SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH N. MCMAHON **PART** 30M

Justice

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LYNDA MANDELL,

Plaintiff,

- v -

JAMAL RAHAMAN, JAMAL RAHAMAN GYN ONCOLOGIST, PLLC, SHARON ZISMAN, MOUNT SINAI HOSPITAL, MARK REINER, LAPAROSCOPIC SURGICAL CENTER OF NEW YORK LLP

Defendant.

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INDEX NO.	805062/2021
MOTION DATE	N/A, N/A, N/A, 10/19/2023
MOTION SEQ. NO.	001 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 63, 67, 68, 69, 79

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 64, 70, 71, 72, 82

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 65, 73, 74, 75, 86, 87, 88

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 56, 57, 58, 59, 60, 61, 62, 66, 76, 77, 78, 80, 81, 83, 84, 85

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is ordered that the motions of defendants, The Mount Sinai Hospital s/h/a Mount Sinai Hospital (hereinafter "Mount Sinai") (Mot. 001), Sharon Zisman, M.D. s/h/a Sharon Zisman (Mot. 002), Mark Reiner and Laparoscopic Surgical Center of New York, LLP (Mot. 003), and Jamal Rahaman, M.D. s/h/a Jamal Rahaman and Jamal Rahaman GYN Oncologist PLLC (Mot. 004), for leave to amend their Answers pursuant to CPLR 3025(b) to assert defenses related to COVID immunity, are denied.

This medical malpractice action arises out of alleged negligent care and treatment rendered to plaintiff, Lynda Mandell, during the performance of two surgeries--a **November 25, 2019,** robotic hysterectomy in which plaintiff claims that the defendant, Dr. Rahaman, perforated her bowel, requiring an emergent colostomy on December 5, 2019[1], and a **June 1, 2020** procedure to reverse the colostomy, in which plaintiff claims that defendants Dr. Reiner[2] and Dr. Zisman[3] negligently re-connected plaintiff's colon to her vagina, causing a colovaginal fistula which necessitated further corrective surgeries. Both procedures were performed at The Mount

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[1] In her Verified Bill of Particulars, plaintiff claims that Dr. Rahaman's negligence includes: "**causing permitting and allowing plaintiff to sustain a colonic perforation during the November 25, 2019, robotic hysterectomy**; failing to timely recognize [and diagnose] that plaintiff had sustained a colonic perforation during the November 25, 2019, robotic hysterectomy; failing to timely examine plaintiff's colon upon the first signs and symptoms of a colonic perforation; failing to visualize and/or adequately visualize the colon; failing to call for a physician or specialist when the signs and symptoms of a colonic perforation were first noted; failing to treat and/or timely treat plaintiff's colonic perforation; causing, permitting and allowing a delay in treatment of plaintiff's colonic perforation; causing, permitting and allowing plaintiff to lose the opportunity to have her colonic perforation treated at an earlier point in time to minimize the injuries; **failing to call for a physician or specialist when the signs and symptoms of sepsis were first noted**; failing to treat and/or timely [and adequately evaluate] plaintiff's sepsis; causing, permitting and allowing a delay in treatment of plaintiff's sepsis; **failing to evaluate plaintiff post-operatively from November 25, 2019, until December 5, 2019, regarding her post-operative symptoms and complaints; causing, permitting and allowing plaintiff to become septic; failing to recommend [or consider recommending] a CT scan of the abdomen prior to postoperative day 10 in light of plaintiff's post-operative complaints**, and **failing to warn or advise the plaintiff of the risks**, hazards and dangers of the aforesaid course of treatment or lack thereof and available alternatives to it; and **failing to properly treat the plaintiff's condition in accordance with the standard and accepted medical, surgical, post-surgical and diagnostic practices and procedures** (*see* NYSCEF Doc. No. 60, para. 7; emphasis supplied).

[2] In her Verified Bill of Particulars, plaintiff claims that Dr. Reiner's negligence includes: "**causing permitting and allowing plaintiff to sustain a colovaginal fistula during the June 1, 2020, surgical intervention**; failing to recognize [and diagnose] that plaintiff had sustained a colovaginal fistula during the June 1, 2020, surgical intervention; failing to timely examine plaintiff's colon and vagina upon the first signs and symptoms of a colovaginal fistula; **failing to visualize and/or adequately visualize the colon**; failing to visualize and/or adequately visualize the colon **and adjacent organs and surrounding anatomical structures; failing to visualize and/or adequately visualize the vagina and adjacent organs and surrounding anatomical structures; failing to call for a physician or specialist when the signs and symptoms of a colovaginal fistula were first noted**; failing to treat and/or timely [and adequately evaluate] plaintiff's colovaginal fistula; causing, permitting and allowing plaintiff to lose the opportunity to have her colovaginal fistula treated at an earlier point in time to minimize the injury; lulling the plaintiff into a false sense of security and complacency regarding her post-surgical medical condition; **failing to warn or advise the plaintiff of the risks**, hazards and dangers of the aforesaid course of treatment or lack thereof and available alternatives to it; and **failing to properly treat the plaintiff's condition in accordance with standard and accepted medical, surgical, post-surgical and diagnostic practices and procedures** (*see* NYSCEF Doc. No. 54, para. 7).

[3] Plaintiff's Verified Bill of Particulars as to Dr. Zisman contains virtually the same claims as those she asserted against Dr. Reiner (*see* NYSCEF Doc. No. 46, para. 1).

Sinai Hospital (hereinafter "MSH"),[4] where plaintiff was confined from December 5, 2019, through January 4, 2020; June 1, 2020, through June 8, 2020; July 31, 2020, through August 6, 2020, and January 14, 2021, through January 21, 2021 (*see* Verified Bill of Particulars as to MSH; NYSCEF Doc. No. 40, para. 8). Plaintiff alleges that the collective defendants' malpractice occurred from November 25, 2019, through June 8, 2020 (*id.*, para.1).

Plaintiff commenced this action with the filing of a summons and complaint on February 25, 2021, against Dr. Rahaman, Dr. Zisman and MSH, and in November of 2021 she instituted a separate action against Dr. Reiner and his practice, Laparoscopic Surgical Center of New York.[5]

MSH served its answer on April 6, 2021 (*see* NYSCEF Doc. No. 7), followed by service of Dr. Rahaman's answer on April 19, 2021 (*see* NYSCEF Doc. No. 11). Dr. Zisman answered the complaint on May 24, 2023 (*see* NYSCEF Doc. No. 14) and Dr. Reiner and Laparoscopic Surgical Center of New York filed an answer on January 24, 2022 (*see* NYSCEF Doc. No. 33).

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[4] Plaintiff's Verified Bill of Particulars as to MSH sets forth that the hospital was negligent in "performing and interpreting tests, ordering consultations, and making/returning phone calls" (*see* NYSCEF Doc. No. 40, para. 2). Additionally, plaintiff claims that hospital employees Dr. Rahaman and Dr. Zisman were negligent in "failing to use due, reasonable and proper skill and care in the treatment of plaintiff; departing from standard and accepted medical, surgical, anesthesia, post-surgical and diagnostic care and treatment while providing care and treatment to plaintiff…[in] **causing permitting and allowing plaintiff to sustain a colonic perforation during the November 25, 2019, robotic hysterectomy**; failing to recognize that plaintiff had sustained a colonic perforation during the November 25, 2019, robotic hysterectomy; **failing to run the patient's bowel and otherwise test for colonic perforation**; **failing to enter into the required process of differential diagnosis and upon same failing to formulate a timely and adequate plan to confirm or rule out bowel perforation; failing to amend and/or revise the differential diagnosis and plan over time**; **failing to properly and/or adequately treat plaintiff's colonic perforation**; causing, permitting and **allowing a delay in treatment of plaintiff's colonic perforation**; causing, permitting and allowing plaintiff to lose the opportunity to have her colonic perforation treated at an earlier point in time to minimize the injury; **failing to properly and/or adequately treat plaintiff's sepsis**; causing, permitting and **allowing a delay in treatment of plaintiff's sepsis**; causing permitting and allowing plaintiff to **sustain a colovaginal (aka rectovaginal) fistula during the June 1, 2020, surgical intervention**; **failing to recognize that plaintiff had sustained a colovaginal fistula during the June 1, 2020, surgical intervention**; failing to visualize and/or adequately **visualize the colon [and] vagina**; failing to adequately treat colovaginal fistula; failing to warn or advise the plaintiff of the risks, hazards and dangers of the aforesaid course of treatment or lack thereof and available alternatives to it; and **failing to properly treat the plaintiff's condition in accordance with standard and accepted medical, surgical, anesthesia, post-surgical and diagnostic practices and procedures** (id., para. 3).

[5] The action against Dr. Reiner was commenced under Index Number 805367/2021 and the two actions were consolidated under Index No. 805062/2021 by stipulation (*see* NYSCEF Doc. Nos. 27, 28, 29).

Not one of the answers asserted a defense based on the Covid immunity statutes, which had already been in effect for over a year before the first answer was served.

Discovery proceeded under this Court's supervision, and at the July 27, 2023, certification conference all parties agreed that discovery was complete. The case was postured for plaintiff to file her Note of Issue. It was at this conference that the defendants raised, for the first time, their intention to seek leave to amend each answer to add the defenses of New York's Emergency or Disaster Treatment Protection Act (EDTPA) (Public Health Law §§ 3080-82) and the federal Public Readiness and Emergency Preparedness Act (PREP) (42 US §247d-6d, *et seq*) (hereinafter "Covid defenses"). The court postponed issuance of the certification order to allow the defendants to make and fully brief these motions.

In **Mot. Seq. No. 001** MSH moves to "assert additional affirmative defenses" related to Covid immunity (*see* NYSCEF Doc. No. 35, para. 2), "based on Executive Orders ("EO"), Article 30-D, §3082(2) of the Public Health Law (now known as the Emergency or Disaster Treatment Protection Act ["EDTPA"]; the PREP Act, and federal immunity under 42 US §247d-6d(d)", on the grounds that plaintiff would not be prejudiced or surprised by said defenses since her alleged dates of loss encompass treatment after March of 2020--the height of the Covid pandemic. MSH maintains that the addition of Covid defenses does not change the basic issues of the case or add any significant factual allegations, and that its proposed amendment is meritorious (*id.*, para. 13).

In support of **Mot. Seq. No. 002,** Dr. Zisman argues that Public Health Law §3082 is not an affirmative defense that was required to be pled in her initial answer and, notwithstanding, that plaintiff will not be prejudiced by the proposed amendment. Dr. Zisman further maintains that the Covid immunity defense is not "devoid of merit or frivolous" (*see* NYSCEF Doc. No. 43

para. 15). The only defendant to offer a reasonable excuse for her delay in asserting the Covid defense, ("because, at the time [of service of the answer], the precise application of Article 30-D of the Public Health Law was still being determined by the courts"), Dr. Zisman argues that plaintiff will not be prejudiced by the amendment because no note of issue has been filed, and that since "the treatment occurred during the Covid-19 emergency" (*id.*, para. 34), then there can be no claim of surprise.

In **Mot. Seq. No. 003** defendants Dr. Reiner and Laparoscopic Surgical Center of New York LLP argue that (1) the Covid defense has merit; (2) plaintiff is not prejudiced because the defense does not change the basic issues of the action or add significant factual allegations of which plaintiff is unaware, and (3) plaintiff should not be surprised, since Dr. Reiner's dates of treatment relative to this action began on June 1, 2020, "a pivotal time early in the Covid-19 pandemic" (*see* NYSCEF Doc. No. 49, para. 22).

In **Mot. Seq. No. 004**, Dr. Rahaman argues that the Covid immunity statutes are not an affirmative defense, that plaintiff will not be surprised or prejudiced by the amendment, and that the defense is not "devoid of merit" (*see* NYSCEF Doc. No. 57, para. 29).

Plaintiff opposes all motions in a "combined opposition" (*see* NYSCEF Doc. Nos. 67, 70, 73, 76), arguing that "this case has absolutely nothing to do with Covid-19" (*id.*, para. 3) and that she would be severely prejudiced by having to re-open discovery to address the impact of Covid on defendants' treatment decisions after waiting over two-and-a-half years to bring this case to trial. Plaintiff points to defendants' lack of a reasonable excuse for the delay (*i.e.*, defendants have not furnished "a single good reason why they waited so long to raise this new defense"[6]

[6] The only defendant to furnish an excuse for her delay in seeking to amend the pleadings is Dr. Zisman, who claims that at the time she served her answer, "the precise application of Article 30-D of the Public Health Law was still being determined by the Courts" (*see* NYSCEF Doc. No. 43, para. 11).

[*id.*]) and maintains that the proposed defense is "palpably devoid of merit." Additionally, plaintiff argues that Public Health Law §3082 is an affirmative defense that should have been pleaded in the first instance, because plaintiff would have had no way of knowing of defendants' claim that the Covid emergency interfered with their ability to treat her, unless defendants expressly raised the statute (*cf., Crampton v. Garnet Health,* 73 Misc.3d 543 [Sup. Ct. Orange County 2021]).

FACTUAL BACKGROUND

On November 25, 2019 (months prior to the first reported case of Covid-19 in the United States), plaintiff, Lynda Mandell, underwent a robotic hysterectomy performed by the defendant, Dr. Rahaman at MSH. Over the next ten days, she purportedly called Dr. Rahaman complaining of bloating, inability to pass gas, projectile vomiting, shortness of breath, nausea, and a rapid heartbeat, for which defendant allegedly reassured Ms. Mandell that these were common post-operative complaints and recommended MiraLAX to relieve gas. When plaintiff presented for her first prescheduled post-operative appointment on December 5, 2019, it was discovered that she was septic due to a perforated colon and was undergoing organ failure. An emergency colostomy procedure (*i.e.*, a procedure where part of the colon is diverted through an artificial hole in a person's abdominal wall) was performed by the defendant, Dr. Reiner, on December 5, 2019.

Six months later, in June of 2020, plaintiff underwent reversal of the colostomy, also performed by Dr. Reiner, along with his assistant on this occasion, Dr. Zisman. During that procedure the defendants surgically connected plaintiff's colon to her vagina, causing a colovaginal fistula. Both Dr. Zisman and Dr. Reiner acknowledge that this error was a departure from the standard of care, but blame each other for the mishap (*see* April 11, 2023, EBT excerpt

of Mark Reiner, NYSCEF Doc. No. 71; November 22, 2022, EBT excerpt of Sharon Zisman, NYSCEF Doc. No. 72).

APPLICABLE LAW AND DISCUSSION

Amended and Supplemental Pleadings

CPLR Rule 3025, entitled "Amended and supplemental pleadings" provides in pertinent part as follows:

> (a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.
>
> (b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Under CPLR 3025(b), "leave to amend a pleading 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*Fairpoint Cos., LLC v. Vella* 134 AD3d 645, 645 [1st Dept. 2015] [*internal citation omitted*]). The determination of whether to allow or disallow an amendment is committed to the court's discretion (*Murray v. City of New York,* 43 NY2d 400, 404-405 [1977]).

On a motion for leave to amend, "the [movant] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept. 2010] [internal citations omitted]; *see also Lucido v. Mancuso,* 49 AD3d 220 [1st Dept. 2008] where the First Department instructed that "no evidentiary showing of merit is required under CPLR 3025[b] [and that] [t]he court need only determine whether the proposed

amendment is 'palpably insufficient' to state a cause of action or defense or is patently devoid of merit." The *Lucido* Court held: "Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied" [*id.*, 49 AD3d at 229]).

"An amendment is devoid of merit where the allegations are legally insufficient" (*Reyes v. BSP Realty Corp.*, 171 AD3d 504, 504 [1st Dept. 2019]). It has long been held that "where a proposed defense plainly lacks merit, amendment of a pleading would serve no purpose but needlessly complicate discovery and trial, and therefore the motion to amend is properly denied" (*Thomas Crimmins Contracting Co. v. New York,* 74 NY2d 166, 170 [1989]). Unless the "alleged insufficiency or lack of merit [of the proposed amendment] is clear and free from doubt," the proposed amendment should be permitted (*Miller v. Staples the Off. Superstore E., Inc.*, 52 AD3d 309, 313 [1st Dept. 2008]).

"Delay alone is not a sufficient ground for denying leave to amend," even where defendants should have been aware of the facts and theories asserted in the amended answers long before amendment was sought (*see Johnson v. Montefiore Medical Center,* 203 AD3d 462 [1st Dept. 2022] [internal citations omitted]). and if the plaintiff has not filed a note of issue or if the case has not been certified as trial ready, then a defendant need not proffer a reasonable excuse for the delay (*id.*).

Covid Immunity Defense

On April 3, 2020, New York State passed the now repealed Emergency or Disaster Treatment Protection Act ("EDTPA"). See L. 2020, C.56, Part GGG, §1. Codified in the Public Health Law Article 30-D at §§3080-3082. The **stated purpose** of the EDTPA was "to promote public health, safety and welfare of all citizens by broadly protecting the health care facilities and

health care professionals in this state from liability that may result from treatment of individuals with Covid-19 under conditions resulting from circumstances associated with the public health emergency." (Public Health Law §3080-D).

Public Health Law §3082 provides that the following criteria must be met to qualify for immunity under the EDTPA:

"1. Notwithstanding any law to the contrary...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 (Public Health Law §3082, as enacted L. 2020, ch. 56 §1 (Part GGG) (emphasis supplied).

All three prongs must be met to secure the immunity from liability. There is no immunity if the harm or damage was caused by acts or omissions resulting from willful or intentional criminal misconduct, gross negligence, reckless misconduct, or the intentional infliction of harm, except 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" (*id.*).

This Court finds, in the first instance, that the proposed amendment is devoid of merit under the specific facts *sub judice,* and therefore chooses not address the parties' remaining contentions, including whether Public Health Law §3082 is an affirmative defense, and whether

plaintiff is sufficiently surprised or prejudiced by the proposed amendment to warrant denial of the motions.

It is evident that Covid-19 **is wholly unrelated to the allegations in the complaint and verified bills of particulars,** in this case, which relate specifically to errors made by defendants during the two separate surgical procedures (*i.e.,* perforation of the colon during a robotic hysterectomy, and the stapling of the colon to the plaintiff's vagina during the subsequent colostomy reversal, where both surgeons[7] acknowledge that an error was made). Plaintiff's theory of liability is based on (1) Dr. Rahaman's alleged negligent conduct during and shortly after the robotic hysterectomy he performed in November of 2019, and (2) Dr. Reiner's and Dr. Zisman's alleged negligent conduct during the colostomy reversal procedure they performed on June 1, 2020. "It is clear from the express language of Public Health Law §3082 that it is not merely a hospital's or health provider's care to persons affected by the coronavirus pandemic, in the abstract, that entitles it to the immunity sought here, but that the care rendered to the person making the claim is affected, in some way, by the hospital's or provider's response to the pandemic" (*Matos v. Chiong*, 2021 N.Y. Misc. LEXIS 4022, 2021 WL 2766674, 1 [Sup. Ct. Bronx Co., May 27, 2021]). Here, the abstract and general allegations made by defendants as contained in their amended verified answers (*see* NYSCEF Doc. Nos. 47, 55, 62) are legally insufficient.

Dr. Rahaman's motion to amend his answer (Mot. Seq. No, 004) to assert Public Health Law §3082 is denied at the outset. While plaintiff's bill of particulars alleges negligent treatment

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[7] At his deposition, Dr. Reiner testified that "in this specific case there were four times that the instrument was not placed in the rectum, it was placed in the vagina" [by Dr. Zisman] (*see* NYSCEF Doc. No. 77, p. 146). At her deposition, Sharon Zisman, M.D. testified that she fired the stapler connecting plaintiff's colon to the vaginal stump at the location where Dr. Reiner told her to fire it, as Dr. Zisman "had no way of seeing it" and Dr. Reiner was in the position to see and direct where the stapler should be fired (*see* NYSCEF Doc. No. 78, p. 101).

by Dr. Rahaman "from November 25, 2019, ***through June 8, 2020***" (*see* NYSCEF Doc. No. 60, para 7), there is no dispute that Dr. Rahaman's only interaction with plaintiff was during November and December of 2019, which predated the first reported case of COVID in the United States. Accordingly, Dr. Rahaman has no basis whatsoever for asserting the COVID immunity defense, and his motion to amend the answer to assert the defense must be denied as devoid of merit.

MSH's, Dr. Zisman's, Dr. Reiner's, and Laparoscopic Surgical Center of New York, LLP's motions to amend their answers (Mot. Seq. Nos. 001, 002 and 003) are also denied. The statute under which these defendants seek to immunize themselves from liability specifically requires that the plaintiff's treatment 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-19 outbreak and in support of the state's directives" (Public Health Law §3082 [1][b]). The question for this Court is whether the care rendered to Lynda Mandell was affected, in some way, by these defendants' responses to the pandemic. Under these facts, the answer is clearly no.

Plaintiff underwent both surgeries at MSH, where she previously held the position of Director of Radiological Oncology. She testified that was acquainted with colleague, Dr. Reiner, through her previous employment, and Dr. Rahaman arranged for her to have a private room (*see* NYSCEF Doc. No. 84, pp. 176-177) following the hysterectomy. Rather than being subjected to the effects of Covid's climate (*i.e.*, scarcity of hospital beds, PPE, hospital personnel, etc.), this plaintiff may have received some level of extra attention during her surgeries and hospitalizations. At her June 9, 2022, deposition, plaintiff was asked two Covid-related questions: (1) "was there any delay in reversing the colostomy because of the Covid-19 pandemic?" and (2) had Dr. Reiner "ever told you that the surgery had to be delayed in time due

to the fact that he couldn't perform an elective procedure because of the Covid-19 pandemic?" (*See* NYSCEF Doc. No. 84, pp. 263-264). Plaintiff answered that Dr. Reiner referenced a one-month Covid-related delay before he could reverse the colostomy but was in favor of the delay because it afforded plaintiff extra time to recuperate from the hysterectomy. Absent from this record is even the smallest hint that the defendants' decisions in treating Ms. Mandell were colored by the effects of Covid (*i.e.*, scarcity of beds, staff, PPE, delays in obtaining test results, etc.).

The only claims made by plaintiff, like the claims made by Mr. Back regarding his gallbladder surgery in *Back v. Facey*, 78 Misc.3d 426 [St. Lawrence County, 2023]), relate to the alleged negligent way the two surgeries were performed and the aftercare rendered. As succinctly stated by Justice Mary M. Farley, "the treatment at issue---limited by the complaint as to how the [surgeries] were performed, and wholly unrelated to their timing---was not impacted, in any way, by the defendants' decisions or activities in response to or as a result of the pandemic…" (*id.* at 435).

Under the facts of this case, the defendants' motions to amend their answers to assert as a defense Public Health Law §3082 is denied on the grounds that the proposed defense is devoid of merit. The parties' remaining arguments in favor of and in opposition to the motions are rendered moot.

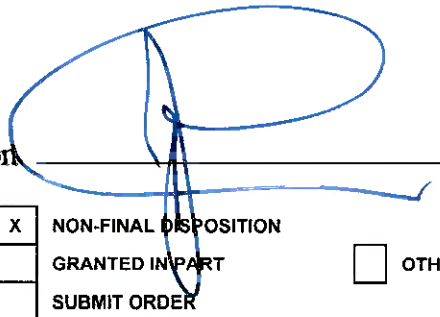
Accordingly, it is

ORDERED that the defendants' motions to amend their answers (Mot. Seq. Nos. 001, 002, 003, 004) pursuant to CPLR 3025(b) are denied as devoid of merit; and it is further

ORDERED that all further requests for relief are denied; and it is further

ORDERED that the parties shall appear for a conference via Microsoft Teams on

December 11, 2023 at 12:00 p.m.



11/8/2023
DATE

Hon. Judith N. McMahon
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE