

Hogan v Amsterdam Nursing Home
2026 NY Slip Op 31171(U)
March 25, 2026
Supreme Court, New York County
Docket Number: Index No. 150542/2022
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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RORY HOGAN, as the Administrator of the Estate of
JACQUELYN ABLES, deceased

Plaintiff,

INDEX NO. 150542/2022

MOTION DATE 01/30/2026

MOTION SEQ. NO. 002

- v -

AMSTERDAM NURSING HOME and NEW YORK
PRESBYTERIAN COLUMBIA HOSPITAL,

Defendants.

DECISION + ORDER ON
MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71,
72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99,
100, 101, 102, 103, 104

were read on this motion to/for DISMISSAL.

In this action to recover damages, inter alia, for medical malpractice, negligent hiring,
training, supervision, and retention of healthcare personnel, gross negligence, and wrongful
death, the defendant Amsterdam Nursing Home (ANH) moves pursuant to CPLR 3211(a) to
dismiss the complaint insofar as asserted against it on the ground that the complaint fails to
state a cause of action (CPLR 3211[a][7]), and on the grounds that the action against it is barred
by the doctrines of collateral estoppel and res judicata (CPLR 3211[a][5]). The plaintiff opposes
the motion. The motion is granted, since the complaint fails to state a cause of action against
ANH by virtue of the immunity from civil liability conferred upon it by the Emergency or Disaster
Treatment Protection Act (Public Health Law former §§ 3080-3082; hereinafter EDTPA).

In an order dated July 24, 2025 (MOT SEQ 001), this court granted the motion of the
defendant New York Presbyterian Columbia Hospital (NYPH) to dismiss the complaint insofar
as asserted against it, and for summary judgment dismissing the complaint insofar as asserted
against it, on the ground that EDTPA afforded it immunity from the plaintiff's causes of action.
As the court explained in that order, the plaintiff's decedent, Jacquelyn Ables, was an inpatient

at NYPH from approximately March 31, 2020 until April 8, 2020. In her complaint, which she filed on January 18, 2022, the plaintiff alleged that her decedent resided at ANH from April 2020 through September 2020. ANH's records established that Ables was admitted to ANH on April 8, 2020, was discharged on June 19, 2020 to Mount Sinai Hospital (MSH), but was readmitted to ANH on June 26, 2020, where she remained until July 6, 2020. The plaintiff's decedent was again transferred to MSH on July 6, 2020, where she was diagnosed with acute cystitis with hematuria, diabetes mellitus, a severe sacral pressure ulcer, and other medical conditions. She remained at MSH until August 3, 2020, on which date she was again readmitted to ANH, where she remained until September 7, 2020, when she once again was transferred to MSH, where she died on September 10, 2020. The plaintiff asserted in her complaint that ANH failed to provide her with the appropriate care or with customary nursing and rehabilitation services during her various times residing there. The plaintiff further alleged that ANH failed to take the proper precautions to prevent the further development and exacerbation of pressure ulcers that had developed while Ables was an inpatient at NYPH. Finally, the plaintiff alleged that, as a result of ANH's departures from good practice, the pressure ulcers caused the decedent's death.

In its motion, ANH argued that the complaint should be dismissed since EDTPA and New York Governor's Executive Order 202.10 each conferred immunity upon it from civil actions, such as the plaintiff's action here. In opposition, the plaintiff argued that EDTPA may not be invoked by this defendant, inasmuch as ANH failed to provide actual proof that Ables's residency and treatment there was impacted by COVID-19. Finally, the plaintiff argued that her claims for gross negligence and recklessness are not subject to statutory immunity.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible

favorable inference” (*id.* at 152; see *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 884 [2013]; *Simkin v Blank*, 19 NY3d 46, 52 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (see *Taxi Tours, Inc. v Go New York Tours, Inc.*, 41 NY3d 991, 993 [2024]; *Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-271 [1st Dept 2004]; CPLR 3026). “The motion must be denied if from the pleading’s four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152 [internal quotation marks omitted]; see *Leon v Martinez*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Where, however, the court considers evidentiary material beyond the complaint, as it does here, the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d at 275), but dismissal will not eventuate unless it is “shown that a material fact as claimed by the pleader to be one is not a fact at all” and that “no significant dispute exists regarding it” (*id.*). Nonetheless, “conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss” (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

The complaint fails to state a cause of action, inasmuch as, under the circumstances of this case, EDTPA confers immunity from liability upon ANH.

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 certain 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 and healthcare professionals immunity from civil or criminal liability related to the care of patients during the COVID-19 pandemic crisis, provided that:

“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; 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 the health care facility or health care professional is arranging for or providing health care services in good faith”

(Public Health Law former § 3082[2]). 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 (*id.*). 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.

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, EDTPA remains applicable to the

claims in this case that arose from alleged acts and omissions that occurred during the statute's effective period, which included the entire duration of the decedent's residency at ANH.

