Gerringer v Parker Jewish Inst. for Health Care & Rehabilitation
2025 NY Slip Op 35462(U)
January 14, 2025
Supreme Court, Nassau County
Docket Number: Index No. 605579/2022
Judge: R. Bruce Cozzens
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. R. BRUCE COZZENS - SUPREME COURT JUSTICE

SHARI GERRINGER, as Proposed Administrator of the Estate of STEVEN GERRINGER aka STEPHEN GERRINGER,

Plaintiffs,

-against-

PARKER JEWISH INSTITUTE FOR HEALTH CARE & REHABILITATION d/b/a PARKER JEWISH INSTITUTE FOR HEALTH CARE & REHAB; ABC CORPORATION; ABC PARTNERSHIP,

Defendants.

TRIAL/ IAS PART 1
NASSAU COUNTY
INDEX NO. 605579/2022
MOT. SEQ. #001

The following papers read on this Motion to Dismiss the Complaint:

Motion/Affidavits/Affirmations/Exhibits.....X
Memorandum of Law in Support.....X
Affidavits/Affirmations/Exhibits in Opposition.....X
Memorandum of Law in Opposition.....X
Reply Affidavits/Affirmations/Exhibits.....X
Reply Memorandum of Law.....X

Upon the foregoing papers, the motion of defendant PARKER JEWISH INSTITUTE FOR HEALTH CARE & REHABILITATION d/b/a PARKER JEWISH INSTITUTE FOR HEALTH CARE & REHAB ("Parker Jewish") for an Order (1) pursuant to CPLR § 3211 (a)(7) dismissing the complaint under New York's Emergency or Disaster Treatment Protection Act, N.Y. Pub. Health Law §§ 3080-82; and (2) pursuant to CPLR §§ 3211 (a)(2) and (a)(7)

dismissing the complaint under the federal Public Readiness and Emergency Preparedness Act ("PREP Act"), 42 U.S.C. § 247d-6d, et seq. is determined as provided herein.

SHARI GERRINGER, as Proposed Administrator of the Estate of STEVEN GERRINGER aka STEPHEN GERRINGER seeks to recover damages for personal injuries allegedly sustained by decedent STEVEN GERRINGER ("Plaintiff"). The claims asserted are premised on negligence, gross negligence, wrongful death, and nursing home malpractice (NYSCEF Doc # 1). According to the Complaint, Parker Jewish was negligent in allowing Plaintiff to become infected with COVID19, failed to protect Plaintiff from COVID19, failed to timely diagnose and treat Plaintiff's COVID19, and failed to implement proper infection control and prevention policies (NYSCEF Doc # 1).

Relevant Facts

Plaintiff had two admissions to Parker Jewish. The first admission was from February 21, 2019 to March 26, 2020 and his second admission was from April 2, 2020 to April 20, 2020. Plaintiff was transferred initially to Parker Jewish from Bridge View Nursing Home for long term care. Due to his medical condition, including dementia and cognitive deficits, he lacked capacity to make medical decisions. As a result, his two daughters, Shari Gerringer ("Shari") and Lisa Thompson ("Lisa") acted as his representatives. On March 6, 2020 Parker Jewish informed Plaintiff's family that it was taking all possible precautions to identify and prevent against the spread of COVID19 and all viral infections (NYSCEF Doc # 38, p. 2007). On March 11, 2020 Parker Jewish informed Plaintiff's designated representative and Plaintiff of the restricted visitation policy (NYSCEF Doc 38, p. 2009). On March 23, 2020, Plaintiff's family reported after speaking to him on the phone that he had occasional slurred speech. (NYSCEF Doc # 38, p. 2020). Attending physician Dr. Gazis examined Plaintiff via telephone and documented Plaintiff

had an unwitnessed fall two days earlier. Dr. Gazis spoke with the nurse who told her Plaintiff currently did not have slurred speech and his vitals were stable. Plaintiff was alert and in no acute distress. He was able to have a conversation with full sentences. However, Dr. Gazis could not rule out TIA (trans ischemic attack). Dr. Gazis spoke with Lisa and Shari and advised that they could transfer their father to the Emergency Room for a CT of the head, but he did not appear to have any gross acute neurological changes. His daughters declined the transfer as they felt it would cause more agitation, worsen his condition, and because of their concerns regarding COVID19. The plan was to continue with neuro checks and monitoring (NYSCEF Doc # 38, p. 2021). On March 25, 2020, Plaintiff experienced altered mental status. On exam, a Kennedy ulcer[1] was noted at the buttock to the sacrum. IV hydration was ordered for dehydration, as well as lab tests and wound care (NYSCEF Doc #38, p. 2023). The following day, Plaintiff was noted to be lethargic, and he developed a fever of 103 with a cough and hypoxia (NYSCEF Doc # 38, p. 2024). Dr. Gazis examined Plaintiff through FaceTime. Dr. Gazis notified Plaintiff's daughters that his condition was guarded, and Parker Jewish would do the "same thing" as the hospital. Despite Dr. Gazis explaining that going to the hospital would put Plaintiff at high risk for exposure to COVID19, his daughters requested his transfer (NYSCEF Doc #38, 2025).

Plaintiff was admitted to the hospital from March 26, 2020 to April 2, 2020. He tested positive for COVID19 and was diagnosed with sepsis secondary to COVID19. He received treatment at the hospital and was discharged back to Parker Jewish. Upon readmission to Parker Jewish, he was to continue contact and droplet isolation precautions and his vital signs were to be monitored every shift. Throughout this admission, Plaintiff was noncompliant with his medications and had poor food intake. Plaintiff received IV hydration and wound care. His

[1] An ulcer that develops rapidly during the final stages of a person's life.

daughters were frequently notified of their father's noncompliance. On April 19, 2020, Plaintiff was congested. He was seen at bedside for cough and his oxygen saturation was 90% on room air. Plaintiff was to receive oxygen via nasal cannula, undergo a chest x-ray the following morning, and have his vital signs monitored every four hours. On April 20, 2020, Plaintiff had coffee ground emesis. Shari was notified and Plaintiff was transferred to the hospital for GI hemorrhage and hyperkalemia (NYSCEF Doc 34). According to the Complaint, Plaintiff passed away on May 1, 2020, due to COVID 19.

Discussion

Defendants move pursuant to CPLR § 3211 (a)(2) and (a)(7) seeking to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a cause of action stating Parker Jewish is immune from liability under the EDTPA and/or the PREP Act.

It is well settled on a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the Court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 N.Y.2d 83 [1994]). On such motion, the question becomes whether the Plaintiff has a cause of action, not whether the Plaintiff has stated one. *Id.* "While a court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR § 3211 (a)(7), such evidence may only be considered to determine whether the plaintiff 'has a cause of action, not whether he has stated one'" (*Hartnagel v GTW Contr.*, 147 AD3d 819 [2d Dept 2017], quoting *Guggenheim v Ginzburg*, 43 NY2d 268 [1977]).

"With respect to tort claims, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint. General, tort claims accrue

upon an injury being sustained, not upon the defendant's wrongful act or the plaintiff's discovery of the injury" *(City Store Gates Mfg. Corp v Empire Rolling Steel Gates Corp.*, 113 AD3d 718 [2d Dept 2014]).

EDTPA

The EDTPA was enacted on April 6, 2020 and made retroactive to March 7, 2020. The EDTPA limited liability to health care facilities for all civil matters for negligent injuries or death directly due from the COVID-19 pandemic (*see Whitehead v Pine Haven Operating LLC*, 222 AD3d 104 [2d Dept 2023]; *see also* Public Health Law former art 30-D, § § 3080-3082). The EDTPA was repealed on April 6, 2021. It has been determined that the repeal of the EDTPA was not retroactive (*see Ruth v Elderwood At Amherst*, 209 AD3d 1281 [4th Dept 2022]).

"By way of background, at the outset of the COVID-19 pandemic in early 2020, then-Governor Cuomo signed executive orders declaring a disaster emergency in New York State (*see* Executive Order [A. Cuomo] No. 202 [9 NYCRR 8.202]) and, among other things, granting health care workers immunity from civil liability, except for instances of gross negligence, for any injury or death alleged to have been sustained directly as a result of providing medical services in support of the State's response to the COVID-19 outbreak (*see* Executive Order [A. Cuomo] No. 202.10 [9 NYCRR 8.202.10])" (*Ruth v Elderwood At Amherst*, 209 A.D.3d 1281 [4th Dept 2022]). Soon after, the EDTPA was enacted. "The purpose of the legislation was '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'" (*id.* at 1282).

"[T]he EDTPA initially provided, with certain exceptions, that a health care facility shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services as long as 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" (*Mera v New York City Health & Hosps. Corp.*, 220 A.D.3d 668 [2d Dept 2023] [internal quotations marks omitted]; *see* Public Health Law former § 3082[1]; *see also Damon v Clove Lakes Healthcare and Rehabilitation Center, Inc.*, 228 AD3d 618 [2d Dept 2024]).

Thus, a defendant moving for dismissal on this ground, must demonstrate "that the treatment of plaintiff 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" (*Matos v Chiong*, 2021 N.Y. Slip Op 32047(U), *1 [Sup Ct, Bronx County May 27, 2021] [internal quotation marks omitted]; *see* Public Health Law former § 3082 [1][b]; *see also Whitehead v Pine Haven Operating LLC*, 222 A.D.3d 104 (3rd Dept 2023]).

Exceptions to the EDTPA immunity include where an act or omission constitutes willful or intentional criminal misconduct, gross negligence, reckless misconduct or intentional infliction of harm (*see Public Health Law § 3082).* "To constitute gross negligence, a party's conduct must smack [] of intentional wrongdoing or evince [] a reckless indifference to the rights of others" (*Goldstein v Carnell Assoc., Inc.*, 74 AD3d 745, 746-747 [2d Dept 2010] [internal quotation marks and citations omitted]).

"It is well settled that the defendant bears the burden, in the first instance, to establish that the three criteria in Public Health Law former § 3080(1) are satisfied" (*Adler v Troy*, 2023 N.Y. Misc. LEXIS 11547 [Sup Ct, New York County 2023]). "If the defendant is successful in doing so, the burden then shifts to the plaintiff to establish that his or her claim falls within the immunity exception set forth in Public Health Law former § 3080 [2] (*see Crampton v Garnet Health*, 73 Misc. 3d at 558)" (*Adler v Troy*, 2023 N.Y. Misc. LEXIS 11547 [Sup Ct, New York County 2023]).

The Instant Motion

Parker Jewish claims dismissal is required under the EDTPA as the complaint expressly alleges harm sustained as a result of an act or omission in the course of the diagnosis, prevention or treatment of COVID19. In support of its motion, Parker Jewish submits, inter alia, the Parker Jewish medical record, copies of policies and procedures provided by Federal and State entities for COVID19, Parker Jewish's infection control protocols, and the Affirmations of Igor Israel, M.D. ("Dr. Israel") and Sophia Gazis, M.D. ("Dr. Gazis"). Parker Jewish contends both Dr. Israel and Dr. Gazis conclusively establish that Plaintiff's treatment, while a resident of Parker Jewish, was provided in good faith and unavoidably impacted by his COVID19 infection and that the acts and decisions of Parker Jewish were in response to the COVID19 outbreak, thereby meeting the criteria under the EDTPA.

