

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D33410  
G/ct

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Submitted - December 8, 2011

MARK C. DILLON, J.P.  
RUTH C. BALKIN  
JOHN M. LEVENTHAL  
CHERYL E. CHAMBERS, JJ.

2010-07510

DECISION & ORDER

William P. Clark, respondent, v Sundaram Ravikumar,  
etc., et al., defendants, Faisal Aziz, etc., et al., appellants.

(Index No. 19754/08)

Wilson, Bave, Conboy, Cozza & Couzens, P.C. (Saretsky Katz Dranoff & Glass,  
LLP, New York, N.Y. [Barry G. Saretsky and Marsha Weinstein], of counsel), for  
appellants.

John T. Wisell, Kew Gardens, N.Y., for respondent.

In an action to recover damages for medical malpractice, the defendants Faisal Aziz and Westchester Medical Center appeal from an order of the Supreme Court, Westchester County (Giacomo, J.), entered May 19, 2010, which granted the plaintiff's motion for leave to amend the complaint to add them as defendants.

ORDERED that the order is reversed, on the law, with costs, and the plaintiff's motion for leave to amend the complaint is denied.

The plaintiff commenced this medical malpractice action against, among others, Sundaram Ravikumar, a private attending physician at Westchester Medical Center (hereinafter WMC). The complaint alleged that, on August 26, 2007, Ravikumar negligently performed an appendectomy on the plaintiff. On December 3, 2009, the plaintiff moved for leave to amend the complaint to add Faisal Aziz, the chief surgical resident at WMC, and WMC as defendants, the latter based on a theory of vicarious liability for Aziz's alleged acts. The plaintiff argued that Aziz and WMC should be equitably estopped from asserting the one-year-and-90-day statute of limitations under General Municipal Law § 50-i and Public Authorities Law § 3316 because Aziz had

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mischaracterized his role in the surgery by indicating in an operative report he dictated that he was an “assistant surgeon” when, in fact, he had excised the plaintiff’s appendix. Further, the plaintiff argued, Aziz and WMC should be equitably estopped from raising the statute of limitations because Ravikumar indicated, almost one year earlier, in an affidavit dated January 14, 2009, that he performed the appendectomy on the plaintiff. Thus, the plaintiff contended that Aziz’s true role in the surgery was not previously apparent.

The extraordinary remedy of equitable estoppel may be invoked to bar the affirmative defense of the statute of limitations only where the defendant’s affirmative wrongdoing contributed to the delay between accrual of the cause of action and commencement of the legal proceeding. Further, the plaintiff must demonstrate reasonable reliance on the defendant’s misrepresentations, and the plaintiff’s due diligence in ascertaining the facts (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553; *Walker v New York City Health & Hosps. Corp.*, 36 AD3d 509, 510).

Contrary to the Supreme Court’s conclusion, Aziz’s identification of himself as an “assistant surgeon” in the operative report was not an “affirmative wrongdoing” under the circumstances of this case, nor should it have contributed to the delay in commencing the action against Aziz and WMC (*Putter v North Shore Univ. Hosp.*, 7 NY3d at 552-553; *see Soto v Andaz*, 8 AD3d 470, 471). Rather, since Aziz identified himself as having participated in the surgery, the plaintiff was under a duty to inquire and ascertain all of the relevant facts regarding Aziz’s role in the surgery (*see Rite Aid Corp. v Grass*, 48 AD3d 363, 364). Further, the plaintiff cannot rely on the affidavit authored by Ravikumar in seeking to invoke the doctrine of equitable estoppel against Aziz and WMC (*see Zoe G. v Frederick F.G.*, 208 AD2d 675). Moreover, the statute of limitations had already expired by the date of Ravikumar’s affidavit, and, therefore, the plaintiff cannot assert that Ravikumar’s affidavit induced him to refrain from timely filing suit against Aziz and WMC (*see Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 492).

Accordingly, the Supreme Court should have denied the plaintiff’s motion for leave to amend the complaint to add Aziz and WMC as defendants.

DILLON, J.P., BALKIN, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:



Aprilanne Agostino  
Clerk of the Court