SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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PA, an infant by his mother and legal guardian, CATERINA ANDORFER-LOPEZ, and CATERINA ANDORFER-LOPEZ, individually,

Plaintiffs,

Index No.: 156060/2019

-against-

DECISION AND ORDER

Motion Seq. #001, #002 and Cross-Motions

THE NEW YORK and PRESBYTERIAN HOSPITAL, THE CITY OF NEW YORK, BELINDA MARQUIS, M.D., SUSAN SAMUELS, M.D., and LARA GORDON, M.D.,

Defendants.

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J. MACHELLE SWEETING, J.S.C.:

Pending before the court is Motion Sequence #001, wherein defendants Lara Gordon, M.D. ("Gordon"), Belinda Marquis, M.D. ("Marquis') and Susan Samuels, M.D. ("Samuels") (collectively "defendant doctors") move, pursuant to CPLR 3211(a)(8), to dismiss all causes of action against them for lack of personal jurisdiction. Also pending before the court is Motion Sequence #002, wherein defendant The City of New York ("City") moves for an order, pursuant to CPLR 3025(b), granting the City leave to amend the answer. The City also moves, pursuant to CPLR 3211 (a)(7), for an order dismissing the complaint against the City for failure to state a cause of action. Defendant The New York and Presbyterian Hospital ("NYP") cross-moves, pursuant to

CPLR 3211 (a)(7), to dismiss the complaint against NYP, Marquis, Samuels and Gordon, and cross-moves, pursuant to CPLR 3124 and 3101, for outstanding discovery.

Additionally, plaintiffs cross-move for an order deeming the notice of claim, previously served on May 6, 2020, to have been timely served, *nunc pro tunc*, or in the alternative, granting plaintiffs leave to serve and file a late notice of claim, *nunc pro tunc*. Plaintiffs also seek an order, pursuant to CPLR §3025, granting plaintiffs leave to amend the verified complaint.

BACKGROUND

Plaintiff, Caterina Andorfer-Lopez ("Andorfer-Lopez"), is the mother and natural guardian of infant plaintiff PA ("PA") (collectively, "plaintiffs"), who, according to the complaint, "suffered from the physically debilitating manifestations of a Chiari malformation" (Complaint, ¶ 17). On May 10, 2017, based upon the medical advice and recommendations of Jeffrey Greenfield, M.D. ("Dr. Greenfield"), a pediatric neurological surgeon affiliated with defendant New York-Presbyterian/Weill Cornell Medical Center ("NYP" or "WCMC"), PA underwent posterior fossa decompression surgery at Banner Desert Medical Center in Mesa, Arizona to correct his Chiari malformation. This surgery was conducted by PA's local treatment team as PA and plaintiff were residents of the State of Arizona.

On or about September 18, 2017, PA underwent a second surgery in Arizona, with his local treatment team. Because of PA's continuing symptoms and additional diagnostic testing, Andorfer-Lopez sought treatment for PA with Dr. Greenfield at NYP. Between May 2018 and September of 2018, Dr. Greenfield ordered diagnostic testing to evaluate PA's objective signs and symptoms. This testing included the insertion of an intracranial pressure bolt, which was

performed at WCMC. Thereafter, Dr. Greenfield recommended that PA undergo suboccipital decompression and duraplasty. Andorfer-Lopez agreed with Dr. Greenfield's advised plan of treatment.

On or about September 28, 2018, plaintiffs were notified by WCMC personnel that the surgery was scheduled to be conducted by Dr. Greenfield at WCMC on October 10, 2018. On or about October 1, 2018, PA was admitted to WCMC for 48-hour presurgical testing. The October 1, 2018 medical records indicate: "Patient has been clinically stable since admission, no true episodes captured like the ones mother has been seeing at home" (Caran affirmation, exhibit H).

Just after arriving at NYP, Andorfer-Lopez posted information about PA's medical care on social media (Caran affirmation, exhibit I). On or about October 2, 2018, after learning about PA's condition on social media, Jamie Hamblett ("Hamblett"), PA's biological father, contacted NYP and/or WCMC personnel. Hamblett complained that NYP personnel had failed to obtain his consent for any of the extensive treatment PA had received thus far at WCMC. Hamblett demanded that NYP personnel cancel PA's surgery scheduled for October 10, 2018. Additionally, Hamblett also stated that he feared Andorfer-Lopez was exploiting PA's medical condition on social media (Caran affirmation, exhibit H). Plaintiffs allege that, thereafter, NYP and/or WCMC personnel began disclosing PA's confidential medical information to Hamblett.

On or about October 3, 2018, Defendant NYP personnel refused to permit Andorfer-Lopez to discharge PA from WCMC despite the pre-surgical testing having been completed. Rather, NYP personnel informed Andorfer-Lopez that they required a ruling from a New York Court concerning her custodial rights before permitting PA to be discharged to her care. Andorfer-Lopez informed NYP personnel that Hamblett had no medical decision-making rights with regards to PA, and that he was not permitted to receive PA's confidential medical information. Shortly thereafter, and on

numerous subsequent occasions, Andorfer-Lopez's attorney(s) notified NYP personnel in writing that Hamblett lacked legal status in this regard.

On or about October 5, 2018, NYP and/or WCMC personnel canceled PA's surgery, and NYP and/or WCMC personnel continued to refuse to permit Andorfer-Lopez to discharge PA from WCMC. Sarah Powers ("Powers"), a social worker employed by NYP and/or WCMC, called Hamblett and "strongly encouraged" him to fly to New York (he was and is a resident of the United Kingdom) in order to pursue custody of PA.

Shortly thereafter, on or about October 12, 2018, Powers, on behalf of Defendant NYP, transmitted a report, drafted by Marquis and Samuels, to the New York Statewide Central Register of Child Abuse and Maltreatment (the "SCR") concerning PA. Later that day, Carol Warner ("Warner"), a Child Protective Specialist employed by ACS, spoke to Powers in response to the report to the SCR. According to allegations in the underlying complaint in this action, Powers emphasized to Warner that "the case is a public relation nightmare." In the report, the doctors opined that "[Andorfer-Lopez] inflicts or allows to be inflicted upon [PA] physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (Robinson affirmation, exhibit A [addendum I to child abuse petition]). In the underlying complaint, plaintiffs allege that this report was not based upon any evaluations of Andorfer-Lopez herself.

According to the report, Gordon, a child abuse specialist was contacted by the medical treatment team for a consultation due to "the teams' concern for a diagnosis of Factitious Disorder imposed on Another (FDIA)" (*id.*). The report details the doctors' investigation of these concerns, which were based upon the following:

> "A multidisciplinary approach and review, including social work, Pediatric Neurology, Pediatric Neurosurgery, Pediatric Psychiatry, care coordinators nursing patient services and Medical Ethics was performed. This included extensive review of the subject child's medical history and medical records from both Arizona and New York.
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> 2. According to the NYP-WCMC multidisciplinary team, including Belinda Marquis, MD (Department of Pediatric Neurology/Epilepsy) and Susan Samuels, MD (Director of Child/Adolescent Psychiatry Consultation-Liaison Services), the subject child has had multiple hospitalizations, emergency department visits, and surgeries since March 2017, between living in Arizona and New York. According to same, the subject child has been a patient at NYP-WCMC since in or around July 2018 and, since that time, the medical team has become increasingly concerned that the description of the subject child's illness and medical course as represented by his mother does not match objective data about his current condition. According to same, the medical treatment team believes that the subject child is being subjected to invasive and unnecessary medical procedures and ongoing medical treatment that could have long-term complications, including the risk of unnecessary surgeries, infection and death.
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> 3. According to Dr. Marquis, in reviewing the subject child's medical history between Arizona and New York, the medical treatment team at NYP-WCMC found that the respondent mother misrepresented the subject child's symptoms and clinical course to different medical providers. According to Dr. Marquis, outreach was made by the medical treatment team to both Step by Step Pediatrics (Dr. Alviar) and Banner Health Neurosurgery practice (primarily by Donna Wallace NP). According to Dr. Marquis, both providers expressed concern for Factitious Disorder Imposed Upon Another and that these concerns stemmed from the respondent mother's repeated requests for subspecialty consults that did not appear to be indicated or necessary and reported team splitting. According to Dr. Marquis, the providers explained that the respondent mother misrepresented what other providers have said and the mother insisted on additional testing. According to Dr. Marquis, the providers documentation clarifies that the subject child's symptoms were never witnessed by any health care providers or people other than the respondent mother.
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> 4. According to Dr. Marquis, the same concerns noted by the Arizona providers have been observed by the medical treatment team at NYP-WCMC. Specifically, according to Dr. Marquis, on or about October 1, 2018, the subject child was admitted into inpatient at NYP-WCMC with the respondent mother reporting complaints of headaches, neck pain, leg pain, incontinence, malaise, difficulty sleeping, and staring episodes. According to Dr. Marquis, the subject child was observed by NYP-WCMC staff during his stay and has not had any complaints of headache, pain, difficulty walking, vomiting, or staring events, despite the respondent mother's reports.
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> 5. According to Dr. Gordon, there is concern that the respondent mother is projecting symptoms onto the subject child and doctor shopping to receive medical and surgical treatment for the subject child"

(*id.*)

According to the allegations in the complaint, Marquis, an attending pediatric neurologist, and Samuels, an attending pediatric psychiatrist, (who were not part of PA's treatment team), allegedly made numerous misrepresentations and inaccurate statements regarding PA's medical history and symptomology. According to the complaint, their "collective opinion was rendered in

ignorance" of the fact that PA actually suffered from a Chiari malformation (complaint, ¶ 26). Plaintiffs contend that this report was prepared by NYP, Marquis, and Samuels for ACS "with the explicit purpose of persuading ACS personnel to seek the removal of PA from plaintiff's care" (complaint, ¶26).

According to the doctors' motion papers, in accordance with New York Social Services Law Section 413, "hospitals and physicians are required to report or cause a report to be made when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Furthermore, and in accordance with New York Social Services Law Section 419, "any person, official, or institution participating in good faith in the making of a report [of suspected child abuse or maltreatment] shall have immunity from any liability, civil or criminal, that might otherwise result by reason of such actions."

