

**Estate of Brito v Harlem Ctr. for Nursing &  
Rehabilitation, LLC**

2025 NY Slip Op 33763(U)

October 6, 2025

Supreme Court, New York County

Docket Number: Index No. 159474/2022

Judge: James E. d'Auguste

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. James E. d'Auguste PART 55

Justice

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INDEX NO. 159474/2022

THE ESTATE OF SHIRLEY BRITO,

MOTION DATE 07/03/2024

Plaintiff,

MOTION SEQ. NO. 001

- v -

HARLEM CENTER FOR NURSING AND REHABILITATION, LLC, HARLEM CENTER FOR NURSING AND REHABILITATION,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for DISMISS

Defendant Harlem Center for Nursing and Rehabilitation LLC (Harlem Center LLC) and defendant Harlem Center for Nursing and Rehabilitation (Harlem Center)(collectively, defendants) move, pursuant to 3211(a)(2), (a)(3) and (a)(7), to dismiss the complaint of the estate of Shirley Brito (decedent), by her proposed administrator, Tairra Baker (plaintiff).

BACKGROUND

According to the complaint, the decedent passed away on February 3, 2021 (complaint, ¶ 3). At the time, decedent was a resident of the nursing home facility known as Harlem Center for Nursing and Rehabilitation, Inc. (complaint, ¶ 99). Harlem Center is a residential care facility in New York City (complaint, ¶ 38). Harlem Center is a nursing home within the meaning of Public Health Law Section 2801(2) (complaint, ¶ 41). The decedent was admitted to Harlem Center on December 3, 2020, for short-term sub-acute rehabilitation after hospitalization

due to a fall and altered mental status (complaint, ¶ 99). Decedent contracted Covid-19 while she was a resident at Harlem Center and died, as a result of Covid-19, on February 3, 2021.

According to the complaint, Harlem Center “per the New York Department of Health,” was the subject of “numerous complaints and received multiple citations for violations of federal and state health codes between 2018 and 2022” (complaint, ¶ 101) and “Harlem Center had more than 100 positive COVID-19 cases in their facility among staff and residents and at least 12 of its residents died from COVID-19” (complaint, ¶ 98).

Plaintiff divides the claims against Harlem Center into different time frames: (1) prior to the pandemic, defendants failed to have the appropriate policies, procedures, staffing and otherwise failed to be prepared for a foreseeable event such as an infectious disease exposure and outbreak; and (2) after the pandemic begun and throughout the time periods referenced herein, the defendants failed to properly respond to the pandemic.

The claims asserted in the complaint are premised on negligence and gross negligence, wrongful death, and pursuant to New York State Public Health Law Sections 2801-d and 2803-c. Plaintiff also seeks recovery for punitive damages from the defendants based upon the foregoing causes of action, and because of conduct that was grossly reckless, in willful disregard, and wanton in the face of the COVID-19 outbreak and pandemic.

The complaint alleges 7 causes of action: (1) violations of the Public Health Law 2801-d and 2803-c; (2) negligence pre-Covid pandemic; (3) negligence following the beginning of the pandemic; (4) negligence per se; (5) conscious pain and suffering; (6) wrongful death; and (7) gross negligence.

The complaint outlines the development of Covid-19 internationally and how it spread to New York City, along with the federal and state requirements for the containment of the illness

and the protection of citizens from Covid-19. The complaint very specifically sets forth the mandates of the Center for Medicare & Medicaid Services (CMS) and of the Centers for Disease Control with respect to Covid-19.

With respect to defendants' treatment of decedent, plaintiff alleges, for example:

"As a direct and foreseeable consequence of defendants' acts, omissions, and failures in taking safety precautions prior and during the COVID-19 pandemic, Shirley Brito sustained loss, damages, injury, and death . . ." (complaint, ¶ 105). Additionally, plaintiff alleges: "This action is brought due to Shirley Brito dying as a result of defendant's failure to protect its residents, including one Shirley Brito, from the [Covid-19] virus before, during and throughout the outbreak and pandemic" (complaint, ¶ 106).

In paragraph 160 of the complaint, plaintiff alleges that Harlem Center engaged in the following acts and/or omissions, including:

"Failed to develop appropriate infection control and prevention policies and procedures (complaint, ¶ 160 (a));

Failed to develop and implement COVID-19 isolation and infection control and prevention procedures that were specifically tailored to [Harlem Center] (complaint, ¶ 160 (b));

Failed to implement appropriate interventions related to infection control and prevention (complaint, ¶160 (c));

Failed to screen all residents, including [decedent], for Covid-19 symptoms, and elevated temperature, heart rate, respirations, and pulse oximetry) (complaint, ¶ 160 (d));

Further, plaintiff alleges, that Harlem Center negligently instructed one or more members of their nursing staff to come in Harlem Center and provide direct care to the elderly residents, including decedent, failed to ensure sufficient levels of staff to provide skilled nursing care and treatment to all residents, including [decedent], in accordance with their care plans" (complaint, ¶¶ 160 (e) and (i).

Defendants move to dismiss the complaint on four grounds: (1) the Emergency or Disaster Treatment or Protection Act, New York Public Health Law Article 30, § 3080-3082 (the EDTPA) affords defendants immunity from all civil liability in connection with plaintiff's claims; (2) the federal Public Readiness and Emergency Preparedness Act (the PREP Act) provides immunity to defendants on plaintiff's claims; (3) plaintiff lacks capacity to represent the decedent's

estate”; and (4) the venue clause in the admission agreement mandates transfer of this action to Nassau County, New York.

Plaintiff opposes defendant’s motion on only the first two grounds.

## **DISCUSSION**

### **a. Harlem Center is entitled to dismissal pursuant to New York’s EDTPA**

In its motion, as a first ground for dismissal, Harlem Center argues that even if “plaintiff was able to show that Harlem Center made errors in treating the decedent,” (memo of law in supp at 1) Harlem Center is entitled to dismissal as plaintiff’s claims of negligence fall directly within the scope of the Emergency or Disaster Treatment Protection Act (EDTPA). This statute provides immunities for healthcare providers engaged in the mitigation and treatment of Covid-19 during the time period of decedent’s illness (*see Holder v Jacob*, 231 AD3d 78, 80 [1st Dept 2024]).

Specifically, in order to “promote the public health, safety and welfare of all citizens,” the EDTPA “broadly protect[ed] the health care facilities and health care professional in this state from liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with the public health emergency” (NY Public Health Law, § 3080 [repealed by L.2021, c. 96, § 1, eff. April 6, 2021]).

In support of their motion, Harlem Center relies upon decedent’s Harlem Center Medical Records. The records, which start with the most recent document and proceed backward in time, indicate a Covid-19 diagnosis during her stay on January 14, 2021. The record dated January 2, 2021 states: “undergoing serial Covid 19 screenings as per DOH recommendations” (Varisco aff, exhibit E at 206). Decedent was transferred to the hospital on January 21, 2021, due to medical conditions, including Covid-19. January 15, 2021 record states: “She is on contact/droplets

isolation precautions for Covid-19” (*id.* at 231). On January 14, 2021, the record states:

“[Decedent] has received a positive result from a Covid19 Swab on 1/14/2021. Resident has been placed on contact/droplet isolation precautions, sharing the room with a roommate that requires the same isolation requirement. All care and activities will be done in the room. Staff will don and doff PPE with all interaction with the resident inside the room” (*id.* at 232). On January 12, 13, 2021, the records indicate: “Continues on contact/droplet isolation as per DOH guidelines” (*id.* at 235).

A note on January 12, 2021 states: “Continues on contact/droplet precautions as per DOH guidelines r/t exposure to covid 19 (+) resident” (*id.* at 236). Decedent’s January 27, 2021 records indicate:

“Continue quarantine contact precautions and covid 19 surveillance protocol as per DOH recommendations” (240). Her record of January 6, 2021, indicates exposure to Covid, and “Standard contact. eye, and droplet precautions implemented. Quarantine and post exposure precautions as per Doh protocol Placement in isolation to prevent transmission” (*id.* at 242). The medical record of January 4, 2021 states “Resident refused to be swabbed for Covid19, multiple attempts made and education provided but resident continue to refused [sic]. The December 30, 2020 medical record indicates: “Writer swabbed (NP) the resident for covid 19 test. Resident tolerated the procedure well no other complaints at this time will continue to monitor” (*id.* at 245). Additionally, the medical records reflect: “On 12/28/20, Administration sent a letter to the resident's family members providing information about the COVID-19 vaccine and its pending distribution (*id.* at 246), and on 12/16/2020, writer and RN Ms. Jeffrey provided Covid19 information/education for the resident” (*id.* at 251).

In further support of their motion, defendants rely upon the affirmations of Dr. Alvaro Genao (Dr. Genao) (Varsico aff, exhibit B) and of Thara Cesar (Cesar)(Varsico aff, exhibit A).

According to the Dr. Genao affirmation, Dr. Genao was an attending physician at Harlem Center during the time of decedent's treatment and takes the position that decedent's care was impacted by the Covid-19 crisis throughout the period of her admission. "Residents with COVID-19, including [decedent], were placed in isolation, and staff, including physicians, nurses, and technicians, could only render care after suiting up in full PPE, which included gloves, masks, gowns and eye protection" (Genao aff, ¶ 6).

According to Dr. Genao, on December 3, 2020, decedent arrived at Harlem Center from Mt. Sinai-St. Luke's Hospital, "after treatment for a fall and altered mental status" (*id.*, ¶ 11). Before admission, decedent tested negative for Covid-19. Although she was only 53 years old, decedent was at high risk for Covid-19 complications "due to her morbid obesity, rhabdomyolysis, kidney disease, asthma and heart disease" (*id.*, ¶ 11). As a result, Dr. Genao ordered daily monitoring of decedent's "vital signs, temperature, and pulse oximetry," with any changes reported to a physician.

In early January 2021, decedent's roommate tested positive for Covid-19. Decedent initially refused to be tested, but on January 6, 2021, she tested negative. Despite the negative test result, decedent was isolated from other residents and staff were required to "don and doff new [personal protective equipment (PPE)] when attending to her according to COVID-19 guidance" (*id.*, ¶ 12). On January 14, 2021, when decedent tested positive for Covid-19, Genao ordered that:"

"[decedent's] pulse oximetry be monitored every shift and that she be administered supplemental oxygen and transferred to the hospital if her oxygen saturation was below 95%. I made this decision in direct response to [decedent's] COVID-19 infection, as

hypoxia is one of the first signs of deterioration and one of the leading causes of death for COVID-19 patients” (*id.*, ¶ 13).

Dr. Genao ordered that decedent be hospitalized if there was a significant change in her mental status, since this could mean that she was decompensating as a result of her Covid-19 infection. Dr. Genao also ordered the administration of medications, including azithromycin, an antibiotic, in case of lung infection and pneumonia, and enoxaparin, an anticoagulant, prophylactically given to prevent blood clotting, which can be caused by Covid-19. On January 20, 2021, decedent began receiving intravenous fluids, a decision made in response to her Covid-19. On January 21, 2021, as decedent was minimally responsive and refused food and medicine, the decision was made to hospitalize her.

In Cesar’s affirmation, she states that she was the Administrator of Harlem Center at the relevant time and has held that position since August 2020. In her affirmation, Cesar explains that “during the first wave of the pandemic in March 2020,” Harlem Center “established specific isolation areas through the facility to isolate patients with diagnosed or suspected Covid-19 from other non-Covid patients” (Cesar aff, ¶ 5). “On December 24, 2020, an outbreak of COVID-19 started, and we designated a specific floor for COVID-19 patients. We cohorted patients who were new admissions from the hospital together” (*id.*).

In paragraph 6 of her affirmation, Cesar lists the protocols adhered to by Harlem Center to contain the spread of Covid-19 in the facility:

“Our protocols were updated throughout the pandemic as more information became available, and included, but were not limited to:

- Suspension of visitation to Harlem Center;
- Health screenings upon entry to the facility;
- Mandatory use of face masks for residents who tested positive for COVID-19;
- Limiting offsite appointments;
- Screening of residents and new admissions for COVID-19, including requiring a negative test before admission;

- Social distancing and restrictions on group activities and communal dining;
- Isolation of residents with confirmed or suspected COVID-19, including this patient;
- Cohorting residents by COVID-19 status;
- Use of full personal protective equipment (“PPE”) such as face shield, face mask, gowns, gloves, and booties, when rendering care to COVID-19 patients, during COVID-19 outbreaks;
- Keeping a 60-day supply of all PPE in the building in accordance with DOH guidelines;
- Hiring nurses from out of state to address staffing shortages; and
- Establishment of a COVID-19 unit within the facility where designated staff were required to remain for the duration of their shift.”

She further explains specific measures taken with respect to decedent:

Cesar affirms that decedent’s “medical conditions put her at serious risk of COVID-19 complications. Her care plan included monitoring for early signs of COVID-19 infection, such as shortness of breath, fever, and low blood oxygen saturation” (*id.*, ¶ 7).

She further states: “During the time of [decedent’s] admission, we checked residents’ temperature, pulse oximetry, respiration and heart rate, and pain scales daily. We used PCR tests for residents who showed signs of COVID-19, including fever and cough, or if we suspected the resident had been exposed to COVID-19” (*id.*, ¶ 12).

On January 14, 2021, decedent’s COVID-19 test revealed a positive result, and although she was asymptomatic at that time, she was being monitored on every shift for a change in status. Cesar states that, at this point: “Dr. Genao ordered that her pulse oximetry be taken on every shift and that she be given supplemental oxygen if her oxygen saturation level went below 95%. He ordered a chest X-ray and placed her on azithromycin, an antibiotic, as precautions against pneumonia. She was placed on enoxaparin, an anticoagulant, to prevent blood clotting from COVID-19” (*id.*, ¶ 14).

Furthermore, Cesar explains that:

“[decedent’s] care plan to address COVID-19 included activity as tolerated to increase lung expansion, deep breathing exercises, use of fever-reducing medication as needed, all meals and

activities to be completed inside her room, good hand-washing techniques for all staff in contact with her, contact and droplet precautions, isolation, antibiotics, and daily monitoring for changes in vital signs, hydration, and consciousness”

(*id.*, ¶ 15).

According to Cesar, the precautions Harlem Center took when decedent was under investigation for, and being treated for, COVID-19 impacted her care and reduced the benefits she could receive from her rehabilitative therapies.

In opposition, plaintiff argues first that as the EDTPA (Section 3082) was repealed on April 6, 2021, there are questions as to whether defendant may invoke it. Plaintiff further argues that defendant has not established that decedent’s treatment was impacted by defendant’s response to the Covid-19 pandemic and the State’s directives, as required by the EDTPA and the standard set forth by the First Department in *Holder v Jacob*, 231 AD3d 78 [1st Dept 2024]). It is plaintiff’s contention that defendants’ submission, including the affirmations, fails to establish that its treatment of the decedent was impacted by defendants’ decisions or activities in response to the pandemic and have failed to establish a link between decedent’s medical care and their decisions in response to Covid-19. In support of this argument, plaintiff relies on, among other cases, *Holder v Jacob*, 231 AD3d 78 [1st Dept 2024]); *Spearance v Snyder*, 73 Misc3d 769 [Sup Ct, Onondaga Cty 2021]; and *Quattlebaum v Dragomir*, 80 Misc3d 1203(a) [Sup Ct, Nassau County 2022]).

In *Spearance*, 73 Misc3d 769, plaintiffs allege that the decedent was not properly treated for basal cell carcinoma; and in *Quattlebaum*, 80 Misc3d 1203(A), plaintiffs allege that defendant did not adequately assess the decedent’s fall risk or her risk for pressure ulcers. Both courts denied the defendants’ motions to dismiss, on the ground that defendants were not entitled

to immunity under the EDTPA as “the care provided cannot be looked at in a vacuum, and that the post-pandemic care was a continuance of the pre-pandemic care” (*Spearance* at 774, *Quattlebaum* at \*4).

Plaintiff additionally relies upon the decisions in *Hernandez v Clove Lakes Health Care and Rehabilitation Center*, Index No.: 540003/2023 [Sup Ct, Nassau County 2023], in which the defendant does not argue the EDTPA on their motion to dismiss, *Quattlebaum v Dragomir*, Index No.: 614094/2022 [Sup Ct, Nassau County, August 2023][if proper precautions had been taken to prevent decedent from falling when decedent was admitted to the defendant’s care facility, before Covid-19, “then even with all of the complications caused by the pandemic that Nurse Rock alluded to, [the decedent] would not have fallen three times”]; and *Massimo v Dubey*, Index No.: 56018/2022, \*1 [Sup Ct, Westchester County 2023][court denies defendants’ motion to dismiss seeking immunity under the EDTPA, where plaintiff alleged claims arising from defendants’ professional care of plaintiff for “certain acute medical complaints from which plaintiff was suffering”]).

In *Holder*, *Spearance*, *Quattlebaum*, and *Massimo*, the plaintiffs were not seeking damages for Covid-19-related injuries or death. For this reason, these rulings are not applicable here. In each of those cases, the courts denied the defendants’ motions to dismiss, on that ground that defendants were not entitled to immunity under the EDTPA as “the care provided cannot be looked at in a vacuum, and that the post-pandemic care was a continuance of the pre-pandemic care” (*Quattlebaum*, 80 Misc3d 1203(A), \*4; *Spearance v Snyder*, 73 Misc3d 769, \*774). In *Hernandez*, although the decedent contracted Covid-19 and had passed away from Covid-19, the defendant was not seeking relief under the EDTPA, and for this reason this case is not applicable.

The EDTPA was enacted by the New York State Legislature at the outset of the Covid-19 pandemic to provide civil immunity for claims relating to health care services rendered in response to the pandemic (*Mera v New York City Health & Hosps. Corp.*, 220 AD3d 668, 669 [2d Dept 2023] [internal quotation marks and citation omitted]). The stated purpose of the EDTPA is to promote the “public health, safety and welfare of all citizens by broadly protecting the health care facilities and health care professionals in this state from liability that may result from treatment of individuals with Covid-19 under conditions resulting from circumstances associated with the public health emergency” (*Mera v New York City Health and Hospitals Corp.*, 220 AD3d 668, 669 [2d Dept 2023][citing Public Health Law former § 3080]).

It was enacted on April 3, 2020, was applied retroactively to March 7, 2020, and has since been repealed. Although the EDTPA was repealed, New York Courts have found it was not repealed retroactively (*Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475, 478 [1st Dept 2024]; *Ruth v Elderwood at Amherst*, 209 AD3d 1281, 1291 [4th Dept 2022]). The Court, therefore, finds no merit to plaintiff’s argument that the EDTPA was questionably in effect at the relevant time in this lawsuit, and finds that because it was in effect, defendants may invoke it.

Health care services included in the immunity provision have been defined as “those related to the diagnosis, prevention, or treatment of COVID-19; the assessment or care of an individual with a confirmed or suspected case of COVID-19; and the care of any other individual who presented at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration.” *Id.*

Immunity under the EDTPA applies if (1) the defendant is a “health care professional” or “facility”; (2) the defendant was providing “health care services”; (3) the services were provided in accordance with the law or a COVID-19 emergency rule; (4) the services were impacted by

the defendant's response to Covid-19; and (5) the services were rendered in good faith and did not amount to gross negligence or recklessness.

“To be entitled to immunity under the EDTPA, a defendant must establish that three requirements were met: (1) “the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law, (2) the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives, and (3) the services were arranged or provided in good faith.”

(*Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 619 (2d Dept 2024) [internal quotation marks and citations omitted]).

“The health care services covered by the immunity provision included those related to the diagnosis, prevention, or treatment of COVID-19; the assessment or care of an individual with a confirmed or suspected case of COVID-19; and the care of any other individual who presented at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration” (*see id.* former § 3081 [5])

However, the immunity does not apply where an act or omission constituted willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the facts alleged in the complaint are typically accepted as true and the plaintiff is accorded every favorable inference (*Whitehead v Pine Haven Operating LLC*, 222 AD3d 104, 109 [1st Dept 2023]). Where a movant “provides evidence extrinsic to the complaint in support of the motion, a court ‘need not assume the truthfulness of the pleaded allegations. Instead, the criterion is whether the proponent of the pleading actually has a cause of action, not whether he [or she] has properly stated one’” (*Whitehead*, 222 AD3d at 109).

