SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

GEOFFREY SANDERS, as Administrator of the Estate of IRENE ARANOVICH, Deceased,

Plaintiff,

- v -

DEWITT REHABILITATION AND NURSING CENTER, INC., doing business as UPPER EAST SIDE REHABILITATION AND NURSING CENTER,

Defendant.

----------X

INDEX NO. 159026/2023

MOTION DATE 04/25/2025

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134,, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155,, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175

were read on this motion to/for DISMISS.

This is an 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, wrongful death, and loss of enjoyment of life. The defendant, Dewitt Rehabilitation and Nursing Center, Inc., doing business as Upper East Side Rehabilitation and Nursing Center (Dewitt), moves pursuant to CPLR 3211(a) to dismiss the complaint for lack of subject matter jurisdiction (CPLR 3211[a][2]) and for failure to state a cause of action (CPLR 3211[a][7]) because the federal Public Readiness and Emergency Preparedness Act (Pub L 109-48, 42 USC § 247d-6d, *et seq*, eff. Dec. 30, 2005; hereinafter the PREP Act) conferred immunity upon it in from liability connection with the plaintiff's claims. The plaintiff opposes the motion. The motion is denied, since the court has subject matter jurisdiction over the plaintiff's claims and the PREP Act, which is the only basis for Dewitt's request for relief pursuant to

CPLR 3211(a)(7), does not confer immunity from liability upon it under the circumstances obtaining in this action.[1]

The plaintiff Geoffrey Sanders is the administrator of the estate of Irene Aranovic, who was a resident of Dewitt from approximately January 2, 2020 until February 4, 2023. In his complaint, which he filed on January 12, 2024, the plaintiff alleged that Dewitt first became aware of the growing COVID-19 pandemic in or around January 2020, and that it failed to provide Aranovich with the appropriate care or with customary nursing and rehabilitation services during her time there. The plaintiff further alleged that Aranovich contracted COVID-19 while at Dewitt, 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. Finally, the plaintiff alleged that Aranovich suffered loss of dignity and enjoyment of life from COVID-19 as a result of Dewitt's failures.

In its motion, Dewitt argued that the complaint should be dismissed since the PREP Act provided broad, federal immunity, and that the claims asserted by the plaintiff here related both to healthcare services provided in response to the COVID-19 pandemic and to "covered countermeasures" employed in the diagnosis or treatment of COVID-19. In opposition, the plaintiff argued that the PREP Act may not be invoked by the defendant since the plaintiff's claim do not arise out of a covered countermeasure.

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

[1] The court notes that the defendant did not invoke the immunity provisions of the Emergency or Disaster Treatment Protection Act (Public Health Law former §§ 3080-3082) as a ground for its motion.

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 [2013]; *Simkin v Blank*, 19 NY3d 46 [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 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc*., 10 AD3d 267 [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 [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 and Public Health Law action.

On March 17, 2020, in response to the pandemic, the Secretary of the United States Department of Health and Human Services (HHS) issued a declaration invoking and implementing the PREP Act (*see* Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 FR 15198-01, Mar. 17, 2020). In the PREP Act, Congress had provided immunity from liability to covered persons for loss caused by or relating to the administration or use of a "covered countermeasure" in times of a public health emergency (*see* 42 USC § 247d-6d[a][1]). "Covered countermeasures" included

any drug or device used to treat, diagnose, or mitigate the spread of COVID-19, as well as PPE and COVID-19 tests, that had been approved by United States Food and Drug Administration (FDA), as well as common medical devices such as thermometers and ventilators (*see Escobar v Mercy Med. Ctr.*, 83 Misc 3d 1213[A], 2024 NY Slip Op 50704[U], *2-3, 2024 NY Misc LEXIS 2457, *7-8 [Sup Ct, Nassau County, Jun. 11, 2024]). The only exception to PREP Act immunity from liability for engaging in "covered countermeasures" was "for death or serious physical injury proximately caused by willful misconduct" by a covered person, and allowed an action to be instituted by the person who suffered such an injury, or by any representative of such a person (*see* 42 USC §§ 247d-6d[d][1], [2]).

Dewitt, however, is not entitled to PREP Act immunity. In a state court action, when addressing an immunity defense pursuant to the PREP Act, the court first must determine whether the plaintiff's claims fall within the act's immunity provision (see 42 USCS § 247d-6d[a][1]; *Thomas v Highland Care Ctr.*, 2024 NYLJ LEXIS 3209 [Sup Ct, Queens County, Sep. 27, 2024]). The PREP Act is triggered only where there are allegations that the defendant administered countermeasures improperly, thus causing injury (*see Whitehead v Pine Haven Operating LLC*, 2022 NY Slip Op 34685[U], *5, 2022 NY Misc LEXIS 35761, *5 [Sup Ct, Columbia County, Nov. 29, 2022], *affd* 222 AD3d 104 [3d Dept 2023], citing *Parker v St. Lawrence County Pub. Health Dept.*, 102 AD3d 140, 141-142 [3d Dept 2012]). In this instance, the plaintiff's claims pertain only to Dewitt's failures to act, and such allegations do not amount to the administration of countermeasures (*see id.*; *see also Estate of Ortiz v Archcare at Terence Cardinal Cooke Health Care Ctr.,* 2025 NY Slip Op 32270[U], *9-10, 2025 NY Misc LEXIS 5809 *14-15 [Sup Ct, N.Y. County, Jun. 26, 2025] [Kelley, J.]; *Adler v Troy*, 2023 NY Slip Op 33804[U], *8, 2023 NY Misc LEXIS 11547, *11-12 [Sup Ct, N.Y. County, Oct. 18, 2023], citing *Dupervil v Alliance Health Operations, LLC*, 516 F Supp 3d 238, 255 [ED NY 2021]). In other words, "[t]he acts and omissions listed in the complaint are unrelated to the administration,

prioritizing, or purposeful allocation of a drug, biological product, or device to an individual within the meaning of the PREP Act" (*Murray v Staten Is. Care Ctr.,* 82 Misc 3d 1220[A], 2024 NY Slip Op 50347[U], *5, 2024 NY Misc LEXIS 1605, *24-25 [Sup Ct, Richmond County, Mar. 22 2024]).

The court rejects Dewitt's contention that PREP Act immunity extends to "administrative activities" beyond the physical act of directly dispensing or administering a covered countermeasure to an individual. In the March 17, 2020 declaration, the Secretary of HHS restricted the definition of "administration" under the PREP Act to "activities related to management and operation of programs and locations for providing countermeasures to recipients, such as decisions and actions involving security and queuing, *but only insofar as those activities directly relate to the countermeasure activities*" (Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 FR 15198-01 [emphasis added]). Hence, "program planners" making policy-level decisions do not fall under the protection of the PREP Act (*see Murray v Staten Is. Care Ctr.,* 82 Misc 3d 1220[A], 2024 NY Slip Op 50347[U], *5, 2024 NY Misc LEXIS 1605, *24-25]; *Estate of Pierro by Stazzone v Carmel Richmond Healthcare and Rehabilitation Ctr.*, 81 Misc 3d 1085, 1095-96 [Sup Ct, Richmond County 2023]; *see generally Goldblatt v HCP Prairie Vill. KS OPCO LLC,* 516 F Supp 3d 1251 [D Kan 2021] [where complaint alleged neither limited covered countermeasures nor a failure to administer those countermeasures to him in order to administer it to another individual, PREP Act immunity in inapplicable]), and there is no merit to Dewitt's contention that certain indirect administrative measures that it allegedly took with respect to the COVID-19 fell within the ambit of PREP Act immunity.

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

Accordingly, it is,

ORDERED that the defendant's motion to dismiss the complaint is denied.

This constitutes the Decision and Order of the court.

7/3/2025
DATE

JOHN J. KELLEY, J.S.C.

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