Specifically, Dr. Israel, Medical Director of Parker Jewish, avers that Parker Jewish responded to the COVID19 pandemic by developing and implementing protocols and procedures as per State and Federal guidelines from, inter alia, the CDC, DOH, United Sates Centers for Medicare and Medicaid Services ("CMS") and Governor Cuomo's Executive Orders. Dr. Israel contends that Plaintiff's medical record demonstrates the implementation of the COVID19

policies and its impact on his care. Dr. Israel states as early as March 6, 2020, Parker Jewish staff contacted Plaintiff's family to inform them of the infection control policies being implemented to mitigate the spread of COVID19 and further on March 11, 2020 Plaintiff's family was advised of restrictions on visitation consistent with state directives and the CDC. Dr. Israel stated within his Affirmation this impacted Plaintiff care as he frequently refused treatment and medications, and his daughters, who visited their father, were oftentimes the only ones who could successfully encourage their father to take his medication. Dr. Israel stated when Plaintiff first presented with possible symptoms of COVID19 on April 12, 2020, he was provided appropriate testing and treatment based on the available information. Parker Jewish argues the clinical decisions to monitor Plaintiff's vital signs and symptoms, to place him on droplet and isolation precautions, ultimately transferring him to the hospital and then readmitting him to Parker Jewish from the hospital as a COVID19 positive patient, and managing his symptoms with drugs and other COVID19 countermeasures were all in conformity with applicable public health guidance and conclusively establishes that Plaintiff's allegations are encompassed by the EDTPA immunity. Dr. Israel contends these aforementioned decisions were in response to the pandemic and state and federal guidance which specifically impacted Plaintiff's care.

Regarding Plaintiff's second admission, Dr. Israel states Plaintiff was re-admitted to Parker Jewish as a COVID19 patient and immediately isolated on a designated unit based on his status in accordance with public health guidance and the DOH's March 25th directive thus impacting Plaintiff's care.

Dr. Gazis, attending physician at Parker Jewish who treated Plaintiff stated within her Affirmation that the COVID19 pandemic and Parker Jewish's response to it specifically impacted Plaintiff's care. Despite Parker Jewish's good faith efforts to prevent the spread of

COVID19 in accordance with State and Federal guidance, Plaintiff developed COVID19. Dr. Gazis stated, specifically on March 23, 2020, she placed Plaintiff on contact and droplet precautions as a precautionary measure since the signs and symptoms of COVID19 were then somewhat unknown. Dr. Gazis made the decision to proactively mitigate the potential spread of COVID19 within the facility and for Plaintiff, thus impacting his care. On March 25, 2020, when Plaintiff began exhibiting lethargy and diminished appetite, he was examined and started on COVID19 countermeasures of IV fluids and labs were ordered. The following day when it was noted he developed a fever, Plaintiff was classified as a Person Under Investigation of COVID 19 ("PUI") and was treated as such, thus demonstrating Parker Jewish's response and the impact on Plaintiff. Dr. Gazis stated Parker Jewish's implementation of temperature and vital sign checks; administration of COVID19 diagnostic testing; issuance of droplet precautions; use of PPE during patient contact; and the use of supplemental oxygen and other clinical decisions to treat Plaintiff's COVID19 illness, all impacted his overall care. Dr. Gazis states Parker Jewish provided healthcare to Plaintiff in accordance with evolving CDC and DOH COVID19 guidance. Dr. Gazis avers Parker Jewish provided health care, in good faith, including specific measures directly related to his COVID19 illness as documented in his medical chart.

Parker Jewish argues Plaintiff cannot claim the EDTPA does not apply due to allegations predicated on negligence that occurred in the months prior to the COVID19 pandemic. Parker Jewish claims, in New York, a tort cause of action cannot accrue until an injury is sustained. Moreover, Parker Jewish contends the complaint does not distinguish conduct claimed to constitute gross negligence from which is ordinary negligence and fails to include any specific factual allegations to support an exception to EDTPA immunity.

In opposition Plaintiff claims the EDTPA repeal was retroactive; the complaint contains causes of action for negligence that predate the EDTPA and are separate and apart to the negligence claims related to COVID19; Parker Jewish failed to meet its burden at this early stage of litigation demonstrating how Plaintiff's care was impacted by Parker Jewish's response to the COVID19 pandemic; Plaintiff properly plead gross negligence; and Plaintiff's claims do not fall within the PREP Act.

Plaintiff claims Parker Jewish failed to adequately prepare and respond to the COVID19 pandemic and failed to implement proper policies and procedures in response to the COVID19 pandemic. Plaintiff claims if Parker Jewish can invoke a repealed statute, it failed to establish with their physician Affirmations any real impact and link between Plaintiff's care and Parker Jewish's decision/activities in response to COVID19 pandemic. Plaintiff also claims due to the early stage of litigation they should be afforded an opportunity to complete discovery and the evidence submitted in support of the instant motion is more appropriate for a summary judgment motion. Further, Plaintiff argues a question of fact exists as to whether Parker Jewish acted in good faith during the COIVD19 pandemic and whether it complied with all applicable federal and state public health guidelines and complied with their own protocols and guidance. Plaintiff argues it alleges negligence and injuries that occurred before the passing of the EDTPA as well as gross negligence, and as a result the immunity does not apply.

Here, it is well established by multiple departments of the Appellate Division that the repeal of the EDTPA was not retroactive (*see Mera v New York City Health & Hosps. Corp.*, 220 A.D.3d 668 [2d Dept 2023]; *see also Ruth v Elderwood At Amherst*, 209 A.D.3d 1281 [4th Dept 2022]). Parker Jewish has submitted its entitlement to immunity under the EDTPA with the support of the Affirmations by Dr. Israel and Dr. Gazis (*see Mera v New York City Health and*

Hosps. Corp., 220 AD3d 668 [2d Dept 2023] *see also Martinez v NYC Health and Hosps. Corp.*, 223 AD3d 731 [2d Dept 2024]). Parker Jewish submits that Plaintiff's care was impacted by their response to the COVID-19 outbreak and in support of state's directives.

In opposition, Plaintiff claims an exception to EDTPA immunity applied. Defendant submits that the claims Plaintiff alleges predate the EDTPA and did not accrue until March 2020 and that the conduct claimed to be grossly negligent is not distinguished from the conduct claimed to be negligent. However this is an early stage of litigation. The Defendant claims there is no factual predicate for the conclusions that Parker Jewish was grossly negligent, only conclusions that are devoid of any facts that rise to the level of willful conduct that evidences a high degree of moral culpability. (*see Hasan v Terrace Acquisitions II, LLC*, 224 A.D.3d 475 [1st Dept 2024], *citing Rey v Park*, 262 A.D.2d 624 [2d Dept 1999]; *see also Barbaro v Eger Health Care and Rehabilitation Center*, 83 Misc 3d 1238(A) [Sup Ct, Richmond County 2024]; *see also Whitehead v Pinehaven Operating LLC*, 222 AD3d 104 [2d Dept 2023]).

Plaintiff submits that the Defendant has failed to conclusively establish that its treatment was specifically impacted by Defendant's response to the COVID-19 pandemic and the State's directives as required under PHL 3082 as well as the standard set forth by the First Department in *Holder v. Jacob* . 2024 NY Slip Op 03864 decided July 18, 2024. Affidavits submitted by a Defendant almost never warrant dismissal under CPLR 3211 unless they conclusively establish that the Plaintiff has no cause of action, *Lawrence v. Graubard Miller*, 11 N.Y.3d 588.

The Court agrees that the Affirmations fail to address the multiple violations PJIHCR received including the failure to establish and maintain an infection prevention and control program. In addition while the Defendants argue the services they provided to decedent were in good faith the Court finds that is a factual question which can not be resolved on a 3211 motion,

Johnson v. Asberry, 190 A.D.3d 491 (1st Dept. 2021). The Court finds that the arguments raised are more appropriate for a Summary Judgment Motion. Viewing the facts in the light most favorable to the Plaintiff, and assuming the truth of the allegations, the Plaintiff may be able to establish that the complained of conduct reached the level of gross negligence. With discovery still to be conducted, dismissal of the complaint is not warranted.

Accordingly, it is:

ORDERED that the Parker Jewish's motion pursuant to CPLR § 3211 (a)(7) dismissing the complaint is DENIED and it is further

ORDERED that all other requested relief not specifically addressed herein is denied.

This shall constitute the decision and order of the Court.

Dated JAN 14 2025

HONORABLE R. BRUCE COZZENS

Supreme Court Justice

ENTERED

Jan 22 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE