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 FLORA FIGUEREDO, by her Administrator, MERCEDES CAMPA, also known as MERCEDES D. CAMPA,

Plaintiff,

- v -

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

Defendants.

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INDEX NO. 161038/2024

MOTION DATE 07/07/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion to/for DISMISSAL.

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 common-law negligence, medical malpractice, and wrongful death, the defendant Isabella Geriatric Center, Inc., doing business as Isabella Center for Rehabilitation and Nursing Care (IGC) moves pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it as time-barred (CPLR 3211[a][5]) and for failure to state a cause of action (CPLR 3211[a][7]). The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed as against IGC, inasmuch as the complaint is time-barred and fails to state a cause of action against IGC 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, Mercedes Campa, is the administrator of the estate of Flora Figueredo, who was a resident of IGC from approximately January 29, 2014 until her death on April 4, 2020. In

her complaint, which she filed on November 25, 2024, the plaintiff alleged that IGC first became aware of the growing COVID-19 pandemic in or around January 2020, and that IGC's pre- and mid-pandemic conduct failed to provide Figueredo with the appropriate care or with customary nursing and rehabilitation services during her time there. The plaintiff further alleged that Figueredo contracted COVID-19 while at IGC, 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, proper staffing levels, and proper infectious disease policies and procedures. The plaintiff alleged that Figueredo also suffered loss of dignity and enjoyment of life from COVID-19 as a result of IGC's failures. The plaintiff also asserted that, while at IGC, Figueredo was not provided with adequate cleaning and bathing needs or proper hydration and nutrition, and was left alone in her room with mobility issues for hours at a time.

In its motion, IGC argued that the complaint should be dismissed, since the statute of limitations has expired, and since EDTPA conferred immunity upon it from civil actions such as the plaintiff's action here, since the claims related to healthcare services provided in response to the COVID-19 pandemic. In opposition, the plaintiff argued that EDTPA may not be invoked by the defendant since the act has since been repealed, and that her claims for gross negligence and recklessness are not subject to statutory immunity. The court notes that the plaintiff did not address the statute of limitations issue.

On April 3, 2022, the plaintiff initially commenced a lawsuit under Index Number 152821/2022 (the first action), asserting the same claims as in the instant action. In an order dated February 21, 2024, the court (Bannon, J.) dismissed the complaint in the first action, without prejudice, based on the plaintiff's lack of capacity to prosecute the action when she commenced it, and correctly determined that the fact that the plaintiff obtained limited letters of administration during the pendency of that action did not permit, let alone require, a different result. On that same date, the first action was administratively reassigned to this court. On

November 25, 2024, the plaintiff commenced the instant action under Index Number 161038/2024. In an order dated April 1, 2025, this court denied plaintiff's motion to vacate Justice Bannon's dismissal order in the first action. On May 5, 2025, IGC timely made the instant motion.

To secure dismissal of the complaint as time-barred, IGC had the initial burden of establishing that the action was commenced after the expiration of relevant limitations period. If IGC satisfies its initial burden in this regard, the plaintiff is obligated to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, whether she actually commenced the action within the applicable limitations period (*see Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358, 1359 [2d Dept 2011]). Alternatively, since the first action, which was timely commenced, was dismissed without prejudice due to the plaintiff's lack of capacity to prosecute it on the date that it was commenced, the plaintiff also could have availed herself of the savings provisions of CPLR 205(a) by commencing a new action for the same relief, under a new index number, within six months of the termination of the claims asserted against the defendant in the first action, but only after the plaintiff was appointed as the executor or administrator of the decedent's estate by the Surrogate's Court pursuant to SCPA article 10 (*see Carrick v Central Gen. Hosp*., 51 NY2d 242, 246, 252 [1980]; *Rodriguez v River Val. Care Ctr., Inc.*, *Rodriguez v River Val. Care Ctr., Inc.,* 175 AD3d 432, 433 [1st Dept 2019]; *Snodgrass v Professional Radiology*, 50 AD3d 883, 884-885 [2d Dept 2008]; *Mendez v Kyung Yoo*, 23 AD3d at 355; *Bernardez v City of New York*, 100 AD2d 798, 799-800 [1st Dept 1984]). As relevant here, CPLR 205(a) provides that

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period."

A "disposition based solely upon the absence of a duly appointed administrator does not preclude reprosecution of the underlying claim through the mechanism of CPLR 205 (subd [a]) once a qualified administrator has been appointed" (*Carrick v Central Gen. Hosp.*, 51 NY2d at 252; *see Rodriguez v River Val. Care Ctr., Inc.*, 175 AD3d at 433; *Snodgrass v Professional Radiology*, 50 AD3d at 884-885; *Bernardez v City of New York*, 100 AD2d at 799-800). The plaintiff, however, failed to take advantage of this mechanism of reprosecution, and instead commenced a new action three months after the lapse of the six-month period afforded by CPLR 205(a).

Hence, complaint in this action must be dismissed against IGC as time-barred, unless the plaintiff's commencement of this action would otherwise have been timely. In this respect, 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, if the plaintiff failed to commence the new action within that six-month period, then within the limitations period otherwise applicable to the relevant causes of action. (*see Sokoloff v Schor*, 176 AD3d 120, 127 [2d Dept 2019]; *Armstead v New York City Health & Hosps. Corp.*, 2024 NYLJ LEXIS 2494, *8 [Sup Ct, Kings County, Jul. 30, 2024]; *Ray v Ray*, 22 F4th 69, 73, 75 [2d Cir 2021] [analyzing this rule in connection with a plaintiff who attempted successively to avail himself of CPLR 205(a) even after the underlying limitations period had expired, and holding that new actions cannot filed "in perpetuity," based on the filing date of the original action after multiple dismissals]).

With respect to the underlying limitation periods applicable to the plaintiff's claims, the court notes that her decedent died on April 4, 2020, which was also the last date that medical treatment was rendered to her. The plaintiff commenced the instant action on November 25, 2024. The limitations period applicable to causes of action to recover for wrongful death is two years from the date of the decedent's death (*see* EPTL 5-4.1[1]). Hence, the limitations

applicable to the wrongful death cause of action normally would have expired on April 4, 2022. The statute of limitations applicable to actions to recover for medical malpractice against a private health-care provider is two years and six months, measured from "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act omission or failure" (CPLR 214-a). Hence, the limitations period applicable to the medical malpractice cause of action normally would have expired on October 4, 2022. An action to recover damages for personal injuries, arising from alleged common-law negligence or violation of a statute that does not sound in medical malpractice, must be commenced within three years of the accrual of the cause of action (*see* CPLR 214[2], [5]). Hence, the limitations period applicable to the common-law negligence and statutory violations cause of action normally would have expired on April 4, 2023. As explained below, the limitations periods applicable to these causes of action, however, had been tolled for a period of 213 days, from April 4, 2020 until November 3, 2020. The plaintiff nonetheless failed to commence the instant action prior to the lapse of these extended limitations periods.

In accordance with L 2020, ch 23, § 2 (eff Mar. 3, 2020), the Legislature amended Executive Law § 29-a to authorize the Governor to issue, by executive order, any directive necessary to respond to the state disaster emergency arising from the COVID-19 pandemic, including a declaration that all statutory periods for the service and filing of papers in legal actions were tolled. On March 20, 2020, the Governor, pursuant to that authority, issued Executive Order (EO) 202.8, which provided, in relevant part:

> "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, *any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules* . . . , or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, *is hereby tolled from the date of this executive order until April 19, 2020."*

(emphasis added). The terms of that EO, including the tolling deadlines set forth therein, were extended 13 times between March 20, 2020 and October 4, 2020. On October 4, 2020, the Governor issued EO 202.67, providing for a final extension of the tolling deadline until November 3, 2020, with the toll no longer in effect as of November 4, 2020 (*see Brash v Richards*, 195 AD3d 582 [2d Dept 2021] [explicitly concluding that the executive orders effectuated a toll and not a mere suspension of filing deadlines]). "A toll suspends the running of the applicable period of limitation for a finite time period, and '[t]he period of the toll is excluded from the calculation of the [relevant time period]'" (*id*. at 582, quoting *Chavez v Occidental Chem. Corp*., 35 NY3d 492, 505, n 8 [2020]; *see Landwehrle v Bianchi,* 2022 NY Slip Op 50649[U], *2, 2022 NY Misc LEXIS 3094, *5 [Sup Ct, N.Y. County, Jun. 24. 2022] [Kelley, J.]; *Pollock v Rengasamy*, 2022 NY Slip Op 22160, *5, 2022 NY Misc LEXIS 2154, *10 [Sup Ct, Washington County, May 18, 2022]).

Since the plaintiff's decedent died after the toll went into effect on March 20, 2020, but before it expired on November 3, 2020, the plaintiff in this action had two years remaining after the expiration of the toll to interpose the wrongful death cause of action in a timely fashion. Consequently, when the toll expired on November 3, 2020, she had two years from that date, or until November 3, 2022, timely to interpose that cause of action. Similarly, since the decedent died within the effective dates of the toll, the plaintiff had two years and six months remaining, after her decedent's death, to interpose the medical malpractice cause of action in a timely fashion. Therefore, when the toll expired on November 3, 2020, she had two years and six months from that date, or until May 3, 2023, timely to interpose that cause of action. Finally, when the decedent died, the plaintiff had three years from the date of her death remaining to interpose the common-law negligence and statutory violation cause of action in a timely fashion. Therefore, when the toll expired on November 3, 2020, she had three years from that date, or until November 3, 2023, timely to interpose that cause of action. Because the plaintiff commenced this action on November 25, 2024, and asserted wrongful death, medical

malpractice, common-law negligence and statutory violation causes of action, the action was not timely commenced, either within the applicable limitations period or within the extension of time provided by CPLR 205(a).

In light of the court's determination that this action is time-barred, it need not address IGC's contention that it also was conferred immunity from suit by virtue of EDTPA. Were the court to address that issue, it would be constrained to conclude that IGC is, in fact, entitled to EDTPA 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]).

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

On April 3, 2020, the Legislature passed EDTPA, granting certain 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 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, 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.*, 239 AD3d 617, 618 [2d Dept 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, 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 thus concludes that, pursuant to EDTPA, IGC is entitled to immunity from the claims asserted by the plaintiff here for the care that her decedent received between March 7, 2020 and April 4, 2020. With respect to the criteria required to be considered by EDTPA, it is evident that IGC was arranging for or providing health care to Figueredo within the meaning of that statute, and was doing so in good faith. The court further concludes that the treatment of Figueredo indeed was affected or impacted by those of IGC'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 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 Figueredo was impacted by COVID-19 and by its determinations and activities addressed thereto, IGC submitted its COVID-19 policies, guidance letters from the federal Center for Medicare & Medicaid Services and the New York State Department of Health, a copy of Figueredo's medical records, and the affidavit of Mary Joseph, who is a nursing supervisor at IGC and held that position during COVID-19 pandemic, and

whose affidavit detailed the impact that the pandemic had on the care specifically provided to Figueredo during that time. These submissions established the very entitlement to immunity that 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 did not establish that the three requirements for immunity were met]).

In opposition, the plaintiff asserted that the defendant failed to establish that Figueredo's care was specifically impacted by IGC's response to the COVID-19 pandemic, and that the defendant's evidence is deficient and inappropriate for a pre-answer motion. The court finds these contentions unavailing. First, Figueredo's medical records and Joseph's affidavit established that Figueredo's care was specifically impacted by IGC'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). Thus, any of the plaintiff's claims arising from IGC's conduct within the period of immunity established by EDPTA are subject to dismissal. 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 IGC 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 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 her claims sounding in gross negligence and recklessness were not subject to statutory immunity. The plaintiff's medical records and IGC's COVID-19 policy, along with Joseph's affidavit, 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,* 2023 NY Misc LEXIS 54929 *10-11 [Sup Ct, Nassau County, Sep. 26, 2023], citing *Godfrey v Spano*, 13 NY3d at 373). Thus, the gross negligence exception is not applicable, and IGC is entitled to immunity under the EDTPA.

Nonetheless, as to the allegations arising from certain non-COVID-19-related care that the decedent received prior to the effective date of EDTPA, specifically the lack of adequate cleaning and bathing, improper hydration and nutrition, and leaving the decedent alone in her room with mobility issues for hours at a time, the court concludes that, while the plaintiff has sufficiently alleged causes of action that fall outside the scope of EDTPA immunity, they are nonetheless time-barred, as explained above.

With respect to the defendants denominated as ""ABC Corporation" and "ABC Partnership," the plaintiff made no showing of any efforts that she made to identify these fictitious defendants, and never sought to amend the caption to substitute any entity or person as a party defendant. Consequently, the plaintiff is precluded from relying on CPLR 1024 to maintain this action against those fictitious 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.

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 it; and it is further,

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

ORDERED that the Clerk of the court shall enter judgment dismissing the entirety of the complaint.

This constitutes the Decision and Order of the court.

10/3/2025
DATE

JOHN J. KELLEY, J.S.C.

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