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

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TERRY LANG-SALGADO, Index No. 156497/2015

Plaintiff,

- against - **DECISION AND ORDER**

THE MOUNT SINAI MEDICAL CENTER, INC.,

Defendant.

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PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff, Terry Lang-Salgado ("plaintiff" or "Lang-Salgado") commenced this action on June 29, 2015 seeking damages for injuries she allegedly sustained on July 5, 2012 as a result of her fall from a hospital stretcher while undergoing a chest X-ray. Defendant, The Mount Sinai Medical Center, Inc. ("defendant"), brings this pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and CPLR §214-a, contending that the action sounds in medical malpractice and is therefore time-barred by the two and a half year statute of limitations for such actions.

In opposition to defendant's motion, plaintiff argues that the complaint asserts a simple negligence cause of action rather than a claim for medical malpractice. As such, the action was commenced within the three year statute of limitations applicable to such claims. See CPLR §214-c. Lang-Salgado further cross-moves to amend her complaint pursuant to CPLR 3025(b) to include the following three additional causes of action: (1) negligent hiring; (2) failure to promulgate regulations on the use of stretchers/hospital beds in the X-ray room; and (3) failure to follow the procedures promulgated for the use of such stretchers/hospital beds.

DISCUSSION

Defendant's Motion to Dismiss

In determining whether an action sounds in medical malpractice or in ordinary negligence for purposes of determining the applicable statute of limitations, the "critical factor is the nature of the duty owed" to the plaintiff which the defendant is alleged to have breached. *Chaff v Parkway Hosp.*, 205 AD2d 571, 572 (2d Dept), *lv denied* 84 NY2d 966 (1994). "When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence." *Stanley v Lebetkin*, 123 AD2d 854, 855 (2d Dept 1986). Like Lang-Salgado, the plaintiff in *Chaff* fell off an examining table during an X-ray. The court held that the action sounded in medical malpractice for which the two and one half year statute of limitations applied, finding that "[t]he incident arose out of the physician-patient relationship . . . and occurred during the course of a procedure substantially related to medical treatment." *Id.* at 572.

Here, plaintiff alleges that on July 5, 2012 while adjusting both the stretcher and her body position, a Mt. Sinai X-ray technician was negligent in pushing her in a manner that caused her to fall off the stretcher (*see* plaintiff's affidavit at ¶¶ 10 and 11). Plaintiff argues that the technician's negligent contact was incidental to her medical treatment because it did not "involve the diagnosis or treatment of the [p]laintiff or a medical condition" (*see* p. 4 of Plaintiff's Memorandum of Law in Opp. And in Supp. of Cross Motion). As such, Lang-Salgado argues her claim sounds in negligence rather than medical malpractice and the three year statute of limitations is applicable.

Plaintiff's argument is unavailing. As found under virtually identical factual circumstances in *Chaff*, the duty claimed to have been breached arose from the physician-patient relationship and was substantially related to plaintiff's medical treatment during the X-ray. As further stated in *Stanley v Lebetkin*, 123 AD2d at 855, "the failure of a doctor or his employee in helping a patient from the diagnostic table is clearly related to the treatment just given, and the duty to help the patient down safely also derives from the same treatment as the doctor-patient relationship." Similarly, this case implicates defendant's X-ray technician's exercise of professional skill and judgment in positioning Lang-Salgado's body while performing an X-ray, *i.e.*, a diagnostic procedure for the identification and prospective treatment of a medical condition.

By contrast, the Court of Appeals noted in *Weiner v. Lenox Hill Hosp.*, 88 NY2d 784, 788 (1996) that "when 'the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty,' the claim sounds in negligence (citations omitted)." The plaintiff in *Weiner* died of AIDS-related illnesses after the hospital administered a blood transfusion in which the blood was contaminated with HIV. The court found that the action sounded in negligence because the adequacy of the hospital's blood testing and screening procedures "does not implicate questions of medical competence or judgment linked to the treatment of [plaintiff]," but instead implicates the hospital's independent duties as a blood-collection center.

Here, Lang-Salgado does not claim that the condition or usage of defendant's table or premises caused her injuries. See *Stanley v Lebetkin*, 123 AD2d at 855. Since the defendant's challenged conduct is linked to the medical treatment of this particular

patient, plaintiff's claim sounds in medical malpractice. *Weiner v Lenox Hill Hosp.*, 88 NY2d at 786. The two and one half year statute of limitations expired on January 5, 2015, almost six months prior to this action's commencement. Accordingly, the case must be dismissed.

Plaintiff's Cross-Motion to Amend Complaint

Although CPLR 3025(b) provides that leave to amend a pleading is to be "freely given", amendment must be denied if the proposed amendment is palpably insufficient or patently devoid of merit. *Calamari v Panos*, 131 AD3d 1088, 1089 (2d Dept 2015); *Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 (1st Dept), *lv dismissed* 12 NY3d 880 (2009) (in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted). Here, the proposed causes of action are untimely under both the three year negligence and two and a half year medical malpractice statutes of limitations,[1] and thus lacking in merit unless CPLR 203(f) applies.

Under CPLR §203(f) a claim in an amended pleading "is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." See also, *Cerrato v R. H. Crown Co.*, 58 AD2d 721, 721 (3d Dept 1977). "[W]hen the nature of a newly asserted cause of action is distinct from the causes of action asserted in the original

[1] Plaintiff contends that all three proposed causes of action are subject to the three year statute of limitations applicable to negligence claims, while defendant argues that the proposed third cause of action for failure to comply with promulgated rules and regulations is subject to the two and a half year statute of limitations applicable to medical malpractice claims.

complaint, and requires different factual allegations as to the underlying conduct than were contained in the original complaint, the new claims will not 'relate back' in time to the interposition of the causes of action in the original complaint (citations omitted)." *Calamari v Panos*, 131 AD3d 1088, 1089-1090 (2d Dept 2015).

Here, plaintiff only summarily claims that she should be granted leave to amend the complaint because the proposed new theories of liability arose from the same set of facts as the original complaint, and the defendant would not be prejudiced since the original complaint gave prior notice of plaintiff's injury and how it occurred. Plaintiff's original complaint, however, asserts one cause of action which arose from her X-ray on July 5, 2012, whereas the transactions and occurrences relating to the proposed causes of action presumably took place before that date.

As to the proposed causes of action for negligent hiring and failure to promulgate rules and regulations for the use of stretchers, in *Calamari*, the Second Department reversed the lower court's order granting plaintiff leave to amend to add causes of action for negligent hiring and negligent supervision, holding that the original "causes of action alleging medical malpractice and lack of informed consent are distinct not only as to the conduct alleged, but also as to the dates on which the conduct occurred and who engaged in it (citations omitted." *Id.* at 1090. Specifically, "[t]he mere reference to 'negligence' in the original complaint did not give [defendant] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved with respect to the proposed causes of action alleging negligent hiring and negligent supervision." *Id.* As such, the proposed causes of action did not relate back to the original pleading and were thus untimely and palpably insufficient.

Similarly, Lang-Salgado's original complaint merely alleges negligence with respect to her fall. However, the proposed causes of action for negligent hiring and failure to promulgate rules and regulations for the use of stretchers in the X-ray room arise from different facts and implicate different duties. For instance, the proposed claim for negligent hiring would be based upon facts pertaining to when defendant hired the X-ray technician in question, while the claim for failure to promulgate rules and regulations relates to defendant's general duties as a hospital, independent of plaintiff's specific treatment. See *Weiner v Lenox Hill Hosp.*, 88 NY2d at 788. Since the original complaint does not give notice as to the transactions and occurrences to be proved with respect to negligent hiring and the failure to promulgate regulations, there can be no relation back to the original complaint for purposes of tolling the statute of limitations.

Finally, as to the proposed cause of action for failure to follow promulgated rules on the use of stretchers/hospital beds in the X-ray room, Lang-Salgado fails to demonstrate that this claim has any merit. Further, the claim is merely an extension of the original complaint's purported negligence cause of action, which this court found sounded in medical malpractice and dismissed as untimely.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss this action is granted and plaintiff's cross-motion is denied. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

The foregoing constitutes this court's Decision and Order.

Dated: New York, New York
April 11, 2016

HON. MARTIN SHULMAN, J.S.C.