SHORT FORM ORDER **INDEX NO. 035452/2006**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

RONALD SALVI

Plaintiff(s),

-against-

BROOKHAVEN MEMORIAL HOSPITAL MEDICAL CENTER, CHIDAMBARANATHA CHANDRASEKARAN, M.D., GABRIELA KAPLAN, M.D., DAN DEFAULT, M.D., BRUCE CAMPBELL, M.D., and ELIZABETH MARTIN, M.D.

Defendant(s).

ORIG. RETURN DATE: March 31, 2007
FINAL RETURN DATE: May 11, 2007
MTN. SEQ. #: 001 MD

ORG. RETURN DATE: July 3, 2007
MTN. SEQ.#. 002 MG

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Upon the following papers numbered 1 to 22 read on this motion (001) to dismiss and the following papers numbered 1 to 5 on this motion (002) for leave to file a late notice of medical malpractice: Notice of Motion (001) and supporting papers 1 - 6; Affirmation in Support 7 - 8; Affidavit in Opposition and supporting papers 9 - 15; Reply Affirmation in Opposition 16 - 17; Reply Affirmation in Support and supporting papers 18 - 22; Notice of Motion (002) and supporting papers 1 - 5; it is,

ORDERED that this motion (001) by the defendant Elizabeth Martin, M.D. for an order dismissing the complaint pursuant to CPLR 3211(a)(5) is denied; and it is further

ORDERED that this unopposed motion (002) by the plaintiff for leave to file a late Notice of Medical Malpractice pursuant to CPLR 2004 and 3406(a) is granted. The plaintiff is directed to file and serve the Notice of Medical Malpractice within 30 days of the date of this Order and the same shall be deemed filed nunc pro tunc; and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on August 15, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

In the interest of judicial economy, these two separate motions (001 & 002) are considered together in this decision and order of the court (*see* CPLR 104).

This medical malpractice action alleges that the plaintiff went to his regular physician (defendant Dr. Chandrasekaran) in September of 2002 with complaints of mild to severe abdominal and pelvic pain. His physician then referred the plaintiff to the Brookhaven Memorial Hospital Medical Center (hereinafter Brookhaven) where he received a series of about six CT scans from that time through on or about November of 2005. Each of the scans was related to the same complaints which never abated and, ultimately, were found to be due to renal carcinoma resulting in the removal of one of the plaintiff's kidneys.

The gravamen of the complaint is that the doctors within the radiology department should have diagnosed and recognized the cancer at an earlier stage.

The CT scans were all done at Brookhaven by, according to the amended complaint and the plaintiff's affidavit (*see* ***Grossfield v Grossfield,*** 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]), the employees and doctors of Brookhaven's radiology department. Indeed, the original complaint named as defendants doctors within that department in addition to the plaintiff's physician..

The original complaint, however omitted one of the doctors in the department, Dr. Elizabeth Martin (hereinafter Dr. Martin), whose name was actually on one of the CT scan reports during the period of time in question. The plaintiff's explanation for this omission is that it was just a mistake.

The plaintiff then, as a matter of right (*see* CPLR 3025[a]), amended his complaint to add the name of Dr. Martin. While the plaintiff states that this was the only amendment, a reading of the corresponding amended complaint shows that some other changes were made within the amended complaint including, inter alia, greater specificity as to the dates of the CT scans within the period of the alleged course of treatment and the specific use of the term "radiological."

Dr. Martin is moving for dismissal of the amended complaint as to her on statute of limitations grounds. Specifically, she contends that since she performed her radiological services regarding a CT scan on and only on July 8, 2004, that any action against her sounding in medical malpractice had to be commenced within two and a half years of that date (*see* CPLR 214-a), to wit: January 8, 2007. Here, the record shows, the amended complaint was filed with the court on January 16, 2007 which, she argues, was

eight days too late.[1]

In opposition to this motion, the plaintiff argues that since the original summons and complaint were filed on December 20, 2006 and served upon the then-named defendants within 120 days, the action was commenced within the statute of limitation period relied upon by Dr. Martin and the amended summons and complaint relate back to that original commencement. Moreover, the plaintiff contends that since he filed the amended summons and complaint within 20 days of the answers being served, he was permitted to make the amendment to his pleadings as of right (*see* CPLR 3025[a]). Lastly, and in any event, even if Dr. Martin had been a named defendant in the original complaint, the plaintiff would have had until sometime in April of 2007 to serve her within the statute of limitations period. Here, even with an amended summons and complaint, Dr. Martin was served on February 1, 2007 - well within the time he would have had to serve her with the original.

In response to these arguments, Dr. Martin states, inter alia, that there can be no relation back to the original complaint because the plaintiff has failed to satisfy one of the three factors required for the application of the relation-back doctrine, to wit: a showing that Dr. Martin knew or should have known that but for the plaintiff's mistake of omitting her name from the caption to this action, it would have been brought against her as well (*see* ***Nani v Gould,*** 39 AD3d 508, 833 NYS2d 198 [2d Dept 2007]).

The court finds that it need not consider the arguments centered around the one specific act of Dr. Martin on July 8, 2004 because the plaintiff has satisfactorily shown that the members of Brookhaven's radiological department are potentially liable individually and vicariously for a course of treatment that ended no earlier than November of 2005 (*see* ***Shifrina v City of New York,*** 5 AD3d 660, 774 NYS2d 85 [2d Dept 2004]; ***Elkin v Nardi,*** 285 AD2d 484, 727 NYS2d 158 [2d Dept 2001][relating to periodic diagnostic examinations as part of ongoing care for an existing condition]) . With that date as the earliest possible accrual date, the statute of limitations would not run until May of 2008, at the earliest. Accordingly, on this basis alone, the motion by Dr. Martin to dismiss on statute of limitations grounds must be denied.

In any event, even using the July 8, 2004 date, the court finds that the plaintiff has satisfied the necessary factors in showing the amended complaint related back to the original complaint (which was unquestionably commenced within this shorter statute of limitations period). The factors for such consideration are: (1) do both claims arise out of the same conduct, transaction or occurrence; (2) is the new defendant united in interest with any of the original defendants such that notice of the claim could be charged to her and she would not be prejudiced in maintaining a defense on the merits ; and, (3) did the new defendant know or should have known that but for the plaintiff's mistake in omitting her name from the caption, that the action would have otherwise been brought against her as well (*see* ***Nani v Gould,*** 39 AD3d 508, 833 NYS2d 198 [2d Dept 2007]).

Applying these factors here, the first two are clearly satisfied. First, there is no issue as to the claims arising out of the same conduct, transactions and occurrences. Second, as an alleged employee of the

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[1] Service upon Dr. Martin of the amended summons and complaint was on February 1, 2007.

hospital (already named as a defendant herein) and an alleged member of the radiology department (whose other doctors are already named as defendants herein), Dr. Martin is obviously united in interest with those defendants. Dr. Martin and her colleagues named as defendants will stand or fall together and any judgment against one will similarly affect the others (*see* ***DeSanna v Rockefeller Ctr., Inc.,*** 9 AD3d 596, 780 NYS2d 651 [3d Dept 2004]; ***Nardi v Hirsch,***245 AD2d 205, 666 NYS2d 607 [1st Dept 1997]).

Third, the original complaint, naming the other colleagues of Dr. Martin in the Brookhaven radiology department and referencing the time period during which they performed their CT scans on the plaintiff, together with the fact that Dr. Martin's name was on the July 8, 2004 report (as the names of the other named doctors were on similar reports), provided sufficient notice to Dr. Martin that but for the mistake by omission she would have been brought into the original action. This circumstance distinguishes this case from the case of ***Nani v Gould*** (39 AD3d 508, 833 NYS2d 198 [2d Dept 2007]) which Dr. Martin cites in support of her application for dismissal.

In ***Nani***, the appellate division for the second judicial department found that the third factor in the relation-back test was not satisfied because the plaintiff failed to show that the defendant therein had any reason to believe he would have been named as a defendant but for the plaintiff's mistake. Here, as stated above, Dr. Martin had every reason to believe that she would have been named but for the mistake. In addition, it cannot be said that the original complaint in this case evidences no intent at all to sue Dr. Martin (*see* ***Shapiro v Good Samaritan Regional Hosp. Med. Ctr.***, __ AD3d __, __NYS2d__, 2007 NY Slip Op 6034, 2d Dept, July 10, 2007).

Accordingly, in addition to being within the statute of limitation based upon a continuous course of treatment, the plaintiff has also satisfied the court that the claims in the amended complaint relates back to the original, thus being within even the arguably shorter statute of limitations.

Dr. Martin's motion for dismissal upon statute of limitations grounds is, thus, denied.

Turning now to the plaintiff's separate motion (002) for leave to file a late notice of medical malpractice, in view of there being no opposition to this application and, therefore, no showing of prejudice, leave is granted to the plaintiff to file and serve a late notice of medical malpractice in accordance with CPLR 3406(a), as provided herein.

This decision constitutes the decision of the court.

Dated: August 2, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.