

Devadas v Niksarli

2009 NY Slip Op 30922(U)

April 20, 2009

Supreme Court, New York County

Docket Number: 107637/07

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey
Justice

PART 29

JOHNSON DEVADAS and SARAMMA
DEVADAS,

Plaintiffs,

-v-

KEVIN NIKSARLI, M.D., MANHATTAN
LASIK CENTER, PLLC and NEWSIGHT
LASER CENTER, PLLC,

Defendants.

Index No.: 107637/07
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

The following papers, 1-52, were read on this motion by defendants for summary judgment dismissing the complaint, pursuant to CPLR §3211(a)(5) and CPLR §214-a, on the ground that the action may not be maintained because of the statute of limitations; and a cross-motion by plaintiff to amend the complaint, pursuant to CPLR §3025(b), and for sanctions and costs against defendants.

Notice Of Motion - Affidavits - Exhibits - Memorandum of Law
Notice Of Cross-Motion/Opposition to Motion - Affidavits -
Exhibits - Memorandum of Law
Replying Affidavits/Opposition to Cross-Motion - Affidavits -
Exhibits - Memorandum of Law
Replying Affidavits

Papers Numbered
1-8
9-37
38-49
50-52

Cross-Motion: Yes No

Plaintiffs, Johnson and Saramma Devadas, commenced the instant medical malpractice action against defendants, Kevin Niksarli, M.D., Manhattan LASIK Center, PLLC and Newsight Laser Center, PLLC with the filing of a summons and complaint on or about May 31, 2007. Plaintiffs allege, *inter alla*, that defendants were negligent in performing LASIK eye surgery on Johnson Devadas, when such procedure was contraindicated. Plaintiffs further allege that as a result of defendants' negligence, Johnson Devadas has sustained injury, including a decrease in visual acuity and visual quality secondary to post-LASIK corneal ectasia, and the need for

post-operative care and treatment. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendants presently move for summary judgment dismissing the complaint, pursuant to CPLR §3211(a)(5) and CPLR §214-a, on the ground that the action may not be maintained because of the statute of limitations. Plaintiffs presently cross-move to amend the complaint, pursuant to CPLR §3025(b), and for sanctions and costs against defendants.

Defendants' Motion For Summary Judgment

CPLR §214-a sets forth, in pertinent part, "[a]n action for medical ... malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." Generally, a medical malpractice action accrues on the date of the alleged wrongful act. See *Plummer v. New York City Health and Hospitals Corporation*, 98 NY2d 263 [2002], citing *Nykorchuck v Henriques*, 78 NY2d 255, 258-259 [1991]. However, where there is a continuous course of treatment for the conditions giving rise to this malpractice action, the running of the applicable statutory period is tolled during the period of continuous treatment. See *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291 [1998]; *Langsam v. Terraciano*, 22 A.D.3d 414 [1st Dept. 2005].

The policy reasoning underlying the continuous treatment doctrine is that "a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuous trust in the physician - patient relationship in order to ensure the timeliness of a medical malpractice action." See *Young v New York City Health & Hosps. Corp.*, *supra*. However, "[a] patients continuing general relationship with a physician, or routine, periodic health examinations will not satisfy the doctrine's requirement of 'continuous treatment' of the condition upon which the allegations of medical malpractice are predicated" *Id.*, citing *Massie v. Crawford*, 78 NY2d 516 [1991]; *McDermott v. Torre*, 56 NY2d 399 [1982]; see also *Plummer v. New York City Health and Hospitals Corporation*, *supra* ["[r]outine examinations of a seemingly healthy patient, or visits concerning matters unrelated to the condition at issue giving rise to the claim, are insufficient to invoke the benefit of the doctrine"]. "Essential to the application of the continuous treatment doctrine is 'a course of treatment established with respect to the condition that gives rise to the lawsuit.'" *Plummer v. New York City Health and Hospitals Corporation*, *supra*, quoting *Nykorchuck v Henriques*, *supra*.

Defendants herein argue that the continuous treatment doctrine is not applicable to the instant action, and, as a result, the action is time-barred as it was commenced after the two years and six months limitations period. Plaintiff, Johnson Devadas, first consulted with Dr. Niksarli on March 25, 2004, to discuss the possibility of having LASIK surgery performed. Thereafter, on April 7, 2004, Dr. Niksarli performed LASIK surgery to both of Mr. Devadas' eyes. Mr. Devadas made three post-LASIK follow-up visits; on April 8, 2004, April 19, 2004, and May 19, 2004. According to defendants, Mr. Devadas made no complaints during these visits and his best corrected vision consistently remained 20/20 bilaterally, during this time. Defendants contend that at the May 19, 2004 visit "it was concluded that plaintiff's LASIK surgery had been successful." Defendants further contend that despite being advised by Dr. Niksarli to schedule a routine ophthalmology check-up within three to six months, Mr. Devadas failed to do so, and discontinued treatment for approximately three years. Mr. Devadas eventually returned to Dr.

Niksarli on February 21, 2007, and complained of blurry vision. Defendants claim that this was the first time Mr. Devadas complained of blurry vision.

Defendants argue that Mr. Devadas' last treatment relating to any issues arising out of the LASIK surgery was on May 19, 2004, and, therefore, the statute of limitations expired in November of 2006. As a result, it is argued, that this action, which was commenced in May of 2007, is untimely. According to defendants, Mr. Devadas' February 21, 2007, visit to Dr. Niksarli related to new complaints of blurry vision, and was not part of a continuous course of treatment relating to the April 2004 LASIK surgery. Therefore, it is argued, the continuous treatment doctrine is not applicable.

In support of their motion, defendants rely upon, *inter alia*, the affidavit of an expert ophthalmologist, who sets forth that one cannot conclude that plaintiff's ectasia, also referred to as keratoconus, that developed three years after his LASIK surgery was caused by the LASIK. The expert states that keratoconus, which is a degenerative corneal disease that affects approximately 1 in 2000, is likely a genetic disorder that usually manifests itself in the late second or third decade of life. The expert opines that "plaintiff, in fact, likely was destined to develop keratoconus even without LASIK." According to defendants' expert, plaintiff exhibited no signs of a keratoconus or ectasia propensity prior to his LASIK surgery as "no clinical signs of keratoconus were noted on preoperative exam, refraction was normal with best corrected vision of 20/20 in both eyes, corneal thickness was normal, there was no corneal steepening, and corneal topography was normal." The expert adds that the tissue removed during the procedure - 30 microns in one eye, 37 in the other - was minimal and the residual stromal bed was normal. The expert specifically stated that the standard of care to avoid ectasia suggests that 250 microns of tissue remains after LASIK, and in the instant action approximately 300 microns of tissue remained in both of plaintiff's eyes following his LASIK surgery. Defendants' expert opines that plaintiff's "[s]urgery was planned and accomplished without any deviation," and, thus, "there is no indication or suggestion that surgery was causative of later keratoconus development in this case."

With respect to whether Mr. Devadas' February 21, 2007, visit to Dr. Niksarli constituted continuous treatment that related to the performance of the LASIK surgery at issue, defendants' expert opines:

"[t]he plaintiff came to defendant on March 25, 2004 with complaints of nearsightedness for which plaintiff was treated with LASIK on April 7, 2004. There were no other findings at that time. Furthermore, there were three follow-up examinations after the LASIK procedure - April 8, 2004, April 19, 2004 and May 19, 2004. In the plaintiff's chart for all of these 2004 visits, there were no patient complaints, specifically no complaints of blurry vision. Outcome was good with 20/20 visual acuity in both eyes. When the plaintiff returned nearly 3 years later on February 21, 2007, it was for a new complaint of blurry vision. Thus, the 2007 visit was for a new complaint unrelated to his 2004 condition of nearsightedness for which LASIK surgery had been performed."

In opposition, plaintiffs argue that there exists a question of fact with respect to whether there was continuous treatment of Mr. Devadas by Dr. Niksarli from the time the LASIK surgery was performed in April of 2004, through the time he returned to Dr. Niksarli for treatment on February 21, 2007. Plaintiffs have submitted the expert affidavit of an ophthalmologist, who at the outset states that in his opinion "medical malpractice was committed in this matter, and that there was continuous treatment between Mr. Devadas and Dr. Niksarli." He further opines that "plaintiff's keratoconus or post-LASIK ectasia was a direct and proximate cause of his April 7, 2004, LASIK surgery with Dr. Niksarli." According to plaintiffs' expert, based upon his pre-operative clinical presentation, on March 25, 2004, Mr. Devadas presented with forme fruste keratoconus, which is a contraindication for LASIK surgery.¹ Plaintiff's expert sets forth that on March 25, 2004, Mr. Devadas presented with an asymmetry between his left and right corneas, with a difference in steepness that is suspicious for forme fruste keratoconus. The expert further sets forth that the shape factor of Mr. Devadas eyes were abnormal and he had a high corneal irregularity measurement, indicating a worsening pathology such as keratoconus. Additionally, the expert states that Mr. Devadas pre-operative pachymetry was thin, also a factor that put him at heightened risk for post-LASIK ectasia.

Plaintiff's expert opines that Mr. Devadas' treatment of Dr. Niksarli constitutes continuous treatment. The expert bases this opinion on the following facts:

"(a) Mr. Devadas's [sic] complaint of blurry vision in 2007, was the same complaint of blurry vision and poor visual acuity from 2004; (b) the cause of Mr. Devadas's [sic] complaints were the same in 2004 and 2007, namely the patient's refractive error; (c) the same body part was being examined and treated throughout, namely the corneas; (d) to the extent that the patient had [forme fruste keratoconus], it is my opinion that the LASIK surgery caused the dormant, sub-clinical condition to become post-LASIK ectasia . . . ; (e) post-LASIK ectasia can cause complaints with visual quality, including, without limitations, blurriness about which the patient complained due to induced refractive error; and (f) Mr. Devadas quickly returned to Dr. Niksarli after observing a worsening of his vision. "

Additionally, plaintiffs' expert states that based upon the facts herein continued treatment was "explicitly anticipated" by both Mr. Devadas and Dr. Niksarli.

In addition to the aforementioned physician's affidavit, plaintiffs' rely upon an affidavit submitted by Mr. Devadas. Mr. Devadas sets forth in his affidavit that he first presented to Dr. Niksarli on March 24, 2004, for the purpose of correcting his vision with LASIK surgery. After being assured by Dr. Niksarli that he was a suitable LASIK candidate, Mr. Devadas agreed to

¹ Plaintiffs' expert explains that forme fruste keratoconus is a dormant and stable condition that develops into post-LASIK ectasia after the performance of LASIK surgery. According to the expert, post-LASIK ectasia, like keratoconus, is the thinning, weakening and bulging of the cornea that creates a visual distortion, including "induced refractive error, blurred vision, halos, ghosting, starbursting, double vision, photosensitivity, contrast sensitivity, and poor night vision."

undergo LASIK. According to Mr. Devadas, prior to agreeing to the LASIK surgery, he was told by Dr. Niksarli that there was a lifetime guarantee, and, if his vision should change in the future, Dr. Niksarli would perform corrective surgery or an enhancement free of charge. Mr. Devadas later learned that Dr. Niksarli's lifetime guarantee is called the "20/20 Commitment" and "Vision for Life Commitment" and is advertised on Dr. Niksarli's website.

Mr. Devadas underwent LASIK surgery on April 7, 2004. Mr. Devadas states in his affidavit that he made his first post-LASIK visit to Dr. Niksarli the very next day, April 8, 2004, and at that time he informed Dr. Niksarli that he was experiencing blurry vision. He was also experiencing headaches, discomfort and tearing at this time. According to Mr. Devadas, he was advised by Dr. Niksarli that blurry vision was part of the healing process, and that the blurry vision may also be the result of an undercorrection, which may require a LASIK enhancement in the future. Mr. Devadas returned to Dr. Niksarli on April 19, 2004, for his second post LASIK follow-up visit, and, as he sets forth in his affidavit, again made complaints of blurred vision. He states that Dr. Niksarli again informed him that blurry vision was part of the healing process, and that the blurry vision may also be the result of an undercorrection, which may require a LASIK enhancement in the future.

Mr. Devadas third post-LASIK follow-up was on May 19, 2004. He sets forth in his affidavit that he again complained of blurry vision, and that Dr. Niksarli's response was the same. According to Mr. Devadas, during the May 19, 2004 visit to Dr. Niksarli he was informed that his vision was stable, and that he need not return unless his vision changed. Mr. Devadas states that by this time he had adapted to the blurry vision. Mr. Devadas affirms that he did not miss any follow-up appointments, despite defendants' contention to the contrary. Mr. Devadas began to notice a decline in his vision in early 2007, and, as a result, visited Dr. Niksarli on February 21, 2007, seeking re-treatment or an enhancement. According to Mr. Devadas, it was at this time he was informed that he had keratoconus or ectasia. He states that Dr. Niksarli advised him that he had always had this condition and that it was the reason for his blurred vision. Mr. Devadas adds that Dr. Niksarli never advised him that he had this condition prior to his LASIK surgery, or that he presented with a contraindication to the procedure.

With respect to his continuous relationship with Dr. Niksarli, Mr. Devadas states:

"[f]rom the period of March 24, 2004 through and until February 21, 2007, I reasonably believed Dr. Niksarli to be my ophthalmologist. I did not see any other ophthalmologist during that time. Based upon Dr. Niksarli's representations to me that I would have a lifetime guarantee, I believed that Dr. Niksarli and I both contemplated continuing treatment for my vision into the future. I believed that Dr. Niksarli, was, and would continue to be, my LASIK surgeon for the remainder of my life.

My complaints of blurry vision, headaches, discomfort and tearing were constant from the time Dr. Niksarli performed the LASIK surgery, through the time of my last visit to him. It was not a new symptom or condition. Consequently, I treated with Dr. Niksarli on a continuous basis. And, the treatment at all times concerned was the same condition of my corneas."

Based on the affidavits of plaintiffs' expert and Mr. Devadas, the Court finds that an issue of fact exists as to whether Mr. Devadas was receiving continuous treatment with respect to his April 2004 LASIK surgery from the time of the LASIK surgery through the date of his last visit to Dr. Niksarli on February 21, 2007.² Accordingly, defendants' motion for summary judgment dismissing the complaint, pursuant to CPLR §3211(a)(5) and CPLR §214-a, on the ground that the action may not be maintained, because of the statute of limitations, is denied.

Plaintiffs' Cross-Motion

Plaintiffs presently cross-move to amend the complaint, pursuant to CPLR §3025(b) to add a cause of action for *prima facie* tort and a claim for punitive damages. Plaintiffs argue that Dr. Niksarli intentionally altered his treatment records for both Mr. Devadas and his wife, Saramma, to conceal his malpractice herein. In support of this cross-motion plaintiffs rely upon, *inter alia*, the affidavit of a forensic expert who analyzed the medical records of Johnson and Saramma Devadas. According to plaintiffs' forensic expert, a notation was made at the bottom of a record that was created on March 25, 2004, that sets forth that the risks, benefits and alternatives to LASIK were explained to Mr. Devadas, and that such risks, benefits and alternatives were set forth on the following page (the addendum³). However, according to plaintiff's forensic expert, such notation was made at a different time than the rest of the notations on that page. Furthermore, according to this expert, the addendum, which sets forth the risks, benefits and alternatives that were purportedly explained to Mr. Devadas "was artificially aged in a manner not consistent with the normal storage of medical records." Plaintiffs' forensic expert also points out that these medical records had previously been tested, presumably by a representative of defendants.

Plaintiffs' forensic expert similarly sets forth that a notation was made at the bottom of one of Saramma Devadas' treatment records indicating that the risks, benefits and alternatives to LASIK was explained to her, and that such risks, benefits and alternatives were set forth on

² It is noted that although defendants do not appear to be seeking summary judgment on the grounds that there were no departures from good and accepted medical practice in the treatment of plaintiff, their expert's affidavit sets forth that the medical treatment rendered to plaintiff was within the standard of care. In opposition, plaintiffs' expert opines that the LASIK surgery performed on plaintiff by Dr. Niksarli was contraindicated, and that the performance of such surgery caused plaintiff's post-LASIK ectasia. Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with whether performance of the subject procedure was contraindicated. Such issues cannot be resolved on this motion for summary judgment (*see Bradley v. Soundview Healthcenter*, 4 AD3d 194 [1st Dept. 2004]; *Morris v Lenox Hill Hosp.*, 232 AD2d 184 [1996]).

³ The addendum is a handwritten page, also dated March 25, 2004, which extensively sets forth the risks of the procedure. It is noted that a pre-printed informed consent form was signed by Mr. Devadas on April 7, 2004, the day of the subject LASIK surgery.

an addendum. The expert again finds that such notation was made at a different time than the rest of the notations on that page. With respect to such addendum, however, the forensic expert sets forth that no such addendum was included in Saramma Devadas' treatment records. Plaintiffs' contend that such evidence demonstrates that Dr. Niksaril altered these records in an effort to conceal his malpractice herein, and seek to amend the complaint, pursuant to CPLR §3025(b) to add a cause of action for *prima facie* tort, as well as a claim for punitive damages.

CPLR 3025(b) sets forth, in pertinent part that, leave to amend a pleading "shall be freely given upon such terms as may be just . . ." Notwithstanding, "where the amendment is sought after a long delay, and a statement of readiness has been filed, judicial discretion in allowing the amendment should be 'discreet, circumspect, prudent and cautious'." *Cseh v. New York City Transit Authority*, 240 AD2d 270 [1st Dept. 1997]; see also *Countrywide Funding Corp. v. Reynolds*, 41 AD3d 524 [2d Dept. 2007] ["where an application for leave to amend is sought after a long delay and the case has been certified as ready for trial, 'judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious'"]; *Comsewogue Union Free School Dist. v. Allied-Trent Roofing Systems Inc.*, 15 AD3d 523 [2d Dept. 2005] ["when leave [to amend] is sought on the eve of trial, judicial discretion should be exercised sparingly"]. The decision whether to grant leave to amend a pleading is left to the discretion of the Trial Court, and in exercising such discretion the Court is to consider "how long the amending party was aware of the facts upon which the motion was predicated, whether the amendment is meritorious, and whether a reasonable excuse for the delay was offered." *Romeo v. Arrigo*, 254 AD2d 270 [2d Dept. 1998]; *Rose v. Velletri*, 202 AD2d 566 [2d Dept. 1994].

With respect to the merit of a proposed amendment, it is well settled that the party seeking to amend a pleading must demonstrate the merit of the proposed amendment, and allege legally sufficient facts to establish a *prima facie* cause of action. See *Davis & Davis, P.C. v. Morson*, 286 AD2d 584 [1st Dept. 2001]; *Peretich v. City of New York*, 263 AD2d 410 [1st Dept. 1999]; *Daniels v. Emple-Orr, Inc.*, 151 AD2d 370 [1st Dept. 1989]; *East Asia Company, Inc. v. J.H. Corash*, 34 AD2d 432 [1st Dept. 1970]. "If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fall as a matter of law." *Daniels v. Emple-Orr, Inc.*, *supra*. Defendants herein oppose plaintiffs' cross-motion to amend the complaint, arguing that plaintiffs' proposed amendment is without merit.

Plaintiffs seek to allege a cause of action for *prima facie* tort. The elements of a cause of action for *prima facie* tort are: (1) the intentional infliction of harm; (2) that results in special damages; (3) without any excuse or justification; (4) by an act or series of acts that would otherwise be lawful. See PJI 3:7, citing *Freihofer v. Hearst Corp.*, 65 NY2d 135 [1985], *Curlano v. Suozzi*, 63 NY2d 113 [1984], *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 NY2d 314 [1983], et al. *Prima facie* tort is reserved for wrongful or malicious conduct that does not fall within any traditional category of tort. See *Curlano v. Suozzi*, *supra*. However, *prima facie* tort "should not 'become a 'catch-all' alternative for every cause of action which cannot stand on its legs'." A plaintiff is not permitted to circumvent the unavailability of a cause of action by simply labeling that cause of action as one for *prima facie* tort. See *Murphy v. American Home Products Corp.*, 58 NY2d 293 [1983] [plaintiff not permitted to circumvent the unavailability of a tort claim for wrongful discharge of an at-will employee by recasting the non-actionable claim as one for *prima facie* tort]; *Drago v. Buonagurio*, 46 NY2d 778 [1978] [plaintiff could not bring a *prima facie* tort action against attorney for bringing baseless legal proceedings on behalf of

a client because Courts had not recognized any tort liability as against an attorney based on such actions]. In the instant action, plaintiffs contend that as a result of Dr. Niksarli's intentional and malicious action, *i.e.*, altering plaintiffs' medical records, they were injured by incurring additional costs in connection with the prosecution of this case,

Plaintiffs acknowledge in their moving papers that New York does not recognize a cause of action that permits a plaintiff to recover in tort where a defendant physician alters pertinent medical records in an attempt to obstruct justice and avoid prosecution for medical malpractice.⁴ Notwithstanding, plaintiffs urge the Court to permit them to proceed against defendants under this theory of liability under the label of *prima facie* tort. As set forth above, *prima facie* tort is not a "catch-all" alternative for every cause of action which cannot stand on its legs, and cannot be used to circumvent the unavailability of a cause of action. New York Courts have not recognized a cause of action for the intentional falsification of records by a physician in an effort to avoid malpractice liability. Therefore, this Court cannot permit plaintiffs to proceed against defendants under this theory of liability, even if they seek to label the cause of action as one for *prima facie* tort. Accordingly, the Court finds that plaintiffs' proposed amendment is without merit, and, thus, plaintiffs' cross-motion to amend the complaint, pursuant to CPLR §3025(b) to add a cause of action for *prima facie* tort is denied. Notwithstanding, at trial, plaintiffs will not be prevented from questioning Dr. Niksarli with respect to the alleged post-treatment tampering of plaintiffs' records. Such evidence is clearly relevant to the issue of informed consent, and will also bear upon the credibility of Dr. Niksarli, as well as the plaintiffs. If the jury finds from the evidence presented at trial that Dr. Niksarli intentionally altered plaintiffs' medical records, the jury may infer that such records were altered because accurate, unaltered records would have been adverse to Dr. Niksarli's interests. See *Pharr v. Cortese, supra*.

To the extent that plaintiffs seek to amend the complaint to seek punitive damages in connection with the existing causes of action for medical malpractice and lack of informed consent, such amendment must also be denied as it too is without merit. The record is devoid of any evidence that the treatment rendered by Dr. Niksarli to Mr. Devadas was so wantonly dishonest, grossly indifferent to patient care, or so malicious and/or reckless to sustain any award of punitive damages. See *Williams v. Halpern*, 25 AD3d 467 [1st Dept. 2006]; *Arnold v. Slegel*, 296 AD2d 363 [2d Dept. 2002]; *Charell v. Gonzalez*, 251 AD2d 72 [1st Dept. 1998]; *Luby v. St. John's Episcopal Hosp.*, 220 AD2d 390 [2d Dept. 1995]; cf. *Graham v. Columbia-*

⁴ In *Pharr v. Cortese*, 147 Misc.2d 1078 [N.Y. Sup. Ct. 1990], Judge Stanley L. Sklar squarely addressed the issue of whether a new cause of action would be created in tort for the intentional falsification of records by a physician in an effort to avoid malpractice liability. See also *Whittlesey v. Espy*, 1996 WL 689402 [S.D.N.Y. Nov. 26, 1996]. Judge Sklar declined to recognize such a cause of action, especially where plaintiff could not demonstrate any injury resulting directly from the alleged altering of the records, either by effectively depriving plaintiff of the prosecution of the malpractice claim or by adversely affecting the medical treatment of plaintiff. Additionally, it is noted that Judge Sklar was not persuaded by the argument of plaintiff therein, that the physician's alleged altering of the records caused her injury by making the prosecution of her case more difficult and expensive.

Presbyterian Medical Center, 185 AD2d 753 [1st Dept. 1992]. Plaintiffs argue that the conduct of Dr. Niksarli in connection with his alleged tampering with plaintiffs' medical records is gross, wanton, wilful and morally culpable and is sufficient to sustain any award of punitive damages. However, this conduct does not arise from medical treatment rendered to Mr. Devadas, as it is alleged to have occurred subsequent to the time of the malpractice herein, and, thus, it may not provide a basis for imposing punitive damages as against defendants in connection with plaintiffs' causes of action for medical malpractice and lack of informed consent.

Lastly, plaintiffs' cross-motion also seeks to impose sanctions upon defendants for their allegedly wilful and contumacious behavior in failing to comply with the discovery orders of this Court. Despite plaintiffs' arguments to the contrary, the Court does not find defendants non-compliance herein to be wilful and contumacious, and in its discretion, denies that portion of plaintiffs' cross-motion seeking sanctions. See CPLR §3126.

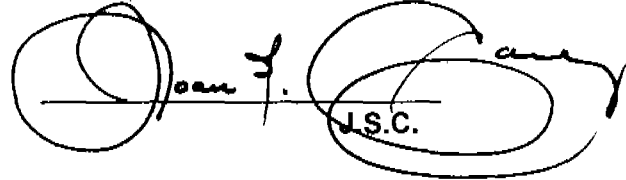
Based on the foregoing, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing the complaint, pursuant to CPLR §3211(a)(5) and CPLR §214-a, on the ground that the action may not be maintained because of the statute of limitations is denied; and it is further

ORDERED that the cross-motion by plaintiff to amend the complaint, pursuant to CPLR §3025(b), and for sanctions and costs against defendants is denied; and it is further

ORDERED that counsel for all parties are to appear before the court on May 13, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a pre-trial conference.

Dated: 4/20/2009



Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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