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SHORT FORM ORDER

INDEX No. 10-23126

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 3-5-13
ADJ. DATE 4-9-13
Mot. Seq. # 004 - MD

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EUGENE CAMPBELL and JEAN CAMPBELL,

Plaintiffs,

- against -

GUSTAVO TORRESCIFUENTES, ST. CATHERINE OF SIENNA MEDICAL CENTER and SULTAN MOHIUDDIN, M.D., P.C.,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13 - 21 ; Replying Affidavits and supporting papers 22 - 24 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Sultan Mohiuddin, M.D., P.C. for an order pursuant to CPLR 1003 dismissing the amended complaint for failure to properly commence the action, or, in the alternative, for an order pursuant to CPLR 3211 (a) (5) dismissing the amended complaint on the ground that the action is time-barred, or, in the alternative, for an order pursuant to CPLR 3103 (a) for a protective order precluding a further deposition of defendant Sultan Mohiuddin, M.D., P.C. is denied.

8-23-13

The plaintiffs commenced this medical malpractice action against defendants Gustavo Torrescifuentes, M.D. ("Dr. Torres") and St. Catherine of Siena Medical Center ("St. Catherine") after plaintiff Eugene Campbell ("the plaintiff") allegedly suffered a stroke 12 hours after undergoing a left carotid endarterectomy, which was performed by Dr. Torres on April 16, 2008 at St. Catherine. It appears that Dr. Torres was employed by Mohiuddin, P.C. ("P.C.") at the time of the alleged malpractice and that Dr. Mohiuddin assisted Dr. Torres during the operation.

Following joinder of issue, the parties entered into a stipulation permitting the plaintiffs to amend the complaint by adding P.C. as an additional defendant. It appears that the plaintiff effected personal service of a supplemental summons and amended complaint on P.C. on September 26, 2012, and that P.C. served its answer to the amended complaint on or about November 28, 2012.

P.C. now moves for an order pursuant to CPLR 1003 dismissing the amended complaint for failure to properly commence the action, or, in the alternative, for an order pursuant to CPLR 3211 (a) (5) dismissing the amended complaint on the ground that the action is time-barred, or, in the alternative, for an order pursuant to CPLR 3103 (a) for a protective order precluding a further deposition of Dr. Mohiuddin.

CPLR 1003 provides, in pertinent part that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared."

Here, it is undisputed that on August 14, 2012, the original parties to the action entered into a stipulation permitting the plaintiffs to amend the complaint to add P.C. as an additional defendant. Whether, as P.C. asserts, the stipulation was never "so-ordered" by the court is of no moment. In any event, P.C. failed to raise its defense of improper joinder in either a pre-answer motion to dismiss the complaint or as an affirmative defense in its answer and, as a result, has waived the defense (*see* ***He-Duan Zheng v American Friends of the Mar Thoma Syrian Church of Malabar, Inc.***, 67 AD3d 639, 889 NYS2d 55 [2d Dept 2009]).

As to the statute of limitations defense and P.C.'s claim that the amended complaint was filed after the expiration of the 2 1/2 year period for a medical malpractice action and does not meet the requirements of the relation back doctrine, it is axiomatic that "[t]he relation-back doctrine, which is codified in CPLR 203(b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are united in interest" (***Stevens v Winthrop S. Nassau Univ. Health Sys., Inc.***, 89 AD3d 835, 836, 932 NYS2d 514, 516 [2d Dept 2011] [internal quotation marks omitted]).

> In order for a claim asserted against a new defendant to relate back to the date a claim was asserted against another defendant, the plaintiff must establish 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 by reason of that relationship, can be charged with notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed, and otherwise stale,

> assertion of those claims against him or her, 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 timely commenced against him or her as well . . . The 'linchpin' of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period

(***Alvarado v Beth Israel Med. Ctr.***, 60 AD3d 981, 982, 876 NYS2d 147, 149 [2d Dept 2009] [internal citations omitted]). "[T]he third prong of the test focuses, *inter alia*, on whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as far as he [or she] is concerned" (***Shapiro v Good Samaritan Regional Hosp. Med. Ctr.***, 42 AD3d 443, 840 NYS2d 94 [2d Dept 2007] [internal quotation marks omitted]).

Even assuming, for purposes of this analysis, that the plaintiffs cannot establish the applicability of the relation back doctrine, the court finds that the continuous treatment rule tolled the statute of limitations and, as a result, the action was timely commenced against P.C. "Pursuant to CPLR 214-a, the statute of limitations is tolled until after the patient's last visit when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (***Venditti v St. Catherine of Siena Med. Ctr.***, 98 AD3d 1035, 1036, 950 NYS2d 759, 761 [2d Dept 2012] [internal quotation marks omitted]). The plaintiffs assert that the statute of limitations had not yet run with respect to P.C. when the supplemental summons and amended complaint were filed on September 5, 2012 because the plaintiff had continuously treated with P.C. from March 6, 2008 until January 17, 2012. After a review of the medical records, the court agrees. The alleged malpractice occurred on April 16, 2008 when the plaintiff suffered from a stroke 12 hours after undergoing a left carotid endarterectomy. The medical records establish that the postoperative care and treatment received by the plaintiff after the surgery occurred was a continuation of the course of treatment for the condition which originally gave rise to the alleged malpractice (*see* ***Salerno v Huntington Hosp. Dolan Family Health Ctr., Inc.***, 98 AD3d 1035, 950 NYS2d 202 [2d Dept 2012]; ***Piro v Macura***, 92 AD3d 658, 938 NYS2d 165 [2d Dept 2012]). Thus, the continuous treatment rule is applicable, and the court finds that the action was timely commenced against P.C.

With respect to the request by P.C. for a protective order precluding a further deposition of Dr. Mohiuddin, CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution . . . of an action." Pursuant to CPLR 3103 (a), a court may issue a protective order denying, limiting, conditioning, or regulating the use of any disclosure device, in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to the other party. "To show that additional depositions are necessary, it must be demonstrated (1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) that there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case" (***Spohn-Konen v Town of Brookhaven***, 74 AD3d 1049, 1049, 902 NYS2d 391, 391 [2d Dept 2010]). The plaintiffs assert that an additional deposition of Dr. Mohiuddin is necessary as he is the owner of P.C. and when he was initially deposed as a non-party witness, before P.C. was added as an additional defendant, he refused to answer certain questions and objected on the ground that he was a non-party witness. The plaintiffs assert that they are entitled to

have a full deposition of Dr. Mohiuddin as a party defendant since he is the owner of P.C. In addition, the plaintiffs assert that after Dr. Mohiuddin's deposition, the plaintiff produced a tape-recorded conversation between himself and Dr. Mohiuddin where certain testimony of Dr. Mohiuddin was contradicted. In light of the foregoing, the court finds that the plaintiffs have established the necessity of another deposition of Dr. Mohiuddin (*see* ***Rosenblatt v Windsor Park Nursing Home, Inc.***, 28 AD3d 736, 812 NYS2d 897 [2d Dept 2006]). Thus, to the extent that P.C.'s motion seeks a protective order precluding a further deposition of Dr. Mohiuddin, it is denied.

Accordingly, the motion is denied in its entirety.

Dated: AUG. 22, 2013

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION