

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

2020 NY Slip Op 33922(U)

November 18, 2020

Supreme Court, Suffolk County

Docket Number: 2422-16

Judge: Denise F. Molia

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SHORT FORM ORDER

**COPY**

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

**PRESENT:**

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

**INDEX NO.: 2422-16**

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 MG  
002 MD  
003 MG

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Upon the following papers read on the application by defendant Sharon

RST

Schwarting for an order pursuant to CPLR 3211 (a) (5), (7), and (8), dismissing the complaint in its entirety: Notice of Motion and Affirmation in Support dated July 22, 2016 together with Exhibit A annexed thereto and a memorandum of law; Affirmation in Opposition of plaintiff dated August 12, 2016, together with Exhibits 1 through 10 annexed thereto; Affirmation in Opposition 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. dated August 25, 2016, together with Exhibit A annexed thereto; Affirmation in Opposition of defendants Good Samaritan Hospital Medical Center and Catholic Health System of Long Island, Inc. d/b/a Catholic Health Services of Long Island, together Exhibit A annexed thereto; Reply Affirmation of defendant Sharon Schwarting dated September 1, 2016 together with Exhibits B and C annexed thereto; Sur-Reply Affirmation of plaintiff dated September 28, 2016 together with Exhibits 11, 12, and 13 annexed thereto; Reply Affirmation of defendant Sharon Schwarting dated December 1, 2016; Reply Affirmation of defendant Sharon Schwarting January 4, 2017 (Motion Sequence 001); on the application of plaintiff for a default judgment against defendant Sharon Schwarting; Notice of Cross-Motion dated August 12, 2016, together with Exhibits 1 to 10 annexed thereto; Affirmation in Opposition of defendant Sharon Schwarting dated September 1, 2016 together with Exhibits B and C annexed thereto (Motion Sequence 002); on the application 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. for an order pursuant to CPLR 3025 granting the moving defendants leave to amend their answer to allege an additional defense based upon documentary evidence and upon the granting of such motion, for an order pursuant to CPLR 3211 (a) (1), (3), (5), and (7), dismissing plaintiff's complaint and any cross-claims asserted as against the moving defendants: Notice of Motion and Affirmation in Support dated October 10, 2016, together with Exhibits A through F annexed thereto; Affirmation in Opposition of plaintiff dated November 10, 2016, together with Exhibits 1 through 3 annexed thereto; Affirmation in Opposition of defendants Good Samaritan Hospital Medical Center and Catholic Health System of Long Island, Inc. d/b/a Catholic Health Services of Long Island, dated December 6, 2016, together with Exhibit A annexed thereto; Reply Affirmation of moving defendants dated December 1, 2016, Reply Affirmation of moving defendants dated January 4, 2017, Affirmation in Opposition of plaintiff dated January 12, 2017; Affirmation in Opposition of defendants Good Samaritan Hospital Medical Center and Catholic Health System of Long Island, Inc. d/b/a Catholic Health Services of Long Island, dated January 12, 2017 together with Exhibit A annexed thereto (Motion Sequence 003); it is

**ORDERED** that the respective motions of the parties (Motion Sequences 001, 002, and 003) are consolidated for purposes of a determination herein; and it is

further

**ORDERED** that the motion by defendant Sharon Schwarting for an order pursuant to CPLR 3211 (a) (5), (7), and (8) dismissing the complaint in its entirety is **GRANTED**, to the extent and for the reasons set forth herein; and it is further

**ORDERED** that the motion by plaintiff for an order granting a default judgment against defendant Sharon Schwarting is **DENIED** for the reasons set forth herein; and it is further

**ORDERED** that the motion 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. for an order pursuant to CPLR 3025 granting the moving defendants leave to amend their answer to allege additional defenses based upon documentary evidence and upon the granting of such motion, for an order pursuant to CPLR 3211 (a) (1), (3), (5) and (7) dismissing plaintiff's complaint and any cross-claims asserted as against the moving defendants is **GRANTED** to the extent and for the reasons set forth herein.

Plaintiff commenced this action by the filing of a summons and complaint on March 7, 2016 seeking damages arising from alleged violations of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C.A. §1320d et seq., the applicable federal regulations, 45 CFR Parts 160 and 164, New York Public Health Law §2803-c, and New York Mental Hygiene Law. Plaintiff thereafter served and filed a first amended complaint (the "complaint"). The complaint alleges, *inter alia*, that beginning on March 6, 2016 details from her medical chart, maintained by defendant Good Samaritan Hospital Medical Center ("Good Samaritan Hospital"), owned and operated by defendant Good Samaritan Hospital and Catholic Health System of Long Island, Inc. d/b/a Catholic Health Services of Long Island ("CHSLI")(collectively referred to herein as the "Hospital defendants"), were unlawfully accessed by defendants Sharon Schwarting ("Schwarting") and Camille Villano ("Villano"), who subsequently shared plaintiff's medical information with her family, friends, and others. Defendant Villano is plaintiff's sister and defendant Schwarting is a close friend of defendant Villano. The complaint further alleges that defendants Schwarting and Villano engaged in an ongoing malicious scheme to divulge plaintiff's confidential and private medical information as part of a years-long plot to violate her privacy and intentionally inflict pain and suffering upon her. The complaint further alleges that defendant Villano enlisted her friend, defendant Schwarting, who it is alleged was and remains the office manager of defendant The Long Island Lung Center LLP ("the Lung Center"). Defendants Jeffrey Zwang, M.D. ("Dr. Zwang"), Gary Wohlberg, M.D. ("Dr. Wohlberg"), Laurence Engelberg, M.D.

("Dr. Engelberg"), Ronald Zielinski, M.D. ("Dr. Zielinski"), Joseph Saraceno, D.O. ("Dr. Saraceno"), Dheeraj Khanna, M.D. ("Dr. Khanna"), and Charles Scott Hall, M.D. ("Dr Hall") (collectively referred to herein as "the Lung Center doctors"), are medical doctors and partners at the Lung Center, who plaintiff alleges had direct supervision and control over defendant Schwarting. The complaint further alleges that defendant Gina Zarilli ("Dr. Zarilli") is a medical doctor employed by the Lung Center and an agent of defendant Good Samaritan Hospital and /or defendant CHSLI. The complaint further alleges that although plaintiff was never a patient at the Lung Center, defendant Schwarting used her position as office manager at the Lung Center and with the assistance of defendant Villano, "accessed, viewed, and/or obtained, plaintiff's medical information...and substance abuse information relating to her treatment at Good Samaritan, without plaintiff's consent...authorization...and knowledge." The complaint further alleges that sometime in 2010, defendant Dr. Zarilli allegedly divulged the confidential information of another patient to defendant Schwarting without the patient's consent and that based upon this prior incident, it is alleged defendants Zarilli and Schwarting "had a propensity for accessing, obtaining, and disclosing the confidential information of patients to third parties without the patient's consent or authorization."

The complaint contains twenty-four causes of action, with the first fourteen sounding in claims alleging breach of fiduciary duty by the Hospital defendants, vicarious liability for the unlawful conduct of those under their control and supervision, negligence in failing to safeguard plaintiff's information, and violations of section 33.13 of the Mental Hygiene Law, which governs the privacy rights of patients and restricts access to their medical records. The fifteenth, sixteenth, seventeenth, and eighteenth causes of action sound in claims of intentional infliction of emotional distress, gross negligence, violations of Mental Hygiene Law §33.13, and negligence *per se*, respectively, as against Dr. Zarilli. The nineteenth, twentieth, twenty-first, and twenty-second causes of action sound in intentional infliction of emotional distress, *prima facie* tort, and gross negligence, as against defendants Villano and Schwarting. The twenty-third and twenty-four causes of action sound in claims for negligent supervision and negligent retention as against defendants the Lung Center and the Lung Center doctors (collectively referred to herein as "the Lung Center defendants").

All defendants, except defendant Schwarting, served and filed answers to the complaint in which they deny the allegations and assert affirmative defenses and cross-claims for contribution and indemnification as against each other, should there be any liability against any of the defendants. Pursuant to stipulation, defendant Schwarting's time to respond to the complaint was extended to July 22, 2016.

Defendant Schwarting now moves to dismiss the claims against her, those being the nineteenth, twentieth, twenty-first, and twenty-second causes of action, as

being barred by the statute of limitations pursuant to CPLR 3211 (a) (5), as failing to state a cause of action pursuant to CPLR 3211 (a) (7), and for lack of personal jurisdiction pursuant to CPLR 3211 (a) (1). In support of the motion to dismiss, defendant Schwarting submits an attorney affirmation, a copy of the complaint, and a memorandum of law. Defendant Schwarting argues that she was only served with the amended complaint, not the original complaint, and that due to this failure, the court lacks personal jurisdiction over her. Defendant Schwarting further argues that the complaint was not timely filed and that the allegations fail to assert claims against her. By way of attorney affirmation, defendants Good Samaritan Hospital and CHSLI oppose the motion of defendant Schwarting to the extent that the cross-claims against defendant Schwarting survive, as defendant Schwarting's notice of motion is silent as to the cross-claims, that the cross-claims have not yet accrued, and the cross-claims would be converted, in any event, to third-party claims. By way of attorney affirmation, the Lung Center defendants oppose the motion of defendant Schwarting on the ground that defendants have alleged viable the cross-claims for indemnification and contribution against defendant Schwarting. Defendant Schwarting replies to all opposition.

Plaintiff opposes the motion by defendant Schwarting and cross-moves for a default judgment against defendant Schwarting. Plaintiff submits in support thereof, *inter alia*, an attorney affirmation, plaintiff's sworn affidavit, a copy of the pleadings, affidavit of service, stipulation between counsel, and correspondence. Plaintiff argues that the complaint was timely filed, the amended complaint was timely served, and that the complaint sufficiently alleges the elements of her claims against defendant Schwarting. Defendant Schwarting opposes plaintiff's cross-motion by attorney affirmation and includes as exhibits thereto certain correspondence between counsel. Plaintiff replies.

The Lung Center defendants move for leave to amend their answer pursuant to CPLR 3025 (b) to assert a defense of dismissal based upon documentary evidence and upon the granting of same, move to dismiss plaintiff's complaint and any cross-claims asserted against them pursuant to CPLR 3211 (a) (1), (3), (5), and (7). In support of their motion, defendants submit, *inter alia*, an attorney affirmation, a copy of the pleadings, the services agreement between defendants Good Samaritan and the Lung Center, the affirmations of defendant doctors Zielinski, Saraceno, Engelberg, Khanna, Wohlberg, Zwang, and Hall, the employment agreements between the Lung Center and the defendant doctors, and a proposed amended answer. Defendants contend that the individual partners of defendant the Lung Center cannot be held liable because the improper accessing of medical records is not considered professional services pursuant to Partnership Law §26, that the complaint fails to state a cause of action to support a claim for punitive damages, the claims for negligent supervision and negligent retention are barred by the three-year statute of limitations, that liability may not be imposed for the improper

disclosure of plaintiff's medical records, which was outside the scope of employment of defendants Schwarting and Zarilli, and the pertinent services contract between defendant Good Samaritan and the Lung Center excludes cross-claims for contribution and indemnification. Plaintiff opposes the motion and submits an attorney affirmation and certain correspondence. Plaintiff argues that it has alleged claims for negligent supervision and retention, that questions of fact exist, and that the motion is premature in that discovery has not commenced. The Hospital defendants oppose the motion to dismiss the cross-claims and submit an attorney affirmation and a copy of the service agreement between defendants Good Samaritan Hospital and the Lung Center executed on March 2, 2011. The Hospital defendants argue that the motion to dismiss is premature, as the liability of the Lung Center defendants has not been established. The Hospital defendants further assert that if the Lung Center defendants are found to be liable to plaintiff on any of her claims against them, then the Lung Center defendants would be liable to Good Samaritan Hospital for breach of the service agreement, entitling Good Samaritan Hospital to indemnification. The Lung Center defendants submit reply attorney affirmations. Plaintiff files a sur-reply attorney affirmation.

Addressing first plaintiff's motion for a default judgment, the plain language of the stipulation between counsel regarding the date upon which defendant Schwarting was to respond to the complaint establishes that she was not in default. In that regard, 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 respond to the complaint until July 22, 2016 and a stipulation was executed in furtherance of that agreement. The motion to dismiss was served on July 22, 2016. The language of the stipulation did not limit defendant Schwarting's response to an answer and thus included the within motion to dismiss. As such, the motion to dismiss was timely served pursuant to the unambiguous terms of the stipulation. Moreover, defendant Schwarting reasonably believed that pursuant to the stipulation, she had until July 22, 2016 to file the motion to dismiss. Under these circumstances, there is no evidence of willful misconduct or an intent to abandon the action nor any prejudice to 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]). In addition, defendant Schwarting has raised possible meritorious defenses (see *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]). Thus, plaintiff's motion for a default judgment is denied.

The court next addresses the motion by the Lung Center defendants for leave to amend their answer pursuant to CPLR 3025 (b) to assert a defense of dismissal based upon documentary evidence.

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement

it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Whether to grant or deny leave to amend is committed to the court's discretion (**Edenwald Contracting Co., Inc. v City of New York**, 60 NY2d 957, 959 [1983]). In the absence of prejudice or surprise to the opposing party, leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted provided the amendment sought is not "palpably insufficient or devoid of merit" (**Emigrant Savings Bank v Walters**, 155 AD3d 829, 830, 63 NYS3d 708 [2d Dept 2017]; see also **Maldonado v Newport, Inc.**, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; **Clark v Clark**, 93 AD3d 812, 941 NYS2d 192 [2d Dept 2012]). No evidentiary showing of merit is required on a motion under CPLR 3025 (b) (see **Lucido v Mancuso**, 49 Ad3d 220, 851 NYS2d 238 [2d Dept 2008]). The party opposing the amendment has the burden of establishing prejudice or surprise (**Garafola v Wing Inc.**, 139 AD3d 793, 33 NYS3d 287 [2d Dept 2016]).

Here, the proposed answer succinctly contains an additional affirmative defense based upon documentary evidence. On its face, the amendment is neither palpably insufficient nor devoid of merit. In addition, there is no evidence of prejudice or surprise to plaintiff in granting the Lung Center defendants' application at this stage of the litigation. As such, the Lung Center defendants are granted leave to amend their answer pursuant to CPLR 3025 (b) and in that regard, their proposed amended answer is deemed served and filed *nunc pro tunc* as of the return date of their motion (see **Bank of America, N.A. v DeNardo**, 151 AD3d 1008, 58 NYS3d 469 [2d Dept 2017]).

The court addresses next defendant Schwarting's motion to dismiss the counts asserted against her pursuant to CPLR 3211 (a) (5), (7), and (8), those being the nineteenth, twentieth, twenty-first, and twenty-second causes of action sounding in intentional infliction of emotional distress, *prima facie* tort, and gross negligence, respectively.

Defendant Schwarting argues that dismissal of the complaint as against her is warranted pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction in that plaintiff served defendant Schwarting only with the summons and amended complaint and not the original complaint. Defendant argues that this is a jurisdictional defect under CPLR 306-b, which is not cured by the service of the summons and amended complaint. There is no dispute that defendant Schwarting was served with the summons and amended complaint on June 20, 2016, which is within 120 days of March 7, 2016, the date of the filing of the original complaint.

Pursuant to CPLR 3025 (a), plaintiff amended the original complaint as of right. The amended complaint then superceded the original complaint and became

the only complaint in the case (see *Seidler v Knopf*, 186 AD3d 886, 130 NYS3d 40 [2d Dept 2020]; *R & G Brenner Income Tax Consultants v Gilmartin*, 166 AD3d 685, 89 NYS3d 85 [2d Dept 2018]). Moreover, where a summons and complaint have been filed but not served, the service of an amended complaint, without leave of court is proper, as it was “served before the period for responding to the original complaint has expired” (*O’Keefe v Baiettie*, 72 AD3d 916, 899 NYS2d 326 [2d Dept 2010]). Being that the summons and amended complaint were served upon defendant Schwarting within 120 days of the filing of the original complaint, there is no basis to dismiss the complaint pursuant to CPLR 3211 (a) (8) (*Id.*).

Defendant Schwarting next argues that the claims are untimely, as the three year statute of limitations on plaintiffs’ claims against her expired on March 6, 2016. The court notes that March 6, 2016 was a Sunday. Pursuant to §25-a of the New York General Construction Law when “any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday, or a public holiday, such act may be done on the next succeeding business day....” (General Construction Law §25-a; see also *Matter of American Cas. Co. v McCoy*, 138 AD2d 485, 525 NYS2d 884 [2d Dept 1988]). The provisions of General Construction Law §25-a have been applied to statutes of limitations (see *Id.*). Thus, this action was timely commenced by the filing of a summons and complaint on Monday, March 7, 2016. Moreover, plaintiff alleges that “beginning on March 6, 2013, and continuing throughout the month of March, 2013, in email exchanges and other communications” defendants Schwarting and Villano “worked together and conspired to have” defendant Schwarting “access, view, or obtain plaintiff’s medical information relating to her treatment at Good Samaritan.” The complaint further alleges that on or about March 25, 2013, defendant Schwarting “accessed, viewed, or obtained” the plaintiff’s psychiatric consultation and that the disclosure of plaintiff’s information by Schwarting did not occur until March 25, 2013. Based on the foregoing, the claims asserted against defendant Schwarting are not barred by the statute of limitations.

Moving next to defendant Schwarting’s motion to dismiss pursuant to CPLR 3211 (a) (7), it is well established that the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Matneja v Zito*, 163 AD3d 800, 801, 81 NYS3d 174 [2d Dept 2018]; see also *Rosenblum v Island Custom Stairs, Inc.*, 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015]; *Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization*, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting *Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). The test of the sufficiency of a pleading is “whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be

discerned from its averments' ” (*Hampshire Prop. v BTA Bldg. and Developing, Inc.*, 122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], quoting *Leon v Martinez*, 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 [1994]; see also (*JPMorgan Chase v J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], quoting *Moore v Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [1989]). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11,19, 799 NYS2d 170 [2005]). However, “conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts” (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; see also *DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v Interboro Mut. Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; *Greschler v Greschler*, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]). Thus, “factual allegations which are flatly contradicted by the record are not presumed to be true, and ‘[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a) (7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action’ ” (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 915, 891 NYS2d 445 [2d Dept 2009], quoting *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]). On a motion to dismiss, it is well established that the court may consider the affidavit of the plaintiff to remedy any purported defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY 633, 636, 389 NYS2d 314, 316 [1976]; *Sheroff v Dreyfus Corp.*, 50 AD3d 877, 855 NYS2d 902 [2d Dept 2008]).

To state a claim for intentional infliction of emotional distress, plaintiff must allege (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress (see *Howell v. New York Post Co.*, 81 NY2d 115, 121, 596 NYS2d 350 [1993]; *Bernat v. Williams*, 81 AD3d 679, 916 NYS2d 614 [2d Dept 2011]).

Defendant Schwarting argues that the conduct complained of was not sufficiently outrageous or extreme to support a claim for intentional infliction of emotional distress and that plaintiff has not alleged severe or extreme mental pain or anguish as required by law. This Court agrees that the alleged conduct is not sufficiently outrageous or extreme in degree “as to exceed all bounds of decency” (*Fischer v. Maloney*, 43 NY2d 553, 557, 402 NYS2d 991 [1978]; see also *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 29 NYS3d 879

[2016](broadcasting of a recording of a patient's last moments of life without consent was not sufficiently extreme or outrageous) or "regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v American Home Products Corp.*, 58 NY2d 293, 461 NYS2d 232 [1983]); see also *Freihofer v Hearst Corp.*, 65 NY2d 135, 490 NYS2d 735 [1985]; *Howell v. New York Post Co.*, *supra*; *Andrews v Bruk*, 220 AD2d 376, 631 NYS2d 771 [2d Dept 1995]; *Doin v. Dame*, 82 AD3d 1338, 918 NYS2d 253 [3d Dept. 2011]; *Burton v. Matteliano*, 81 AD3d 1272, 916 NYS2d 438 [4th Dept. 2011]). Moreover, a cause of action for intentional infliction of emotional distress should not be entertained where, as here, the conduct complained of falls within the ambit of other traditional tort liability (see *Fischer v. Maloney*, *supra*; *Doin v. Dame*, *supra*).

Plaintiff's claim sounding in conspiracy to commit intentional infliction of emotional distress cannot be stated, as "New York does not recognize civil conspiracy to commit a tort as an independent cause of action rather, such a claim stands or falls with the underlying tort" (*Barns & Farms Realty, LLC v Novelli*, 82 AD3d 689, 691, 917 NYS2d 691 [2d Dept 2011]; *Hebrew Inst. for Deaf & Exceptional Children v Kahana*, 57 AD3d 734, 735, 870 NYS2d 85 [2d Dept 2008]). Inasmuch as plaintiff has not stated a claim for intentional infliction of emotional distress, the conspiracy count is dismissed as well pursuant to CPLR 3211 (a) (7).

