Cameron v Cobble Hill Health Ctr., Inc.

2024 NY Slip Op 30249(U)

January 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 510564/2022

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of January, 2024.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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PHILIP CAMERON, AS PROPOSED ADMINISTRATOR OF THE ESTATE OF MARY CAMERON, DECEASED,

Plaintiff,

-against-

Index No.: 510564/2022

COBBLE HILL HEALTH CENTER, INC.,

DECISION AND ORDER

Defendant.

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The following e-filed papers read herein: NYSCEF Doc. Nos.:

Notice of Motion/Affirmation/Memorandum of Law/Exhibits.....	6-13
Affirmation in Opposition and Cross-Motion/Exhibits.....	17-19, 30
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Defendant Cobble Hill Health Center, Inc. ("Defendant") moves for an order, pursuant to CPLR 3211(a)(3) and (7), dismissing Plaintiff's complaint (Mot. Seq. No. 1) because Plaintiff Philip Cameron ("Plaintiff"), as proposed administrator, lacks capacity to bring this action and the complaint fails to state a cause of action. Plaintiff opposes the motion and cross-moves to amend the caption to reflect that Plaintiff has obtained letters of administration (Mot. Seq. No. 2).

On or about April 11, 2022, Plaintiff filed a summons and complaint against Defendant arising from the death of Mary Cameron ("Cameron"). Cameron had been admitted to Defendant's care facility from approximately December 31, 2018 to April 12, 2020, the date of her death. During her admission, Plaintiff alleges that Cameron was infected by SARS-CoV-2 and COVID-19 and developed respiratory distress and hypoxia, resulting in her death. Plaintiff claims that Cameron's death was a result of Defendant's failure to take precaution to prevent the spread of

future infections. In the complaint, Plaintiff asserts four causes of action: (1) violations of Public Health Law §§ 2801-d and 2803-c, (2) negligence, (3) gross negligence, and (4) wrongful death.

The Court first addresses Defendant's claim that the complaint fails to state a cause of action. Courts will only grant a motion to dismiss under CPLR 3211(a)(7) if, "taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (*Rubinstein v Salomon*, 46 AD3d 536, 538 [2d Dept 2007] [internal quotation marks and citations omitted]). However, bare legal conclusions are not presumed to be true or accorded every favorable inference (*Morris v Morris*, 306 AD2d 449, 451 [2d Dept 2003]). A complaint has sufficiently plead a cause of action if "it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and [] the requisite elements of any cause of action known to our law can be discerned from its averments" (*Pace v Perk*, 81 AD2d 444, 449 [2d Dept 1981] [internal citations omitted]). Since Plaintiff failed to address this claim in his opposition, the Court will only consider whether Defendant made a prima facie entitlement to dismissal of Plaintiff's complaint (*see Etminan v Sasson*, 51 AD3d 623, 624 [2d Dept 2008] [dismissal of a cause of action is warranted where defendants made a prima facie entitlement to that relief and plaintiff's opposition failed to address the issue]).

Defendant asserts that Plaintiff's complaint contains speculative and conclusory allegations. Thus, Defendant argues the following: (1) Defendant is immune from liability under the Emergency or Disaster Treatment Protection Act (the "EDTPA") and the exception to immunity does not apply; and (2) the complaint does not articulate a viable cause of action.

In response to the COVID-19 outbreak, the EDTPA was enacted on April 3, 2020, and retroactively effective as of March 7, 2020 (L 2020, ch 56, § 1; part GGG, § 2). The EDTPA was codified as Public Health Law ("PHL"), Article 30-D, Sections 3080-3082. It initially provided health care facilities and professionals immunity from any civil or criminal 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"[1] if: (a) the services were provided in accordance with applicable law or pursuant to a COVID-19 emergency rule; (b) the act or omission occurred

[1] Under the EDTPA, a nursing home or other licensed facility qualified as a health care facility (PHL former § 3081 [3]). In addition, the EDTPA defined "health care services" as services that related to the diagnosis or treatment of COVID-19, the assessment or care of an individual with a confirmed or suspected case of COVID-19, or the care of an individual who presented at a health care facility during the COVID-19 emergency (PHL former § 3081 [5]).

in the course of providing the services and the treatment was impacted by the 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 services were provided in good faith (PHL former § 3082). However, immunity would not extend to harm or damages "caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm" (PHL former § 3082 [2]). The EDTPA was repealed on April 6, 2021 (L 2021, ch 96, §§ 1-2), and the Fourth Department found that the repeal was not retroactive (*see Ruth v Elderwood at Amherst*, 209 AD3d 1281 [4th Dept 2022]). Since the Second Department has not issued a decision on this issue, this Court is bound to follow the Fourth Department's holding (*see Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984] ["[T]he doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule"]).

It is undisputed that EDTPA, as initially enacted, was in effect at the time of Cameron's death on April 12, 2020. Defendant argues that its immunity under EDTPA is triggered by Plaintiff's allegation that Defendant's acts and omissions led to the death of Cameron from COVID-19 infection. Defendant contends that in the complaint, Plaintiff did not state any specific factual allegations, such as specific dates, times, acts, omissions, or occurrences. Therefore, Defendant argues that the complaint failed to state a cause of action or warrant the exception to immunity. Plaintiff failed to address this aspect of Defendant's motion in his opposition. Even if Plaintiff had, the Court finds that the complaint failed to allege facts sufficient to constitute one of the exceptions to immunity under the EDTPA: willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm. Plaintiff's allegations of Defendant failing to test patients, residents and staff and accepting COVID-19 positive patients and residents without more are inadequate (*see Mancuso v Rubin*, 52 AD3d 580, 583 [2d Dept 2008] [no cause of action for gross negligence exists where the complaint contains only conclusory assertions unsupported by factual allegations evincing a reckless disregard for the rights of others or smacking of intentional wrongdoing]). At most, these allegations may constitute ordinary negligence, but such cause of action is not sustainable under the EDTPA. Trial courts have held that similar allegations will not defeat a motion seeking to dismiss a complaint on the basis of immunity under EDTPA (*compare Hasan v Terrace Acquisions II, LLC*, 79 Misc 3d 1021, 2023 NY Slip Op 23155 [Sup Ct., Bronx County 2023] [conclusory and vague allegations insufficient

to constitute gross negligence]), *and Crampton v Garnet Health*, 73 Misc 3d 543, 2021 NY Slip Op 21242 [Sup Ct., Orange County 2021] [dismissing causes of action for gross negligence and reckless misconduct where allegations were "bare legal conclusions with no factual specificity"], *with Messina v Clove Lakes Health Care & Rehab. Ctr., Inc.*, 78 Misc 3d 537, 2023 NY Slip Op 23008 [Sup Ct., Richmond County 2023] [holding that Plaintiff adequately particularized defendant's harmful conduct]). Thus, the Court finds that Plaintiff has failed to state a cause of action.

Given the Court's finding, the Court will only briefly address Defendant's motion to dismiss under CPLR 3211(a)(3) and Plaintiff's cross-motion. Under CPLR 3211(a)(3), a defendant may move to dismiss a cause of action where the plaintiff does not have legal capacity to sue (CPLR 3211 [a] [3]). A plaintiff lacks capacity where he commences an action on behalf of a decedent prior to the issuance of the letters of administration (*Snodgrass v Pro. Radiology*, 50 AD3d 883, 884 [2d Dept 2008]; *Muriel v New York City Health & Hosps. Corp.*, 52 AD3d 792 [2d Dept 2008]). It is undisputed that Plaintiff did not have the letters of administration in April 2022 when the complaint was filed. Normally, Plaintiff's complaint would be dismissed (*see Deutsch v LoPresti*, 272 AD2d 506, 507 [2d Dept 2000], but under CPLR 205(a), Plaintiff would have six months to recommence the action after dismissal.

Rather than filing a new action, Plaintiff seeks to amend the caption to reflect that he is the administrator of Cameron's estate, in accordance with the letters of administration. Leave to amend "shall be freely given" (CPLR 3025 [b]), absent a showing of prejudice or surprise to the opponent (*see Hewitt v Palmer Veterinary Clinic, PC*, 35 NY3d 541, 555 n 4 [2020]; *Faracy v McGraw Edison Corp.*, 229 AD2d 463, 464 [2d Dept 1996]). Defendant has not demonstrated that it would be prejudiced by the amendment. Instead, it argues that the complaint must first be dismissed before Plaintiff can benefit from CPLR 205(a). In *Egan v. Neghavi*, the Second Department found that the trial court properly dismissed the complaint commenced prior to the receipt of letters of administration (84 AD3d 1014 [2d Dept 2011]). The plaintiff in *Egan* had not cross-moved for leave to amend or requested such relief in his opposition papers (*id.*). Here, Plaintiff did cross move to amend the caption upon obtaining letters of administration. If Plaintiff's complaint was not dismissed pursuant to CPLR 3211(a)(7), the Court would deny Defendant's motion to dismiss under CPLR 3211(a)(3) and grant Plaintiff's cross-motion to amend the caption (*Tilden Dev. Corp. v Nicaj*, 49 AD3d 629 [2d Dept 2008] [finding that trial court did not err in

allowing the caption to be amended where defendants did not demonstrate they would be prejudiced]).

Accordingly, it is hereby

ORDERED, that Defendant's motion is granted to the extent that the Plaintiff's complaint is dismissed pursuant to CPLR 3211(a)(7); and it is further

ORDERED, that Plaintiff's cross-motion is denied.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice