

Estate of Frett v Chapin Acquisition I, LLC
2025 NY Slip Op 35468(U)
January 6, 2025
Supreme Court, Queens County
Docket Number: Index No. 703149/2023
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS



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THE ESTATE OF CARMELITA C. FRETT, by her
Personal Representative, LLOYD D. KEITH,

Plaintiff,

Index No.: 703149/2023

Motion Seq. No.: 2

-against-

DECISION and ORDER

CHAPIN ACQUISITION I, LLC d/b/a MARGARET
TIETZ NURSING AND REHABILITATION CENTER,
ABC CORPORATION, ABC PARTNERSHIP,

Defendants.

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PRESENT: HONORABLE ULYSSES B. LEVERETT

Notice of Motion-Affirmation-Exhibits

Affirmation in Opposition-Memorandum of Law-Exhibits

Affirmation in Reply-Exhibits

Papers Numbered

EF 77-106

EF 110-144

EF 150-157

Upon the foregoing papers and after oral argument, Defendant Chapin Acquisitions I, LLC d/b/a Margaret Tietz Nursing and Rehabilitation Center's (Margaret Tietz) motion for an Order pursuant to CPLR §§ 3211(a)(2) and 3211(a)(7) dismissing all claims and crossclaims against it with prejudice because MARGARET TIETZ is immune from liability under New York's Emergency or Disaster Treatment Protection Act ("EDTPA"), N.Y. Pub. Health Law §§ 3080-82 and the federal Public Readiness and Emergency Preparedness Act ("PREP Act"), 42 U.S.C. § 247d-6d, et seq. is decided as follows:

CPLR § 3211(a)(2) states that "a party may move to dismiss a cause of action on the ground that the court lacks subject matter jurisdiction as the cause of action is preempted by federal law." *See* CPLR § 3211(a)(2).

Pursuant to CPLR § 3211(a)(7), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleadings fail to state a cause of action. *See* CPLR § 3211(a)(7).

This action is one to recover damages for personal injuries allegedly sustained by the decedent, Carmelita Frett during her admission to Margaret Tietz regarding care she received relating to COVID-19 and her death on February 14, 2021.

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are afforded a liberal construction, the facts as alleged in the complaint are accepted as true, and the

plaintiff is accorded the benefit of every possible favorable inference. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994). "A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" *Sokol v. Leader*, 74 A.D.3d 1180 (2d Dep't 2010). "If the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one'" *See Sokol*, at 1181-1182, quoting *Guggenheimer v. Ginzburg*, 43 NY2d 268 (1977). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" *Bailey v. City of New York*, 228 A.D.3d 713 (2d Dep't 2024) citing *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137 (2017).

In support of its argument, Margaret Tietx argues that dismissal is appropriate under New York's EDTPA because 1) the provisions of the EDTPA confer immunity and mandate dismissal of any claim involving care that was impacted by acts or decisions by healthcare providers and facilities in response to the COVID-19 pandemic, absent narrow exceptions and 2) that the Amended Complaint pleads a claim for loss relating to the administration and use of covered countermeasures to prevent and treat COVID-19, thereby triggering the federal PREP Act. 42 U.S.C. § 247d-6d, et seq.

The EDTPA enacted on March 23, 2020 and repealed on April 6, 2021 provides for immunity for facilities regarding the diagnosis, prevention or treatment of COVID-19, in addition to the assessment and care of the individuals at these facilities except where an act or omission constitutes willful or intentional criminal misconduct, gross negligence, reckless misconduct or intentional infliction of harm. *See* New York Public Health Law §3082.

The Second Department has ruled in favor of Defendant's argument that immunity protection was effectively conferred by the EDTPA and that the repeal thereof did not apply retroactively, *Martinez v. N.Y.C. Health and Hosps. Corp.*, 223 A.D.3d 731 (2d Dep't 2024) and *Mera v. New York City Health and Hosps. Corp.*, 220 A.D.3d 668 (2d Dep't 2023). As such, this Court declines to address the arguments made regarding its applicability.

Defendant argues that there are no facts in the Amended Complaint that allege gross negligence or willful misconduct with specificity. None of the EDTPA's exceptions, triggered if the harm or damages were "caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm", are encompassed by Plaintiff's allegations. *See* New York Public Health Law § 3082(2).

The alleged "misconduct" must "smack of intentional wrongdoing" (*Colnaghi, U.S.A. Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821, 823-24 [1993]) and be "aggravated beyond mere negligence." *McDougald v. Garber*, 73 N.Y.2d 246, 254 (1989).

Plaintiff opposes the motion on the grounds that 1) Defendant may not invoke the immunity granted by New York Public Health Law § 3082 due to the repeal of the EDTPA, inappropriate evidence, gross negligence exception and the Federal Nursing Home Reform Act and 2) the PREP Act is inapplicable to the present case.

Plaintiff further opposes the motion arguing that defendant violated standards set by federal statutes and regulations such as 42 U.S.C. 1396(r) (1990) et seq. (Federal Nursing Home Reform Act). Plaintiff argues that the Federal Nursing Home Reform Act ensures that nursing homes that receive Medicaid and Medicare funding respect and protect their residents' health, safety, and dignity. *Health and Hospital Corp. of Marion County et al. v. Talevski*, 599 U.S. 166, 171 (2023).

As to Plaintiff's arguments regarding the FNHRA, this Court finds that the argument is not applicable to the instant case as Plaintiff has not plead with any specificity in the Complaint as to this argument.

Plaintiff argues that "where evidence is lacking, insufficient and/or inadmissible, dismissal is not warranted under C.P.L.R. §3211(a)(7). Plaintiff states Defendant failed to show that the treatment of decedent was impacted by Defendant's decisions or activities in response to or as a result of the COVID-19 outbreak, the motion to dismiss should be denied.

The Affidavit of David Tavdy, M.D. an internal medicine attending physician at Margaret Tietz who aided in the decedent's care swore as to the care provided to the decedent which was supported by the records submitted at NYSCEF Doc. 81.

Plaintiff in further opposition states that affidavits, deposition testimony, and letters are not considered documentary evidence within the intendment of C.P.L.R. §3211. *Bonavita v. Gov't Emps. Ins. Co.*, 185 A.D.3d 892 (2nd Dep't 2020). Plaintiff argues that the affidavit of Dr. Tavdy should only be considered as admissible documentary evidence if the motion has not been converted to a CPLR 3212 motion for summary judgment, the affidavit should not be used to offer evidentiary support for properly pleaded claims". *Nonnon v. City of New York*, 9 N.Y.3d 825 (2007). The Court notes that in addition to the affidavit of Dr. Tavdy, are the decedent's medical records which refute the Plaintiff's conclusory allegations establishing a defense as a matter of law. *See Bonavita*.

The Court finds that the decedent's medical records 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" (Public Health Law former § 3082[1][b]) and, further, that such health care services were provided in good faith (see Public Health Law former § 3082[1][c]), as required to demonstrate defendant's entitlement to immunity from civil liability (see Public Health Law former § 3082[1]).

Plaintiff in opposition argues that Plaintiff has claims against Defendant for gross negligence and as such Defendant is not subject to statutory immunity. While Plaintiff's Complaint does allege a cause of action for gross negligence, the Complaint fails to specify any facts constituting gross negligence. Regarding gross negligence, Plaintiff's Complaint contains allegations that conclusory, vague and devoid of any facts that rise to the level of a "smack of intentional wrongdoing" or "evinced a reckless indifference to the rights of others." Accordingly, as the Amended Complaint failed to plead specific allegations that rise to the level of gross

negligence, which are distinct from ordinary negligence, the exception to EDTPA for gross negligence does not apply. *See Weiss v. Vacca*, 2023 NY Slip Op. 04613 (2d Dep't 9/13/2023). As such, any alternative grounds for dismissal are not addressed by this Court.

Accordingly, it is hereby

ORDERED, that the motion for an Order pursuant to CPLR §§ 3211(a)(2) and 3211(a)(7) dismissing all claims and crossclaims against Defendant Chapin Acquisitions I, LLC d/b/a Margaret Tietz Nursing and Rehabilitation Center is granted, Plaintiff's Complaint is dismissed.

This constitutes the Decision and Order of this Court.

Dated: January 6, 2025


Hon. Ulysses B. Leverett, J.S.C.

HON. ULYSSES B. LEVERETT

