SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, **PART 34**

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TOWNSEND, STEVEN Index №. **800321/2021E**

- against - Hon. **JOHN R. HIGGITT**,

PENUS, NELSON, R.N., et al J.S.C.

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The following papers in the NYSCEF System were read on this motion for **DISMISSAL**, duly submitted as No. ___ on the Motion Calendar of **April 27, 2021**

	DOCUMENTS NUMBERED
Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed	3-16
Notice of Cross Motion – Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavits and Exhibits	18-23
Replying Affidavits and Exhibits	25

Upon the February 24, 2021 notice of motion of defendants Penus, Wondemunegne, Bartnik and St. Barnabas Hospital and the affirmation, affidavits and exhibits submitted in support thereof; plaintiff's April 13, 2021 affirmation in opposition and the exhibits submitted therewith; the moving defendants' April 26, 2021 affirmation in reply; and due deliberation; the moving defendants' motion for an order dismissing the complaint pursuant to CPLR 3211(a)(7) on the ground that the moving defendants are entitled to qualified immunity under Public Health Law §§ 3080 and 3082 is denied.

The complaint alleges that the individually-named defendants negligently rendered medical care to the plaintiff, on behalf of defendant hospital, on May 2, 2020.

In asserting that they are entitled to immunity, the moving defendants rely on Public Health Law §§ 3080-3082.[1] Article 30-D of the Public Health Law, the Emergency or Disaster Treatment Protection Act, consisting of Public Health Law §§ 3080-3082, was enacted by L 2020, ch 56, § 1 (Part GGG), effective April 3, 2020, in response to the coronavirus pandemic. Public Health Law §§ 3081 and 3082 were amended by L 2020, ch 134, §§ 1 and 2, respectively, effective August 3, 2020. The article was repealed, effective April 6, 2021, by L 2021, ch 96, § 1. Relevant here is the article's provision immunizing health care facilities and health care professionals from civil and criminal liability under certain circumstances (*see* Public Health Law § 3082[1]).

Public Health Law § 3080, effective April 3, 2020, expresses the purpose of the article, and states:

> "A public health emergency that occurs on a statewide basis requires an enormous response from state and federal and local governments working in concert with private

[1] The moving defendants also rely on that portion of Governor Cuomo's Executive Order 202.10, issued in response to the coronavirus pandemic, which modified various provisions of the Education Law

> "to the extent necessary to provide that all physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered 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 medical professional in the course of providing medical services in support of the State's response to the COVID-19 outbreak*, unless it is established that such injury or death was caused by the gross negligence of such medical professional" (Executive Order 202.10, issued March 23, 2020) (emphasis added).

and public health care providers in the community. The furnishing of treatment of patients during such a public health emergency is a matter of vital state concern affecting the public health, safety and welfare of all citizens. It is the purpose of this article to promote the 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" (emphasis added).

Public Health Law § 3082, effective April 3, 2020, states, as is relevant here:

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 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 (emphasis added).[2]

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 infliction of harm by the health care facility or health care professional providing health care services, provided, however, 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.

Public Health Law § 3082 is "deemed to have been in full force and effect on or after March 7, 2020" (Laws 2020, ch 56, § 2 [Part GGG]). "Health care services," as defined in the version of Public Health Law § 3081 in effect at the time of plaintiff's alleged treatment and care, included "services provided by a health care facility or a health care professional, regardless of the location where those services are provided, that relate to … the care of any other individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration" (Public Health Law § 3081[5][c]).[3]

The moving defendants assert that the claims against them are barred, in whole or in part, by the above-mentioned legislation because they rendered care to numerous patients affected by the coronavirus pandemic before and after the effective date of Public Health Law § 3082. Absent from the moving defendants' proof, however, is any demonstration that the "treatment of [plaintiff 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 §

[2] Subdivision 1 of Public Health Law § 3082 was subsequently amended, effective August 3, 2020, to delete the phrase "arranging for" from the description of protected activities.

[3] Also effective August 3, 2020, Public Health Law § 3081(5)(c) was deleted from the definition of health care services, leaving health care services to be defined as those relating to the diagnosis or treatment of COVID-19, or to the assessment or care of an individual as it relates to COVID-19, when such individual has a confirmed or suspected case of COVID-19.

3082[1][b]). Notably, the statute does not qualify how treatment must be affected -- whether positively, negatively, or otherwise -- it merely requires that treatment be "impacted."

In assessing a motion to dismiss under CPLR 3211(a)(7) directed to the sufficiency of the complaint itself, "[the court] must accept [plaintiff's] allegations as true, accord plaintiff[] the benefit of every possible favorable inference" (*Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018]), "liberally construe a pleading, and accord those allegations the benefit of every possible favorable inference in order to determine whether those facts fit within any cognizable legal theory" (*Molina v Phoenix Sound, Inc.*, 297 AD2d 595, 596 [1st Dept 2002]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [citation and quotation marks omitted]).

When a defendant makes a CPLR 3211(a)(7) motion that is not supported by any evidence except for the challenged pleading, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The focus is not on the quality or quantum of evidence in support of the claim, but the adequacy of the pleading itself (*see Davis v Boeheim*, 24 NY3d 262 [2014]). "If … [plaintiff is] entitled to relief on any reasonable view of the facts stated, [the court's] inquiry is complete and [the court] must declare the complaint legally sufficient" (*Campaign for Fiscal Equity v State*, 86 NY2d 307, 318 [1995] [internal citations omitted]; *see also Aristy-Farer v State of N.Y.*, 29 NY3d 501 [2017]; *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 [2005]).

Where, as here, evidentiary material such as affidavits is submitted in support of the motion, such evidence must conclusively establish a defense to plaintiff's claims as a matter of law (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 571 [2005] [citations omitted]). "[A] defendant can submit evidence[, such as affidavits or testimony,] in support of [a CPLR 3211(a)(7)] motion attacking a well-pleaded cognizable claim" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Grp., Inc.*, 115 AD3d 128, 134 [1st Dept 2014]). The affidavits or testimony submitted in support of a motion to dismiss must conclusively establish the lack of a claim or cause of action (*see Godfrey v Spano*, 13 NY3d 358 [2009]; *Anonymous v Anonymous*, 165 AD3d 19 [1st Dept 2018]).

There are no reported cases at either the state or federal level interpreting Public Health Law § 3082. Nevertheless, 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 (*see* Public Health Law § 3082[1][b]). Such proof is absent here; while the moving defendants submitted plaintiff's medical records and their affidavits, they did not point to any instance where the coronavirus pandemic or the moving defendants' response thereto had an impact on any aspect of plaintiff's treatment or care. While the moving defendants submitted four affidavits, no affiant directly addressed, let alone established, whether the care rendered *to plaintiff* -- not merely any care they rendered during the effective period of Public Health Law § 3082 -- was in any way impacted by the pandemic or the moving defendants' response thereto. To assume this very central fact, without actual proof submitted by the proponents, transcends the court's role and relieves the moving defendants of their burden on a CPLR 3211(a)(7) dismissal motion. Accordingly, the moving defendants failed to *conclusively* demonstrate that they meet all conditions for the application of immunity, that plaintiff thus has no cause of action, and that they are entitled to relief under CPLR 3211(a)(7).

There is no doubt that the Legislature's actions were taken in response to a global health crisis unparalleled in our lifetimes, were intended to address the burdens of health care providers who had been stretched unbearably thinly, and were intended to alleviate one concern (i.e., liability) that must exist in the back of the minds of all those who endeavor to keep us healthy and heal us when we are not. However,

> "When presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature. We have long held that the *statutory text is the clearest indicator of legislative intent*, and that a court should construe unambiguous language to give effect to its plain meaning. In the absence of a statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase. Where the statutory language is unambiguous, a court need not resort to legislative history. Further, a statute must be construed as a whole and its various sections must be considered together and with reference to each other (*Matter of Walsh v N.Y. State Comptroller*, 34 NY3d 520, 524 [2019] [citations and quotation marks omitted]).

Moreover, a statute conferring immunity must be strictly construed (*Brown v Bowery Sav. Bank*, 51 NY2d 411, 415 [1980]), and the party seeking its protections "must conform strictly with its conditions" (*Zaldin v Concord Hotel*, 48 NY2d 107, 113 [1979]). The language of the statute, being unambiguous, must be "[applied] … as it is written" (*id.* at 113).

Considering these principles, together with the standard of proof required on a CPLR 3211(a)(7) motion, the moving defendants' showing is insufficient to demonstrate entitlement to dismissal of the complaint on the basis of the application of Public Health Law § 3082.

Accordingly, it is

ORDERED, that the moving defendants' motion for an order dismissing plaintiff's complaint pursuant to CPLR 3211(a)(7) on the ground of the moving defendants' qualified immunity under Public Health Law §§ 3080 and 3082 is denied.

This constitutes the decision and order of the court

Dated: June 1, 2021

Hon. John R. Higgitt, J.S.C.