Barnhart v Kingston NH Operation LLC
2026 NY Slip Op 32040(U)
April 13, 2026
Supreme Court, Ulster County
Docket Number: Index No. EF2022-947
Judge: Kevin R. Bryant
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STATE OF NEW YORK
SUPREME COURT ULSTER COUNTY

GLORIA BARNHART

Plaintiff,

-against-

DECISION & ORDER ON MOTION
Index No.: EF2022-947

KINGSTON NH OPERATION LLC et al

Defendant(s)

Supreme Court, Ulster County
Present: Hon. Kevin R. Bryant, J.S.C.

Appearances:

Plaintiff:
Joseph Leonard Ciaccio
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Defendant(s):
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Bryant, K.:

On May 2, 2022, Gloria Barnhart, as Proposed Administer of the Estate of Donald Milton Parker, Sr., (hereinafter referred to as "Plaintiff") filed a complaint alleging, *inter-alia,* negligence, gross negligence, nursing home malpractice and wrongful death; and

A motion requesting dismissal pursuant to CPLR §3211 having been filed, fully submitted and denied by this Court by Decision and Order dated September 9, 2024 wherein this Court found that there are outstanding questions of fact regarding numerous decisions and actions taken by Kingston NH Operation, LLC (hereinafter referred to as "Defendant") and whether-or-not these actions were taken in reliance upon and pursuant to COVID-19 emergency measures and therefore protected[1]; and

Discovery having been conducted and a Note of Issue having been filed; and

A motion for Summary Judgment having been filed by Defendant; and

Further motions having been filed requesting preclusion of expert testimony; and

Affirmations in Opposition and further submissions having been received and considered.

NOW, it is hereby ORDERED, that the motion for Summary Judgment is granted and the cross-motions regarding expert disclosure are denied as moot[2].

Findings of Fact

On March 23, 2017, Donald Parker was admitted to Defendant's facility. At the time of admission, he was seventy-eight years old, and he had an extensive medical history including, but not limited to, dementia, hyperlipidemia, diabetes, and a history of repeated falls. At some time after admission, Mr. Parker was infected with COVID-19. His condition declined progressively. He died on May 2, 2020. The recorded cause of death was "acute hypoxic respiratory failure and COVID-19. Plaintiff brings this action as the "proposed" administrator of Mr. Parker's estate. She is Mr. Parker's daughter. She alleges in her complaint and Bill of Particulars that Defendant, *inter-alia*, failed to develop and implement effective infection and

[1] NYSCEF doc. 106
[2] In determining this motion, this Court has considered documents filed on NYSCEF as cited above as well as all other filings in this matter that have been electronically filed with the Court.

prevention policies specifically related to the diagnosis, prevention, and treatment of COVID-19 and that failed to maintain sufficient records, develop an adequate nursing plan or provide sufficient staffing[3]. While the Bill of Particulars sets forth pages of alleged failures on the part of Defendant, it does not specifically identify those failures that do or do not fall within statutory immunity for COVID-19 counter measures or protocols.

This motion for Summary Judgment has been filed by Defendant. Defendant argues that all alleged deficiencies in treatment and services provided to the decedent are protected by the Federal Public Readiness and Emergency Preparedness Act (hereinafter referred to as "PREP Act") or the New York's Emergency or Disaster Treatment Protection Act (hereinafter referred to as "EDTPA") and under the circumstances herein, these statutes provide them with immunity from liability.

In support of the motion, Defendant has submitted an expert affirmation from Gisele Wolf-Klein, M.D. who reviewed voluminous written material, including, but not limited to pleadings, deposition and records. Based upon this review, Dr. Wolf-Klein concluded that Defendants met the applicable standard of care. Most significantly with-regard-to the instant motion, Dr. Wolf-Klein concluded, within a reasonable degree of medical certainty, that "the care and services rendered to Mr. Parker . . . were affected by various measures taken at the facility in response to COVID-19, in good faith, and in support of the State of New York's response to COVID-19".

Defendant has also submitted an expert affirmation from Dial Hewlett, Jr., M.D. Dr. Hewlett also reviewed voluminous documents, including, but not limited to, court pleadings and depositions and records related to Mr. Parker's COVID-19 infection. He opined that

[3] See NYSCEF doc. 202

Defendant "kept and maintained policies for infection control and emergency preparedness before the COVID-19 pandemic began" and "implemented a plethora of measures in response . . . These include policies involving the use of PPE, social distancing, suspension of communal dining and visitation and screening of staff, visitors, and residents". Dr. Hewlett further opined that "it would be unduly speculative to state within a reasonable degree of medical or professional certainty that Mr. Parker contracted COVID-19 as the result of any act or omission of TenBroeck or any of its employees or agents that was not in accordance with the standard of care".

Of-particular-note, Dr. Hewlett concluded that "during Mr. Parker's admission, TenBroeck implemented various measures in response to COVID-19 in good faith, and in support of the State of New York's response to COVID-19, and that such measures undoubtably impacted the care and services rendered to Mr. Parker as a resident of the facility". Furthermore, "TenBroeck implemented various protocols that directly involved the systemic use, allocation, and decision-making with respect to 'covered countermeasures', in response to COVID-19, and that such activities and decisions, more likely than not, had a substantial causal impact on the manner in which COVID-19 would have spread from human-to-human within the facility during that time". With-regard-to the specific issue before this Court in the instant motion, Dr. Hewlett opined that "[e]ven though the precise cause of Mr. Parker's COVID-19 exposure cannot be ascertained to a reasonable degree of medical or professional certainty, it is nevertheless my opinion that TenBroeck's use, allocation, and decision-making with respect to 'covered countermeasures' had a significant causal impact on the manner in which COVID-19 spread throughout the facility in general". In his report, Dr. Hewlitt provided a comprehensive and detailed analysis of the treatment provided to Mr. Hunter and outlined how the treatment was

impacted by COVID-19 protocols and attendant limitations on the facilities ability to provide treatment to its residents. Dr. Hewlitt also outlined at length how these protocols and countermeasures and the availability of PPE supplies forced the facility to make difficult treatment decisions based upon the availability of staff, equipment and other resources[4].

Plaintiff opposes the motion and has submitted an expert affirmation from Summit Gupta, M.D.[5] Dr. Gupta reviewed most of the same voluminous records reviewed by Defendant's experts but disagreed with the conclusions reached therein. Specifically, he concluded that "the care provided by TenBroeck was improper, inappropriate and non-compliant with the standards of care". He continues that, in his opinion, Mr. Parker was "wrongfully deprived of rights"[6]. Specifically, Dr. Gupta concluded that "the administration of fluid infusion . . . was not consistently applied and/or applied incorrectly", that "[p]roper medical care requires continuous evaluation of the patient's hemodynamic status, intake and output vital signs and risk factors for fluid overload", and that "inconsistent and poorly justified pattern of initiating, stopping and re-initiating fluids, represents a significant deviation from the accepted standard of care".

Notably, Dr. Gupta does not address whether this allegedly inconsistent monitoring and administration of fluids was the result of reduced staffing and patient overload due to COVID-19

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[4] The expert affidavit is replete with examples of how COVID-19 protocols impacted treatment. Of- particular-note, Dr. Hewlitt opined that "the type of PPE used, the manner in which it is used, as well as the decision-making regarding allocation of PPE resources among staff and residents will all play a substantial casual role with respect to how COVID-19 is transmitted". Dr, Hewlitt further opined that "the limited availability of diagnostic tests required decisions to be made as to who should and should not receive a test" and "TenBroeck's good faith reliance on the results of COVID-19 tests to make decisions regarding infection control . . . undoubtably had a casual impact on how COVID-19 spread within the facility".

[5] For-the-purpose-of this motion, this Court will consider the affidavit submitted by Dr. Gupta without addressing the merits of the cross-motions requesting leave to file late expert disclosure and the motion to preclude.

[6] NYSCEF doc. 185, page 2

nor does Dr. Gupta address whether fluid infusion protocols were changed or impacted by pandemic countermeasures. In point-of-fact, Dr. Gupta's "expert affirmation" does not contain the phrase "covered countermeasure", nor does it address the provisions and applicability of the PREP Act or the EDTPA.

With-regard-to the expert affidavits submitted in support of the motion, Plaintiff argues that Defendant's expert sets forth general conclusions without sufficient reference to the actual care provided to Mr. Parker nor does Defendant's expert precisely outline how the alleged failures of the facility are attributable to COVID-19 measures. Counsel for Plaintiff also argues that the medical records that have been provided are incomplete and allege a "1,571-page discrepancy in the records Defendant has now provided as the certified complete nursing home chart compared to the previously exchanged records"[7]. Plaintiff argues that this discrepancy alone warrants denial of the Summary Judgment motion.

Counsel for Plaintiff further argues that the PREP act is inapplicable as the actions at issue are not within the scope of "covered countermeasures" as defined in the act and that "Defendant wants to broaden the definition of what a 'covered countermeasure' is . . . to include virtually any FDA approved or authorized 'drug' or 'device' used to treat or diagnose COVID-19 or mitigate its spread, and purports to encapsulate plaintiff's claims within their own self-serving definition"[8]. Plaintiff further argues that immunity is not conferred on Defendant for acts of gross negligence and that the record is sufficient to establish questions of fact regarding this cause of action. Counsel further argues that the medical records that have been provided are incomplete and allege a "1,571-page discrepancy in the records Defendant has now provided as

[7] Id., page 15
[8] Id., page 17

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Applicable Law

Summary Judgment

"A party moving for Summary Judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in the moving party's favor . . . the proponent of a Summary Judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact"[11] (Jacobsen v. N.Y.C. Health and Hospitals Corp., 22 N.Y.3d 824 (2014)). See also, P.R.B. v. State of New York, 201 A.D.3d 1237 (3rd Dept., 2022); Ferretti v. Village of Scotia, 200 A.D.3d 1243 (3rd Dept., 2021)). "To determine whether there are any factual issues, this Court must view the evidence in a light

[9] Id., page 15
[10] Id., page 17
[11] Internal citations, quotations and punctuation omitted in all quotations contained herein.

most favorable to the nonmoving party and give that party the benefit of every favorable inference" (McEleney v. Riverview Assets, 201 A.D.3d 1159 (3rd Dept., 2022)).

Immunity Pursuant to EDTPA and PREP Act

The PREP Act authorizes the Secretary of Health and Human Services (hereinafter referred to as "HHS") to declare that a public health emergency exists and to take such action as may be appropriate to lead the national response (see, Parker v. St. Lawrence County Pub. Health Dept., 102 A.D.3d 140 (3rd Dept., 2012)). Permissible actions pursuant to such a declaration include but are not limited to the provision of civil immunity to individuals and companies participating in the country's response to the public health emergency. Pursuant to the PREP Act, a defendant is immune from suit if the defendant is a "covered person", the claim "relates to" or "arises" out of the defendants "recommended" activities with respect to "covered countermeasures"; and all residential criteria for immunity are met[12]. The PREP Act defines "covered persons" to include "program planners,' "qualified persons," and their officials, agents, and employees" and any person "authorized in accordance with the public health and emergency response of the Authority having jurisdiction … to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures and their officials, agents, employees, contractor"[13].

A covered person will 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[14]. An exception to immunity exists if there is an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct brought by the person

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[12] 42 U.S.C.A. §§247d-6d(b)(1)
[13] 85 Fed. Reg. at 15202-02
[14] 42 U.S.C.A.§§247d-6d(a)(1)

who suffers such injury or by the representative of such a person[15]. "For the PREP Act to apply, there must be a causal link between that [covered person's] use of covered countermeasures and the injury the plaintiff sustained." (Mackey v. Tower Hill Rehabilitation, LLC, 569 F.Supp.3d 740 (N.D. Ill., E.D. 2021)). See also, Solomon v. St. Joseph Hospital, 64 F.4th (2d Cir. 2023).

Defendant also relies on the EDTPA, codified in the Public Health Law, which was enacted on April 3, 2020, and which confers broad immunity upon providers who render "health care services" in response to the COVID-19 pandemic and was retroactively applied to March 7, 2020[16].

Public Health Law § 3082, provides, in relevant part that:

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 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 facilities or health care professionals' 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 harm by the health care facility or health care professional providing health care services, provided, however, that acts, omissions or decisions resulting for a resource or staffing shortage shall not be considered to be willful of intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm.

Finally, Defendant relies on Executive Order 202.10. which provides in relevant part that:

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[15] 42 U.S.C.A. §247-6d (2)
[16] Public Health §3080

> all physicians, physician assistants, specialist assistants, nurse practitioners, licensed professional nurses and licensed practical nurses shall be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission by such a medical professional in the course of providing medical services in support of the State's response to COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence of such medical professional.
>
> [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 conditions 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 . . . The health care services covered by the immunity provision included, at least initially, those related to the diagnosis, prevention, or treatment of COVID-19; the assessment or care of an induvial with a confirmed or suspected case of COVID-19; and the care of any other individual who presented at a health care facility or to a health care professional during the period of the COVID-19 emergency (Estate of Pierro v. Carmel Richmond Healthcare Rehab. Ctr., 241 A.D.3d 645 (2nd Dept., 2025).

See also, Estate of Middleton v. CLR Troy LLC, ____ A.D.3d ____, 2026 NY Slip Op 01826 (3rd Dept., March 26, 2026); Cacace v. Grandell Rehab & Nursing Ctr., Inc., ____ A.D.3rd ____, 2026 NY Slip Op 01759 (2nd Dept., March 25, 2026); Macru v. Shorefront Operations, LLC, 244 A.D.3d 1092 (2nd Dept., 2025); Whitehead v. Pine Haven Operating LLC, 222 A.D.3rd 104 (3rd Dept., 2023).

In the time that this matter has been pending, despite amendments which limited the scope of immunity, all appellate departments have clearly shown a trend towards an expansive application of immunity statutes. Silva-Rios v. New York Presbyt. Columbia Med. Ctr., 246 A.D.3d 416 (1st Dept., 2026) (immunity attached when the record established that "pandemic-related overcapacity, staffing, supply shortages, and guidelines with respect to personal protective equipment had a clear impact on would prevention and treatment practices,

including frequency of turning and repositioning at the hospital's cardiac unit, and would have affected plaintiff"); Madourie v, Montefiore Med. Ctr., 246 A.D.3d 467 (1st Dept., 2026) ("In a case where the plaintiff has died from COVID-19, it is usually self-evident that plaintiff's treatment was impacted by defendant's decisions or activities in response to or as a result of the COVID-19 outbreak"; Byington v. North Sea Assoc., LLC, 244 A.D.3d 1177 (2nd Dept., 2025) (immunity attached despite claims of gross negligence when the Court found that "the allegations are no more than bare legal conclusions with no factual specificity, which are insufficient to survive a motion to dismiss"). See also, Holder v. Jacob, 231 A.D.3d 78 (1st Dept., 2024).

Those instances where plaintiffs have survived motions to dismiss are limited to instances where the plaintiff was being treated for a collateral illness and there was an insufficient showing that the allegedly deficient acts were tied, in any way, to the impact of COVID-19. See, Damiani v. WSHCH N., Inc., 244 A.D.3d 1059 (2nd Dept., 2025) (motion to dismiss denied when "the defendants also failed to conclusively demonstrate that the treatment of the decedent's skin integrity and pressure ulcer was impacted by the hospital's decisions or activities in response to or as a result of the COVIDS-19 outbreak and in support of the state's directives"). See also, Costiera v. MMR Care Corp., 244 A.D.3d 1180 (2nd Dept., 2025).

Discussion

This Court has considered the facts and circumstances and the arguments presented in support and in opposition to the motion to preclude. It is the finding of this Court that Defendant has met their met their prima facie burden to establish entitlement to judgment as a matter of law based on immunity. First, and most significantly, it is not disputed that Plaintiff's cause of death was COVID-19 and, as noted in Madourie v, Montefiore Med. Ctr., 246 A.D.3d 467 (1st Dept.,

2026), "[i]n a case where the plaintiff has died from COVID-19, it is usually self-evident that plaintiff's treatment was impacted by defendant's decisions or activities in response to or as a result of the COVID-19 outbreak". Moreover, a review of the record shows that "pandemic-related overcapacity, staffing, supply shortages, and guidelines with respect to personal protective equipment" significantly impacted the treatment Plaintiff received (Silva-Rios v. New York Presbyt. Columbia Med. Ctr., 246 A.D.3d 416 (1st Dept., 2026).

With-regard-to the controlling issue in this motion, Defendant has claimed immunity and sets forth in the submitted affirmations that Plaintiff's death was the direct result of COVID-19 and his treatment was directly impacted by COVID-19 measures and protocols that are protected by the EDTPA and the PREP Act. The affirmations submitted in support of the motion and the deposition testimony corroborate this claim. Moreover, Defendant has submitted an expert affidavit that specifically, and in-great-detail, outline precisely how these measures and protocols were implemented at the facility and how they impacted the care provided to Mr. Parker. It is the finding of this Court that these conclusions are wholly corroborated by the deposition testimony that has been introduced as well as the other documentary evidence.

In contrast, Plaintiff relies on an expert affidavit from purported expert Dr. Gupta who reached general conclusions regarding the applicable standard of care without specifically addressing how the care Mr. Parker received was or was not impacted by COVID-19 protocols and counter measures. As indicated above, his conclusion that "the care provided by TenBroeck was improper, inappropriate and non-compliant with the standards of care" and that Mr. Parker was "wrongfully deprived of rights", is only marginally relevant to the controlling issue before this Court and does nothing to rebut the expert opinion offered in support of the motion.

While Plaintiff makes conclusory assertions regarding alleged deficiencies in care, Plaintiff has not offered any cogent argument to counter Defendant's claim that Plaintiff's treatment was based upon COVID-19 protocols and countermeasures and that any delays in addressing specific symptoms were related to overcrowding, staffing shortages and other COVID-19 protocol limitations at the facility.

This Court has reviewed all relevant documents and finds, as argued by Defendant, that the alleged deficiencies outlined by Plaintiff, if presumed to be accurate, would be attributable to COVID-19 countermeasures and protocols and staffing and "pandemic-related overcapacity, staffing, supply shortages, and guidelines with respect to personal protective equipment". While Plaintiff phrases their complaint as lying in gross-negligence, and argues Defendant is attempting to broaden the scope of statutory immunity, it is the finding of this Court that Defendant's argument is consistent with the above outlined expansive reading of the applicable statutes, an approach that has been followed in this Department as recently as April 2026.

Given this Court's decision on Summary Judgment, the cross-motions related to the expert disclosure are dismissed as moot.

This Court has also considered all other arguments raised by counsel in opposition to the motion. To the extent these additional issues are not specifically addressed in this decision, they have been determined to be without merit.

For the foregoing reasons, it is the finding of this Court that Defendants have established their entitlement to judgment as a matter of law in reliance on statutory immunity. Plaintiffs have failed to introduce any evidence in support of the existence of any contested issue of fact.

For the foregoing reasons, the motion for partial Summary Judgment is denied in all respects.

EF2022-947

This shall constitute the Decision and Order of the Court.

The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220.

Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

Dated: April 13, 2026
Kingston, New York

ENTER,

Kevin R Bryant

HON. KEVIN R. BRYANT, J.S.C.