Plaintiff's twenty-first count against defendant Schwarting titled prima facie tort requires four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful (see *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 464 NYS2d 712 [1983]). "A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143, 490 NYS2d 735 [1985]). In that regard, the complaint must contain "a particularized statement of the reasonable, identifiable, and measurable special damages" (*Varela v Investors Ins. Holding Corp.*, 185 AD2d 309, 311 [2d Dept 1992]). Broad and conclusory claims of damages are insufficient to state a cause of action for prima facie tort (*Id.*). In addition, the complaint must allege that the defendant's actions were motivated solely by defendant's "disinterested malevolence" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333, 464 NYS2d 712 [1983]; *Lisi v Kanca*, 105 AD3d 714, 961 NYS2d 592 [2d Dept 2013]), "by which is meant that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d at 333, 464 NYS2d 712 [citations omitted]). Here, the complaint fails to allege that defendant Schwarting's sole motivation for her actions were due to disinterested malevolence, as required. As to damages, the complaint alleges defendants' "actions have caused special damages

to plaintiff' and that plaintiff "suffered embarrassment, humiliation, severe emotional and mental anguish and pain and suffering." These broad and conclusory allegations lack the required specificity necessary to sustain this claim (*Varela v Investors Ins. Holding Corp., supra*). Thus, plaintiff's prima facie tort cause of action against defendant Schwarting is dismissed pursuant to CPLR 3211 (a) (7).

As to the last claim asserted by plaintiff against defendant Schwarting sounding in gross negligence, the plaintiff must "demonstrate that the defendant owed the plaintiff a duty and the defendant failed to exercise 'even slight care' in the discharge of that duty" (*Dilworth v Goldberg*, 914 FSupp2d 433, 473 [SDNY 2012] quoting *Food Pageant, Inc. v Consol. Edison Co.*, 54 NY2d 167, 172, 445 NYS2d 60 [1981]). Such a claim "differs in kind, not only degree, from one of ordinary negligence", and to constitute gross negligence, a party's conduct must be indicative of intentional wrongdoing or evince a reckless indifference to the rights of others (see *Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823, 595 NYS2d 381 [1993]; *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554, 583 NYS2d 957 [1992]; *Bennett v State Farm Fire and Casualty Company*, 161 AD3d 926, 929, 78 NYS3d 169 [2d Dept 2018]). "Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence" and whether such a claim exists is ordinarily "a matter to be determined by the trier of fact" (*Dolphin Holdings, Ltd v Gander & White Shipping, Inc.*, 122 AD3d 901, 902, 998 NYS2d 107 [2d Dept 2014]). Here, accepting the facts as alleged in the amended complaint and plaintiff's affidavit as true, and according plaintiff the benefit of every possible favorable inference, plaintiff has stated a claim for gross negligence by asserting that defendant Schwarting, while office manager at defendant the Lung Center, accessed, viewed, and disclosed plaintiff's confidential medical information to third parties without plaintiff's knowledge or consent (see *Randi A.J. v Long Island Surgi-Ctr.*, 46 AD3d 74, 842 NYS2d 558 [2d Dept 2007])(wrongful disclosure of patient's confidential medical information evidenced gross negligence). The court notes that defendant Schwarting alleges for the first time in her reply papers that she never owed a duty to keep plaintiff's medical records confidential. However, no case law is cited in support of this newly raised argument. In any event, as it is being raised for the first time in her reply papers, it will not be considered herein (see, e.g., *All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 836, 16 NYS3d 539 [2d Dept 2015])(reply papers do not permit movant to introduce new arguments); *American Express Centurion Bank v Cutler*, 81 AD3d 761, 763, 916 NYS2d 622 [2d Dept 2011], quoting *Yeum v Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 71 AD3d 739, 895 NYS2d 742 [2010]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562, 582 NYS2d 712 [1st Dept 1992] citing *Lazar v Nico Indus.*, 128 AD2d 408, 409-410 [1st Dept 1987]; see also *Rubens v Fund*, 23 AD3d 636; 805 NYS2d 640 [2d Dept 2005], citing *Sanz v Discount Auto*, 10 AD3d 395, 780 NYS2d 763 [2d Dept 2004]; *Matter of TIG Ins. Co. v Pellegrini*, 258 AD2d 658, 685 NYS2d 777 [2d Dept 1999]; *Dannasch v*

**Bifulco**, 184 AD2d 415, 417, 585 NYS2d 360 [1st Dept1992]). Thus, defendant Schwarting's motion to dismiss the twenty-second cause of action for gross negligence is denied.

The court notes that defendant Schwarting did not move to dismiss the cross-claims asserted against her and thus the court need not consider the arguments raised by the remaining defendants in regards to their cross-claims. Notwithstanding, any such arguments raised by the Hospital and Lung Center defendants are rendered academic, inasmuch as plaintiff has asserted a gross negligence claim against defendant Schwarting.

The court next addresses the motion by the Lung Center defendants to dismiss the claims asserted against them in the complaint, those being the twenty-third and twenty-fourth causes of action, as well as dismissal of the cross-claims asserted against them by the Hospital defendants.

