

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ESTHER ROSARIO by ANITA ROSARIO as
ATTORNEY-IN-FACT

Index No.: 819204/2023E

Plaintiff,

VERIFIED ANSWER

-against-

RIVERDALE SNF LLC d/b/a SCHERVIER NURSING
CARE CENTER and RIVERDALE SNR LLC d/b/a
SCHERVIER REHABILITATION & NURSING CENTER,

Defendants,

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Defendant, **RIVERDALE SNF LLC d/b/a SCHERVIER NURSING CARE CENTER,**

by its attorneys, KAUFMAN BORGEEST & RYAN LLP, as and for its Verified Answer to
plaintiff's Verified Complaint states and alleges upon information and belief:

1. Denies knowledge or information sufficient to form a belief as to the truth of the
allegations set forth in the paragraphs of the Verified Complaint designated as "1", "2", "3", "4",
"29", "34", "59" and "64" and otherwise begs leave to refer all questions of fact to the trier thereof
and all questions of law to the Court

2. Denies each and every allegation contained in the paragraphs designated as "5",
"6", "7", "8", "9", "15", "17", "18", "19", "20", "21", "22", "23", "24", "25", "35", "36", "37",
"38", "39", "45", "47", "48", "49", "50", "51", "52", "53", "54", "55" and "56" of the Verified
Complaint except to admit defendant is a domestic limited liability company, operates a licensed
residential health care facility, maintains a business address at 2975 Independence Avenue, Bronx,
New York 10463 and otherwise begs leave to refer all questions of fact to the trier thereof and all
questions of law to the Court.

3. Denies in the form alleged each and every allegation contained in the paragraphs designated as “10”, “11”, “13”, “26”, “33”, “40”, “41”, “43” and “63” of the Verified Complaint and otherwise begs leave to refer all questions of fact to the trier thereof and all questions of law to the Court.

4. Denies each and every allegation contained in the paragraphs designated as “12”, “16”, “28”, “32”, “42”, “46”, “58”, “62”, “65”, “66”, “67”, “68”, “69”, “70”, “71”, “72”, “73” and “74” of the Verified Complaint.

5. Denies in the form alleged each and every allegation contained in the paragraphs designated as “14”, “27”, “30”, “31”, “44”, “57”, “60” and “61” of the Verified Complaint except to admit that plaintiff ward was a resident of defendant’s licensed residential health care facility and otherwise begs leave to refer all questions of fact to the trier thereof and all questions of law to the Court.

AS AND FOR A FIRST CAUSE IN NEGLIGENCE AGAINST DEFENDANTS

6. With respect to that paragraph of the Verified Complaint designated as “75”, answering Defendant repeats, reiterates and re-alleges each and every admission, denial, denial in the form and manner, and denial of knowledge or information sufficient to form a belief of each and every allegation contained in those paragraphs designated as “1” through “74”, with the same force and effect as if set forth herein.

7. Denies each and every allegation contained in the paragraphs designated as “76”, “77”, “78”, “79”, “80”, “81” and “82” of the Verified Complaint.

AS AND FOR A SECOND CAUSE OF ACTION PURSUANT TO PUBLIC HEALTH LAW SECTION 2801-d AGAINST DEFENDANTS

8. With respect to that paragraph of the Verified Complaint designated as “83”, answering Defendant repeats, reiterates and re-alleges each and every admission, denial, denial in

the form and manner, and denial of knowledge or information sufficient to form a belief of each and every allegation contained in those paragraphs designated as “1” through “82”, with the same force and effect as if set forth herein.

9. Denies each and every allegation contained in the paragraphs designated as “84”, “85”, “86”, “87”, “88”, “89” and “90” of the Verified Complaint.

**AS AND FOR A THIRD CAUSE OF ACTION FOR MEDICAL MALPRACTICE
AGAINST DEFENDANTS**

10. With respect to that paragraph of the Verified Complaint designated as “91”, answering Defendant repeats, reiterates and re-alleges each and every admission, denial, denial in the form and manner, and denial of knowledge or information sufficient to form a belief of each and every allegation contained in those paragraphs designated as “1” through “90”, with the same force and effect as if set forth herein.

11. Denies each and every allegation contained in the paragraphs designated as “92”, “93”, “94”, “95” and “96” of the Verified Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

12. Upon information and belief, whatever injury and/or damages the Plaintiff may have sustained at the time and place mentioned in the Verified Complaint and/or as a result of the occurrence alleged in the Verified Complaint, all of which are denied by this answering Defendant, were caused in whole or in part by the culpable conduct of the Plaintiff. The amount of damages recovered, if any, shall therefore be diminished in the proportion which the culpable conduct, attributable to plaintiff and/or plaintiff’s decedent, bears to the culpable conduct which caused said injuries.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

13. Upon information and belief, the injuries and damages alleged were caused by the culpable conduct of some third person or persons over whom answering Defendant neither had nor exercised control.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

14. Defendant invokes the protection of Public Health Law §2801-d with respect to the alleged cause of action for deprivation of Plaintiff's rights. Defendant exercised all care reasonably necessary to prevent and limit any deprivation and injury to Plaintiff.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

15. Pursuant to the Public Readiness and Emergency Preparedness Act (PREP Act) (42 U.S.C. § 247d-6d et seq.), the Declaration under the PREP Act for Medical Countermeasures Against COVID-19 by the Secretary of the Department of Health & Human Services, and all relevant regulations, the Defendant and its agents, servants and employees are covered persons and their actions arose out of or related to the administration of covered countermeasures as defined by the Act. Accordingly, this Court lacks subject matter jurisdiction and they are immune from liability under State and Federal law.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

16. The PREP Act provides the remedy for plaintiff's claims under the Countermeasures Injury Compensation Program (CCIP). Accordingly, plaintiff failed to exhaust his/her administrative remedies and thus the Court lacks subject matter jurisdiction. 42 U.S.C. §247d-6e(d)(1); Parker v. St. Lawrence County Public Health Department, 102 A.D.3d 140 (3d Dept. 2012).

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

17. The allocation of health care resources during an emergency is a discretionary governmental function and the Defendant, its agents, servants and employees are therefore immune from civil liability.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

18. The injuries complained of were due exclusively to causes of so extraordinary a nature that they could not reasonably have been foreseen and the result avoided.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

19. Given the declared public health emergency, the Court lacks subject matter jurisdiction pursuant to the Federal Officers Statute (28 U.S.C. §1442(a)(1)).

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

20. Given the declared public health emergency, the Defendant and its agents, servants and employees acted at all times reasonably and in accordance with the applicable standard of care in effect under the conditions existing at the time.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

21. Pursuant to the "Coronavirus Aid Relief, and Economic Security Act" signed into law on March 27, 2020, the defendant is immune from any cause of action arising under Federal or State law for any harm caused by an act or omission of the professional in the provision of health care services during the COVID-19 public health emergency.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

22. Pursuant to the Volunteer Protection Act of 1997, the defendant is immune from any cause of action arising under Federal or State law for any harm caused by an act or omission of the professional in the provision of health care services.

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