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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART 16 IA PART 16

Justice

Vincent Craccolici, etal

v.

Sorrin Shah, M.D., etal.

INDEX NO. 80067/10

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s).

Answering Affidavits — Exhibits | No(s).

Replying Affidavits | No(s).

The motion by defendant Simon Barkagan, M.D., is granted in accordance with the accompanying memorandum decision.

FILED

JUL 31 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: JUL 29 2013

ALICE SCHLESINGER, J.S.C.

ALICE SCHLESINGER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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VINCENT M. CRACOLICI and
STEFANIA CRACOLICI,

Plaintiffs,

Index No. 800067/10
Mot. Seq. Nos. 001 & 002

-against-

SOVRIN SHAH, M.D., GABOR NEMESDY, M.D.,
YORK ANESTHESIOLOGISTS, PLLC,
SIMON BARKAGAN, M.D., and ZAFAR KHAN, M.D.,

Defendants.

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SCHLESINGER, J.:

When they commenced this medical malpractice action by filing on September 3, 2010, the plaintiffs Vincent and Stefania Cracolici were representing themselves.[1] Also, the action was commenced solely against Dr. Sovrin Shah, the physician who had performed surgery on March 17, 2008, to replace Mr. Cracolici's artificial urinary sphincter. Subsequently, the plaintiffs were able to retain counsel, and additional defendants were sued; namely, Dr. Gabor Nemesdy, an anesthesiologist, his group York Anesthesiologists, PLLC, ("York"), Dr. Simon Barkagan, a urologist, and Dr. Zafar Khan, also a urologist.

Then, Dr. Barkagan moved to dismiss the action on Statute of Limitations grounds. The plaintiffs opposed. Following that, the other defendant doctors, Shah, Nemesdy and Khan, moved for summary judgment, but essentially arguing the untimeliness of the action. The plaintiffs opposed that motion except as to Dr. Nemesdy and York. Regarding those two defendants, their counsel and plaintiff's counsel stipulated to discontinue the action with prejudice on January 22, 2013, and the Stipulation was "So Ordered" by the Court.

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[1]To be precise, the action was commenced by Vincent Cracolici, the main defendant; his wife, Stefania has a derivative claim.

Therefore, in this decision, I will deal only with the motions by Doctors Shah, Barkagan and Khan, all of whom are arguing that the plaintiffs waited too long to commence the action. I believe Doctors Barkagan and Khan are correct in this argument. However, Dr. Shah is not. He was the first defendant sued, and he will remain as the one and only defendant. I have reached that conclusion after reviewing all the dates of contact that Vincent Cracolici had with each of the moving defendants, as well as the relationships, if any, that these physicians had with each other, along with the applicable law. I will now discuss those dates, relationships and the law.

Dr. Barkagan, a urologist, had been treating the plaintiff since 1995 when he performed surgery on him. This doctor saw Mr. Cracolici through the years up until April 24, 2008. This appointment followed Dr. Shah's surgery on March 17, 2008, a surgery to replace the artificial urinary sphincter that Dr. Barkagan had inserted in 1995. The sphincter had become damaged when Mr. Cracolici was in an automobile accident in 2007. Dr. Barkagan's visit with the plaintiff on April 24th after the surgery is the predicate for the case against him. Specifically, Cracolici contends that he made complaints to Dr. Barkagan during his examination about the artificial sphincter being too easily and inadvertently activated, which the doctor failed to properly address.

The two and one-half year Statute of Limitations dictated by CPLR §214-a would therefore begin running from the last visit on April 24, 2008 and end on October 24, 2010. Since the action against Dr. Barkagan was not commenced until 2011, it is untimely (although it appears that on December 28, 2010, the plaintiffs attempted to serve this doctor and others with an amended complaint, which was not filed with the County Clerk

until months later on February 15, 2011).[2]

Because of the problem created by the above facts, counsel for the plaintiffs asked to supplement their papers to argue that Dr. Barkagan was "united in interest" with Dr. Shah so as to have the 2011 complaint, which names Dr. Barkagan, "relate back" to the September 3, 2010 complaint that named only Dr. Shah.

But the two defendants are not united in interest. As both counsel acknowledge, pursuant to case law which was ultimately codified into CPLR §203, there must be three factors present to make a finding that defendants are "united in interest". They are that:

> (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant and thus can be charged with notice of the initiation of the action without being prejudiced in maintaining his defense on the merits; and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

See, Brock v Bua, 83 AD2d 61 (2nd Dep't 1981) and *Mondello v New York Blood Ctr.*, 80 NY2d 219 (1992). In *Baran v. Coupal*, 87 NY2d 173 (1995), the third prong of this doctrine was relaxed to eliminate any requirement that the mistake had to be "excusable".

Moving counsel argues that Mr. Cracolici does not meet any of these prongs. I believe she is correct. As to the first, the new defendant must be a part of the same occurrence or involved in the same event as the original defendant. But Dr. Barkagan had

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[2]The plaintiff filed an affidavit dated October 2, 2012, wherein he makes the erroneous statement that "Dr. Barkagan's own records reveal, this continuous treatment continued until at least November 24, 2008" (¶3). But the records, which are attached to the affidavit, actually show "April 24, 2008" as the last appointment. The "4" representing the month of April could have been misread as an "11".

no participation in the March 17, 2008 surgery performed by Dr. Shah. The plaintiff does take issue with the manner in which that surgery was performed, which is reflected in the claims made against Dr. Shah. However, as I interpret the complaint against Dr. Barkagan, it alleges that on April 24, when Mr. Cracolici came to his office for an examination, this doctor failed to adequately address his complaints and his conditions. That, I find, is a claim separate from the surgery and certainly would not share any departure from accepted standards of medical care that is alleged against the surgeon Dr. Shah.

The second prong is also not met. As I understand it, there is no formal or even informal professional relationship between the two doctors. No one claims otherwise. In other words, it seems clear that they are independent physicians operating separate urological practices. That Dr. Barkagan may have on occasion recommended Dr. Shah does not change that fact. Under such circumstances, neither doctor would be responsible for the actions of the other.

As to the final prong, under these circumstances there is no reason to believe that Dr. Barkagan knew about the action commenced against Dr. Shah or anticipated that he also would be sued by a patient they both had treated.

What is more, Dr. Shah and Dr. Barkagan would not share a common defense. Dr. Shah will presumably say that he performed the surgery within accepted standards of care. Dr. Barkagan would presumably say that more than a month after the surgery, he properly diagnosed Mr. Cracolici's condition. Therefore, since I find that the plaintiff has failed to prove that Drs. Shah and Barkagan are united in interest, I also find that the action against Dr. Barkagan must fail as untimely.

As to Dr. Khan, the papers show that he examined the plaintiff on two occasions, April 5, 2004 and October 15, 2007. That means that the two and one half-year period for

bringing a timely action would have expired on April 15, 2010. Here, the sole argument that counsel for the plaintiff makes is that the motion is premature and should not be granted before discovery has been conducted and counsel has had an opportunity to review the records in hopes of finding some continuous treatment. But under the circumstances here, even assuming that it was Dr. Kahn rather than Dr. Barkagan who recommended Dr. Shah, there is no reason to anticipate that more time would be productive in this regard. Therefore, Dr. Kahn's motion to dismiss is granted.

As for the final, but first-named, defendant Dr. Sovrin Shah, this defendant has a much harder argument to successfully make. Defense counsel acknowledges that the last post-surgical contact between the doctor and patient was on September 23, 2008. Therefore, the complaint filed against him only two years later on September 3, 2010, is timely. After this filing, the plaintiffs amended their complaint and arranged for service of it on Dr. Shah on December 28, 2010, at his office at 130 East 18th Street in New York City. Issue was joined with the service of an answer on January 25, 2011. The amended complaint was filed with the Clerk on February 15, 2011, also a timely filing. The September 23, 2008 contact begins the running of the two and one-half year Statute of Limitations, which ends on March 23, 2011.

With these facts, defense counsel makes an extremely technical argument that since Mr. Cracolici, who was representing himself, never served Dr. Shah with the original complaint he had filed and never obtained leave of court before filing the amended complaint, he violated §1003 and §3025 of the CPLR. Finally, counsel asserts that the plaintiffs never complied with the requirement in CPLR §306-b, which required service of the original complaint within 120 days of filing, because they never served it at all! As stated earlier, plaintiffs only served the amended complaint.

I am not prepared to deny the plaintiffs their day in court under these circumstances. Dr. Shah and his counsel were put on notice of the claims within the statutory time. Section 306-b gives this Court the discretion to allow service of complaints well after the allowable time "upon good cause shown or in the interest of justice". I would have found under both alternatives and given permission for service on Dr. Shah of the original complaint, if a request had been made or if it was necessary. But it is not necessary here because Dr. Shah has been timely served with the amended complaint. Certainly, absolutely no prejudice has been shown by Dr. Shah. Therefore, his motion to dismiss this action is denied.

Accordingly, it is hereby

ORDERED that the motions by defendants Gabor Nemesdy, M.D., Simon Barkagan, M.D., and Zafar Kahn, M. D., are granted and the Clerk is directed to sever and dismiss those claims; and it is further

ORDERED that the motion by defendant Sovrin Shah, M.D., is denied; and it is further

ORDERED that counsel for the remaining parties shall appear in Room 222 for a preliminary conference on Wednesday, October 2, 2013 at 9:30 a.m. At least twenty days before that date, plaintiffs shall respond to any outstanding Demand for a Bill of Particulars and discovery.

Dated: July 29, 2013

JUL 29 2013

FILED

JUL 31 2013

COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.
ALICE SCHLESINGER