The Lung Center defendants assert that the Lung Center doctors are members of a limited liability partnership and can only be held liable for the negligence, wrongful acts or misconduct committed by an employee under direct supervision of a partner when the employee is "rendering professional services in his or her capacity as an employee of the limited liability partnership" (Partnership Law § 26 (2) (c)). Here, plaintiff admits she was never a patient of the Lung Center. Thus, any alleged negligence, wrongful acts, or misconduct on the part of either defendant Schwarting or Dr. Zarilli in improperly viewing and disclosing plaintiff's medical information, were not in connection with their rendering professional services to the plaintiff (see (**Doe v Gutherie Clinic, Ltd.**, 22 NY3d 480, 485, 982 NYS2d 431 [2014])). As such, the claims asserted against the Lung Center doctors are dismissed.<sup>1</sup>

In addition, there is no liability against defendant the Lung Center for the acts of its employees that were not in furtherance of its business and not within the scope of their employment (**Doe v Gutherie Clinic, Ltd.**, 22 NY3d at 485, 982 NYS2d 431).<sup>2</sup> In this regard, and particularly relevant here, is the ruling by the Court of

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<sup>1</sup>The court notes that defendant Dr. Zarilli is represented by separate counsel and has not moved herein to dismiss the claims asserted against her, which do not include the twenty-third and twenty-fourth causes of action.

<sup>2</sup>Conversely, under the doctrine of respondeat superior, an employer may be held vicariously liable for injuries resulting from intentional torts or negligence committed by an employee acting within the scope of his or her employment (see **Judith M. v Sisters of Charity Hosp.**, 93 NY2d 932, 693 NYS2d 67 [1999]; **Hoffman v Verizon Wireless, Inc.**, 125 AD3d 806, 5 NYS3d 123 [2d Dept 2015]). An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his or her employer, or if his

Appeals in *Doe v Gutherie Clinic, Ltd.*, that there is no absolute liability against a medical corporation for an employee's dissemination of a patient's confidential information, as the employee is acting outside the scope of their employment in doing so (22 NY3d at 485). However, "a direct cause of action against the medical corporation for its own misconduct, be it negligent hiring, supervision or other negligence may still be maintained...and [the medical corporation] may also be liable in tort for failing to establish adequate policies and procedures to safeguard the confidentiality of patient information or to train their employees to properly discharge their duties under those policies and procedures" (*Doe v Gutherie Clinic, Ltd.*, 22 NY3d 480, 485, 982 NYS2d 431 [2014]).

Here, the claims of negligent supervision and negligent retention can only be asserted against defendant the Lung Center. As to these claims, the Lung Center defendants do not seek to dismiss the claims in their entirety as against the Lung Center but rather they argue that certain aspects of those claims should be stricken. In that regard, the Lung Center defendants assert that the plaintiff's request for punitive damages on her negligent supervision and negligent retention claims should be stricken. Punitive damages are warranted where the conduct of the party being held liable evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes wilful or wanton negligence or recklessness (*Lee v Health Force, Inc.*, 268 AD2d 564, 702 NYS2d 108 [2d Dept 2008]; *Nooger v Jay-Dee Fast Delivery*, 251 AD2d 307, 673 NYS2d 1006 [2d Dept 1998]). Punitive damages may be awarded when defendant's conduct has a high degree of moral culpability. Such conduct need not be intentional and it is sufficient if it is reckless and wantonly negligent as to be the equivalent of a conscious disregard for the rights of others (*Rinaldo v Mashayekhi*, 185 AD2d 435, 585 NYS2d 615 [3d Dept 1992]). In order to recover punitive damages, plaintiff must allege that the egregious conduct directed at plaintiff was part of a pattern directed at the public generally (see *Rocanova v. Equitable Life Assurance Soc'y of the United States*, 83 NY2d 603, 612 NYS2d 339 [1994]; *Jacobson v. New York Property Ins. Underwriting Assoc.*, 120 AD2d 433, 501 NYS2d 882 [1st Dept 1986]). The purpose of punitive damages is not to remedy private wrongs but to vindicate public rights (see *Reads Co., LLC v Katz*, 72 AD3d 1054, 900 NYS2d 131 [2d Dept 2010]). Here, plaintiff does not allege that the conduct of

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or her act may be reasonably said to be necessary or incidental to such employment (see *Scott v Lopez*, 136 AD3d 885, 25 NYS3d 298 [2d Dept 2016]; *Gui Ying Shi v McDonald's Corp.*, *supra*; *Pinto v Tenenbaum*, 105 AD3d 930, 963 NYS2d 699 [2d Dept 2013]). "Generally, when a plaintiff seeks to recover damages against an employer based on an employee's actions committed within the scope of his or her employment, the employer is liable under the doctrine of respondeat superior, not negligent hiring or supervision" (*Segal v St. John's Univ.*, 69 AD3d 702, 703, 893 NYS2d 221 [2d Dept 2010]).

defendant the Lung Center was egregious or that it was directed at the public generally, as required to recover punitive damages.

Next, in regards to plaintiff's negligent supervision and negligent retention claims, the Lung Center defendants argue that their alleged failure to investigate the conduct of defendant Schwarting and Dr. Zarilli in accessing medical information of another patient, occurred prior to March 6, 2013, and such allegations are therefore barred by the statute of limitations. A necessary element of a cause of action for negligent retention is that the employer knew or should have known of the offending employee's propensity to commit the conduct that caused the plaintiff's injury (see *DeJesus v DeJesus*, 132 AD3d 721, 18 NYS3d 103 [2d Dept 2015]; *John B. v Allegro Vivace Music School, Inc.*, 113 AD3d 800, 979 NYS2d 531 [2d Dept 2014]; *Evans v City of Mount Vernon*, 92 AD3d 829, 939 NYS2d 130 [2d Dept], *lv denied* 20 NY3d 852, 957 NYS2d 689 [2012]; *Bumpus v New York City Tr. Auth.*, 47 AD3d 653, 654, 851 NYS2d 591 [2d Dept 2008] [internal quotation marks and citation omitted]; see also *Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801, 801–02, 893 NYS2d 235 [2d Dept 2010]). Similarly, to prevail on a negligent supervision claim requires the plaintiff to prove that the defendant knew or should have known about the employee's propensity for the conduct that caused the plaintiff's injury (see e.g. *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161, 654 NYS2d 791 [2d Dept 1997]; *Mirand v City of New York*, 84 NY2d 44, 49, 614 NYS2d 372 [1994]; see also *Jackson v New York Univ. Downtown Hosp.*, *supra*, 69 AD3d at 801, 893 NYS2d 235; *Bumpus*, *supra*, 47 A.D.3d at 654, 851 N.Y.S.2d 591; *Peter T. v Children's Vil., Inc.*, 30 AD3d 582, 586, 819 NYS2d 44 [2d Dept 2006]). No statutory requirement exists that negligent supervision or negligent retention claims be pled with specificity (*Kenneth R.*, 229 AD2d at 162, 654 N.Y.S.2d 791). However, "bare legal conclusions and/or factual claims flatly contradicted by documentary evidence should be dismissed pursuant to CPLR 3211(a)(7)" (*Id.* [internal quotation marks and citation omitted]).

Here, accepting the facts as alleged in the complaint and plaintiff's affidavit as true and according plaintiff the benefit of every possible favorable inference, the complaint sufficiently alleges claims for negligent supervision and negligent retention as against defendant the Lung Center (see *Bumpus v New York City Tr. Auth.*, 47 AD3d 653, 654, 851 NYS2d 591 [2d Dept 2008]; *Kenneth R.*, *supra*; see also *Quiroz v Zottola*, 96 AD3d 1035, 948 NYS2d 87 [2d Dept 2012]). Moreover, whether the Lung Center knew or should have known of the alleged propensity of defendants Schwarting and Zarilli to access and disclose patient information may necessarily involve alleged prior bad acts on the part of both Schwarting and Dr. Zarilli. The issues of notice or knowledge on the part of the Lung Center raise questions of fact that cannot be decided on a motion to dismiss (see *Anglero v Hanif*, 140 AD3d 905, 35 NYS3d 152 [2d Dept 2016]; *Stewart v New York City Tr. Auth.*, 50 AD3d 1013, 856 NYS2d 638 [2d Dept 2008]; *City Line Rent A Car, Inc.*

*v Alfess Realty, LLC*, 33 AD3d 835, 823 NYS2d 214 [2d Dept 2006]; see also *Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 85 NYS3d 562 [2d Dept 2018]; *Navaeh T. v City of New York*, 132 AD3d 840, 18 NYS3d 415 [2d Dept 2015]).

The Lung Center defendants next argue that they were under no duty to ensure that plaintiff's medical records from Good Samaritan Hospital were not accessed and disclosed to third parties and purportedly that any allegations regarding same should be stricken from the negligent supervision and negligent hiring counts of the complaint. While the alleged actions of defendants Schwarting and Dr. Zarilli in accessing and disclosing plaintiff's medical records are outside the scope of their employment (*Doe v Gutherie Clinic, Ltd.*, 22 NY3d 480, 485, 982 NYS2d 431 [2014]), whether the Lung Center defendants knew of the alleged propensities of defendants Schwarting and Dr. Zarilli and whether it was foreseeable that defendants Schwarting and Dr. Zarilli, as employees of the Lung Center, could access and disclose plaintiff's medical records from Good Samaritan Hospital, are questions of fact that cannot be decided on a motion to dismiss (see *Anglero v Hanif, supra*; *Johansmeyer v New York City Dept. of Educ., supra*; *Navaeh T. v City of New York, supra*). Further, discovery would be required on these issues prior to any determination as to the viability of these claims. While the court notes that the Lung Center doctors submitted affirmations denying any knowledge that an employee of the Lung Center improperly accessed and reviewed Good Samaritan Hospital records, such self-serving affirmations are insufficient on a motion to dismiss (see *Gawrych v Astoria Federal Savings and Loan*, 148 AD3d 681, 48 NYS3d 450 [2d Dept 2017]; *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]).

The Lung Center defendants also move to dismiss the cross-claim asserted against them by defendant Good Samaritan Hospital sounding in contractual indemnification. The Lung Center defendants rely upon a certain service agreement between the Lung Center and Good Samaritan Hospital in support of the dismissal of the cross-claim.

The right to contractual indemnification depends upon the specific language of the contract between the parties (see *Sovereign Bank v Biagioni*, 115 AD3d 847, 982 NYS2d 322 [2d Dept 2014]; *Kielty v AJS Constr. of L.I., Inc.*, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]; *Kader v City of NY. Hour. Preserv. & Dev.*, 16 AD3d 461, 791 NYS2d 634 [2d Dept 2005]; *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939, 634 NYS2d 588 [4th Dept 1995]). Indemnification provisions are "strictly construed" (*Davis v Catsimatidis*, 129 AD3d 766, 768, 12 NYS3d 141 [2d Dept 2015]). Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire

agreement and the surrounding circumstances” (*Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999-1000, 47 NYS3d 121 [2d Dept 2017] [internal quotation marks and citations omitted]; *LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]; see also *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 521 NYS2d 216 [1987]; *Blank Rome, LLP v Parrish*, 92 AD3d 444, 938 NYS2d 284 [1st Dept 2012]; *Torres v LPE Land Dev. & Constr. Inc.*, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; *Canela v TLH 140 Perry St.*, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]).

Here, the service agreement provides, in pertinent part, that the Lung Center and the Lung Center doctors shall participate in and comply with the Hospital’s compliance program, comply with all applicable federal and state statutes, comply with the bylaws, rules, regulations, and policies of the Hospital’s medical staff, and that the Lung Center and Lung Center doctors may be privy to information regarding patients “obtained by them or disclosed to them, or known to them as a consequence of their relationship with the Hospital...[and] Group and each physician shall not in any manner, directly or indirectly, disclose to any third party whatsoever, or use for any purpose other than to carry out their duties hereunder, any such confidential information.”

While the service agreement requires the Lung Center defendants to comply with its provisions, the service agreement does not contain any indemnification or hold harmless language. In the absence of any specific indemnification language, the third cross-claim asserted by Good Samaritan Hospital for contractual indemnification is dismissed pursuant to CPLR 3211 (a)(1) and (a)(7) (see *Torres v 63 Perry Realty, LLC*, 123 AD3d 911, 1 NYS3d 142 [2d Dept 2014]).

The Lung Center defendants also seek to dismiss the Hospital defendants’ cross-claims for contribution and common law indemnification. “Implied, or common-law, indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other” (*Castillo v Port Auth. of New York & New Jersey*, 159 AD3d 792, 795, 72 NYS3d 582 [2d Dept 2018], quoting *Mas v Two Bridges Assocs.*, 75 NY2d 680, 690, 555 NYS2d 669 [1990]). “Common law indemnification is warranted where a defendant’s role in causing the plaintiff’s injury is solely passive, and thus its liability is purely vicarious” (*Bivona v Danna & Assoc., P.C.*, 123 AD3d 956, 957, 999 NYS2d 490, 493 [2d Dept. 2014]). As such, one seeking common law indemnification must be free from negligence and to the extent the party has participated in any wrongdoing, the party is not entitled to indemnification (*Bivona v Danna & Assoc., P.C.*, 123 AD3d 956, 999 NYS2d 490 [2d Dept. 2014]; *Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 484, 899 NYS2d 30 [1st Dept 2010], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d

596 [1st Dept 1999]). Common-law indemnification “is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer” (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d at 484). Contribution or apportionment among tortfeasors, rather than a shifting of the entire loss through indemnification, is the proper rule when two or more tortfeasors share in responsibility for an injury (see *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 516 NYS2d 451 [1987]). The critical requirement for contribution is that “the parties must have contributed to the same injury” (*Razdolskaya v Lyubarsky*, 160 AD3d 994, 997, 76 NYS3d 95 [2d Dept. 2018]; see also *DiMarco v New York City Health & Hosps. Corp.*, 187 AD2d 479, 480, 589 NYS2d 580 [2d Dept 1992]; see also *Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237 [1997]). “A claim for contribution may be established, among other ways, where the party from whom contribution is sought owed a duty to the injured plaintiff, and a breach of this duty contributed to the plaintiff’s alleged injury” (*Razdolskaya v Lyubarsky*, 160 AD3d at 997, 76 NYS3d at 99; see also *Castillo v Port Auth. of New York & New Jersey*, *supra*, 159 AD3d at 795; *Bivona v Danna & Assoc., P.C.*, 123 AD3d at 958-59, 999 NYS2d at 493-94 ).

Based upon these established principles of law, the cross-claims for common law indemnification and contribution are dismissed as against the Lung Center doctors, as there are no direct claims that can be asserted against them. As to defendant the Lung Center, dismissal of the cross-claims is premature, inasmuch as there has been no discovery on plaintiff’s claims against the remaining defendants to determine what liability, if any, can be attributed to them. Further, inasmuch as plaintiff has stated claims against defendant the Lung Center for negligent supervision and negligent retention, the cross-claims asserted by the Hospital defendants for common law indemnification and contribution stand.

Accordingly, the motion by defendant Schwarting to dismiss the claims asserted against her is granted, except as to the gross negligence claim. The motion by plaintiff for a default judgment against defendant Schwarting is denied. The motion by the Lung Center defendants to amend their answer is granted and their motion to dismiss is granted, only as to the claims asserted against the Lung Center doctors. The cross-claim asserted by Good Samaritan Hospital for contractual indemnification is dismissed as are the remaining cross-claims asserted against the Lung Center doctors.

The foregoing constitutes the **Decision** and **Order** of the Court.

Dated: 11-18-20

**Hon. Denise F. Molia**

HON. DENISE F. MOLIA

A.J.S.C.