD3d_____, 2025 NY Slip Op 03313, *2 [2d Dept, Jun. 4, 2005]; *Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 619 [2d Dept 2024]). Likewise, in *Whitehead v Pine Haven Operating LLC* (222 AD3d 104, 107 [3d Dept 2023]), the Third Department found that both the text and legislative history of the repeal supported prospective-only application. Similarly, in *Ruth v Elderwood at Amherst* (209 AD3d 1281, 1287 [4th Dept 2022]), the Fourth Department concluded that the legislature's expressions of intent were insufficient to support retroactive repeal. Accordingly, the EDTPA remains applicable to the claims in this case that arose from alleged acts and omissions that occurred during the statute's effective period.

The court thus concludes that, pursuant to EDTPA, Isabella is entitled to immunity from the claims asserted by the plaintiff here for the care that Mas received between January 1, 2020 (very shortly after the first COVID-19 case was reported in Wuhan, China in December 2019)

and Mas's death on April 19, 2021. With respect to the criteria required to be considered by EDTPA, it is evident that Isabella was arranging for or providing health care to Mas within the meaning of that statute, and was doing so in good faith. The court further concludes that the treatment of Mas indeed was affected or impacted by those of Isabella's medical and nursing determinations or activities that had been made in response to, or as result of, the COVID-19 outbreak, and that those determinations and activities had been made in response to, as result of, or in support of the State's COVID-19 directives. The statute does not require that the "treatment of the individual" must be impacted one way or another, that is, it does not specify that the treatment be affected positively, negatively, or otherwise, it does not require the patient to have been uniquely impacted as compared to other patients, and it does not identify any particular aspect of, or assign weight to, any aspect of the treatment that must be impacted by such determinations and activities (*see Holder v Jacob*, 231 AD3d 73, 85 [1st Dept 2024]).

In showing that its specific treatment of Mas was impacted by COVID-19 and by its determinations and activities addressed thereto, Isabella relied upon its COVID-19 policies, a copy of Mas's medical records, and the affirmation of Christine Young, who was a nursing supervisor at Isabella at the time of the COVID-19 pandemic, and is the current director of nursing there. Young detailed the impact that the pandemic had on the care specifically provided to Mas during that time. These submissions established the very entitlement to immunity that the EDTPA was meant to provide (*see Hasan v Terrace Acquisitions II, LLC*, 224 AD3d at 477; *Whitehead v Pine Haven Operating LLC*, 222 AD3d at 110; *Martinez v NYC Health & Hosps. Corp.*, 223 AD3d 731, 732 [2d Dept 2024]; *Mera v NY City Health & Hosps. Corp.*, 220 AD3d 668, 670 [2d Dept 2023]; *see also Holder v Jacob*, 231 AD3d at 88 ["where, as here, the CPLR 3211(a)(7) motion is predicated on what is asserted to be a complete defense, and that motion is supported by evidence, the evidence of the defense must be *conclusive*"]; *but cf. Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 619 [2d Dept

2024] [finding that the defendant's submission did not establish that the three requirements for immunity were met]).

In opposition, the plaintiff asserts that the defendant failed to establish that Mas's care was specifically impacted by Isabella's response to the COVID-19 pandemic, and that Isabella's evidence is deficient and inappropriate for a pre-answer motion. The court finds these contentions to be unavailing. First, Mas's medical records and Young's affirmation established that Mas's care was specifically impacted by Isabella's COVID-19 response. Second, pre-answer dismissal is appropriate when defendants are statutorily immunized from liability, since such immunity forms the basis for a CPLR 3211(a)(7) motion to dismiss the complaint (*see Mera v NY City Health & Hosps. Corp.*, 220 AD3d at 670). Third, although the plaintiff asserted that Isabella had preexisting, pre-pandemic compliance issues and staffing concerns, these allegations do not meet the high bar required to overcome EDTPA immunity. The court notes that the first reported case of COVID-19 in New York was documented on March 1, 2020. Accordingly, the court concludes that the plaintiff's allegations that Isabella should have or could have been prepared for the pandemic, before anyone knew of its severity and virulence, lacked sufficient factual support and failed to defeat the statutory immunity provided under the EDTPA, and that any claims of negligent pre-pandemic preparation are devoid of factual specificity and without merit in the instant case.

Finally, the plaintiff argued that his claims sounding in gross negligence and recklessness were not subject to statutory immunity. The plaintiff's medical records, Isabella's COVID-19 policy, and Young's affirmation negated such claims (*see Hasan v Terrace Acquisitions II, LLC*, 224 AD3d at 479) and, hence, with respect to the allegations of gross negligence, a fact alleged to be a fact by the plaintiff is not a fact at all. Additionally, the plaintiff's allegation that the defendant had been cited for "improper infection control violations" since at least 2019 does not sufficiently support a gross negligence claim (*see id.*). Allegations purporting to support a gross negligence claim that are devoid of factual specificity and replete

with legal conclusions cannot survive dismissal (*see Lociero v Park Avenue Operating, LLC* [Sup Ct, Nassau County, Index No. 615904/2022, Sep. 26, 2023], citing *Godfrey v Spano*, 13 NY3d at 373). Thus, the gross negligence exception is not applicable, and Isabella is entitled to immunity under the EDTPA.

With respect to the defendants denominated as ABC Corporation and ABC Partnership, the plaintiff made no showing that she made any efforts that to identify these fictitious defendants. Since they were never identified, the plaintiff is precluded from relying on CPLR 1024 to maintain this action against those parties (*see generally Fountain v Ocean View II Assocs., L.P.,* 266 AD2d 339 [2d Dept 1999]), and the complaint must be dismissed as against them. Consequently, the complaint must be dismissed insofar as asserted against all of the defendants, and the action must now be marked disposed.

This court has considered the plaintiff's remaining contentions and find them unavailing.

Accordingly, it is,

ORDERED that the motion of the defendant Isabella Geriatric Center, Inc., doing business as Isabella Center for Rehabilitation and Nursing Care, to dismiss the complaint insofar as asserted against it is granted, and the complaint is dismissed insofar as asserted against the defendant Isabella Geriatric Center, Inc., doing business as Isabella Center for Rehabilitation and Nursing Care; and it is further,

ORDERED that, on the court's own motion, the complaint is dismissed insofar as asserted against the fictitious defendants, ABC Corporation and ABC Partnership; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant Isabella Geriatric Center, Inc., doing business as Isabella Center for Rehabilitation and Nursing Care; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Isabella Geriatric Center, Inc., doing business as Isabella Center for Rehabilitation and Nursing Care.

This constitutes the Decision and Order of the court.

7/3/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	☐	**CASE DISPOSED**		☐	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐ **DENIED**	☐	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**