

**Stevens v Dewitt Rehabilitation & Nursing Ctr., Inc.**

2025 NY Slip Op 32818(U)

July 24, 2025

Supreme Court, New York County

Docket Number: Index No. 159411/2023

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

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BARRY STEVENS, as Executor of the Estate of JEFFREY SHAW, Deceased,

Plaintiff,

**INDEX NO.** 159411/2023

**MOTION DATE** 07/24/2025

**MOTION SEQ. NO.** 001

- v -

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

Defendant(s).

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 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, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105.

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 Dewitt Rehabilitation and Nursing Center, Inc., doing business as Upper East Side Rehabilitation and Nursing Center (hereinafter Dewitt), 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.<sup>1</sup> The motion is granted, inasmuch as the complaint fails to state a cause of action against Dewitt by virtue of the immunity from civil

<sup>1</sup> At the outset, the court notes that the plaintiff's opposition was untimely served. By stipulation, the parties agreed to adjourn the motion to March 28, 2025, with the plaintiff's opposition due by March 14, 2025, and reply papers due by March 25, 2025. The plaintiff, however, did not serve his opposition until March 21, 2025, one week after the stipulated deadline. While the court nevertheless considers the plaintiff's opposition papers in resolving this motion, since Dewitt was able to serve reply papers, and the court is granting the motion in any event, the procedural deficiency is duly noted.

liability conferred upon it by the Emergency or Disaster Treatment Protection Act (Public Health Law former §§ 3080–3082; hereinafter EDTPA).

The plaintiff, Barry Stevens, is the administrator of the estate of Jeffrey Shaw, who was a resident of Dewitt from approximately February 21, 2020, until his death on April 9, 2020. In his complaint, which he filed on September 26, 2023, the plaintiff alleged that Dewitt first became aware of the growing COVID-19 pandemic in or around January 2020, and that Dewitt's pre- and mid-pandemic actions failed to provide Shaw with the appropriate care or with customary nursing and rehabilitation services during his time there. The plaintiff further alleged that Shaw contracted COVID-19 while at Dewitt, and that the facility failed to take proper precautions to prevent and control the spread of infections, such as having sufficient or proper personal protective equipment (PPE) available, proper staffing levels, and proper infectious disease policies and procedures. The plaintiff alleged that Shaw also 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 EDTPA conferred immunity upon it from civil actions such as the plaintiff's action here, while the federal Public Readiness and Emergency Preparedness Act (Pub L 109-148, 42 USC § 247d-6d et seq, eff. Dec 20, 2005; hereinafter the PREP Act) provided broad, federal immunity, and the claims here related both to healthcare services in response to the COVID-19 pandemic and to "covered countermeasures" used in the diagnosis or treatment of COVID-19. In opposition, the plaintiff argued that Dewitt cannot invoke EDTPA because the statute has since been repealed. Plaintiff contended that the PREP Act is inapplicable under the facts presented. Lastly, the plaintiff contended that his claims alleging gross negligence and recklessness are not shielded by 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 Dewitt.

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

during the COVID-19 pandemic crisis, including those patients who has contracted 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.

Separately, on March 17, 2020, in response to the pandemic, the Secretary of the United States Department of Health and Human Services 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), pursuant to which 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]).

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.

This court concludes that, pursuant to EDTPA, Dewitt is entitled to immunity from the claims asserted by the plaintiff here for the care that his decedent received during his admission between February 21, 2020, and April 9, 2020. With respect to the criteria required to be considered by EDTPA, it is evident that Dewitt was arranging for or providing health care to Shaw within the meaning of the statute and was doing so in good faith. The court further finds that Shaw's treatment was indeed impacted by Dewitt's medical, administrative, and nursing decisions made in response to, or as a result of, the COVID-19 outbreak and in accordance with the State's COVID-19 directives. 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]).

In showing that its treatment of Shaw was impacted by COVID-19 and by its determinations and activities addressed thereto, Dewitt submitted its COVID-19 policies, a copy of Shaw’s redacted medical chart, the affirmation of Scott Mair, who has been the Administrator at Dewitt since January 2012, that detailed the impact that the pandemic had on the care specifically provided to Shaw during that time. Taken together, these materials demonstrate the precise immunity EDTPA was enacted to afford (*see Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475, 477 [1st Dept 2024]; *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 110 [3d Dept 2023]; *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 73, 88 [1st Dept 2024] [“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]).

In opposition, the plaintiff asserted that the defendant failed to establish that Shaw’s care was specifically impacted by Dewitt’s COVID-19 response, and that the defendant’s evidence was deficient and inappropriate for a pre-answer motion. The court finds these contentions unavailing. First, the defendant submitted a robust evidentiary record including, inter alia, the affirmation of administrator Scott Mair, the decedent’s redacted chart, COVID-19 policies and training materials, pre-COVID infection control policies, multiple advisories and directives issued by the New York State Department of Health in early 2020, Executive Order 202.10, guidance

from the New York State Health Facilities Association and the Centers for Medicare & Medicaid Services, as well as additional regulatory materials including the PREP Act and supporting federal register entries. These documents, taken together, support the conclusion that Dewitt's treatment of Shaw was indeed impacted by COVID-19-related policies and determinations. 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 [2d Dept 2023]). Thus, any of the plaintiff's claims arising from Dewitt's conduct within the period of immunity established by EDTPA are subject to dismissal. Third, although the plaintiff offered an expert physician's report by Terrance Baker, M.D., that affirmation only discussed generalized standards and deficiencies concerning Dewitt's pre-pandemic preparedness and early pandemic operational conditions, including staffing levels, PPE supply, and infection control readiness. The court notes that the first reported case of COVID-19 in New York was documented on March 1, 2020. Allegations that Dewitt should have better anticipated or prepared for the pandemic before its onset lack both legal and factual support. Dr. Baker admitted that he reviewed Mair's affidavit and offered criticisms largely speculative in nature concerning events prior to the decedent's admission. His affirmation lacked specific analysis of Shaw's treatment, and acknowledged the uncertain and evolving nature of clinical practices during the early days of the pandemic. As such, Dr. Baker, like many similarly situated experts evaluating events from a retrospective posture, had no meaningful opportunity to contemporaneously assess how a nursing home should have responded amidst an unprecedented and rapidly escalating crisis. Although the plaintiff asserted that Dewitt exhibited preexisting compliance issues and chronic staffing concerns, such allegations do not rise to the level of gross negligence required to defeat the statutory immunity under EDTPA. Consequently, the court concludes that plaintiff's claims regarding negligent pre-pandemic

preparation are unsupported by the record, lack factual specificity, and are legally insufficient to overcome EDTPA's immunity shield.

Finally, the plaintiff argued that his claims sounding in gross negligence and recklessness were not subject to statutory immunity. The plaintiff's medical chart and Dewitt's COVID-19 policy, along with Mair'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. The 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 Dewitt is entitled to immunity under the EDTPA.

In light of the court's determination with respect to EDTPA immunity, it need not address Dewitt's contention that it also was conferred immunity from suit by virtue of the federal PREP Act. Were the court to address that issue, it would be constrained to conclude that it 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, NY County, Nov. 29, 2022], 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 the defendant'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]).

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

Accordingly, it is,

ORDERED that the motion of the defendant Dewitt Rehabilitation and Nursing Center, Inc., doing business as Upper East Side Rehabilitation and Nursing Center, to dismiss the complaint is granted, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the Court shall enter judgment dismissing the complaint against Dewitt Rehabilitation and Nursing Center, Inc., doing business as Upper East Side Rehabilitation and Nursing Center.

This constitutes the Decision and Order of the court.

7/24/2025

DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: