

**L.W. v Good Samaritan Hosp. Med. Ctr.**

2020 NY Slip Op 32394(U)

May 29, 2020

Supreme Court, Suffolk County

Docket Number: 2422/2016

Judge: Denise F. Molia

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SUPREME COURT – STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. DENISE F. MOLIA  
*Acting Justice of the Supreme Court*

INDEX NO.: 2422-16

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L.W.,

Plaintiff,

- against -

GOOD SAMARITAN HOSPITAL MEDICAL CENTER, CATHOLIC HEALTH SYSTEM OF LONG ISLAND, INC. d/b/a CATHOLIC HEALTH SERVICES OF LONG ISLAND, GINA ZARILLI, M.D., SHARON SCHWARTING, CAMILLE VILLANO, THE LONG ISLAND LUNG CENTER LLP, JEFFREY ZWANG, M.D., GARY WOHLBERG, M.D., LAURENCE ENGELBERG, M.D., RONALD ZIELINSKI, M.D., JOSEPH SARACENO, D.O., DHEERAJ KHANNA, M.D., and CHARLES SCOTT HALL, M.D.,

Defendants.

CASE DISPOSED: NO  
MOTION R/D: 11/16/16  
SUBMISSION DATE: 3/29/19  
MOTION SEQUENCE NO.: 001 MOT ADJ 7/31  
002 MD  
003 MOT ADJ

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Upon the following papers numbered \_\_\_\_\_ read on this motion to dismiss and cross-motion and further motion to amend and dismiss; Notice of Motion/ Order to Show Cause and supporting papers \_\_\_; Notice of Cross Motion and supporting papers 93 - 101; Answering Affidavits and supporting papers \_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion (#001) by defendant, Sharon Schwarting, pursuant to CPLR § 3211(a)(5),(7) and (8), for an Order dismissing the Amended Complaint, the cross-motion (#002) by plaintiff, L.W., for a default judgment against defendant Sharon Schwarting, and the motion (#003) by defendants, The Long Island Lung Center LLP, Jeffrey Zwang, M.D., Gary Wohlberg, M.D., Laurence Engelberg, M.D., Ronald Zielinski, M.D., Joseph Saraceno, D.O., Dheeraj Khanna, M.D. and Charles Scott Hall, M.D., pursuant to CPLR § 3025, for an Order granting leave to amend the Answer to add the additional defense of dismissal based upon documentary evidence, and for a further Order, pursuant to CPLR § 3211(a)(1),(3) and (7), dismissing the Complaint and any cross-claims asserted against said moving defendants, are consolidated for the purposes of this determination; and it is further

**ORDERED** that the motion (#001) by defendant, Sharon Schwarting, for an order pursuant to CPLR § 3211(a)(5),(7) and (8), dismissing the Amended Complaint as against her is converted to a motion for summary judgment pursuant to CPLR § 3212, and, as such, the converted motion will be held in abeyance for a period of sixty (60) days from the date of this order so that the parties may submit for the Court's consideration any additional documentation and evidence in connection with the motion; and it is further

**ORDERED** that defendant, Sharon Schwarting, serves an Answer to the Amended Complaint, within twenty (20) days after service of a copy of this order with notice of entry; and it is further

**ORDERED** that the cross-motion (#002) of plaintiff, L.W., for a default judgment pursuant to CPLR § 3215 against defendant, Sharon Schwarting, is denied; and it is further

**ORDERED** that the motion (#003) by defendants, The Long Island Lung Center LLP, Jeffrey Zwang, M.D., Gary Wohlberg, M.D., Laurence Engelberg, M.D., Ronald Zielinski, M.D., Joseph Saraceno, D.O., Dheeraj Khanna, M.D. and Charles Scott Hall, M.D., is granted to the limited extent that the aforesaid defendants are granted leave pursuant to CPLR § 3025 to amend the Answer, and, the Amended Answer submitted in connection with the motion is deemed filed and served as of the date of this order, and the remaining portions of the motion seeking dismissal of Amended Complaint is converted to a motion for summary judgment pursuant to CPLR § 3212, and, as such, the converted motion will be held in abeyance for a period of sixty (60) days from the date of this order so that the parties may submit for the Court's consideration any additional documentation and evidence in connection with the motion; and it is further

**ORDERED** that plaintiff and defendants serve a response, if any, to the Amended Answer of defendants, the Long Island Lung Center LLP, Jeffrey Zwang, M.D., Gary Wohlberg, M.D., Laurence Engelberg, M.D., Ronald Zielinski, M.D., Joseph Saraceno, D.O., Dheeraj Khanna, M.D. and Charles Scott Hall, M.D, within twenty (20) days after service of a copy of this order with notice of entry.

This is an action to recover damages relating to alleged breaches of fiduciary duty to maintain confidentiality of plaintiff's medical information. Plaintiff also claims that defendants Sharon Schwarting ("Schwarting") and Camille Villano ("Villano"), plaintiff's sister, participated in an ongoing scheme to

cause intentional harm to plaintiff by maliciously divulging her confidential and private medical information to friends, family and her employer. The underpinning of the allegations is plaintiff's claim that her sister's deep-rooted hatred for her was the motivation to enlist others to assist in her years-long plot to violate her privacy and to intentionally inflict pain and suffering.

## **I. HIPAA and New York State Mental Hygiene and Public Health Law**

Plaintiff alleges that defendants' conduct was in violation of her rights under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the privacy rules enacted under State statutes. HIPAA generally provides for the confidentiality of individually identifiable health information (*see 42 U.S.C. §§ 1320d-1 to d-7*), and it exclusively authorizes the Secretary of Health and Human Services to commence enforcement actions (*see 42 U.S.C. § 300gg-22*). In limited situations, HIPAA permits health care providers and other covered entities to disclose protected health information without patient consent, such as in response to a court order (*see, e.g., 45 C.F.R. § 164.512(e)(1)(i),(ii)*), but none of the listed exceptions are applicable to the instant matter (*45 C.F.R. § 164.512*). Heightened protections of privacy are afforded information regarding a patient's mental health treatment (*45 C.F.R. § 164.508(a)(2)*).

While recognizing that there is no private right of action for HIPAA violations (*see Bond v. Conn. Bd. of Nursing*, 622 F. App'x 43, 44 (2d Cir. 2015); *Warren Pearl Constr. Corp. v. Guardian Life Ins. Co. of Am.*, 639 F. Supp. 2d 371, 377 (S.D.N.Y. 2009)), plaintiff's claims are cloaked within the broader context of privacy and confidentiality rights afforded under HIPAA and New York State Law. New York Public Health Law ensures the right of patients to have "private communications and consultations" with their physicians (*Public Health Law § 2803-c (3)(b)*). New York Law further protects the privacy rights of patients and restricts access to medical records as set forth in Mental Hygiene Law. Section (f) of Mental Hygiene Law § 33.13 provides, in pertinent part:

All records of identity, diagnosis, prognosis, treatment, care coordination or any other information contained in a patient or client's record shall be confidential unless disclosure is permitted under subdivision [c] of this section. Any disclosure made pursuant to this section shall be limited to that information necessary and required in light of the reason for disclosure. Information so disclosed shall be kept confidential by the party receiving such information and the limitations on disclosure in this section shall apply to such party.

None of the approximate seventeen (17) exceptions set forth within the section are applicable in this matter (*Mental Hygiene Law § 33.13*).

## **II. Facts**

The following facts are taken from the pleadings and submitted papers and do not constitute findings of fact by this Court. On March 6, 2013, plaintiff was transported from work by ambulance to defendant Good Samaritan Hospital Medical Center ("Good Samaritan Hospital" or "Hospital"), which is owned and operated by defendant Catholic Health System of Long Island d/b/a Catholic Health Services of Long Island ("CHSL"), complaining of chest pains after being found intoxicated at work (Amend. Compl., ¶ 63).

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During that hospital stay and under the doctor-patient covenant, plaintiff shared with the Hospital's psychiatrist "[m]any deeply personal things, including her substance abuse issues" (Amend. Compl., ¶ 68). The psychiatrist thereafter memorialized the examination of plaintiff in the form of a written consultation (Amend. Compl., ¶¶ 69-70).

Defendant Schwarting, a close friend of defendant Villano, is the office manager of defendant Long Island Lung Center LLP ("LI Lung Center") (Amend. Compl., ¶ 24). Defendants Jeffrey Zwang, M.D. ("Zwang"), Gary Wohlberg, M.D. ("Wohlberg"), Laurence Engelberg, M.D., ("Engelberg"), Ronald Zielinski, M.D. ("Zielinski"), Joseph Saraceno, D.O. ("Saraceno"), Dheeraj Khanna, M.D., ("Khanna"), Charles Scott Hall, M.D., ("Hall") are medical doctors and partners at the LI Lung Center, allegedly having direct supervision and control over defendants Schwarting and defendant Gina Zarilli, M.D. ("Zarilli"), a medical doctor employed by LI Lung Center and an agent of Good Samaritan Hospital and/or CHSLI (Amend. Compl., ¶¶ 10-16, 29-62).

Plaintiff is not and has never been a patient of the LI Lung Center (Amend. Compl., ¶ 75). For several years prior to the instant incident, defendant Villano allegedly "harbored [a] deep hatred for [her sister] the plaintiff," and she viewed plaintiff's 2013 medical diagnosis, which included, substance abuse and mental health information, as an opportunity to share embarrassing personal information about her sister with family, friends and others (Amend. Compl., ¶ 92).

Beginning on March 6, 2013, defendant Schwarting used her position as office manager at LI Lung Center, and with the assistance of defendant Villano, on multiple occasions allegedly "[a]ccessed, viewed, and/or obtained, plaintiff's medical information . . . and substance abuse information relating to her treatment at Good Samaritan [Hospital], without plaintiff's consent . . . authorization . . . and knowledge" (Amend. Compl., ¶ 78). Specifically, on March 25, 2013, defendant Schwarting allegedly accessed the psychiatrist's written consultation following his evaluation of plaintiff on March 6, 2013, and shared the contents therein, along with other personal, confidential medical information pertaining to plaintiff, without the consent or knowledge of plaintiff, with defendant Villano (Amend. Compl., ¶¶ 79-80).

The unlawful accessing and dissemination of plaintiff's medical and substance abuse information was apparently discussed by defendants Schwarting and Villano in a series of e-mails over the span of twenty-seven (27) minutes on March 25, 2013. The initial e-mail chain states:

**March 25, 2013 at 2:33 p.m.**

... When I see you I will tell you what your sister told the psychiatric doctor in the hospital [] I don't want to write it in an email because it is a hippaa [sic] violation.

Sharon Schwarting  
Office Manager  
Long Island Lung Center

**March 25, 2013 at 2:50 p.m.**

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OMG - I am dying to know what my sister told the psychiatric doctor!!!!!!  
Can you call me tonight? ...

Camille Villano

The e-mails further state:

**March 25, 2013 at 2:56 p.m.**

Of course I can call you but if you have a minute during the day call my work  
# 666-5806. I will be here till 4:30. You are gonna flip!

Sharon Schwarting  
Office Manager  
Long Island Lung Center

**March 25, 2013 at 3:00 p.m.**

... I'll call you around 3:30 as I have a 3:00 meeting.

Camille Villano

(Amend. Compl., ¶ 81).

The ongoing discord between plaintiff and defendants Villano and Schwarting, including motivation for defendants' accessing and divulging of plaintiff's confidential medical information, is further detailed in separate e-mail exchanges between March 5, 2013 and May 2, 2014 (Amend. Compl., ¶¶ 100-02, 103, 105-06, 109). Within these e-mails, defendant Villano states that she "loathes" plaintiff and that she "can't even call her my sister" (Amend. Compl., ¶ 100). In response, defendant Schwarting refers to plaintiff as "a nutbag" and an "evil demon," and threatened future violence against plaintiff— "[w]ill make mince meat out of that little troll" and "I will have to punch her" (Amend. Compl., ¶¶ 101-03, 105-06).

The breadth and duration of this ongoing dispute was referenced, without specific detail, by defendant Villano in an e-mail to her brother Frederic Villano, dated April 2, 2013, apparently intended as a response to correspondence from plaintiff's counsel regarding an effort to evict plaintiff from their mother's home in 2011. Defendant Villano, in describing the animosity, wrote:

Not to harp on this forever, but I keep thinking about the part in Greg Curry's letter where he says that ever since [L.W.] enlisted his services, you and I started a campaign to try to get her evicted. Little does he know that this "campaign" started long before he ever came into the picture!! ...

(Amend. Compl., ¶ 109).

Plaintiff does not affirmatively allege that defendant Zarilli directly aided or assisted defendant Schwarting in unlawfully accessing plaintiff's medical information, but instead impugns misconduct based

upon a prior 2010 incident wherein Dr. Zarilli allegedly divulged to defendant Schwarting the confidential medical information of another individual without consent (Amend. Compl., ¶¶ 114-17, 119-210, 123). Plaintiff further alleges that based upon their pattern of unlawful accessing and disclosing of confidential patient information, the remaining defendants “knew or should have known” that Dr. Zarilli and defendant Schwarting “[h]ad a propensity for accessing, obtaining, and disclosing the confidential medical information of patients to third parties without the patient’s consent or authorization” (Amend. Compl., ¶¶ 124-43).

In response to a letter of complaint from plaintiff’s counsel, dated, February 3, 2016, Good Samaritan Hospital Privacy Officer Gail Donhesier acknowledged that an investigation had been undertaken and Good Samaritan Hospital concluded that “[t]his incident constitutes a breach of [plaintiff’s] protected health information” (Letter of Gail Donhesier, attached as Exhibit 3 to plaintiff’s cross-motion). Ms. Donhesier’s letter further states that defendant Schwarting has never been employed by Good Samaritan Hospital and it remained to be determined how she “inappropriately accessed [plaintiff’s] medical records or how she may have otherwise learned the details of [plaintiff’s] consultation” (*id.*). She concludes by stating that the incident would be reported to the federal Department of Health and Human Services’ Office of Civil Rights.

### III. Pleadings

The amended complaint contains twenty-four (24) causes of action seeking compensation for economic loss, lost earnings, emotional and mental anguish, and pain and suffering, plus punitive damages, in an amount not less than \$6,000,000 per cause of action. In the first fourteen (14) causes of action, plaintiff alleges, *inter alia*, that defendants Good Samaritan Hospital and CHSLI breached their fiduciary duty, are vicariously liable for the unlawful conduct of those under their control and supervision, acted in a negligent manner by failing to safeguard plaintiff’s medical information, and further acted in violation of the Mental Hygiene Law.

The Fifteenth, Sixteenth, Seventeenth and Eighteenth causes of action allege that Dr. Zarilli is liable for intentional infliction of emotional distress, gross negligence, violations of Mental Hygiene Law § 33.13, and negligence *per se*, respectively. Defendants Villano and Schwarting are the focus of the Nineteenth, Twentieth, Twenty-First, and Twenty-Second causes of action, wherein plaintiff alleges liability for the intentional infliction of emotional distress, conspiracy to commit intentional infliction of emotional distress, *prima facie* tort, and gross negligence. Finally, the Twenty-Third and Twenty-Fourth causes of action are against defendants LI Lung Center and Doctors Zwang, Wohlberg, Engelberg, Zielinski, Saraceno, Khanna, and Hall for negligent supervision and retention.

All defendants except Ms. Schwarting, who has moved pursuant to *CPLR* § 3211 to dismiss the Amended Complaint (mot. seq.:001), have filed an Answer in which they deny the substantive allegations and assert affirmative defenses, and seek costs and disbursements. The defendants further assert various cross-claims for contribution and indemnification against each other should liability be found against any of the defendants.

### IV. Instant Motions

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Defendant Schwarting moves to dismiss the Amended Complaint as asserted against her (Nineteenth, Twentieth, Twenty-First and Twenty-Second causes of action) (mot. seq.:001) based upon the statute of limitations (*CPLR § 3211(a)(5)*), failure to state causes of action for intentional infliction of emotional distress, conspiracy to commit intentional infliction of emotional distress, *prima facie* tort, and gross negligence (*CPLR § 3211(a)(7)*), and lack of personal jurisdiction (*CPLR § 3211(a)(8)*).

In support of the motion, defendant Schwarting asserts that the plaintiff's failure to serve the original complaint upon her is a jurisdictional defect under *CPLR § 306-b*, and that such defect is not cured by service of the Summons and Amended Complaint. Defendant Schwarting further claims that the one-year statute of limitations expired on the Nineteenth and Twenty-First causes of action, intentional infliction of emotional distress and *prima facie* tort, respectively, on March 6, 2014, and, the three-year statute of limitations expired on the Twenty-Second Cause of Action, gross negligence, on March 6, 2016. This proceeding was commenced on March 7, 2016.

Finally, defendant Schwarting asserts that the four (4) causes of action are insufficiently pled and fail to state a *prima facie* claim, and, with regard to the Twentieth Cause of Action, conspiracy to commit intentional infliction of emotional distress, no such cause of action exists in New York. In support of the motion, defendant Schwarting submits, *inter alia*, in support of the motion: (1) counsel's affirmation and reply affirmation with exhibits; (2) a copy of the Amended Complaint; and (3) a memorandum of law.

In opposition, plaintiff asserts that there was no need to serve the original complaint upon any of the defendants since plaintiff amended the complaint as of right, primarily to add causes of action against Good Samaritan Hospital and CHSLI, within twenty (20) days of filing pursuant to *CPLR § 3025(a)*, and the Summons and Amended Complaint were served upon defendants within 120 days of the original filing. Plaintiff further contends that the causes of action against defendant Schwarting sufficiently plead the requisite elements, and relies, *in part*, upon the e-mail communications of defendants Schwarting and Villano to satisfy both any heightened negligence and intent requirements and further to demonstrate a pattern of continuing infliction of harm against plaintiff. Further, plaintiff contends that the claims are timely under the theory of continuing tort as the pattern of unlawful conduct continued through at least November 2015, when defendant Villano, using the medical information provided by defendant Schwarting, disclosed plaintiff's confidential medical information to plaintiff's employer, which resulted in her termination. The remaining defendants submit opposition to defendant Schwarting's motion to dismiss, and further affirmatively assert, that if a portion or all of the motion is granted, defendants' cross-claims for contribution and indemnification should be permitted to continue, and, if need be, leave be granted to serve and file a Third-Party Complaint(s).

In support of plaintiff's opposition, plaintiff submits, *inter alia*, the affidavit of plaintiff, affirmation of counsel, the Amended Complaint, the letter of Good Samaritan Hospital acknowledging a breach of plaintiff's privacy rights, and several e-mail communications. Plaintiff further cross-moves (mot. seq.:#002) for a default judgment pursuant to *CPLR § 3215* against defendant Schwarting for failing to timely answer and/or move prior to July 10, 2016, after allegedly being personally served on June 20, 2016. In support of the cross-motion, plaintiff's counsel avers that on July 14, 2016, he consented to the request of counsel for defendant Schwarting to extend the time to answer to July 22, 2016, but that the enlargement of time was for the purpose of service of an Answer; i.e., he did not consent to the additional time for motion practice.

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Defendant Schwarting opposes the cross-motion and avers that there was no restrictions placed on plaintiff's consent to the extension. A copy of the counsel's stipulation regarding the extension was submitted in connection with the pending motions.

Defendants LI Lung Center and Doctors Zwang, Wohlberg, Engelberg, Zielinski, Saraceno, Khanna, and Hall further move (mot. seq.:003) to serve and file an amended answer pursuant to **CPLR § 3025(b)**, and, upon granting, to then dismiss the Amended Complaint (Twenty-Third and Twenty-Fourth causes of action) and cross-claims pursuant to **CPLR § 3211(a)(1),(3),(5) and (7)**. According to counsel, the purpose of the amended pleading is to add the affirmative defense of dismissal based upon the documentary evidence, which they claim is supported by the record and would not pose any prejudice to any of the parties. The gravamen of the moving defendants' motion to dismiss is that plaintiff failed to state a cause of action against the individual named partners of LI Lung Center because the improper accessing of medical records is not "professional services" pursuant to **Partnership Law § 26**; the Amended Complaint fails to state a cause of action for punitive damages; the claims of negligent supervision and retention are barred by a three-year statute of limitations; liability may not be imposed for the improper disclosures of plaintiff's medical records outside the scope of the employment of defendants Schwarting and Zarilli; and the pertinent services contract omit provisions supporting a cross-claim for contribution and indemnification.

The Court notes that although described as a motion to dismiss pursuant to **CPLR § 3211**, the notice of motion is titled a motion for summary judgment, and was interposed after the moving defendants served an Answer. In support of the motion, moving defendants submit the affidavits of Doctors Zwang, Wohlberg, Engelberg, Khanna, and Hall; the partnership Agreement of the LI Lung Center; the Services Agreement between Good Samaritan Hospital and LI Lung Center; affirmation of counsel; and the proposed Amended Answer. Plaintiff and defendants Good Samaritan Hospital and CHSLI oppose the motion. In further opposition, plaintiff contends that discovery is required to adequately respond to the portion of the motion seeking dismissal. Specifically, plaintiff seeks discovery, presumably including an opportunity to conduct examinations before trial, *inter alia*, regarding the depth and scope of knowledge pertaining to plaintiff's medical records, and whom acquired such information; the identities of those individuals with accessibility to plaintiff's medical records, and the manner and form of such access; the step taken to investigate prior similar alleged incidents of unlawful accessing and disclosing of confidential patient information; and the extent of communications and associations between defendants Zarilli, Schwarting and Villano regarding the claims and defenses.

## V. Analysis

### A. Motions to Dismiss (#001 and #003) (conversion to CPLR § 3212 motions)

It would be premature to render determination on the motion of defendant Schwarting (mot. seq.:001) and the portion of the motion of defendants LI Lung Center and Doctors Zwang, Wohlberg, Engelberg, Zielinski, Saraceno, Khanna, and Hall (mot. seq.:#003) seeking dismissal of the Amended Complaint pursuant to **CPLR § 3211(a)(1), (5), (7), and (8)**. Accordingly, the motions are converted to motions for summary judgment pursuant to **CPLR § 3212**.

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“*CPLR 3211* is a purely mechanical device, a procedural statute through and through . . . . Whether dismissal is warranted in a given situation will depend on law (substantive, procedural or both) that comes from outside *CPLR 3211*’s borders” (*John R. Higgitt, Practice Comm.*, McKinney’s C3211:1 [2018]). “An order granting a *CPLR 3211(a)* motion is not a disposition on the merits of the action (unless the motion was properly converted to a summary judgment motion).”

*CPLR § 3211(c)* provides, in relevant part:

Upon the hearing of a motion . . . , either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. . . .

*CPLR § 3211(c)*.

The parties have submitted affidavits and numerous documentary exhibits in connection with the motions to dismiss which may properly be considered on a motion for summary judgment. The Court finds that this documentary evidence, which is beyond the corners of the Amended Complaint, establishes that the parties are “charting a summary judgment course” (*see CPLR § 3211(c)*; *Mihlovan v. Grozavu*, 72 NY2d 506, 534 N.Y.S.2d 656 [1988]; *Four Seasons Hotels v. Vinnik*, 127 AD2d 310, 515 NYS2d 1 [2d Dept 1987]). Accordingly, pursuant to *CPLR § 3211(c)*, the aforesaid motions shall be held in abeyance for a period of sixty (60) days from the date of this order during which time the parties may submit additional relevant evidence for the Court’s consideration.

Notably, a review of the motion papers reveals several areas requiring additional inquiry and investigation into the sequencing, timing, and specificity of the events alleged. The lack of clarity may likely be the result of the passage of time, but, nevertheless, additional investigation, particularly, the conducting of discovery, will be fruitful and a judicious usage of time and resources so that the parties may adequately address the host of outstanding factual issues raised involving the timeliness of the complaint, and the responsibilities, knowledge and conduct of the individuals involved. This information is further interrelated and necessary for an appropriate determination of the motions.

For these reasons, defendant Schwarting’s motion (mot. seq.:#001) and a portion of the motion of defendants LI Lung Center and Doctors Zwang, Wohlberg, Engelberg, Zielinski, Saraceno, Khanna, and Hall (mot. seq.:#003) seeking dismissal of the Amended Complaint are converted to motions for summary judgment.

**B. Cross-Motion for Default Judgment (mot. seq.: #002)**

*CPLR § 3215(a)* provides that a plaintiff may seek entry of default judgment against a defendant who has failed to file a responsive pleading (*Thattil v. Mondesir*, 253 AD2d 809, 677 NYS2d 513 [2d Dept 1998]). On a motion for a default judgment under *CPLR § 3215* based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant’s default in answering or appearing (*see CPLR § 3215 (f)*; *Matone v. Sycamore Realty*

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*Corp.*, 50 AD3d 978, 858 NYS2d 202 [2d Dept 2008]; *Allstate Ins. Co. v. Austin*, 48 AD3d 720, 851 NYS2d 375 [2d Dept 2008]; *see also Liberty County Mut. v. Avenue I Med., P.C.*, 129 AD3d 783, 11 NYS3d 623 [2d Dept 2015]).

To defeat a facially sufficient *CPLR § 3215* motion, a defendant must show either that there was no default, or that it had a reasonable excuse for its delay and a potentially meritorious defense (*see Fried v. Jacob Holding, Inc.*, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]). Here, defendant Schwarting established that she was not in default. Indeed, it is undisputed that on July 15, 2016, prior to moving for a default judgment, counsel for plaintiff agreed to extend the time for defendant Schwarting to interpose a response until July 22, 2016, and executed a stipulation in furtherance of that agreement (Notice of Cross-Motion; Exhibit 10).

Although counselors now dispute the substance of their communications and whether the extension was limited to serving an answer, rather than making a motion to dismiss, the Court does not intend to interject itself into petty quarrels, and reminds counsel of the civility and professionalism expected of Officers of the Court. In any event, the Court notes that the stipulation signed by plaintiff's counsel does not include any such limiting provisions, but, rather, merely provides that the time for defendant Schwarting to "respond" was extended on consent to July 22, 2016, at which time, the motion to dismiss was filed (mot. seq.:001). As such, counsel for defendant Schwarting reasonably believed pursuant to the stipulation that the motion was timely filed. In addition, there was "no evidence of willful misconduct or an intent to abandon the action, and there was no prejudice to the plaintiff" (*see Li v. Caruso*, 161 AD3d 1132, 77 NYS3d 685 [2d Dept 2018]; *Fischer v City of New York*, 147 AD3d 1029, 46 NYS3d 916 [2d Dept 2017]; *Spence v Davis*, 139 AD3d 703, 704, 31 NYS3d 539 [2d Dept 2016]; *Klughaupt v Hi-Tower Contrs., Inc.*, 64 AD3d 545, 882 NYS2d 313 [2d Dept 2009]).

Defendant Schwarting has also raised possible meritorious defenses regarding the statute of limitations and sufficiency of the pleadings. Under these circumstances, and in light of the strong public policy in favor of deciding matters on their merits, there has been a more than an adequate showing to permit the motion to dismiss (which has now been converted to a motion for summary judgment), and plaintiff's motion for a default judgment is denied (*see Gerdes v. Canales*, 74 AD3d 1017, 903 NYS2d 499 [2d Dept 2010]; *Merchants Ins. Group v. Hudson Val. Fire Protection Co., Inc.*, 72 AD3d 762, 898 NYS2d 242 [2d Dept 2010]; *Klughaupt v Hi-Tower Contrs., Inc.*, 64 AD3d at 545).

### C. Defendants' Motion to Amend the Answer (mot. seq.:#003)

With regard to the remaining portion of the motion of defendants LI Lung Center and Doctors Zwang, Wohlberg, Engelberg, Zielinski, Saraceno, Khanna, and Hall for leave to amend their Answer pursuant to *CPLR § 3025(b)* (mot. seq.:003), leave is sought to assert the additional defense of dismissal based upon documentary evidence pursuant to *CPLR § 3211(a)(1)*. *CPLR § 3025(b)* provides for the routine granting of motions to serve an amended pleading. The pertinent section states:

- (b) A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by

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stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. . . .

*CPLR § 3025(b)*.

A motion for leave to serve and file an amended pleading rests within the sound discretion of the trial court. A motion to amend pursuant to *CPLR § 3025(b)* should be granted provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*Maldonado v. Newport Inc.*, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; *Lucido v. Mancuso*, 49 AD3d 220, 222, 851 N.Y.S.2d 238 [2d Dept 2008]). In exercising this discretion, a trial court shall examine the legal sufficiency or merits of a pleading that are clear and free from doubt (*Emigrant Savings Bank v. Walters*, 155 AD3d 829, 63 N.Y.S.3d 708 [2d Dept 2017]).

The burden of establishing prejudice or surprise precluding the amendment of the pleading is on the party opposing the amendment (*Emigrant Savings Bank*, 155 AD3d at 829). Here, plaintiff's opposition to the motion to dismiss the Amended Complaint highlights the factual disputes regarding the documentary evidence and the need for discovery, thereby bolstering defendants' argument for leave to serve the proposed Amended Answer.

The proposed Amended Answer, a copy of which was attached as Exhibit F to Notice of Motion, succinctly contains an additional affirmative defense (Tenth Affirmative Defense) based upon the documentary evidence. On its face, the amended pleading is neither palpably insufficient nor patently devoid of merit. In addition, there is no indication that the Amended Answer will result in prejudice or was unduly surprising to plaintiff. Finally, it would be a mistake to delay the litigation, or to presume the eventual outcome on the remaining portion of defendants' motion, by denying the proposed amendment until after the summary judgment motion is decided.

Therefore, the portion of moving defendants' motion for an order granting leave to amend the answer pursuant to *CPLR § 3025(b)* is granted. The Amended Answer is further deemed served and filed as of the date of this order, and plaintiff and co-defendants are to serve a response, if any, to the Amended Answer within twenty (20) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: May 29, 2020  
Riverhead, NY

**HON. DENISE F. MOLIA**

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HON. DENISE F. MOLIA  
*Acting Justice of the Supreme Court*