Plaintiffs' allege that the report was disseminated to ACS without Andorfer Lopez's consent (complaint, ¶ 26) and that the previous day, via electronic mail, Andorfer-Lopez had requested that Dr. Greenfield or someone in his office prepare a report about PA's medical treatment, yet, later that day, Dr. Greenfield responded to Andorfer-Lopez that "the hospital informed me that we were not to create any new documents through the office" (complaint, ¶ 26). On or about October 12, 2018, ACS initiated a child abuse proceeding pursuant to Article Ten of the Family Court Act against Andorfer-Lopez. The sole allegation against her was that she suffered from FDIA (complaint, ¶ 27). Thereafter, and at all times through March 12, 2019, ACS maintained the position before the Honorable Jonathan Shim ("Judge Shim") of the New York County Family Court that PA would be at imminent risk of harm to his life or health were he to be in the care and custody of Andorfer-Lopez. ACS sought to deny Andorfer-Lopez the opportunity to seek medical treatment of PA outside of WCMC (complaint, ¶ 27).

According to the complaint, Andorfer-Lopez informed ACS personnel that Hamblett had no decision-making rights with regards to PA, and that he was not to receive confidential information. "Nonetheless, on numerous occasions up through and including April 29, 2019, ACS personnel disclosed confidential information concerning PA and Andorfer-Lopez to Hamblett" (complaint, ¶ 27). Up to that point, NYP and/or WCMC personnel had not permitted Andorfer-Lopez to remove PA from WCMC without any Court Order or any other legal authority.

Or about October 12, 2018, in response to the applications of counsel for ACS, Judge Shim ordered that PA remain at NYP/WCMC. All orders entered by Judge Shim on that date were over the objection of Andorfer-Lopez and a hearing, pursuant to Section 1027 of the Family Court Act, commenced ("Hearing") (complaint, ¶ 27). On or about October 15, 2018, Judge Shim issued an order that directed that: (1) PA is not to be removed from New York City; (2) Andorfer-Lopez and PA's maternal grandmother, Matilda Andorfer, are to follow up with the medical recommendations for PA only from NYP and WCMC and no other providers; (3) Andorfer-Lopez is excluded from PA's residence; (4) Andorfer-Lopez is to have ACS-supervised visits only; (5) PA's maternal grandmother is to facilitate court-ordered visitation for PA's biological father; and (6) PA's maternal grandmother is to comply with ACS supervision.

On or about October 15, 2018, in response to the applications of counsel for ACS, Judge Shim ordered that PA continue to be removed from the care of Andorfer-Lopez and, instead, be placed in the care of PA's maternal grandmother within the jurisdiction of the City of New York. Andorfer-Lopez was excluded from PA's residence, and was to have no contact with him whatsoever, other than visitation supervised by ACS personnel. Moreover, Andorfer-Lopez was to seek no medical care for PA outside of WCMC. On or about October 29, 2018, Judge Shim continued the order directing the removal of PA from the care of Andorfer-Lopez, but permitted

Andorfer-Lopez to return to PA's residence. She was not, however, permitted to be alone with PA or permitted to administer any medication to him. Furthermore, she was not permitted to seek any medical care for him outside of WCMC.

On or about November 9, 2018, Dr. Greenfield spoke to Brenda Boyce ("Boyce"), who was employed by ACS as a Child Protective Specialist Supervisor. Boyce subsequently memorialized Dr. Greenfield's statements in the ACS records:

> "A. [PA's] diagnosis is 100% accurate (Cairi [sic] Malformation) and he has had the appropriate surgery to attempt to correct his medical concern in Phoenix. However it was not perfect and [Plaintiff] has sought him out to try to get the surgery done more efficiently.
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> B. Dr. Greenfield stated that the decision for [PA] to have surgery was correct however he did not think it was done perfectly and [PA] is still exhibiting symptoms.
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> C. He shared that he was not informed or had knowledge that there was a father involved until the father called the hospital. Dr. Greenfield conveyed that he then met with the hospital lawyers and social workers"

(Complaint, ¶ 30).

Boyce memorialized Dr. Greenfield's statement to ACS personnel that "The surgery . . . has to be done at some point" (*id.*, ¶ 31). On December 7, 2018, Dr. Greenfield said to plaintiff:

> "When I go to court or testify for you or get asked questions about the medical care, I have no concerns or questions about any of the decision-making that you and I have made. We didn't do anything inappropriate. When I made the decision to do the bolt, I can defend that. . . I think you're being a thorough parent. I didn't have any red flags at all until the hospital raised all these issues and said 'Look. We think that [PA's] mom is doing this for secondary gain. We think that there's something going on between the parents. The dad doesn't know what's going on.' I had to take a step back at that point. I don't think that there's going to be any problem with me defending the medical side of things. The social aspect of it and where all that goes and why the hospital and the social workers got all in a tizzy, I'm honestly just staying out of that. It has nothing to do with my decision-making for [PA] or the decision-making that you and I had in terms of his medical care so hopefully that will at least put that part to rest. I don't see a whole lot of controversy there. But we'll see. They've asked me to come to Family Court and I'm happy to testify in front of the judge or whoever else wants to question me so hopefully that will make that easier"

(*id.*), ¶ 32).

According to the complaint, "despite being under compulsion of subpoena for several months," for the first time, on or about March 5, 2019, Dr. Greenfield appeared before Judge Shim at the continued Hearing (complaint, ¶ 34). Previously, Marquis and Gordon had testified on behalf of NYP and/or ACS consistent with the report prepared by Marquis and Samuels. "Dr. Greenfield's testimony conclusively undermined the legal and factual theories underpinning the child abuse proceeding[, yet] ACS continued to advocate for removal of PA from the care and custody of Andorfer-Lopez" (complaint, ¶ 34).

On or about March 12, 2019, Dr. Greenfield concluded his testimony at the continued Hearing. That same day, Judge Shim issued a ruling that PA was to return to Andorfer-Lopez's custody. After PA was returned to Andorfer-Lopez's care, WCMC personnel rescheduled PA's surgery. Between October 2018 and April 2019, NYP and/or WCMC personnel conducted additional diagnostic testing upon PA which indicated the continued existence of objective symptoms of Chiari malformation. Nonetheless, NYP and/or WCMC personnel had otherwise declined to schedule PA for the surgery as recommended by Dr. Greenfield.

On or about March 26, 2019, ACS "initiated their own report to SCR" against Andorfer-Lopez, which, according to the complaint, triggered a collateral investigation and a late night emergency home visit by ACS personnel and New York City Police Department personnel to PA's residence (complaint, ¶ 37).

On or about April 8, 2019, Dr. Greenfield performed suboccipital decompression with autologous duraplasty surgery upon PA as he had recommended in September of 2018. On April 29, 2019, due to the withdrawal of the petition, Judge Shim dismissed the child abuse proceeding with prejudice.

On March 27, 2019, plaintiffs filed a notice of claim. In the notice of claim, plaintiffs recount the facts about how PA came to NYP/WCMC for surgery, based upon the recommendations of Dr. Greenfield. In the notice of claim, plaintiffs further recount Hamblett's, "[PA's] putative, though not legally-established father" contact to NYP/WCMC. In the notice of claim, plaintiffs further allege that:

> "ACS is required to investigate all reports made to the SCR and, within 60 days or fewer, determine whether or not to indicate the case. Despite this clear mandate, ACS failed to make such a determination within the requisite timeframe but, rather, presented Claimant with a Notice of Indication (NOI) on or about December 27, 2018 (the deadline to have done so in this matter was December 4, 2018). More egregiously, ACS personnel delegated their investigatory process to NYP-WCMC which was wholly subsumed into the 1027 Hearing"

(Robinson affirmation, exhibit C).

Further, in the notice of claim, plaintiffs allege that ACS represented to Judge Shim that their investigation was complete, but continued the investigation. Finally, in the notice of claim, plaintiffs allege that:

> "Despite Dr. Greenfield's testimony conclusively undermining the legal theory underpinning the Article Ten petition, ACS maintains the action. ACS personnel (inclusive of attorneys) has regularly interfered with Claimant's parental rights by virtue of disseminating information, some of it factually and legally incorrect, to NYP-WCMC and Mr. Hamblett, in violation of New York and federal law"

(*id.*).

The notice of claim contains causes of action for abuse of process, malicious prosecution, violations of plaintiffs' first, fourth and fourteenth amendment rights to intimate association, to be free of illegal seizure and detention of her child, to be free of government intrusion, and a violation of her privacy rights. On May 6, 2020, plaintiffs filed a second notice of claim.

The complaint in this action was filed in New York State Supreme Court on June 18, 2019 and contains 12 causes of action: intentional infliction of emotional distress against all defendants, negligent infliction of emotional distress against all defendants, abuse of process against NYP and NYC, malicious prosecution against NYC, negligence against NYP and NYC, breach of physician-

patient confidentiality against NYP and Marquis, false imprisonment against NYP, violation of the right to intimate association against NYP, Marquis, Samuels and Gordon, negligent hiring/training/supervision/retention against NYP and NYC, malicious prosecution under 42 USC § 1983 and New York State Law against NYC, and a substantive due process claim against NYC. The complaint also contains an allegation that NYP acted under color of law.

On July 11, 2019, NYP, Gordon, Marquis and Samuels filed a notice of removal, staying the state court action and removing it to the United States District Court for the Southern District of New York (Caran affirmation, exhibit C). On July 19, 2019, NYP and Samuels filed and served an answer in the United States District Court for the Southern District of New York (Caran affirmation, exhibit D). On October 3, 2019, a verified answer was filed and served on behalf of Marquis (Caran affirmation, exhibit E). On October 16, 2019, a verified answer was filed and served on behalf of Gordon (Caran affirmation, exhibit F). On or about August 9, 2019, plaintiff moved to remand the action to state court, which NYP, Samuels, Marquis, and Gordon opposed. In a decision and order by the Honorable Alvin K. Hellerstein, United States District Court for the Southern District of New York, dated October 17, 2019 and electronically filed in this Court by the New York County Clerk on November 7, 2019, the action was remanded to this Court because the City did not express its consent to the removal to federal court in time (Caran affirmation, exhibit G).

According to plaintiff, on or about August 20, 2019, issue was joined as to the City by service of their verified answer. Plaintiff asserts that in their answer, the City, in violation of Social Services Law, Section422, disclosed confidential information contained within the unfounded and sealed subsequent March 26, 2019 SCR report made by ACS personnel.

On December 16, 2019, Gordon, Marquis and Samuels (collectively the "doctors") moved, pursuant to CPLR 3211(a)(8), to dismiss all causes of action for lack of personal jurisdiction. The City also moved for an order on two grounds. First, the City moved, pursuant to CPLR 3025(b) for an order granting the City leave to amend the answer; and second, the city moved for an order, pursuant to CPLR 3211 (a)(7), dismissing the complaint against the City for failure to state a cause of action.

I. Gordon, Marquis, Samuels' Motion to Dismiss Pursuant to CPLR 3211 (a)(8)

Gordon, Marquis and Samuels (collectively "defendant doctors") move to dismiss, pursuant to CPLR 3211(a)(8), on the ground of lack of personal jurisdiction. Each defendant submitted an affidavit to the court stating that although they each filed an answer, they did not consent to the court having jurisdiction over them, as they asserted the affirmative defense of lack of personal jurisdiction.

Gordon, Marquis and Samuels argue that proper service was not effectuated upon them as service of process must strictly comply with the CPLR. Citing to the Court of Appeals, the doctors contend that: "[n]otice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court" (affirmation in reply at 2, citing *Macchia v Russo*, 67 NY2d 592, 594 [1986]).

In opposition, plaintiffs argue that defendant doctors waived their objections to service of the summons and complaint as they did not move for this relief within 60 days of filing the answer. Specifically, plaintiffs argue that Samuels served her answer on July 19, 2019, Marquis served her answer on October 3, 2019 and Gordon served her answer on October 16, 2019. Plaintiffs' contend that although each defendant doctor pled the affirmative defense of improper service, their motion was filed on December 16, 2019, more than 60 days from the dates of service.

Plaintiffs further argue that defendant doctors may not object to the service of the complaint, because they have substantially participated in this litigation. According to plaintiffs, defendants' notice of removal before Judge Alvin Hellerstein; request for an extension to respond to plaintiffs' motion to remand; and opposition to plaintiffs' motion to remand all constitute an appearance in this action.

In addition, plaintiffs attach a copy of the affidavits of service and argue that the summons and complaint were properly served upon "Kimba Smith," "an individual who represented herself as an agent authorized to accept service upon of [sic] the aforementioned Defendants" (affirmation in opp at 6). There are three affidavits of service, one for each of the three individual defendants: Gordon, Marquis and Samuels. The affidavits describe service upon an individual at The New York and Presbyterian Hospital who expressed her apparent authorization to accept service on behalf of these defendants. According to plaintiffs' "when service is properly effected, a mistake in the affidavit incorrectly identifying the person served, is a mere irregularity and not a jurisdictional defect" (*id.* at 6, citing *Mendez v Yoo*, 23 AD3d 354 [2d Dept 2005]). Plaintiffs posit that whether "Kimba Smith" is an actual employee is a subject for a traverse hearing and not one to be decided upon by motion (*id.*).

The Traverse Hearing

In response to the motion on the question of service on Marquis, Samuels and Gordon, the court held a traverse hearing over three days on January 27, 2021, February 5, 2021, and February 19, 2021. At the hearing, plaintiffs introduced documentary evidence and called the process server, Andre Meisel ("Meisel"), as a witness.

In support of their motion, Gordon, Marquis and Samuels submitted documentary evidence, and they each testified on their own behalf. Defendant doctors also called John Phillips from the Patient Access Department and Nayisha Luquis from the Human Resources Department as witnesses. All witnesses were subject to both cross and direct examination.

Defendant Doctors' Case

Dr. Gordon

In her affidavit and at the hearing, Gordon averred that she reviewed the affidavit of service, which states that on June 21, 2019, "an individual named Kimba Smith identified herself as being authorized to accept service of the summons and complaint and notice of electronic filing on my behalf at a premises identified as 525 East 68th Street, New York, New York 10021" (Gordon affidavit, ¶ 2). Gordon also averred that she does not know an individual named Kimba Smith and did not authorize anyone with that name to accept service on her behalf. She further stated that she does not receive mail at the above address.

At the traverse hearing, Gordon testified that she was the director of the child protective team and that the team did not have an office at the 585 East 68th Street hospital. Her office is located at 215 East 79th Street and that she is there four days each week. and that she never received service of the summons and complaint at home, her place of business or in the mail. She was made aware of this action when she saw a copy of the summons and complaint in a post by plaintiff Andorfer-Lopez that was on social media. She testified that she would go to the hospital, on average, twice per month for a total of four hour per month, but she has no office, desk or even a chair assigned to her at 525 East 68th Street. The address on her letterhead is 215 East 79th Street. She denied knowing anyone named Kimba or any receptionist at the main entrance or anywhere else inside the hospital, and she testified that she did not authorize anyone to accept service on her behalf. She testified that none of the receptionists are her co-workers. She further testified that she does not advertise anyplace other than 215 East 79th Street as her place of business and that

her letter head bears her office address as 215 East 79th Street, New York, New York 10075. She has her own receptionist at 215 East 79th Street who is authorized to accept service on her behalf. Gordon has been served with subpoenas before at her office at 215 East 79th Street and she has arranged a system with her receptionist when someone comes by to serve legal papers. At no time was she made aware of service in this case having been received by her receptionist.

As to her connection to the hospital, Gordon testified that she is affiliated with the hospital; she has admitting privileges there; she has access to the hospital's electronic records and has log-in credentials there. If she sees a patient at the hospital she usually returns to her office at 215 East 79th Street to enter her notes there. Gordon consulted with plaintiff Andorfer in a room inside 525 East 68th Street and saw the infant plaintiff there, but she specifically recalled entering her notes at her 79th Street office.

Dr. Marquis

Dr. Marquis is a pediatric neurologist and that the Weill Cornel Office of Pediatric Neurology does not maintain an office at 525 East 68th Street, but maintains an office at 505 East 70th Street. She testified that she never received a copy of the summons and complaint at her home, place of business or through the mail and that she only found out that she was being sued because Dr. Samuels alerted her. She testified that she does not know anyone named Kimba Smith, and she did not authorize anyone with that name to accept service on her behalf. She additionally states that the zip code for the address 525 East 68th Street, is not 10021, but is 10065. Dr. Marquis denies having received a copy of the summons and complaint in this action either at home, at her place of business or through the mail, and she did not authorize Kimba or any receptionist at 525

East 68th Street to receive service on her behalf. She does not know anyone named Kimba and does not know any receptionist at the information desk at 525 East 68th Street. With regard to the receptionists at 525 East 68th Street, she does not consider them co-workers because they do not work in pediatric neurology. She testified that her practice and place of business since March 2018, is located at 505 East 70th Street, New York, NY 10021. She works from this location five days per week and does not advertise any other place as her place of business. She testified that she goes to the hospital located at 525 East 68th Street when she is on call or to make her rounds, which are usually one week per month for two hours per day. The remainder of her time is at her office located at 505 East 70th Street. She does not have a room, office space, desk or chair inside of 525 East 68th Street and she does not advertise or solicit business at this location.

With regard to the hospital, Marquis testified that she treated the infant patient at her outpatient office located at East 70th Street and she also treated the infant plaintiff on the 6th Floor of the pediatric unit at 525 East 68th Street. She also testified that she has credentials to login to patients' medical records at 525 East 68th Street and that she input notes about the infant patient and other patients at one of the computer terminal located inside 525 East 68th Street while there. he is also able to see patients referred or admitted to the hospital from an outpatient setting and when attending physicians request a consultation. The address 525 East 68th Street Box 91, New York, NY 10065 is on her letterhead. She drafted a letter on October 9, 2018, together with Dr. Samuels, on letter head that has on it the address of 525 East 68th Street. She only has admitting privileges at 525 East 68th Street and the pediatric neurology office maintains a physical mailbox at 5252 East 68th Street. There is a mailbox for the Division of Pediatric Neurology inside the hospital, but she does not know where it is.

Dr. Samuels

Dr. Samuels testified that her office is located at 525 East 68th Street, Floor 12A, Room F1330 and that the NYP website lists her address as 525 East 68th Street, but she did not know whether the website lists her floor. She works in the psychiatry department that has a mail room on the 11th Floor with open access mail slots.

In her affidavit, and at the hearing, Samuels testified that the affidavit of service reflects service on June 21, 2019, but that she does not know who put it there. Samuels testified that she was not in her office on June 21, 2019, but when she returned to her office on June 24, 2019, she found the summons and complaint "in a nonsecure, open access, mailbox slot assigned to me." She testified that she does not know anyone named Kimba Smith and she did not authorize anyone with that name to accept process on her behalf. She does not know who put the papers there. She dos not know the receptionists at the main desk, did not consider them to be her co-workers and did not authorize any of them to accept papers of deliveries on her behalf. The papers were loose, not in an envelope, inside her mailbox. The mailboxes are in a locked room inside 525 East 68th Street and about 50-100 people have the key. Dr. Samuels testified that she never received the summons and complaint by postal mail. Samuels further added that she was not served by postal service mail and that the zip code is 10065 and not 10021 for the address at 525 East 68th Street.