Here, the plaintiff alleges that decedent was diagnosed with Covid-19 while at Harlem Center. The complaint contains numerous allegations stating that defendants failed to comply with the Covid-19 protocols of the Center for Disease Control (CDC) and other guidance and direction from government agencies concerning: prompt detection, triage and isolation of potentially infectious residents, steps to prevent the communication of Covid-19, deferring visitors and/or requiring the wearing of face masks, communal dining and all group activities, social distancing and frequent hand hygiene. Plaintiff alleges that as a result of this alleged negligence and gross negligence, decedent was infected with and contracted Covid-19 while she was a resident at Harlem Center, and as a result she subsequently died on February 3, 2021.

In opposition to defendants' motion, plaintiff argues that defendants are not entitled to immunity under the EDTPA, since the First Department, in *Holder*, and certain trial courts, refused to grant defendants' motions to dismiss on the ground that the immunity set forth in the EDTPA was not applicable. Specifically, plaintiff relies upon the First Department decision in *Holder*, to argue that the applicability of the defense requires a fact-intensive inquiry, that, therefore, discovery is required before dispositive motion practice, and, most significantly, that defendant failed to establish a link between decedent's medical care and their decisions/activities in response to Covid-19 (memo in opp at 5-6).

However, the plaintiff in *Holder*, was not diagnosed with Covid-19. Instead, plaintiff, who was admitted to defendant's facility on April 7, 2020, for ulcerative colitis, fell, hitting his head, which resulted in severe injuries. Although defendant moved to dismiss, arguing immunity from liability under the EDTPA, the First Department held that the immunity statute was not applicable to those facts as defendant was unable to establish that "the treatment of [plaintiff was] impacted by [defendants'] decisions or activities in response to or as a result of the Covid-

19 outbreak” (*Holder*, 231 AD3d at 88). Finding that the evidence was not conclusive, the First Department denied the motion to dismiss in favor of additional discovery.

However, the Court in *Holder*, notes that in other appellate-level cases EDTPA immunity was appropriate (*see Martinez v NYC Health & Hosps. Corp.*, 223 AD3d 731 [2d Dept 2024]; *Whitehead v Pine Haven Operating LLC*, 222 AD3d 104 [3d Dept 2023]; *Mera v NYC Health & Hosps. Corp.*, 220 AD3d 668 [2d Dept 2023]; and *Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475 [1<sup>st</sup> Dept 2024]).

In *Martinez*, the decedent died on April 9, 2020 from Covid-19 while in the defendant’s health care facility. The Court granted the defendant’s motion to dismiss, pursuant to CPLR 3211 (a) (7), on the ground of immunity under the EDTPA, after stating the standard to a CPLR 3211 motion, the Court held:

“Here, the plaintiff alleges that the decedent was diagnosed with Covid-19 after arriving at Elmhurst Hospital on March 30, 2020 and that he died from Covid-19 on April 9, 2020. The defendants’ submissions, including the complaint and the transcript of the plaintiff’s hearing pursuant to General Municipal Law Sec. 50-h, conclusively established that the defendants were entitled to immunity under the EDTPA”

(*Martinez*, 223 AD3d at 732).

The Court further noted that the complaint did not contain any allegations of gross negligence.

Likewise, in *Whitehead*, the decedent, while residing at the defendant’s Nursing Home, contracted, and died from, Covid-19. Defendants moved to dismiss pursuant to CPLR 3211 (a) (7), arguing immunity to liability under the EDTPA. In support of their motion, defendants submitted the affidavit of their director of nursing. In the affidavit, the director averred that:

“Decedent’s care was impacted by the facility’s response to Covid-19 in that her visitation was restricted; employees who provided her care were screened for Covid-19; her dining services were restricted to in-unit tray service; she was examined by an infectious disease doctor she was administered a Covid-19 test and placed on droplet

precautions pending the result of that test; her vital signs were monitored; and she was administered medications and treatments for Covid-19 and to mitigate the effects thereof”

(*id.* at 110).

Based upon this affidavit, the Court held that defendant was able to establish that the care provided to decedent “occur[red] in the course of arranging for or providing health care services and the treatment of [decedent was] 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” (*Whitehead*, 222 AD3d at 110 quoting Public Health Law former sec. 3082[1][b]), and further held that such health care services were provided in good faith as required to demonstrate defendants’ entitlement to immunity from civil liability (*id.*).

Further, the Court in *Whitehead* found that plaintiff’s cause of action for gross negligence was nothing more than “bare legal conclusions with no factual specificity” and, therefore, the Court granted defendant’s motion (*Whitehead*, 222 AD3d at 111; see also *Hasan*, 224 AD3d at 478-479 [where decedent died from Covid-19 contracted in defendant’s healthcare facility, the Court found that defendant was entitled to immunity under the EDTPA and that defendant’s pandemic-related policies and medical records negated plaintiff’s claims of gross negligence]). Likewise, in *Mera*, the Court held that defendant was entitled to the immunity provided for in the EDTPA, where the decedent died from Covid-19 in the defendant’s healthcare facility based upon the affirmation of the attending physician who treated the decedent (*Mera*, 220 AD3d 668, 670 [2023]).

“A statute conferring immunity must be strictly construed and a party seeking its protections ‘must conform strictly with its conditions’” (*Holder*, 231 AD3d at 88 [internal citations omitted]).

Here, the plaintiff alleges that the decedent contracted Covid-19 at Harlem Center and subsequently died from this illness. Plaintiff alleges that defendants did not comply with Covid-19 protocol, thereby failing to prevent decedent from contracting, and dying from, the illness. In support of their motion, defendants submitted decedent's medical records from Harlem Center, and the affirmations of Dr. Genao, a treating physician, and Cesar, an Administrator at Harlem Center. Both of these affirmations, similar to the director's affidavit in *Whitehead*, set forth in express detail and from firsthand experience the infection control policies, based upon informed decision making and federal and state mandate, administered by Harlem Center.

The health care services covered by the EDTPA include those "related to the diagnosis, prevention, or treatment of COVID-19; the assessment or care of an individual with a confirmed or suspected case of COVID-19; and the care of any other individual who presented at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration" (*see* New York Public Health Law, former § 3081 [5]).

This matter fits squarely within that requirement. It was clearly the case here that decedent contracted Covid-19 and subsequently died from the illness. Defendants' submission sets forth in detail that during decedent's time at Harlem Center, defendants monitored decedent for Covid-19 symptoms and for Covid-19, isolated decedent and staff and other patients according to mandated Covid-19 protocol, used protective gear to prevent or minimize the spread of Covid-19 and tested decedent for Covid-19.

Based upon the detailed affirmations of Dr. Genao and Cesar, the Court finds that defendants have satisfied the three-part test under the EDTPA by establishing that Harlem Center was providing health care to the decedent under the Covid-19 emergency orders during decedent's time at the facility and in accordance with applicable law, the care provided was

“impacted by” defendant’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 care was provided in “good faith” (see Hasan, 224 AD3d at 478 quoting Public Health Law former § 3082 [1] [a]-[c]).

Further, the Court finds that plaintiff’s claims of gross negligence are conclusory allegations with no factual specificity. Additionally, based upon the medical records and affirmations submitted by defendants, together with plaintiff’s lack of factual support in opposition, the Court finds, even if it credited plaintiff’s general allegations of gross negligence, that the defendants’ submission negates plaintiff’s allegations. The defendants’ are, therefore, entitled to the immunity provided under the EDTPA, and the Court grants defendants’ motion on this ground. In light of this conclusion, the Court need not address the alternative grounds for dismissal raised by defendants in their motion.

Accordingly, it is hereby:

ORDERED that the Court grants defendants’ Harlem Center for Nursing and Rehabilitation LLC and Harlem Center for Rehabilitation’s motion to dismiss (Motion Sequence 001), and the Clerk is directed to enter judgment in favor of the defendants dismissing this action, together with costs and disbursements, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes the decision and order of the Court.

10/6/2025  
DATE

James d’Auguste, 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"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE