Estate of Falbo v Our Lady of Consolation Nursing & Rehabilitative Care Ctr.
2025 NY Slip Op 35481(U)
April 10, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 205007/2022
Judge: Joseph C. Pastoressa
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SUPREME COURT OF THE STATE OF NEW YORK
IAS/TRIAL PART 34 - SUFFOLK COUNTY

PRESENT: HON. JOSEPH C. PASTORESSA

DECISION AND ORDER

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THE ESTATE OF MARIE FALBO, by her Administrator, RON FALBO,

Plaintiff,

- against -

OUR LADY OF CONSOLATION NURSING AND REHABILITATIVE CARE CENTER; ABC CORPORATION; ABC PARTNERSHIP,

Defendants.

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Index No.: 205007/2022

Mot. Seq. 002: MotD

Napoli Shkolnik, PLLC, Melville, NY, for plaintiff

Barker Patterson Nichols, LLP, Valhalla, NY, for defendant Our Lady of Consolation Nursing and Rehabilitative Center

I. Introduction

Decedent, Marie Falbo, contracted COVID and died on April 25, 2020, while a patient at defendant Our Lady of Consolation Nursing and Rehabilitative Care Center (OLOC). Plaintiff, the administrator of decedent's estate, interposed claims against OLOC, ABC Corporation, and ABC Partnership (the latter two of which are fictitious names meant to represent OLOC's owner(s)), alleging, in broad terms, that their negligence caused decedent to become infected with COVID. Plaintiff's amended complaint contains claims labeled as violations of Public Health Law §§ 2801-d and 2803-c, negligence (labeled as two separate causes of action, one for pre-COVID negligence and one for post-COVID negligence), negligence per se based on violations of various state and federal regulations and Public Health Law §§ 2801-d and 2803-c, conscious pain and suffering, wrongful death, gross negligence, and malpractice.

OLOC now moves to dismiss the amended complaint under CPLR 3211 (a) (2) and (7), claiming that it is immune from suit under the Emergency or Disaster Treatment Protection Act (EDTPA) (former Public Health Law [PHL] § 3080 et seq.) and the Public Readiness and Emergency Preparedness Act (PREP Act) (42 USC § 247d-6d). Plaintiff opposes the motion.

II. Analysis

A. The EDTPA

At all relevant times, former PHL § 3082 stated the following:

1. Notwithstanding any law to the contrary, except as provided in subdivision two of this section, any health care facility or health care professional 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, if:
(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.

2. The immunity provided by subdivision one of this section shall not apply 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 by the health care facility or health care professional providing health care services, provided, however, that acts, omissions or decisions resulting from a resource or staffing shortage shall not be considered to be willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.

At all relevant times, former PHL § 3081 (5) stated:

5. The term "health care services" means services provided by a health care facility or a health care 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.

Further, the EDTPA

> does not qualify how treatment must be affected – whether positively, negatively, or otherwise – it merely requires that treatment be impacted. It does not require that the plaintiff's treatment be uniquely impacted as compared to other patients. It does not identify any particular aspect of, or the materiality of any aspect of, a patient's treatment that must be impacted to warrant a finding that the immunity statute is applicable

(*Holder v Jacob*, 231 AD3d 78, 85 [quotation marks and citations omitted]). And although the EDTPA was subsequently repealed, such repeal is not retroactive (*Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 619).

OLOC has shown, through the affirmation of Dr. Anne Nolte, who treated decedent after she became infected with COVID, that decedent's treatment was impacted by OLOC's response to COVID (*see Mera v New York City Health & Hosps. Corp.*, 220 AD3d 668, 670 [relying on a treating physician's affirmation that "established that the defendants were entitled to immunity under the EDTPA"]). Indeed, decedent was infected with COVID itself. Dr. Nolte stated, inter alia, that OLOC chose to isolate decedent in her room, and "a discussion and then decision was made not to transfer her to the hospital but rather to provide her with comfort care at OLOC as a direct result of COVID-19." Dr. Nolte further explained that the treatment of decedent complied with the then-existing guidelines for treating COVID, including administering Zithromax and elevating the head of her bed.

OLOC's initial showing of immunity applies to all of plaintiff's claims. Although the amended complaint separates out pre-COVID negligence from post-COVID negligence, the only alleged injury from any claimed negligence is decedent's infection with

COVID. But a complete claim for negligence requires the existence of a duty of care, a breach of that duty, causation, and damages (*e.g. Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 157). A tort claim does not accrue without damages (*e.g. Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94). Accordingly, plaintiff cannot get around the EDTPA by pleading pre-EDTPA breaches that caused post-EDTPA damages. And contrary to plaintiff's argument, neither the Federal Nursing Home Reform Act (42 USC § 1396r) (*see Zietek v Pinancle Nursing Home*, 2024 WL 243436, *5) nor the regulations in 42 CFR part 483 (*see Houston v Highland Care Ctr.*, 2024 WL 638721, *3) allow plaintiff to circumvent the EDTPA.

The Court must then ascertain if the amended complaint sufficiently pleads that OLOC, under former PHL § 3082 (2), engaged in willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm (*see Crampton v Garnet Health*, 73 Misc 3d 543, 558 [explaining the EDTPA's framework in the context of a motion to dismiss]). "To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others," i.e., "when it fails to exercise even slight care or slight diligence" (*Seti v Carnell Assoc., Inc.*, 218 AD3d 509, 511 [quotation marks, ellipses, and citations omitted]; *see Belcastro v Roman Catholic Diocese of Brooklyn, N.Y.*, 213 AD3d 800, 802). Whether a party acted in a grossly negligent manner is typically a question for the trier of fact (*AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC*, 214 AD3d 111, 132; *Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902).

Here, the amended complaint sufficiently pleads a claim for gross negligence. The amended complaint pleads, inter alia, that OLOC "cohort[ed] suspected and/or positive COVID-19 residents with (at the time) non-COVID-19 residents." A reasonable factfinder could conclude that this commingling, in the midst of a new and deadly pandemic that was wreaking havoc in New York and around the world, was grossly negligent. Although OLOC accurately contends that it was required by the State to admit COVID-positive patients and could not test for COVID prior to admission (though it was not barred from testing for COVID after admission), OLOC has not submitted any evidence that the State additionally forced it to "cohort[] suspected and/or positive COVID-19 residents with (at the time) non-COVID-19 residents," as plaintiff alleges happened. Nor does OLOC address the possibility that this commingling did not exclusively involve newly-admitted patients.

Accordingly, the entire amended complaint, except for the claim for gross negligence, is dismissed as barred by the EDTPA.

B. The PREP Act

The PREP Act provides that

> a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

(42 USC § 247d-6d [a] [1]). A "covered countermeasure" means "a qualified pandemic or epidemic product (as defined in paragraph (7))"; "a security countermeasure (as defined in section 247d-6b(c)(1)(B) of this title)"; "a drug . . ., biological product . . . , or device . . . that is authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act"; or "a respiratory protective device that is approved by the National Institute for Occupational Safety and Health under part 84 of title 42, Code of Federal Regulations (or any successor regulations), and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title." A security countermeasure and a qualified pandemic or epidemic product each refer to certain drugs, biological products, or devices (42 USC § 247d-6b). A "covered person," as pertinent here, means an entity that is a manufacturer, distributor, or program planner of such countermeasure; "a qualified person who prescribed, administered, or dispensed such countermeasure," or an agent of employee thereof. The required declaration under subsection (b) was issued by the Secretary of Health and Human Services, along with subsequent amendments (*see e.g.* Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed Reg 15198-01).

Covered countermeasures, by the statutory definition, refer to tangible medical items and drugs, and the PREP Act applies only to their "administration to or the use [thereof] by an individual." Nonuse of a covered countermeasure is not protected under the statute. OLOC has not shown, prima facie, that plaintiff's gross negligence claim arises out of or relates to the use or administration of a covered countermeasure.

To the extent that OLOC relies on the Department of Health and Human Services' interpretation of the PREP Act, deference is not owed to an agency's interpretation of a statute when, as here, the issue is one of pure statutory interpretation (*Matter of DeVera v Elia*, 32 NY3d 423, 434; *Matter of New York State Bd. of Regents v State Univ. of N.Y.*, 178 AD3d 11, 20, *lv denied* 35 NY3d 912). Reading the language of the PREP Act and its detailed statutory definition of a "covered countermeasure" does not "involve[] knowledge and understanding of underlying operational practices or entail[] an evaluation of factual data and inferences to be drawn therefrom" (*Matter of Gonzalez v Annucci*, 32 NY3d 461, 471 [quotation marks and citation omitted]; *see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 285). Thus, the PREP Act does not bar plaintiff's gross negligence claim.

To the extent that OLOC presses a complete preemption argument, it is meritless (*Solomon v St. Joseph Hosp.*, 62 F4th 54, 60-62 [2d Cir 2023] [declining to give deference to the Department of Health and Human Services' contrary statutory interpretation of the PREP Act regarding preemption]).

III. Conclusion

OLOC's motion to dismiss is granted to the extent that the entire amended complaint, except for the gross negligence claim, is dismissed.

This shall constitute the decision and order of the Court.

Dated: APRIL 10, 225

Hon. Joseph C. Pastoressa, J.S.C.

Papers considered: NYSCEF documents 97 through 220