SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 2

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SCOTT D. MANTEL, as Administrator for the Estate of DEBORAH BUCKO,

Plaintiff,

-against-

SOUTH NASSAU COMMUNITIES HOSPITAL d/b/a MOUNT SINAI SOUTH NASSAU,

Defendant.

_____X

Index No.: 607604/23
Motion Sequence...01
Motion Date...1/19/24

Papers Submitted:
Notice of Motion…….....x
Memo of Law in Support……x
Memo of Law in Opposition……x
Reply Affirmation……x
Reply Memo of Law……x

Upon the foregoing papers, the motion by the Defendant, SOUTH NASSAU COMMUNITIES HOSPITAL d/b/a MOUNT SINAI SOUTH NASSAU ("South Nassau"), seeking an Order, pursuant to CPLR §3211 (a)(7), dismissing the complaint on the ground that Mount Sinai is immune from suit and liability under the federal Public Readiness and Emergency Preparedness Act, 42 U.S.C. §247d-6d, *et seq.* (hereinafter "PREP"), and thus, the complaint fails to state a cause of action; and pursuant to CPLR §3211 (a)(2), dismissing the complaint on the ground that the Plaintiff's claims are

defensively preempted by PREP, thus divesting the court of subject matter jurisdiction, is decided as provided herein.

On February 28, 2021, the Plaintiff-decedent, DEBORAH BUCKO (hereinafter the "Decedent"), presented to the emergency room at South Nassau complaining of shortness of breath, body aches, fatigue and fever (NYSCEF Doc. No. 5 at ¶14). On the same day, the Decedent was admitted to South Nassau with a diagnosis of "suspected COVID-19 illness" (*Id.* at ¶15). Subsequent to admission, the Decedent purportedly did not respond to South Nassau's "standard treatment protocols" and, on or about March 9, 2021, "was transferred to the critical care unit" (*Id.* at ¶¶17,18). On April 7, 2021, Dr. Robert Clark, the Decedent's treating infectious disease specialist, wrote an initial prescription for the drug Ivermectin for what he concluded was "end stage covid 19" (*Id.* at ¶¶28,29). Notwithstanding Dr. Clark's action, this prescription was immediately placed on hold and ultimately rescinded by the "Hospital Stewardship Committee", which was allegedly comprised "of senior hospital physicians, department chiefs, and/or administrators" all of whom were acting on behalf of South Nassau (*Id.* at ¶¶31-33).

On April 20, 2021, this Court signed an Order to Show Cause under Index No. 604589/21 whereby South Nassau was directed to "immediately enforce...Doctor Robert H. Clark's order to administer the prescription Ivermectin to their mutual patient, Deborah Bucko" (NYSCEF Doc No. 20). As a result thereof, the Decedent received her first dose of the drug on April 20 which continued daily until April 24, 2021, during which

time she allegedly experienced "significant improvement" and "required significantly less oxygen, vasopressors, and ventilator support" (NYSCEF Doc No. 5 at ¶¶ 38, 39).

On April 27, 2021, Dr. Clark wrote a second prescription for Ivermectin spanning a period of 35 days "with a stop date of May 31, 2021", which was blocked and ultimately rescinded by South Nassau (*Id.* at ¶¶46,47). On May 4, 2021, this Court signed an Order to Show Cause once again directing South Nassau to "enforce" Dr. Clark's "second order to administer the prescription Ivermectin" to the Decedent (NYSCEF Doc No. 21). On May 5, 2021, the Decedent was again receiving Ivermectin, however, rather than the full 35 day course of treatment ordered by Dr. Clark, the prescription was purportedly "changed" and "the second round of ivermectin was stopped on May 10, 2021" (NYSCEF Doc No. 5 at ¶¶ 53, 57). Subsequently, the Decedent's "condition rapidly deteriorated" and on May 16, 2021, she passed away (*Id.* at ¶ 57, 58).

On September 15, 2023, the Plaintiff, SCOTT MANTEL, as the Administrator for the Decedent's Estate (hereinafter the "Plaintiff"), commenced the underlying wrongful death action referable to which South Nassau now moves for dismissal pursuant to CPLR §§ 3211 [a] [2] and [7] (NYSCEF Doc Nos. 5, 16, 17, 51). In moving herein, South Nassau maintains it is insulated from liability by virtue of the immunity afforded under the Public Readiness and Emergency Preparedness Act ["PREP"] as codified in 42 U.S.C. § 247d-6d, *et seq.*, and, as such, the Plaintiff's complaint is not cognizable and concomitantly this Court lacks subject matter jurisdiction to entertain the

matter *sub judice* (NYSCEF Doc. Nos. 17, 51). South Nassau's application is strenuously opposed by the Plaintiff (NYSCEF Doc. No. 44).

On a motion to dismiss interposed pursuant to CPLR § 3211 (a) (7), the Court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

PREP, upon which South Nassau principally relies, was initially promulgated by congress in 2005 in response to the SARS epidemic "[i]n order to encourage the use of products, drugs, and devices designed to address epidemics and pandemics" which are approved by the Federal Drug Administration, and imbues the Secretary of Health and Human Services (hereinafter the "Secretary") with the "authority to make declarations that have the effect of conferring immunity on certain persons from federal and state liability" (*Shapnik v Hebrew Home for Aged at Riverdale*, 535 F.Supp.3d 301, 304 [SDNY 2021]).

As relevant here, 42 USC § 247d-6d (a) (1) provides, in pertinent part, that "a covered person shall 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 if a declaration ...has been issued with respect to such countermeasure." Relatedly, 42 USC § 247d-6d (a)(2)(B) provides, in relevant part, that "[t]he immunity under paragraph (1) applies to any

claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the...administration...of such countermeasure." Of further relevance herein, on March 17, 2020, the Secretary declared a "covered countermeasure" to be "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19" (NYSCEF Doc. No. 22 at p. 8).

As an initial matter, the Court notes that on this record, as thus far developed, there appears to be no dispute as to South Nassau being a "covered person" or Ivermectin being characterized as a "covered countermeasure" within the ambit of PREP. However, contrary to South Nassau's assertions, the Plaintiff's complaint neither "pleads a 'claim[] for loss…relating to' the use and administration of covered countermeasures to treat COVID-19" nor does it "arise[] solely from...[South Nassau's] acts and decisions in dispensing covered countermeasures to...[the Decedent] for the treatment of her COVID-19 infection"(NYSCEF Doc. No. 17 at pp. 2, 11). Rather, in stunning contrast to South Nassau's assertions, the complaint alleges, with particularity, that South Nassau "acted wrongfully and negligently, by repeatedly refusing to administer ivermectin to...[the Decedent]" notwithstanding it "having been prescribed" by Dr. Clark and "despite clear evidence in the medical records that...[the Decedent's] condition showed significant improvement once the ivermectin treatment was initiated" (NYSCEF Doc. No. 5 at ¶ 60).

In the instant matter, PREP confers "immunity only from 'any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure'" (*Hudak v Elmcroft of Sagamore Hills*, 58 F4th 845, 849 [6th Cir 2023] quoting 42 USC § 247d-6d [a][2][B]) and not with respect to "such a measure's non-administration or non-use" (*Hampton v California*, 83 F4th 754, 763 [9th Cir 2023]), the latter of which is the central predicate upon which the Plaintiff's complaint is based.

Consistent with the above, the factual claims alleged in the complaint, which must be accepted as true and afforded the benefit of every favorable intendment (*Nonnon v City of New York*, *supra* at 827), are unequivocally based upon South Nassau's "non-administration" of Ivermectin and accordingly the immunity afforded under PREP is inapplicable (*Hampton v California*, *supra* at 763).

Accordingly, it is hereby

ORDERED, that South Nassau's application for an order dismissing the Plaintiff's complaint is **DENIED**, in its entirety; and it is further

ORDERED, that the parties are reminded of the previously scheduled **Preliminary Conference on June 3, 2024, which shall be held in accordance with the virtual PC Protocols in effect**.

This constitutes the decision and order of this Court.

DATED: Mineola, New York
May 17, 2024

Hon. Randy Sue Marber, **J.S.C.**