The court concludes that, pursuant to EDTPA, ANH is entitled to immunity from the claims asserted by the plaintiff arising from the care that Ables received at ANH between April 8, 2020 and September 7, 2020. With respect to the criteria required to be considered by EDTPA, it is evident that ANH was arranging for or providing health care to Ables within the meaning of that statute, and was doing so in good faith. The court further concludes that the treatment of Ables indeed was affected or impacted by those of ANH's medical and nursing determinations or activities that had been made in response to, or as result of, the COVID-19 outbreak, and that those determinations and activities had been made in response to, as result of, or in support of the State's COVID-19 directives. The statute does not indicate that the "treatment of the individual" must be impacted one way or another, that is, it does not specify that the treatment be affected positively, negatively, or otherwise, it does not require the patient to have been uniquely impacted as compared to other patients, and it does 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]).

In demonstrating that its treatment of Ables was impacted by COVID-19 and by its determinations and activities addressed thereto, ANH submitted, among other things, a copy of Ables's medical records and the affirmation of Steven Cooper Lansey, M.D., detailing the impact that the pandemic had on the care specifically provided to Ables during that time. Specifically, Dr. Lansey attested that

"[a]t ANH, during the height of Covid-19 between 4/8/20 and 9/7/20 when JACQUELYN ABLES was a resident, the nursing home had unseen numbers of chronically ill patients due to the Covid-19 virus and it's [sic] spread. The staff responded by prioritizing patient care and focusing on helping the critically ill residents to survive. The care of the residents who were not critically ill were [sic] also impacted by the decisions and activities of ANH in response to Covid-19. This included never ending testing of residents and staff for the covid virus, treating covid symptoms, segregating residents, providing mandated personal protective equipment (PPE) for the residents and staff, and changing/altering the

resident's schedules for meals, medication, wound care, bathing and showering, medical care, rehabilitation therapy, and all activities of daily living.

“Medical personnel, administrators, and staff at ANH complied with the ever changing State and Federal mandates for residential care. These regulations were implemented on an ‘emergent basis’ with no prior training or practice in the application of the mandated directives for ANH medical personnel and staff.

“Every aspect of ANH's functioning as a nursing care facility, including, but not limited to, the rendering of medical care, wound care, physical therapy, occupational therapy, speech therapy, muscle strengthening, 24 hour nursing care, assistance with daily living, social and recreational activities, resident's personalized care schedules and other care provided for the residents, were impacted by the decisions and activities that were in response to, or the result of, the Covid-19 pandemic and in support of the Federal and State directives. The treatment for and prevention of skin breakdowns, especially in residents such as JACQUELYN ABLES, were exceedingly difficult during this unprecedented historic time period. JACQUELYN ABLES was admitted to ANH with severe skin breakdown (a Stage 3 sacral ulcer) and treatment to MS. ABLES was impacted by the staff's response to Covid-19 outbreak and the New York States directives. Treatment of Ms. ABLES and all resident's [sic] were impacted as their individualized routine mealtimes, medication schedules, and therapy schedules were altered and changed to comply with Federal and New York States directives.

“Between 4/8/20 and 9/7/20, ANH was essentially in lockdown mode. Outside visitors were almost always prohibited from entering and visiting with residents pursuant to state mandates. At times it was necessary for a resident's caregiver to enter ANH, in segregated areas, to be trained in the use of home care equipment, medication administration, and wound care for a resident who was being discharged home from ANH.

“Caring for ANH residents was impacted by the staff's decisions and activities in response to the outbreak and the State's emergency directives insofar as there was an overflow of severely ill residents. This impacted residential room assignments. Those residents exhibiting signs or symptoms of the Covid virus, or those who had tested positive for Covid-19, had to be separated from other residents. This rotating and shifting of rooms and schedules caused significant logistical challenges for the nursing home and the residents' care.”

ANH's submissions established the very entitlement to immunity that the EDTPA was meant to provide (see *Hasan v Terrace Acquisitions II, LLC*, 224 AD3d at 477; *Whitehead v Pine Haven Operating LLC*, 222 AD3d at 110; *Martinez v NYC Health & Hosps. Corp.*, 223 AD3d 731, 732 [2d Dept 2024]; *Mera v NY City Health & Hosps. Corp.*, 220 AD3d 668, 670 [2d Dept 2023]; see also *Holder v Jacob*, 231 AD3d at 88 [“where, as here, the CPLR 3211(a)(7) motion is predicated on what is asserted to be a complete defense, and that motion is supported

by evidence, the evidence of the defense must be *conclusive*”]; *but cf. Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 619 [2d Dept 2024] [finding that the defendant’s submission did not establish that the three requirements for immunity were met]).

In opposition, the plaintiff submitted the affirmation of Sheryl A. Pearl, M.D., M.B.A. Dr. Pearl opined that ANH failed to provide actual proof that Ables’s stay was impacted by COVID-19. The court finds these opinions unavailing. First, as set forth in Dr. Lansey’s affirmation, many medical professionals at ANH were reassigned due to the overflow caused by a substantial number of COVID-19 patients, and he opined that reassignments and staffing shortages impacted how wound care was rendered. Dr. Lansey’s affirmation directly posited that the changes that had been implemented in response to the COVID-19 pandemic impacted Ables’s treatment. Hence, the court rejects the plaintiff’s assertion that the defendant did not provide conclusive proof that Ables’s stay at ANH was impacted by the COVID-19 pandemic.

Finally, the plaintiff argued that her claims sounding in gross negligence and recklessness were not subject to statutory immunity. The plaintiff’s medical records and Dr. Lansey’s affirmation negated such claims (*see Hasan v Terrace Acquisitions II, LLC*, 224 AD3d at 479) and, hence, with respect to the allegations of gross negligence, a fact alleged to be a fact by the plaintiff is not a fact at all. Additionally, allegations purporting to support a gross negligence claim that are devoid of factual specificity and replete with legal conclusions cannot survive dismissal (*see Lociero v Park Avenue Operating, LLC* [Sup Ct, Nassau County, Index No. 615904/2022, Sep. 26, 2023], citing *Godfrey v Spano*, 13 NY3d at 373). Thus, the gross negligence exception is not applicable, and NYPH is entitled to immunity under EDTPA.

Consequently, ANH’s motion must be granted on the ground that the complaint failed to state a cause of action insofar as asserted against it because it was immune from liability by virtue of EDTPA. Dismissal is warranted where a defendant is statutorily immunized from liability, since such immunity forms an appropriate basis for a CPLR 3211(a)(7) motion to dismiss the complaint (*see Mera v NY City Health & Hosps. Corp.*, 220 AD3d at 670).

In light of the foregoing, the court need not reach the alternate grounds for dismissal that ANH urged upon the court, namely, the doctrines of collateral estoppel and res judicata. Were the court to do so, it would reject ANH's reliance on those affirmative defenses, since they were not raised in its answer or made the subject of a timely motion to dismiss the complaint (see CPLR 3211[e]; *Matter of Windermere Props., LLC v City of New York*, 244 AD3d 465, 465 [1st Dept 2025]; *Darbeau v 136 W. 3rd St., LLC*, 225 AD3d 537, 538 [1st Dept 2024] [defendant, "which did not move to dismiss prior to answering the complaint, waived the defense of collateral estoppel by failing to raise it in the responsive pleading"]). The proper procedure for raising these affirmative defenses would have been for ANH to move for leave to amend its answer to add res judicata and collateral estoppel as affirmative defenses, and then move for summary judgment dismissing the complaint insofar as asserted against it on those grounds (see *Molina v Mount Sinai Morningside Hosp.*, 244 AD3d 489, 489-490 [1st Dept 2025]).

In any event, "[u]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; see *Matter of Reilly v Reid*, 45 NY2d 24 [1978]). As a general rule, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). "The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). ANH, however, has secured no valid final judgment against the plaintiff that would bar her prosecution of this action against it, and, hence, res judicata does not bar the plaintiff's claims against ANH. Moreover, the doctrine of collateral estoppel only precludes a party "from relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action" (*Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120

AD3d 18, 23 [1st Dept 2014]; see *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 515 [1st Dept 2016]). To successfully invoke the doctrine, "the issue in the second action must be identical to an issue which was raised, necessarily decided and material in the first action," and "the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action" (*Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d at 23). Although this court had previously determined that EDTPA precluded the plaintiff from prosecuting the action against NYPH, the facts underpinning her claims against ANH, while similar, were not identical to the facts underpinning her claims against NYPH. Specifically, her admission to NYPH as an inpatient preceded her residency at ANH, and the nature and extent to which the COVID-19 pandemic impacted the operations of the two facilities, although analogous, were factually distinct. Specifically, the fact referable to these issues were established by the affirmations of two different professionals who described distinct, fact-specific institutional responses to the pandemic. Since this court did not "decide issues identical to those raised by the plaintiff's" factual claims against NYPH, the plaintiff's claims against ANH are not barred by the doctrine of collateral estoppel (see *Neuman v Echevarria*, 171 AD3d 767, 768 [2d Dept 2019]; cf. *Bauhouse Group I, Inc. v Kalikow*, 190 AD3d 401, 402 [1st Dept 2021] [collateral estoppel barred plaintiff's claims because factual issues that were necessary to the outcome of a prior action had been decided against the plaintiff]; *Karimian v Time Equities, Inc.* 164 AD3d 486, 489 [2d Dept 2018] ["factual determinations made" by court in prior action were determinative of factual claims made in pending action]).

Inasmuch as this court already has directed the dismissal of the complaint insofar as asserted against NYPH, and severed the action against NYPH, leaving ANH as the only remaining defendant, this action must now be marked disposed, and the Clerk of the court may, without further judicial intervention, enter judgment dismissing the complaint insofar as asserted against ANH.

Accordingly, it is,

ORDERED that the motion of the defendant Amsterdam Nursing Home to dismiss the complaint insofar as asserted against it is granted, and the complaint is dismissed insofar as asserted against Amsterdam Nursing Home; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment in favor of the defendant Amsterdam Nursing Home dismissing the complaint insofar as asserted against it.

This constitutes the Decision and Order of the court.

3/25/2026
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE