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

PRESENT: ALICE SCHLESINGER PART ~~IA~~ PART 16

Justice

Index Number : 117498/2009

CRESCENZI, ALBERT J.

VS.

HOSPITAL FOR SPECIAL SURGERY

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: OCT 21 2010

ALICE SCHLESINGER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☒ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG ☐ SETTLE ORDER

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

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ALBERT J. CRESCENZI,

Plaintiff,

Index No. 117498/09
Motion Seq. No. 001

-against-

HOSPITAL FOR SPECIAL SURGERY AND EAST RIVER MEDICAL IMAGING, P.C.,

Defendants.

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SCHLESINGER, J.:

Before this Court is a motion to dismiss by defendant Hospital For Special Surgery. The defendant's claim is that the lawsuit is untimely because it was brought more than two and one-half years after the alleged negligence, which occurred on December 14, 2006. The action was commenced on December 14, 2009. Therefore, if one were using the statute of limitations applicable in medical malpractice cases, the defendant's position would be correct and the action would be untimely.

When this action was commenced, the plaintiff marked on the Request for Judicial Intervention that it was a medical malpractice action. Also, soon after the action was commenced, plaintiff's counsel indicated in a Certificate of Merit that he had consulted with a physician before bringing the action. It is these documents which defense counsel points to in its argument that this is an action that sounds in medical malpractice.

However, the plaintiff's position is that the action sounds in simple negligence, rather than malpractice. If plaintiff is correct, then the applicable statute of limitations would be three years and this action would be timely.

The predicate facts giving rise to this lawsuit occurred one month after the plaintiff had knee surgery at the hospital, on November 17, 2006. There is no claim that the surgery was not warranted or that anything was done wrong vis-a-vis the surgery. On December 14, 2006, plaintiff came in for a follow-up plain x-ray of his knee. All we really know of what happened is that during the course of that x-ray, he fell and injured himself. It is his position that the mechanical aide that he had used in coming in, be that a walker or crutches, was taken away from him by the technician right before the x-ray was taken. Lacking in support, he fell. That is really all we know about the details of the accident because no discovery has occurred here. In other words, no depositions have been taken and the only exchange has been that contained in a bill of particulars.

There are a number of cases which revolve around the issue of whether an action sounds in simple negligence or medical malpractice. Here, the plaintiff points to the fact that despite the Certificate of Merit and their designation of medical malpractice, all of their other actions have supported their position that this action sounds in simple negligence. Counsel indicates that the RJI entry was a result of law office failure. Here they point to the complaint and the bill of particulars where language consistent with simple negligence is used. They also point out that in their bill of particulars, in response to inquiries by the defendant as to specific acts of medical malpractice allegedly committed by their client, plaintiff's counsel repeatedly answers "non-applicable."

In making a determination as to whether an action sounds in simple negligence or medical malpractice, there should be an inquiry into whether the challenged conduct constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. By contrast, when the complaint is not directly

concerned with the furnishing of medical treatment to a patient but rather concerns the hospital's failure in fulfilling a different duty, the claim sounds in negligence, *Weiner v. Lenox Hill Hospital*, 88 NY2d 784 (1996). Another way of deciding what kind of action this truly is, is that in a simple negligence situation, the alleged negligent act may be readily determined by the trier of fact based on common knowledge, rather than the need of the jury to hear from a physician to discuss whether or not the negligent act was a departure from accepted standards of professional skill and judgment. *Friedmann v. NY Hospital-Cornell Medical Center*, 65 AD3d 850 (1st Dep't 2009).

One other claim merits attention. This is the claim made by the plaintiff that there was negligence by the defendant in not giving the technician involved in the x-ray proper training and/or supervision. Moving defendant points to this claim for its argument that this action would require the need of expert testimony to say what proper supervision would be.

This issue is a close one here. I do not agree with defense counsel that the mere inclusion of a claim of improper supervision and training kicks this matter into the medical malpractice category. Certainly one could argue, as the plaintiff does, that jurors would be able to determine the issues here using general principles of foreseeability and reasonableness of conduct under these circumstances, in other words, principles inherent in a simple negligence case.

At this point, I am denying defendant's motion to dismiss this action as untimely. It appears to me on the basis of what I know about the circumstances of the case that it is more likely than not that it sounds in simple negligence. However, I am denying the motion without prejudice to bringing it again at the conclusion of discovery if the defendant

sincerely believes that facts have come up during the discovery process which would move the case into the medical malpractice category.

Accordingly, it is hereby

ORDERED that the motion by defendant East River Medical Imaging, P.C. to dismiss is denied as provided herein.

This decision constitutes the order of the Court.

Dated: October 21, 2010

OCT 21 2010

J.S.C

ALICE SCHLESINGER

FILED

OCT 26 2010

NEW YORK
COUNTY CLERK'S OFFICE