

Marrero v Yager

2025 NY Slip Op 34696(U)

December 8, 2025

Supreme Court, New York County

Docket Number: Index No. 805241/2021

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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YUDELKA MARRERO,

Plaintiff,

- v -

JEFFREY S. YAGER, M.D., JEFFREY S. YAGER, M.D.,
doing business as YAGER ESTHETICS/ESTETICA, and
GABRIEL WADE, M.D.,

Defendants.

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INDEX NO. 805241/2021

MOTION DATE 08/12/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 50, 70, 73, 74, 75, 76, 77, 78, 108

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice and lack of informed consent, the defendants Jeffrey S. Yager, M.D., and Jeffrey S. Yager, M.D., doing business as Yager Esthetics/Estetica (together the Yager defendants), move pursuant to CPLR 3025(b) for leave serve and file an amended answer to assert, as an affirmative defense, that the Emergency or Disaster Treatment Protection Act (Public Health Law former §§ 3080-3082; hereinafter EDTPA) conferred immunity upon them from liability for any alleged acts of malpractice occurring on March 11, 2020, March 30, 2020, April 3, 2020, July 9, 2020, August 18, 2020, and November 18, 2020. The plaintiff opposes the motion. The motion is granted, and the proposed amended answer annexed as Exhibit F to the Yager defendants moving papers is deemed to have been served nunc pro tunc as of July 2, 2024, the date that they made the instant motion.¹

¹ The court notes that the Yager defendants also have moved for summary judgment dismissing the complaint insofar as asserted against them (MOT SEQ 003), but that they did not argue that EDPTA immunity constituted one of the grounds for that motion. The court has adjourned the return date of that motion until February 3, 2026 to permit the Yager defendants to supplement their motion papers in order to address that ground, and the plaintiff to respond to that supplementation.

In her complaint, the plaintiff alleged that the Yager defendants committed medical malpractice on February 27, 2020 by negligently performing a surgical procedure that resulted in permanent nerve damage to her elbow, hand, and fingers. In her bill of particulars as to the Yager defendants, the plaintiff essentially reiterated her allegations of malpractice related to the treatment that they rendered to her on February 27, 2020, adding particulars as to the Yager defendants' acts and failures to act on that date. In response to a question in the Yager defendants' demand for a bill of particulars, which asked her to identify all of the dates on which they treated or examined her, the plaintiff averred that they also treated her on February 20, 2020, February 25, 2020, February 29, 2020, March 3, 2020, March 11, 2020, March 30, 2020, April 3, 2020, July 9, 2020, August 18, 2020, and November 18, 2020. She did not, however, specify what acts or omissions were attributable to the Yager defendants on each of those additional dates, although she did aver that they committed malpractice in their preoperative examination, testing, assessment, and preparation of her for the procedure, and that they also committed malpractice postoperatively by failing to record and act upon her postoperative complaints of numbness and tingling in her elbow, arm, and hand.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit (see CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]). The court nonetheless must examine the sufficiency of the proposed amendment to determine whether the proposed amended pleading is "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Badesch v Fort 710 Assoc., L.P.*, 233 AD3d 604, 604 [1st Dept 2024]; *Ferrer v Go New York Tours Inc.*, 221 AD3d 499, 500 [1st Dept 2023]).

In March 2020, then-Governor Andrew Cuomo signed Executive Order No. 202 (9 NYCRR 8.202), declaring a disaster emergency in New York state, and Executive Order No. 202.10 (9 NYCRR 8.202.10), conferring, upon healthcare workers and facilities, immunity from civil liability for any injury or death alleged to have been sustained directly as a result of the provision of medical services in support of New York's response to the COVID-19 pandemic, except where such injury or death was caused by gross negligence or recklessness. On April 3, 2020, the Legislature passed EDTPA, granting certain healthcare facilities or professionals immunity from civil or criminal liability related to the care of patients with COVID-19, provided that:

“(a) 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; (b) 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 (c) the health care facility or health care professional is arranging for or providing health care services in good faith”

(Public Health Law former § 3082[1] [emphasis added]). 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 (Public Health Law former § 3082[2]). 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.

The term “health care professional,” as explicitly defined by EDTPA, means,

“an individual, whether acting as an agent, volunteer, contractor, employee, or otherwise, who is:

“(a) licensed or otherwise authorized under title eight, article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-one- C, one hundred thirty-seven, one hundred thirty-nine, one hundred forty, one hundred fifty-three, one hundred fifty-four, one hundred sixty-three, one hundred sixty-four or one hundred sixty-five of the education law; [or]

“(c) licensed or certified under article thirty of this chapter to provide emergency medical services; [and who is]

“(e) providing health care services within the scope of authority permitted by a COVID-19 emergency rule”

(Public Health Law former §§ 3081[4][a], [c], [e]). The term “health care services,” as employed in EDTPA, means,

“services provided by a healthcare facility or a healthcare professional, regardless of the location where those services are provided, *that relate to*:

“(a) the diagnosis, prevention, or treatment of COVID-19;

“(b) the assessment or care of an individual with a confirmed or suspected case of COVID-19; *or*

“(c) *the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration.*”

(Public Health Law former § 3081[5] [emphasis added]). For purposes of EDTPA, the term “health care facility” means

“a hospital, nursing home, or other facility licensed or authorized to provide health care services for any individual under article twenty-eight of this chapter, article sixteen and article thirty-one of the mental hygiene law or under a COVID-19 emergency rule.”

(Public Health Law former § 3081[3]).

The statute did not expressly provide that the “treatment of the individual” must be impacted one way or another, that is, it did not specify that the treatment be affected positively, negatively, or otherwise, it did not require the patient to have been uniquely impacted as compared to other patients, and it did 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]).

The Yager defendants have established that Yager is a health care professional within the meaning of EDTPA, that he rendered the subject treatment at a health care facility, as

defined by EDTPA, and that the plaintiff presented “at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration,” that is, he provided “health care services” to her within the meaning of the statute. They have also made a sufficient showing that there is potential merit to their contention that the care that they rendered 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.” Although the facts underlying this element of EDTPA immunity ultimately may be disputed, the showing made by the Yager defendants is, at the very least, sufficient to warrant an amendment to their answer to assert EDTPA immunity as an affirmative defense.

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 2025]; *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 thus concludes that Yager defendants’ contention that EDTPA conferred immunity upon from the claims asserted by the plaintiff here for the care that she received

between March 7, 2020 and November 18, 2020 is not palpably insufficient or clearly devoid of merit. Hence, their motion must be granted.²

Accordingly, it is,

ORDERED that the motion of the defendants Jeffrey S. Yager, M.D., and Jeffrey S. Yager, M.D., doing business as Yager Esthetics/Estetica, for leave to serve and file an amended answer is granted, and the proposed amended answer attached as Exhibit F to their motion papers is deemed timely to have been served as of July 2, 2024; and it is further,

ORDERED that, on the court's own motion, the defendants Jeffrey S. Yager, M.D., and Jeffrey S. Yager, M.D., doing business as Yager Esthetics/Estetica, may supplement their motion for summary judgment, pending under Motion Sequence 003, with affirmations, affidavits, and a memorandum of law addressing whether certain of the plaintiff's claims may summarily be dismissed on the grounds that the Emergency or Disaster Treatment Protection Act conferred immunity upon them from liability for any alleged acts of malpractice occurring on March 11, 2020, March 30, 2020, April 3, 2020, July 9, 2020, August 18, 2020, and November 18, 2020, and the plaintiff may supplement her opposition papers to address any issues raised by those defendants in their supplementary papers.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

<u>12/8/2025</u>				
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE

² The court notes that the claims arising from the care that the Yager defendants rendered to the plaintiff on February 20, 2020, February 25, 2020, February 27, 2020, February 29, 2020, and March 3, 2020 antedated the effective date of EDTPA, and, hence, the Yager defendants are not immunized from liability for any negligent acts or omissions occurring on those dates or during the period beginning on February 20, 2020 and March 6, 2020; nor are they immunized from liability in connection with the plaintiff's lack of informed consent cause of action, which necessarily is based on alleged omissions that occurred on or before February 27, 2020.