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VIA ECF

Honorable LeShann DeArcy Hall, U.S.D.J.
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Arbeeney v. Cuomo, et. al.
Civ. No.: 22-CV-2336 (LDH) (LB)

Dear Judge DeArcy Hall:

American Courts have recognized that the right to be free from cruel, unhuman or degrading treatment is a universally accepted customary human rights norm. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir.1996), *cert. denied*, 519 U.S. 830, 117 S.Ct. 96, 136 L.Ed.2d 51 (1996); *Najjarro de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir.1985); *Jama v. U.S. I.N.S.*, 22 F. Supp. 2d 353 (D.N.J. 1998). *Xuncax v. Gramajo*, 886 F.Supp. 162 (D.Mass.1995); *Paul v. Avril*, 901 F.Supp. 330 (S.D.Fla.1994). There are few things more cruel, more unhuman, more degrading than helpless, vulnerable elderly people being abandoned to suffer miserable torturous but wholly avoidable COVID deaths that were substantially caused by Defendants' deliberate indifference and conscience shocking unconstitutional misconduct. Am. Compl. ¶¶ 1-108.

Accordingly, Plaintiff respectfully submits this correspondence briefly summarizing Plaintiff's vigorous opposition to Defendants' upcoming motions to dismiss.¹ In evaluating a motion to dismiss, the Complaint is liberally construed with all factual allegations accepted as true, and all reasonable inferences are drawn in Plaintiff's favor. *Mazzei v. The Money Store*, 62 F.4th 88, 92 (2d Cir. 2023). Defendants' version of the facts is immaterial and irrelevant. *Harris v. City of New York*, 222 F.Supp.3d 341, 348 (S.D.N.Y. 2016).

¹As a threshold matter, Daniel Arbeeney's standing to bring this action is no longer an issue in this case, due to the probating of the Estate and the granting of Letters of Administration on March 31, 2023. Concurrent with the filing of this letter, documentation will be provided to Defendants.

On March 25, 2020, Defendants administratively issued the following directive (“the Directive”) ordering all nursing homes in the State, “No resident shall be denied re-admission to a [nursing home] solely based on a confirmed or suspected diagnosis of COVID-19. [Nursing homes] are prohibited from requiring a hospitalized resident who is determined medically stable to be tested for COVID-19 prior to admission or readmission.”

Defendants were warned that the Directive would be a deadly disaster for elderly nursing home residents, the most vulnerable Covid demographic. Defendants knew the Directive would be a deadly disaster, as exemplified by Governor Cuomo’s acknowledgment, “For nursing homes, this could be like fire through grass.” Defendants knew all of this, yet they maliciously and in act of deliberate indifference, promulgated and enforced the Directive anyway.

As a result of the Directive, over 9000 (nine-thousand) Covid positive patients who otherwise would not have been admitted to the State’s nursing homes, were admitted, resulting in as many as 15,000 (fifteen-thousand) wholly avoidable Covid deaths. The Directive amounted to mass State-sanctioned euthanasia of its elderly victims.

Based upon this misconduct detailed in the Amended Complaint, Defendants have committed a conscience-shocking substantive due process violation. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-47, 118 S.Ct. 1708, 1716-17, 140 L.Ed.2d 1043 (1998). Defendants are further liable under the State Created Danger doctrine, in that they dramatically increased the risk that New York’s elderly nursing home patients would be afflicted with, and ultimately die from Covid. *Lombardi v. Whitman*, 485 F.3d 73, 80 (2d Cir. 2007). Defendants exercised deliberate indifference in that they knowingly disregarded the excessive risk that the Directive posed to nursing home patients’ health and safety. *Tangreti v. Bachmann*, 983 F.3d 609, 619 (2d Cir. 2020).

In doing so, Defendants violated multiple clearly established fundamental rights, which are defined as rights “implicit in the concept of ordered liberty or deeply rooted in this Nation’s history and tradition” so as to trigger strict scrutiny. *Everest Foods, Inc. v. Cuomo*, 585 F.Supp.3d 425, 439-40 (S.D.N.Y. 2022). One’s right to life is a fundamental right that cannot be submitted to a vote, and is not dependent upon the outcome of elections. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185-86, 87 L.Ed. 674 (1943).

Closely related to the right to life is the right to bodily integrity, which was violated when the Directive dramatically increased the risk of helpless nursing home patients’ exposure and death from Covid. *Davis v. New York City Housing Auth.*, 379 F.Supp.3d 237, 255 (S.D.N.Y. 2019). Defendants likewise violated the right to safe conditions, as “the right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause. *Youngberg v. Romeo*, 457 U.S. 307, 315, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982). *See also Mauro v. Cuomo*, 2023 WL 2403482 at *7 (E.D.N.Y. 2023) (New York State officials are obligated to protect nursing home residents from the COVID-19 pandemic). It is even a crime under New York law to endanger the welfare of a vulnerable elderly person. P.L. § 260.32; P.L. § 260.34.

Reasonable public officials confronted with these facts could not have reasonably believed that their actions did not violate settled constitutional rights. *Jones v. Harris*, 665 F. Supp. 2d 384, 394 (S.D.N.Y. 2009). Qualified immunity is therefore inapplicable.

Regarding causation, under New York’s substantial factor test, a wrongful act is the legal cause of the injury if it was a substantial factor in bringing about the injury. *Locust Valley Water Dist. v. Dow Chemical Co.*, 465 F.Supp.3d 235 240 (E.D.N.Y. 2020). In a case such as this, proof of causation entails that as a result of the Directive: (1) Plaintiff was exposed to Covid; (2) Covid is capable of causing Plaintiff’s death (general causation); and (3) Plaintiff was exposed to sufficient levels of Covid to cause his death (specific causation). *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448, 824 N.Y.S.2d 584, 590, 857 N.E.2d 1114 (2006).

According to data released by none other than the New York Department of Health, the “admission of coronavirus-positive patients into New York nursing homes under March 25 guidance from the New York State Department of Health was associated with a statistically significant increase in resident deaths.” Am. Compl. ¶ 107. In any event, proximate cause is ordinarily a jury question. *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 135 (2d Cir. 2021).

Defendant DeRosa contends that Cobble Hill Health Center admitted only one COVID-infected person pursuant to the Directive, which occurred more than three weeks after Mr. Arbeeney left the facility. This proclamation is contrary to Plaintiff’s information and belief. Any such factual assertion made by Defendant in this case is subject to discovery, especially where much of the factual information lies particularly within Defendants’ knowledge. *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1248 (2d Cir. 1987).

Defendant Zucker asserts that the state law claim should be dismissed under the two-year statute of limitations because Mr. Arbeeney passed away on April 21, 2020 but the Complaint was not filed until April 26, 2022, five days after the two-year statute of limitations period expired. At the time, however, Plaintiff was *pro se*, the court facilities were closed to the public, and Plaintiff did not have access to electronic filing. Consequently, delivery of the Complaint was practicable only by U.S. mail for which Plaintiff has a postage paid receipt dated April 21, 2020.

No special deference is granted to the Governor when the exercise of emergency powers infringes on constitutional rights. *Agadath Israel of America v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020). Courts may not defer to the Governor simply because he is addressing a matter involving public health. *Id.* Even in a pandemic, the Constitution “cannot be put away or forgotten.” *Id.* Courts “have a duty to conduct a serious examination into the necessity of public health measures that infringe upon constitutionally protected rights.” *Id.* We thank the Court for its kind consideration.

Respectfully submitted,
Michael S. Kasanoff
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cc: All Counsel