Estate of Lyles v Fort Tryon Rehab & Health Care Facility, LLC

2025 NY Slip Op 32775(U)

July 17, 2025

Supreme Court, New York County

Docket Number: Index No. 156565/2024

Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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THE ESTATE OF JOSEPH LYLES by his Administrator, HATTIE LYLES,

Plaintiff,

- v -

FORT TRYON REHAB & HEALTH CARE FACILITY, LLC, doing business as FORT TRYON CENTER FOR REHABILITATION AND NURSING, HELEN WEBSTER, ABC CORPORATION, and ABC PARTNERSHIP (These names being fictitious as their true identities are presently unknown),

Defendants.

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INDEX NO. 156565/2024

MOTION DATE 07/15/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for DISMISSAL.

In this action to recover damages, inter alia, pursuant to Public Health Law §§ 2801-d and 2803-c for purported violations of statutes and regulations governing nursing homes, and for medical malpractice, common-law negligence, negligence per se, gross negligence, and wrongful death, the defendant Fort Tryon Rehab & Health Care Facility, LLC, doing business as Fort Tryon Center for Rehabilitation and Nursing (Fort Tryon), moves pursuant to CPLR 3211(a)(5) to dismiss, as time-barred, the wrongful death cause of action insofar as asserted against it, and pursuant to CPLR 3211(a)(7) to dismiss the entirety of the complaint insofar as asserted against it for failure to state a cause of action. The plaintiff opposes the motion. The motion is granted, inasmuch as the complaint fails to state a cause of action against Fort Tryon 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), and because the wrongful death cause of action is time-barred.

On April 9, 2020, Joseph Lyles, who was then a resident of Fort Tryon, died from COVID-19. On April 9, 2022, Hattie Lyles, as proposed administrator of the estate of Joseph Lyles, commenced an action against Fort Tryon, under Index No. 153074/2022 (the 2022 action), to recover damages, inter alia, pursuant to Public Health Law §§ 2801-d and 2803-c for purported violations of statutes and regulations governing nursing homes, and for medical malpractice, common-law negligence, negligence per se, gross negligence, and wrongful death. In an order dated April 4, 2023, the court (Ramseur, J.) granted Fort Tryon's motion pursuant to CPLR 3211(a)(3) to dismiss the complaint in that action on the ground that, inasmuch as Hattie Lyles was only the "proposed" administrator of the decedent's estate, she lacked capacity to prosecute the action on behalf of the estate (*see Rodriguez v River Val. Care Ctr., Inc.,* 175 AD3d 432, 433 [1st Dept 2019]; *Richards v Lourdes Hosp.,* 58 AD3d 927, 927-928 [3d Dept 2009]; *Mendez v Kyung Yoo*, 23 AD3d 354, 355 [2d Dept 2005]). The dismissal was without prejudice to the timely commencement of a new action against Fort Tryon for the same relief pursuant to CPLR 205(a) once Hattie Lyles had been appointed as the actual administrator of the decedent's estate (*see Carrick v Central Gen. Hosp*., 51 NY2d 242, 246, 252 [1980]; *see Rodriguez v River Val. Care Ctr., Inc.*, 175 AD3d at 433; *Snodgrass v Professional Radiology*, 50 AD3d 883, 884-885 [2d Dept 2008]). Hence, Hattie Lyles had six months after April 4, 2023, or until October 4, 2023, to obtain letters of administration and commence the new action in accordance with CPLR 205(a) (*see* CPLR 205[a]).

Hattie Lyles waited until September 29, 2023 to petition the Surrogate's Court for letters of administration in connection with the decedent's estate. On October 2, 2023, despite having yet to be appointed as the administrator of the decedent's estate, Hattie Lyles commenced a second action against Fort Tryon, which was essentially identical to the 2022 action, under Index No. 159657/2023, additionally naming Helen Webster as a party defendant (the 2023 action), but still characterized herself as the "proposed administrator" of the decedent's estate. In an order dated January 26, 2024, the court (Bannon, J.) granted Fort Tryon's motion to

dismiss the complaint insofar as asserted against it on the ground that Hattie Lyles still lacked capacity to prosecute an action on behalf of the decedent's estate. That court also invoked the doctrine of collateral estoppel in dismissing the complaint against Fort Tryon, as the dismissals in the 2023 action were premised upon the same ground as the dismissal in the 2022 action.

The Surrogate's Court, New York County, ultimately appointed Hattie Lyles as the administrator of the decedent's estate on April 10, 2024. On July 18, 2024, Hattie Lyles commenced the instant action against Fort Tryon and Webster, making the same allegations and seeking the same relief against them as she sought in the 2023 action.

Initially, the court notes that it 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.

Notwithstanding the foregoing, the wrongful death cause of action is time-barred.

The law requires that a plaintiff whose complaint had been dismissed for lack of capacity to prosecute an action on behalf of a decedent's estate must either first secure appointment as an administrator or executor of that decedent's estate, and thereafter commence the new action within six months of the subject dismissal or, notwithstanding the fact that he or she had yet to be appointed as an administrator or executor of a decedent's estate during that six-month period, to commence the new action *not only within that six-month period, but also within the limitations period applicable to the relevant causes of action*. Only in the latter situation would the plaintiff be able to avail himself or herself of a second six-month grace period when the second action is dismissed for lack of capacity. The decedent died on April 9, 2020. When the plaintiff commenced the 2023 action on October 2, 2023, after the 2022 action already had been dismissed for her lack of capacity, not only had she yet to be appointed as her decedent's administrator, but the two-year limitations period applicable to the wrongful death cause of action had expired, even taking into account the toll of limitations periods between March 20, 2020 and November 3, 2020 that had been established by the Legislature and the Governor in connection with the 2020 COVID-19 pandemic (*see* Executive Law § 29-a; *Brash v Richards*, 195 AD3d 582 [2d Dept 2021]; EO 202.8, 202.67). Similarly, when she commenced this third action on July 18, 2024, although she had by then been appointed as the administrator of the

decedent's estate, the two-year limitations period applicable to the wrongful death cause of action had long since expired.

As one appellate court has explained,

> "CPLR 205(a) is subject to three unyielding conditions. First, the new action will be permitted only if it would have been timely if commenced at the time of the prior action. Second, the new action must be commenced within six months of the termination of the prior action. Third, the prior action must be terminated for reasons other than its voluntary discontinuance, the failure to obtain personal jurisdiction over the defendant, neglect to prosecute, or a final judgment on the merits"

(*Sokoloff v Schor*, 176 AD3d 120, 127 [2d Dept 2019]).

> "Where, as in this case, a plaintiff's claims are dismissed more than once, it is important to clarify whether the first condition enunciated in *Sokoloff* refers to the timeliness of the originally filed 'prior action' or the most recent dismissed action. Although repeated CPLR 205(a) applications are not per se inappropriate, this question has never been addressed directly by any state appellate authority,"

(*Armstead v New York City Health & Hosps. Corp*., 2024 NYLJ LEXIS 2494, *8 [Sup Ct, Kings County, Jul. 30, 2024]), although the issue has been addressed by a federal appellate court exercising its diversity jurisdiction (*see Ray v Ray*, 22 F4th 69 [2d Cir 2021]).

As the United States Court of Appeals for the Second Circuit explained in *Ray*, CPLR 205(a) "does not permit a litigant to file an otherwise untimely 'new action' within six months of a 'prior action,' where that prior action was, itself, *only made timely* by a previous application of section 205(a)" (*Ray v Ray*, 22 F4th at 75 [emphasis added]). Were that not the correct rule, new actions could be filed "in perpetuity" based on the original filing date after multiple dismissals (*id.*, at 73). The decision of the Appellate Division, First Department, in *E & L, Inc. v Liberty Mut. Fire Ins. Co*. (227 AD2d 303, 303-304 [1st Dept 1996]), is instructive in this respect. In that action, the Supreme Court had dismissed a corporate plaintiff's complaint in an initial breach of contract action for lack of capacity to prosecute the action, inasmuch as its board of directors had not authorized the corporation to commence the action. Although the corporation commenced such a second action within six months of the dismissal of the first action in accordance with CPLR 205(a), it had still yet to obtain its board of directors' approval therefor

when it commenced the second action. The second action also was dismissed for lack of capacity. Within six months of the dismissal of the second action, the corporation finally obtained authority from its board of directors to prosecute the claim, and it commenced a third action for the same relief during that interval. The Appellate Division, First Department, concluded that CPLR 205(a) permitted the commencement of the third action, but only because, in that case, the six-year limitations period applicable to the underlying claim had yet to expire when the third action was commenced, by which time the plaintiff had obtained its board of directors' authority to prosecute the claim and, thus, had obtained capacity to commence the third action. That is not the case here, since the two-year limitations period applicable to wrongful death causes of action *had* expired before the plaintiff here commenced both her second and third actions.

Several trial courts, including this one, have held that the six-month extension of CPLR 205(a) is intended to allow one "full bite of the apple" only, not a chain of recommencements (*Armstead v New York City Health & Hosps. Corp*., 2024 NYLJ LEXIS 2494, *9; *see Figueroa v Jewish Home Lifecare Manhattan,* 2025 NY Slip Op 31010[U], *4-6, 2025 NY Misc LEXIS 1880, *6-8 [Sup Ct, N.Y. County, Mar. 31, 2025] [Kelley, J.]; *Tecocoatzi-Ortiz v Just Salad 600 Third, LLC*, 2023 NY Slip Op 30512[U], *8, 2023 NY Misc LEXIS 687, *11-12 [Sup Ct, N.Y. County, Feb. 17, 2023]; *Goldberg v Littauer Hosp. Assn*., 160 Misc 2d 571, 574 n 2 [Sup Ct, Albany County 1994]). "[B]oth federal and New York courts have consistently described section 205(a) as authorizing a 'second' opportunity to file a claim after a 'first' or 'initial' claim is dismissed on a non-merits final judgment" (*Ray v Ray*, 22 F4th at 73-74; *see Windward Bora, LLC v Sotomayor*, 113 F4th 236, 243 [2d Cir 2024] [CPLR 205(a) was enacted to permit a plaintiff to "gain one final chance" to litigate a claim after non-merits based dismissal]).

Hence, upon the dismissal of the 2022 action on April 4, 2023, the plaintiff was obligated to obtain letters of administration and, thus, legal capacity, before commencing the 2023 action, and thereupon commence the 2023 action within six months of April 4, 2023, that is, by October

4, 2023. If she had obtained letters of administration prior to October 4, 2023, and commenced the 2023 action on or before that date, all of her claims would have survived. If, as it turned out was the case, she still lacked capacity for several months subsequent to October 4, 2023, or was having difficulty obtaining letters of administration from the Surrogate's Court, she only would have been permitted to interpose the wrongful death cause of action in a new action, in her capacity as a "proposed administrator"---and thus again avail herself of the provisions of CPLR 205(a)---had she done so on or before November 3, 2022,[1] which was the date that the limitations period applicable to the wrongful death cause of action expired. Since the plaintiff was not entitled to second, six-month extension of time to interpose the wrongful death cause of action because the limitations period applicable to that cause of action had by then expired, she is barred from asserting the claim here, and it thus must be dismissed with prejudice.

With respect to whether the plaintiff's claims, including the wrongful death claim, state a cause of action, 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*

[1] Since the decedent died on April 9, 2020, when the limitations toll was in effect, and the toll remained in effect until November 3, 2020, a representative of his estate would have had until November 3, 2022 to timely interpose a wrongful death cause of action regardless of CPLR 205(a). When the 2023 action was dismissed on January 26, 2024, and the plaintiff still had yet to obtain letters of administration, that limitations period had long since expired. Hence, as explained herein, the wrongful death cause of action asserted in this action was time-barred.

Short Hills, Inc., 10 AD3d 267, 270-271 [1st Dept 2004]; CPLR 3026). As a general rule, "[t]he 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]). 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]). 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*.; *see High Definition MRI, P.C. v Travelers Cos., Inc.,* 137 AD3d 602, 602-603 [1st Dept 2016]).

The complaint here fails to state a cause of action under CPLR 3211(a)(7) since, under the circumstances of this case, EDTPA confers immunity upon Fort Tryon.

On April 3, 2020, the Legislature passed EDTPA, granting any healthcare facility or healthcare professional 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 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.

With respect to the causes of action other than the wrongful death cause of action, although Fort Tryon did not argue that they were time-barred, those causes of action nonetheless must be dismissed pursuant to CPLR 3211(a)(7), as they fail to state a cognizable claim in light of the statutory immunity conferred by EDTPA. As explained below, the court finds that Fort Tryon is entitled to such immunity for the alleged acts or omissions at issue in this case, which occurred during the effective period of the EDTPA and during the time that it provided healthcare services impacted by the COVID-19 pandemic.

Fort Tryon has established its entitlement to immunity under EDTPA, which was enacted on April 3, 2020, and granted civil liability immunity to healthcare facilities and professionals for

acts or omissions occurring between March 7, 2020, and April 6, 2021, so long as the care provided was impacted by the COVID-19 pandemic and rendered in good faith (see Public Health Law former §§ 3080-3082; *Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475, 477 [1st Dept 2024]; *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 107 [3d Dept 2023]). Fort Tryon submitted evidentiary materials, including the affirmation of Joseph Oyori, R.N., the facility's COVID-19 policies, and copies of state Public Health Orders. These materials support Fort Tryon's claim that the decedent's care was arranged for and provided in good faith during a period in which the facility's operations and treatment protocols were directly impacted by the COVID-19 emergency and in furtherance of the State's directives. Plaintiff's broad allegations, largely devoid of specific factual support, fail to demonstrate that the care rendered fell outside the scope of EDTPA protection or that Fort Tryon acted with gross negligence or willful misconduct so as to trigger any exception to immunity.

In his affirmation, Oyori, who served as Fort Tryon's Registered Nurse Supervisor during the relevant period, affirmed that the facility operated in accordance with emergency directives from the New York State Department of Health (DOH) and the federal Centers for Disease Control and Prevention (CDC), and that staff provided care in good faith under difficult and evolving circumstances. Oyori specifically refuted the plaintiff's allegations that Fort Tryon failed to maintain adequate staffing, procure sufficient personal protective equipment (PPE), or implement appropriate infection control and isolation protocols. He averred that PPE supplies were sufficient, infection control measures, including one-on-one care, contact precautions, and resident isolation were implemented, and that any staffing shortages were the unavoidable result of pandemic-related workforce disruption beyond the facility's control. Oyori also confirmed that Fort Tryon complied with a March 25, 2020 DOH directive, which prohibited nursing homes from denying admission or readmission of medically stable residents based on a confirmed or suspected diagnosis of COVID-19, and prohibited facilities from requiring COVID-19 testing prior to admission. These statements, made by a supervising clinician with firsthand

knowledge of the facility's conditions and pandemic response, further corroborate that Fort Tryon's actions were neither grossly negligent nor willful, but instead fell squarely within the scope of EDTPA immunity.

In opposition, the plaintiff contended that Fort Tryon failed to demonstrate that the care rendered to her decedent was specifically impacted by the facility's response to the COVID-19 pandemic, and that the evidence that it submitted was insufficient and procedurally improper on a pre-answer motion. These arguments are unavailing. First, Oyori's affirmation establishes that the decedent's care was in fact directly impacted by the facility's COVID-19 emergency operations, including infection control measures, staff redeployments, PPE protocols, and compliance with state-issued directives.[2] Second, as courts have held, a defendant's invocation of statutory immunity under the EDTPA is appropriately addressed on a pre-answer motion to dismiss pursuant to CPLR 3211(a)(7), where such immunity, if established, renders the pleading legally insufficient (*see Mera v NY City Health & Hosps. Corp.*, 220 AD3d 666, 670 [1st Dept 2023]). Accordingly, any claims premised on conduct occurring within the EDTPA immunity period must be dismissed. Third, the plaintiff's allegations of pre-pandemic deficiencies are unpersuasive. Although plaintiff relies on general regulatory reports and a February 27, 2020 response letter from Fort Tryon addressing family complaints, the record confirms that the decedent was admitted to the facility on December 5, 2019, and that the alleged wrongful acts, including COVID-related negligence and alleged failure to isolate, occurred in March and April 2020, squarely within the EDTPA immunity period. The facility's contemporaneous response letter refutes any implication of mistreatment and describes the clinical basis for decisions about the decedent's nutrition, speech therapy, and general care. In any event, the plaintiff has failed

[2] The statute does not indicate 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]).

to plead with specificity how any pre-pandemic conduct constituted gross negligence or willful misconduct sufficient to overcome EDTPA protection. The court notes that the first reported case of COVID-19 in New York was documented on March 1, 2020. Allegations that Fort Tryon should have better anticipated or prepared for the pandemic before its onset lack both legal and factual support. As the courts have repeatedly held, speculative assertions of institutional unpreparedness, without concrete facts rising to the level of willful or reckless misconduct, do not suffice to defeat statutory immunity (*see Hasan v Terrace Acquisitions II, LLC*, 224 AD3d at 477; *Whitehead v Pine Haven Operating LLC*, 222 AD3d at 107). Accordingly, the plaintiff's arguments in opposition fail to overcome the comprehensive immunity conferred by the EDTPA, even for acts and omissions that predated March 7, 2020.

Finally, the plaintiff contends that her claims sounding in gross negligence and recklessness fall outside the scope of statutory immunity. However, the decedent's medical records, Fort Tryon's COVID-19 policies, and Oyori's affirmation refute those claims (*see Hasan v Terrace Acquisitions II, LLC*, 224 AD3d at 479). With respect to the plaintiff's allegations of gross negligence, "a fact alleged to be a fact by the plaintiff is not a fact at all." The purported allegations of gross negligence are wholly conclusory, devoid of factual specificity, and insufficient to sustain the claim (*see Lociero v Park Avenue Operating, LLC*, Sup Ct, Nassau County, Index No. 615904/2022, Sep. 26, 2023, citing *Godfrey v Spano*, 13 NY3d 358, 373 [2009]). Thus, the gross negligence exception is not applicable, and Fort Tryon is entitled to immunity under the EDTPA.

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

Accordingly, it is

ORDERED that the motion of the defendant Fort Tryon Rehab & Health Care Facility, LLC, doing business as Fort Tryon Center for Rehabilitation and Nursing**,** pursuant to CPLR 3211(a)(5) and (a)(7), is granted, and the complaint is dismissed in its entirety insofar as

asserted against Fort Tryon Rehab & Health Care Facility, LLC, doing business as Fort Tryon Center for Rehabilitation and Nursing; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant Fort Tryon Rehab & Health Care Facility, LLC, doing business as Fort Tryon Center for Rehabilitation and Nursing; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Fort Tryon Rehab & Health Care Facility, LLC, doing business as Fort Tryon Center for Rehabilitation and Nursing.

This constitutes the Decision and Order of the Court.

7/17/2025
DATE

JOHN J. KELLEY, J.S.C.

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