Hosten-McIntosh v New York City Health & Hosps. Corp.
2026 NY Slip Op 31563(U)
April 15, 2026
Supreme Court, Kings County
Docket Number: Index No. 516417/2021
Judge: Anne J. Swern
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At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 15th day of April 2026.

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

ESTHER HOSTEN-MCINTOSH, as Administrator of the ESTATE of HENRY MCINTOSH,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION d/b/a DR. SUSAN SMITH MCKINNEY NURSING AND REHABILITATION CENTER, and DR. SUSAN SMITH MCKINNEY NURSING AND REHABILITATION CENTER,

Defendants.

DECISION & ORDER
Index No.: 516417/2021

Calendar No.: 20

Motion Seq.: 2

Return Date: 2/26/2026

Recitation of the following papers as required by CPLR 2219 (a):

	NYSCEF Papers Numbered
Notice of Motion, Affirmation in Support, Supporting Exhibits to Affirmation in Support, Memorandum of Law in Support of Motion, Affirmation in Opposition, Memorandum of Law in Opposition, Supporting Exhibits to Affirmation in Opposition, and Reply Affirmation……	51-85

Upon the foregoing papers, the decision and order of the Court is as follows:

Defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION s/h/a NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION d/b/a DR. SUSAN SMITH MCKINNEY NURSING AND REHABILITATION CENTER, and DR. SUSAN SMITH MCKINNEY NURSING AND REHABILITATION CENTER ("defendants" or "facility"), move for an Order pursuant to CPLR § 3212, granting summary judgment and dismissing the verified complaint of

plaintiff, ESTHER HOSTEN-MCINTOSH, as Administrator of the ESTATE of HENRY MCINTOSH ("plaintiff"). Defendants' motion is granted in its entirety.

Facts

Plaintiff commenced this action seeking damages for conscious pain and suffering and wrongful death of her husband, Henry McIntosh ("decedent"). At the time of his death, decedent was 73 years of age and had developed a sacral ulcer and left heel deep tissue injury while a long-term care resident at the facility operated by New York City Health and Hospitals.

Decedent's wounds were first identified on April 7, 2020, during a state of emergency due to the public health crisis caused by the COVID-19 pandemic ("COVID"). Decedent was transported from Mount Sinai Brooklyn to the facility on August 16, 2018. His past medical history included hypertension, hyperlipidemia, type II diabetes, three cerebrovascular accidents with resultant left hemiparesis, dysphagia and aphasia, Alzheimer dementia, stage III chronic kidney disease, seizure disorder, severe anemia, and chronic leukocytosis. Decedent was also mentally and cognitively impaired, unable to communicate his needs, incontinent of bladder and bowel, and required total care and feeding. As such, decedent was bed-bound with contractures to his lower extremities and required transfer to a wheelchair through a Hoyer lift, making him an ineligible candidate for physical therapy or occupational therapy.

On March 12, 2020, the medical chart confirms that decedent's family was advised of visitation restrictions, and on March 31, 2020, a video conference was held with the family. On April 3, 2020, a care plan was created for decedent's at-risk status that included interventions to monitor his psycho-social well-being issues due to medical and visitation restrictions secondary to COVID. Plaintiff testified that she visited decedent weekly and would feed him before the pandemic restrictions prevented her from doing so. On April 23, 2020, the chart documented that

defendants called plaintiff to inform her that there were positive cases of COVID and COVID-related deaths in the facility.

On May 1, 2020, decedent experienced elevated temperatures on two readings based over a 24-hour period. Decedent was examined by the attending physician, Dr. Inna Sosina ("Dr. Sosina"), who noted that at the time of the assessment, decedent did not have a fever. Dr. Sosina ordered various labs, such as a chest x-ray, urinalysis, IV fluids, droplet precautions, and a COVID test via a nasal swab. The swab was negative, but a chest x-ray confirmed aspiration pneumonia of the right upper lung. On May 6, 2020, Dr. Sosina wrote that per her assessment, decedent was not in any distress, that she planned on repeating the COVID swab, and that she notified plaintiff about decedent's grave prognosis. As the initial swab was pending, decedent was provided with antibiotics and placed on contact isolation and droplet precautions to reduce the risk of transmissible disease. As per the chart, COVID, aspiration pneumonia, and a urinary tract infection were all on the differential diagnosis.

Plaintiff informed Dr. Sosina that she preferred that the facility continue to treat decedent and declined transfer to a hospital because of the fear of greater exposure of COVID. The plan was for decedent to continue with IV fluid hydration, fingerstick monitoring, and modification of existing medications. Decedent's second COVID test was obtained on May 6, 2020, via a nasal swab PCR test. On May 7, 2020, the chart indicated that decedent continued to be monitored for fever with IV hydration in place, remaining on droplet/contact precautions including on May 1, May 2, and May 4, 2020. On May 7, 2020, plaintiff agreed to transfer decedent to Mount Sinai Hospital due to his declining health, where he was diagnosed with COVID on May 28, 2020. He was discharged from Mount Sinai on June 26, 2020, and transported to Chateau Nursing Home

for rehabilitation where he passed away on July 1, 2020. The cause of death was attributed to cardiopulmonary arrest due to atherosclerotic heart disease.

In response to the COVID-19 crisis, defendants created the memorandum entitled "Guidance and Management for COVID in Long-Term Care Facilities" dated March 12, 2020 (revised on May 4, 2020) for the Department of Infection Control ("policy" or "procedure"). The policy set forth measures that were designed to minimize the following: the spread of COVID-19, the introduction of COVID-positive patients in the facility, and the transmission of the virus within the facility. The policy included strategies for implementation such as monitoring for early identification of infection, assessing supplies of PPE stockpiles and optimizing current supplies through conservation, identifying and managing severe illness, and maintaining adequate staffing patterns. Further, the policy detailed ongoing staff education and training, monitoring, education and reinforcement about hand hygiene and environmental disinfection, mask use, contact and droplet precautions, and PPE conservation and use. The foregoing was based on recommendations from the Centers for Disease Control and Prevention (CDC) and the Department of Health (DOH).

Law and Analysis

a) Summary Judgment

Pursuant to CPLR § 3212 (b), a motion for summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR § 3212 [b]). On the other hand, to defeat a motion for summary judgment, the opposing party must "show facts sufficient to require a trial of any issue of fact" (*id.*). Normally, if the opponent is to succeed in defeating a summary judgment motion, the opponent must make their

showing by producing evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When the movant has established a prima facie case, it is the opposing party's burden to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . or [to] demonstrate [an] acceptable excuse for [their] failure to meet [this] requirement" (*City of New York v Grosfeld Realty Corp*., 173 AD2d 436, 570 [2d Dept 1991]).

b) Emergency Disaster Treatment Protection Act ("EDTPA"): Former Public Health Law § 3082 [1]-[4] and Public Health Law § 2801-d

In recognition of the devastation wrought by COVID-19 in the spring of 2020, the New York State Legislature enacted the Emergency or Disaster Treatment Protection Act ("EDTPA") on April 3, 2020 (*see* Public Health Law Article 30-D, Public Health Law former § 3082 [1]-[4]). The EDTPA granted broad civil and criminal immunity for health care professionals and facilities in connection with health care services provided during the pandemic regardless of whether the patient/resident was infected with COVID-19. It applied retroactively to March 7, 2020, the date the COVID emergency declaration was issued in New York.

According to Public Health Law former § 3082 [1]-[4], EDTPA limits liability 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 emergency rule or otherwise in accordance with applicable law; (b) the alleged act or omission occurred in the course of arranging for or providing treatment, and 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 outbreak; and (c) the provider arranged or provided health care services in good faith. If the above three elements are met and there is no gross negligence, recklessness, or intentional

misconduct, then EDTPA applies and provides immunity. However, "Public Health Law former § 3082 did not qualify 'how treatment must be affected—whether positively, negatively, or otherwise—it merely require[d] that treatment be impacted'" (*Sapienza v Tromba,* 241 AD3d 722, 723 [2d Dept 2025], *citing Holder v Jacob,* 231 AD3d 78, 85 [1st Dept 2024]). Further, the EDTPA "did not require that the plaintiff's treatment be uniquely impacted as compared to other patients, or identify any particular aspect of, or the materiality of any aspect of, the plaintiff's treatment that must be impacted to warrant a finding that the immunity statute is applicable" (*id*).

Here, defendants satisfied their burden of proof to warrant summary judgment dismissing the complaint in its entirety (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Defendants established that wound care was impacted by the fact that decedent was placed on contact isolation and droplet precautions while his COVID-19 swab results were pending. Further, Dr. Sosina stated that decedent's wound care was impacted by COVID because he was placed on contact isolation and droplet precautions which reduced the amount of time staff could spend at his bedside to reduce possible transmission of infection due to decedent's larger comorbid health conditions. Decedent's care was also impacted by the "no visitor" policy that prevented plaintiff from assisting with his care and tending to her husband. Therefore, since decedent's comorbid conditions impeded his mobility and the COVID-19 contact isolation and droplet precautions restricted contact by the medical staff and plaintiff, no liability may be imposed due to the resulting sacral ulcers (*Madourie v Montefiore Medical Center,* 246 AD3d 467, 469 [1st Dept 2026]).

It is noteworthy that although defendants rely on decedent's cause of death, cardiopulmonary arrest due to atherosclerotic heart disease, the death certificate was not submitted in support of the motion. However, plaintiff testified that to her knowledge, decedent

died because his oxygen levels were dropping, and he was non-responsive. Therefore, the precise cause of death is not dispositive to this Court's determination. Further, the opinion of plaintiff's expert lacks probative value because it relies in part on decedent's hospital records that were not submitted as an exhibit. Even construing the expert's affirmation in the light most favorable to plaintiff, decedent's development of sacral ulcers, standing alone, does not fall within one of the exceptions to immunity under the EDTPA (*id.*). Based on this finding, plaintiff's cause of action under Public Health § 2801 is also dismissed when a wound was "unavoidable" or inevitable due to the patient's medical condition and comorbidities (*Vargas v St. Barnabas Hosp.*, 168 AD3d 596, 597 [1st Dept 2019]).

Lastly, although the Court need not address the negligent hiring and retention claim and the wrongful death claim, both causes of action fail for the reasons explained below because defendant facility has established its prima facie entitlement to judgment. "To establish a cause of action based on negligent hiring, negligent retention, or negligent supervision [of an employee], it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Hoffman v Verizon Wireless, Inc*., 125 AD3d 806 [2d Dept 2015], citing *Jackson v New York Univ. Downtown Hosp*., 69 AD3d 801, 801 [2d Dept 2010]). Here, plaintiff failed to provide any evidence that defendant facility knew or should have known of a propensity on the part of any of its employees to commit an alleged wrongful act.

Lastly, plaintiff failed to offer evidence as to any pecuniary loss sustained by the distributees of the estate due to the death of decedent (*see Chong v New York City Tr. Auth*., 83 AD2d 546 [2d Dept 1981]).

The Court has considered the parties' remaining arguments and finds same to be without merit.

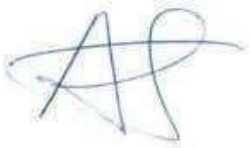
Accordingly, it is hereby

ORDERED that defendants' motion for an Order pursuant to CPLR § 3212, granting summary judgment to defendants and dismissing the Verified Complaint of plaintiff in its entirety as against defendant facility, with prejudice, is GRANTED; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the Court.

E N T E R:



Hon. Anne J. Swern, J.S.C.
Dated: 4/15/2026