

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ZELIG GOLDMAN, Administrator for the Estate of
SARAH GOLDMAN, Deceased, and ZELIG GOLDMAN,
Individually,

Index # 508724/23

Plaintiff,

-against-

**VERIFIED ANSWER
TO AMENDED
COMPLAINT**

CODY DeMARCO, M.D., SANDERS CHANG, M.D., BRUCE
SAFFRAN, M.D., STEVEN NAYMAGON, M.D., RANDOLPH
M. STEINHAGEN, and MOUNT SINAI HOSPITAL,

Defendants.

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Defendant, **CODY DeMARCO, M.D.**, by his attorneys, WILSON, ELSER,
MOSKOWITZ, EDELMAN and DICKER LLP, hereby answers the Verified Complaint as
follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the
allegations contained in unnumbered Paragraph (directly above First Cause of Action).

AS AND FOR AN ANSWER TO THE FIRST CAUSE OF ACTION

2. Deny the allegations contained in Paragraphs “1”, “2”, “3”, “4”, “5”, “6”, “7”, “9”,
“10”, “11”, “12”, “13”, “14”, “15”, “17”, “18”, “19”, “20”, “21”, “22”, “23”, “25”, “26”, “27”,
“28”, “29”, “30”, “31”, “33”, “34”, “35”, “36”, “37”, “38”, “39”, “41”, “42”, “43”, “45”, “ in the
form alleged, and refer all questions of law to the Honorable Court.

3. Deny the allegations contained in Paragraphs “8”, “16”, “24”, “32”, “40”, “ in the
form alleged, except admit that plaintiff-decedent SARAH GOLDMAN was a patient at THE
MOUNT SINAI HOSPITAL s/h/a MOUNT SINAI HOSPITAL.

4. Deny the allegations contained in Paragraph “44” in the form alleged except admit
that THE MOUNT SINAI HOSPITAL s/h/a MOUNT SINAI HOSPITAL is a domestic

corporation duly organized and existing under and by virtue of the laws of the State of New York, and refer questions of law to the Honorable Court.

5. Deny the allegations contained in Paragraph “46” in the form alleged except admit that THE MOUNT SINAI HOSPITAL s/h/a MOUNT SINAI HOSPITAL maintained appropriate services incident to its function as a hospital, and refer all questions of law to the Honorable Court.

6. Deny the allegations contained in Paragraph “47”.

AS AND FOR AN ANSWER TO THE SECOND CAUSE OF ACTION

7. In response to Paragraph “48”, repeat each admission or denial made herein as though fully set forth hereat.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph “49”, “51”, and “52”.

9. Deny the allegations contained in Paragraph “50” and “53”.

AS AND FOR AN ANSWER TO THE THIRD CAUSE OF ACTION

10. In response to Paragraph “54”, repeat each admission or denial made herein as though fully set forth hereat.

11. Deny the allegations in Paragraphs “55”, “56”, “57”, “58”, “59”, “60”, and “61”.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

12. The answering Defendant asserts those applicable affirmative defenses for which provision is made at Public Health Law Section 2805(d).

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

13. That the alleged injuries of plaintiff was caused in whole or in part by the culpable conduct of the plaintiff which either bars the claims completely or else diminishes the damages by

the proportion that such culpable conduct of the plaintiff bears to the total culpable conduct causing the alleged injuries.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

14. Pursuant to CPLR Article 16, the liability, if any, of the answering Defendant, for non-economic loss shall not exceed his/her equitable share of liability.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

15. If plaintiff is entitled to recover damages for economic loss as against the answering Defendant by reason of the matters alleged in the complaint, the liability for which is hereby denied, then pursuant to CPLR 4545 the amount of damages recoverable against said Defendant, if any, shall be reduced by the amount by which such economic loss was or will be replaced or indemnified from any collateral source payment.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

16. If plaintiff is entitled to recover damages for loss of earnings or impairment of earning ability as against the answering Defendant by reason of the matters alleged in the complaint, the liability for which is hereby denied, then pursuant to CPLR 4546 the amount of damages recoverable against said Defendant, if any, shall be reduced by the amount of federal, state and local income taxes which the plaintiff would have been obligated by law to pay.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

17. The Complaint fails to state a cause of action upon which relief can be granted as a matter of law.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

18. Plaintiff has failed to mitigate the alleged damages claimed herein.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

19. The answering Defendant claims the benefit of each and every provision of General Obligation Law §15-108 including, but not limited to, the reduction of plaintiff's claim against the answering Defendants herein to the extent of any amounts stipulated by a release or covenant not to sue entered into by the plaintiff or in the amount of consideration paid for same, or in the amount of any released tortfeasor's equitable share of the damages under Article 14 of the Civil Practice Law and Rules, whichever is the greatest, or whichever the answering Defendant herein elects to apply.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

20. That any injuries or damages claimed were caused, in whole or in part, by the negligence or other culpable conduct of third parties over which the answering Defendant had no control or right to exercise such control.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

21. The complaint is time barred inasmuch as suit was not initiated within the statutory period of limitations prescribed in CPLR §214-a, and EPTL § 5-4.1.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

22. The alleged causes of action set forth in the plaintiffs Complaint against Defendant is barred, including by Executive Order 202.10, Education Law § 6527(2), Education Law § 6545, Education Law § 6909, Article 30-D of the Public Health Law, Public Health Law §3082, and/or Public Readiness and Emergency Preparedness Act ("PREP Act"), 42 U.S.C. § 247D-6D and 42 U.S.C. § 247d-6c. The defendant was providing medical services in support of the response to COVID-19. The causes of action set forth in the plaintiff's Complaint sound in ordinary negligence and/or medical malpractice, and they do not constitute gross negligence. The plaintiff's

bare assertions of gross negligence in the Complaint lack the required specificity to support a cause of action for gross negligence.

WHEREFORE, Defendant, CODY DeMARCO, M.D., demands judgment dismissing the Verified Complaint of the plaintiff herein, together with costs, disbursements, and attorney's fees of this action.

Dated: New York, New York
May 18, 2023

Yours, etc.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By:  _____

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