To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. HAL GREENWALD, J.S.C.

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ELEANORE MCCAFFERY individually, and ELEANORE MCCAFFERY, by her Power of Attorney, THERESA LAROCCA-BAFALMENTE,

Plaintiff,

– against –

WHITE PLAINS HOSPITAL MEDICAL CENTER, JEWISH HOME LIFE CARE SARAH NEUMAN CENTER WESTCHESTER, THE NEW JEWISH HOME SARAH NEUMAN,

Defendants.

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Index No. 62102/2022

Motion Seq. 2

DECISION & ORDER

In a hospital/nursing home negligence action, defendants Jewish Home Life Care Sarah Neuman Center Westchester and The New Jewish Home Sarah Neuman (collectively, Sarah Neuman) move to dismiss the complaint for lack of jurisdiction pursuant to CPLR 3211(a)(2) and for failure to state a cause of action pursuant to CPLR 3211(a)(7) (Motion Seq. 2).

Papers Considered **NYSCEF Doc. Nos. 45-74, 82-83, 85-88**

1. Notice of Motion/Affirmation of Jeffrey T. Wolber, Esq./Memorandum of Law/Exhibits A-AA
2. Affirmation of Rod Behren, Esq. in Opposition/Exhibit 1
3. Affirmation of Jeffrey T. Wolber, Esq., Esq. in Reply/Exhibits BB-DD

Discussion

By way of background, plaintiff commenced this action for damages for injuries sustained during plaintiff's treatment and residency at defendants' facilities by filing the summons and complaint on July 1, 2022. The complaint was amended in November 2022. Plaintiff was admitted to White Plains Hospital Medical Center (WHPMC) from on or about March 26, 2020, through April 2, 2020 and admitted to Sarah Neuman's facilities on April 2, 2020 through June 9, 2020. The complaint alleges plaintiff developed ulcerations and/or decubitus ulcers and/or bed sores during her stay at WHPMC and that those maladies worsened at Sarah Neuman and additional ulcerations and/or decubitus ulcers and/or bed sores developed at Sarah Neuman.

Sarah Neuman now moves to dismiss the complaint for lack of jurisdiction pursuant to CPLR 3211(a)(2) and for failure to state a cause of action pursuant to CPLR 3211(a)(7).

In support of the motion, Sarah Neuman contends that it is immune from claims relating to health care services provided during the first wave of the Covid-19 pandemic citing The New York Emergency or Disaster Treatment Protection Act (EDTPA), NY Public Health Law Article 30-D (§§ 3080-3082), and New York Executive Order 202.10, at the state-level, and the Federal Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. §§ 247d-6d, 247d-6e, at the federal-level.

Sarah Neuman argues, among other things, that its services were impacted by Covid-19 and provides an affidavit from Marion Smith, Director of Nursing at Sarah Neuman, wherein Smith attests that plaintiff's care was impacted in 17 enumerated ways due to Covid-19 protocols in place during plaintiff's residency at Sarah Neuman including room changes and isolation due to suspected and confirmed Covid-19 status, as well as treatment for Covid-19. Smith also attests to good faith efforts to provide care to residents and decisions that were being made "to balance the practical need for close physical contact to provide care to Sarah Neuman residents against the risk of human-to-human transmission of a disease with limited scientific information available" (Smith aff. at para 12 [NYSCEF Doc. 66]).

In opposition, plaintiff argues, among other things, that EDTPA is inapplicable because it was repealed, and the PREP Act is inapplicable because plaintiff is not claiming injuries due to Covid-19 or vaccine administration. Plaintiff further argues that she nonetheless pleaded gross negligence and reckless conduct.

In reply, Sarah Neuman argues that plaintiff is incorrect on the repeal of EDTPA, and plaintiff too narrowly construes acts covered by the PREP Act. Sarah Neuman also argues that plaintiff failed to properly plead gross negligence or reckless conduct because the complaint lacks any facts to support that conclusory allegation and plaintiff's opposition failed to oppose dismissal under EO 202.10.

"On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), '[w]e accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [quoting *Leon v Martinez,* 84 NY2d 83, 87-88 [1994]]; *see Bass v D. Ragno Realty Corp.*, 111 AD3d 863, 863 [2d Dept 2013]).

Enacted during the initial wave of the Covid-19 pandemic, EDTPA provided civil immunity to health care workers from liability for alleged harm sustained as a result of an act or omission in the course of arranging for or providing health care services pursuant to a Covid-19 emergency rule or otherwise in accordance with applicable law.

First, as to plaintiff's contentions regarding repeal of EDTPA, plaintiff's reliance on *Whitehead v Pine Haven Operating LLC* (75 Misc3d 985 [Sup Ct, Columbia County 2022]) is misplaced. That non-binding decision was rendered on June 8, 2022. However, four

months later in October 2022, the Fourth Department of the Appellate Division held that the repeal of EDTPA did not have retroactive effect:

> We thus conclude that applying the repeal of EDTPA to the allegations in the complaint would have retroactive effect "by impairing rights [defendants] possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed" …"Because the [repeal of EDTPA], if applied to past conduct, would impact substantive rights and have retroactive effect, the presumption against retroactivity is triggered" (*Ruth v Elderwood At Amherst*, 209 AD3d 1281, 1286-1287 [4th Dept 2022] [quoting *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 369-370 [2020]; internal citation omitted]).

Given that the Second Department has not opined on this issue, this Court is bound by *Ruth* (*see Maple Med., LLP v Scott*, 191 AD3d 81, 90 [2d Dept 2020] ["the Supreme Court is obligated to follow the precedent set by the Appellate Division of another department until its home department or the Court of Appeals pronounces a contrary rule"]). As such, the EDTPA was in full effect during plaintiff's residency at Sarah Neuman from April 2, 2020, to June 9, 2020.[1]

Turning to the applicability of EDTPA to the instant action, a medical facility is immune from civil liability for harm sustained from an act or omission in providing health care services, if such act or omission "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" (Pub Health Law 3082[1][b] [emphasis added]).

Here, Sarah Neuman submitted evidence demonstrating that Sarah Neuman's care of plaintiff was impacted by Covid-19 protocols in 17 enumerated ways, including placement into isolation and treatment for Covid-19, and that such care was provided in good faith. Thus, immunity under EDTPA is warranted (*see Garcia v New York City Health & Hosps. Corp.* 2022 NY Slip Op 32115[U], *6 [Sup Ct, New York County 2022]; *DeFonce v Sky View Rehab. and Health Care Ctr*, Westchester County, Jan. 6, 2023, Wood J., index no. 61757/2022, 5-6; *compare Matos v Chiong*, 2021 NY Slip Op 32047[U], 2021 NY Misc LEXIS 4022, *3 [Sup Ct, Bronx County May 27, 2021] [explaining earlier motion was denied because movant failed to demonstrate that "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" [italics in original]]).

Exceptions to immunity include acts or omissions that are not rendered in good faith or that constitute "willful or intentional criminal misconduct, gross negligence,

[1] EDTPA was enacted on April 3, 2020, and retroactively applied to March 7, 2020. It was amended by bill S8835 signed into law on August 3, 2020, limiting claims for harm or damages occurring on or after that date, and it was ultimately repealed on April 6, 2021 (*see Ruth*, 209 AD3d at 1283; 2020-S7506, L 2020, ch 56, § 1; 2019-S8835, L 2020 ch 134, § 1; 2021-A3397, L 2021, ch 96, § 1).

reckless misconduct, or intentional infliction of harm" (Pub Health Law 3082[1][c], [2]; *see Ruth*, 209 AD3d at 1286; *Garcia*, 2022 NY Slip Op 32115[U] at *4-5; *DeFonce*, 61757/2022 at 6). "To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others" (*J. Petrocelli Contr., Inc. v Morganti Group, Inc.*, 137 AD3d 1082, 1083 [2d Dept 2016]). Although the complaint alleges gross negligence and "intentional acts," it provides no facts beyond those sounding in ordinary negligence. Plaintiff's bald assertions of gross negligence, recklessness, lack of good faith, and "willful" or "intentional" acts are bare legal conclusions with no factual specificity. As such, plaintiff failed to adequately plead any such conduct, and therefore fails to invoke these exceptions (*DeFonce*, 61757/2022 at 6; *see also J. Petrocelli Contr.*, 137 AD3d at 1083).

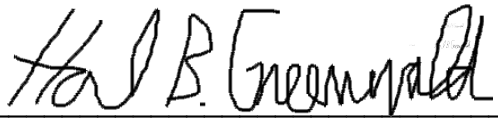
All other remaining contentions have been considered and are either without merit or rendered moot by the above determination.

Based on the foregoing, it is hereby

ORDERED that Sara Neuman's motion to dismiss is GRANTED; and it is further.

ORDERED that the action is referred to the Preliminary Conference Part.

Dated: White Plains, New York
September 7, 2023



HON. HAL B. GREENWALD, J.S.C.