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

----------X

GREENBERG, ELAINE

- against -

MONTEFIORE NEW ROCHELLE HOSP., et al

----------X

Index №. **20340/2019E**

Hon. **JOHN R. HIGGITT**, J.S.C.

The following papers in the NYSCEF System were read on this motion for **DISMISSAL**, duly submitted as No. ___ on the Motion Calendar of **January 22, 2021**

	NYSCEF Doc. Nos.
Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed	27-34
Notice of Cross Motion – Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavits and Exhibits	36-40
Replying Affidavits and Exhibits	

Upon the October 21, 2020 notice of motion of defendants Montefiore New Rochelle Hospital and Escobar and the affirmation and exhibits submitted in support thereof; plaintiff's December 7, 2020 affirmation in opposition and the exhibits submitted therewith; the moving defendants' January 22, 2021 affirmation in reply; and due deliberation; the moving defendants' motion for an order dismissing the complaint as against them is granted.

It is alleged that plaintiff's decedent was wrongfully administered medication and care in contravention of a health care proxy declining life-saving measures, thereby prolonging the decedent's life and resulting in additional days of pain and suffering that the decedent would not have endured had the measures not been administered. The moving defendants assert that plaintiff's claim for "wrongful life" is not recognized under New York law. Plaintiff asserts that the decisional precedents cited by the moving defendants in support of their motion have been superseded by Public Health Law § 2994-f(1), which prescribes the conduct of a medical practitioner confronted with a decision to withdraw or withhold life-sustaining treatment.

The moving defendants rely in part on the Second Department's decision in *Cronin v Jamaica Hosp. Med. Ctr.*, 60 AD3d 803 (2d Dept 2009), wherein the Appellate Division affirmed the trial court decision granting summary judgment to defendants where plaintiff alleged that defendants "wrongfully prolonged the decedent's life by resuscitating him against the express instructions of the decedent and his family." The court found that decedent had not sustained a legally cognizable injury because "the status of being alive does not constitute an injury in New York" (*Cronin*, 60 AD3d at 804 [citations omitted]).

The Family Health Care Decisions Act ("FHCDA"), enacted in 2010 (*see* L 2010, ch 8, § 2, eff June 1, 2010), states,

> "An attending practitioner informed of a decision to withdraw or withhold life-sustaining treatment made pursuant to the standards of this article shall record the decision in the patient's medical record, review the medical basis for the decision, and shall either: (a) implement the decision, or (b) promptly make his or her objection to the decision and the reasons for the objection known to the decision-maker, and either make all reasonable efforts to arrange for the transfer of the patient to another physician, nurse practitioner or physician assistant, if necessary, or promptly refer the matter to the ethics review committee" (Public Health Law § 2994-f[1]).

Check one:
■ Case Disposed in Entirety
□ Case Still Active

Motion is:
■ Granted □ GIP
□ Denied □ Other

Check if appropriate:
□ Schedule Appearance □ Settle Order
□ Fiduciary Appointment □ Submit Order

While plaintiff asserts that this statute supersedes the holding in *Cronin* (and the other cases cited by the moving defendants), the statutory provision describing the remedy for the failure to abide by a health care directive does not so indicate. The FHCDA denies the hospital or practitioner payment for the non-compliant services rendered (*see* Public Health Law § 2994-s[1]). The FHCDA states that this remedy "is *in addition to and cumulative with any other remedies available at law or in equity* or by administrative proceedings to a patient, a health care agent appointed pursuant to article twenty-nine-C of this chapter, or a person authorized to make health care decisions pursuant to this article, including injunctive and declaratory relief, and any other provisions of this chapter governing fines, penalties, or forfeitures" (*id.* at [2] [emphasis added]). The provision relied upon by plaintiff, neither explicitly (*see Fumarelli v Marsam Dev., Inc.*, 92 NY2d 298, 306-7 [1998]) nor implicitly (*see Jacqueline S. v City of N.Y.*, 81 NY2d 288, 293 [1993], *rearg den* 82 NY2d 749 [1993]) suggests supersession. To the contrary, by its terms, Public Health Law § 2994-f does not supersede the legal precedents brought to the court's attention, but exists in addition to the state of the common law (*see generally B & F Bldg. Corp. v Liebig*, 76 NY2d 689, 693 [1990] ["The Legislature is presumed to be aware of the law in existence at the time of an enactment and to have abrogated the common law only to the extent that the clear import of the language of the statute requires"]). Because plaintiff has not demonstrated that the holdings of *Cronin* and similar cases have been abrogated, the remedy sought by plaintiff is not "available" within the meaning of Public Health Law § 2994-s(2).

Accordingly, it is

ORDERED, that the moving defendants' motion for an order dismissing the complaint as against them is granted; and it is further

ORDERED, that the complaint as against defendants Montefiore New Rochelle Hospital and Escobar and all cross claims against them are dismissed; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Montefiore New Rochelle Hospital and Escobar dismissing the complaint as against them and all cross claims against them; and it is further

ORDERED, that, in light of the discontinuance of the action as against the remaining defendant, Montefiore Health System, Inc. (*see* NYSCEF Doc. No. 23), the Clerk of the Court is directed to mark this action disposed.

This constitutes the decision and order of the court.

Dated: February 5, 2021

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