John Phillips

On June 21, 2019 John Phillips was the supervisor of the patient access department at 525 East 68th Street, a position he has held since 2015. His responsibilities include overseeing the information desk which provides guidance and direction to visitors. His office is roughly 30-feet from the information desk. The information desk is a wide rectangular shape at the center of the 68th Street and 70th Street entrances that can be accessed from four different angles. Phillips testified that on the date in question, there were three information clerks, who are part of the patient access department, none of whom are named Kimba. The clerks were: Rachel Ryer, Adolpho Romero and Judith Price. Clerks are required to were identification badges visibly displaying their first and last name. Phillips testified that if they needed more coverage, such as if one of the clerks was out, they would pull coverage personnel from the patient access department. In in his six years as supervisor no one named Kimba or Kemba ever worked at the desk as an information clerk and that no one in the patient access department or at the desk matched the description given in the affidavits of service. He testified that information clerks are firmly instructed never to accept any deliveries, legal papers or packages for anyone. He testified that none of the three defendant doctors authorized the information desk to accept service on their behalf and that information clerks are not considered co-workers of the doctors.

Nayisha Luquis

Nayisha Luquis has worked in the HR Department for five years in the area of record keeping and data management. Part of her responsibilities is to ascertain whether or not an individual is or is not an employee at NYP. She testified that she reviewed the employee records for the period from 1996 to present which do not show any hospital employee by the name of Kimba Smith. She also ran a number of queries with a variation of the name "Kimberly Smith" and Kim Smith" across eight different NYP sites in Westchester, Lower Manhattan, Brooklyn Methodist, Queens, Hudson Valley and Weil Cornell and did not find anyone with that name (Defendants' Exhibit E). She further testified that at all times, employees are required to wear ID visible to the public and that such IDs must include the employee's full name and department.

Plaintiffs' Case

Andre Meisel

Andre Meisel has been a process server for fifteen years, ten of which were with the current agency Gotham Press. He testified that it is his practice to indicate in his log book the type of service, the date, time and address of service, what was served, the index number and the description of the person served. Before he enters the premises where service is to take place, he takes a picture of the location using his smart phone of the GPS coordinates with a map of the location.

With regard to his June 21, 2019 affidavits of service, Meisel avers that he served Marquis, Samuels and Gordon by delivering copies of the summons and verified complaint to Kimba Smith, a person of suitable age and discretion at 525 East 68th Street, New York, NY 10021.

Specifically, Meisel testified that he took a photo of the location of the hospital; went inside; and approached a receptionist named Kimba Smith who he observed at the round desk in the middle of the lobby. In the affidavits, Meisel describes Kimba Smith as "female, skin color: Black, hair color: Black, age (Approx.): 40, height (Approx.): 5'7 and weight (Approx): 160" (Meisel affirmation, exhibit G; Plaintiff's Exhibits 8, 9, 10). He asked her where the doctors' offices were located, their departments and room numbers and she asked why. He told her he had legal documents for them. She read the caption, saw who the papers were for and told him that she would accept service for the doctors. He said he asked, but she did not provide him with a last name and she did not tell him anything else. Kimba was not wearing a name tag and Meisel did not know what department Kimba worked for nor did he know her exact title (January Tr. at 68, 79). He believed she was the receptionist and authorized to accept service because she was "talking

with authority" and "close enough to the desk to be part of the action." Three minutes later, after delivering the papers, Meisel took a picture of the hospital, which automatically enters the GPS as to his location and within seconds, he entered the information into his log book, pursuant to his practice (Plaintiffs' Exhibits 3-7).

With respect to the name "Kimba 'Smith," Meisel stated in his initial affidavit that he "asked for her name and believed she stated it was Kimba Smith" (Roque affirmation, exhibit C, ¶ 5). Meisel testified at the traverse hearing that "the Kimba part was what I heard. The Smith is fictitious because she declined to give me her last name" (January 27, 2021 Tr. at 32). He testified that in his log book (Plaintiff's Exhibit 6), he entered the woman's last name as "Smith" because she did not give him her last name, and that he puts quotation marks around a last name to indicate that the person's last name is unknown.

Meisel did not put quotation marks around the name Smith in his affidavits of service to indicate that any part of the name Kimba Smith was fictitious. In his supplemental affidavit, dated January 21, 2020 Meisel did not indicate that the last name Smith was fictitious. Instead, he maintained that the person upon whom he had delivered service was named Kimba Smith. Meisel testified that he indicated in his handwritten log book that the name Smith was fictitious by putting quotation marks around it. The handwritten page of the log book was produced the day before his testimony at the traverse hearing. Meisel testified that the log book had been in his possession, but he had not previously been asked for it.

At the hearing, Meisel testified:

> Q: On the affidavit of service you could have documented that Smith was a fictitious name; [sic] correct?
>
> A: It could have been a little clearer

(January 27, 2021 Tr. at 96).

On this point, Meisel further testified:

> Q: And didn't you see that it was being told to the Court that you believed that the receptionist's name was Kimba Smith?
>
> A: Yes
>
> Q: And didn't you realize that that was false information you were telling the Court?
>
> A: I didn't consider it misleading or false . . .
>
> Q: Besides this log entry, handwritten log entry, is there any other documents that you see where it says that Smith is a fictitious name?
>
> A: No

(*Id.* at 103-104, 108).

In his January 21, 2020 supplemental affidavit, Meisel swore that before serving the summons and complaint, he identified "The New York and Presbyterian Hospital" as the place of business for Marquis, Samuels and Gordon (Roque affirmation, exhibit C, ¶ 2). During his testimony at the traverse hearing, Meisel testified that based on his prior experience serving NYP, it was his understanding that not every doctor affiliated with NYP could be served at the 525 East 68th Street address (January 27, 2021 Tr. at 117). On the day prior to serving the papers, he called and spoke with the hospital operator who told him that Marquis, Samuels and Gordon were at 525 East 68th Street. He did not make a record of the call. According to Meisel, he did not serve Gordon at her office at 215 East 79th Street, or Marquis at her office at 505 East 70th Street, because he believed 525 East 68th Street was "their actual place of business" (January 27, 2021 Tr. at 56).

Specifically, Meisel testified:

> I called the operator of the hospital, as is my usual thing when I deal with New York Presbyterian Hospital and their employees and I asked for the room numbers of these Doctors. I explained that I was a patient and I lost the room information and I was told by the operator that they knew that they worked there but they did not have a room number for them.

(January 27, 2021 Tr. at 56).

Meisel further testified that he did not look online to ascertain the doctors' room numbers or the area of the hospital where they worked (*id.* at 58) and he did not look online to see what addresses were associated with the doctors' practices (*id.* at 61).

Meisel also testified that he later mailed three separate envelopes containing the summons and complaint to each of the doctors at 525 East 68th Street, New York, New York 10021 (Plaintiff's Exhibits 8, 9, 10; NYSCEF Doc. No 4). He testified that the address of the hospital includes zip codes 10021 and 10065.

CONCLUSIONS OF LAW

CPLR § 3211 (a)(8) provides in relevant part:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . (8) the court has no jurisdiction of the person of the defendant.
>
> Personal service upon a natural person shall be made by any of the following methods:
>
> 1. By delivering the summons within the state to the person to be served; or
>
> 2. By delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing . . ."

(CPLR 308[1] and [2]).

> "'CPLR 308 (2) requires strict compliance and the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made'" (*Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979, 980 [2d Dept 2011]). . . [The individual defendant's "actual place of business" is] the "location where they were physically present with regularity, and where they regularly transacted business"

(*Rosario v NES Medical Services of NY, P.C.*, 105 AD3d 831, 833 [2d Dept 2013]).

As set forth above, CPLR 308 (2) requires strict compliance and the burden is on plaintiff to establish proper service by a preponderance of the evidence. Based on the evidence adduced on this record, this court finds that plaintiffs did not meet their burden in establishing proper service on Marquis, Samuels or Gordon.

Credibility

In reaching a determination, the court must weigh the evidence and make a determination in the issue of credibility. "Evaluating the credibility of the respective witnesses is primarily a matter committed to the sound discretion of the ... Court" (*Varga v Varga,* 288 AD2d 210; *Ferraro v Ferraro*, 257 AD2d 596). The court's assessment of the credibility of witnesses is entitled to great weight (*see Wortman v Wortman,* 11 AD3d 604). "In a nonjury trial, evaluating the credibility of the respective witnesses and determining which of the proffered items of evidence are most credible are matters committed to the trial court's discretion" (*Ivani v. Ivani*, 303 AD2d 639).

In analyzing the evidentiary record, this court observed the witnesses' in-court testimony, their demeanor, manner in which they testified, substance and tone of their testimony to arrive at an overall assessment of their credibility. This court weighed the witnesses' testimony, character, temperament and sincerity as well as the documentary evidence submitted. Based on the testimony and evidence presented, this court finds as follows:

Service on Dr. Gordon

With regard to Gordon, plaintiffs failed to establish that 525 East 68th Street is her place of business or that the summons was delivered to a person of suitable age and discretion on her behalf. Moreover, plaintiffs failed to establish that the summons was served by mail upon Gordon at her place of business. First, Gordon credibly denied ever receiving a copy of the complaint at her home, place of business or through the mail. Gordon testified that her office is located at 215 East 79th Street and she has no office, desk or even a chair assigned to her at 525 East 68th Street. Additionally, Gordon did not advertise any place other than 215 East 79th Street as her place of business and her letterhead bears her office address as 215 East 79th Street, New York, NY 10075. Further, even the child protection team, on which Gordon was the director, did not have an office at 585 East 68th Street. Notably, although Gordon had log-in credentials at the hospital, she

testified that with regard to plaintiff, she returned to her 79th Street office and entered her notes there, and not at the hospital.

Gordon denied knowing anyone named Kimba or authorizing anyone by that name or any receptionist at 525 East 68th Street to accept service on her behalf. She did not consider any of the receptionists at 525 to be her co workers. Indeed, Gordon has her own receptionist at her office located at 215 East 79th Street who is authorized to accept service on her behalf and at no time was she was aware of service in this case having been received by her receptionist. Other than a post Gordon said she saw on social media, the record is devoid of any evidence that service was ever effectuated on Gordon.

Importantly, even if this court were to find, which this court does not, that Gordon's admitting privileges, access to the hospital's electronic records and consultation with infant plaintiff and his mother at the hospital were enough to find that 525 East 68th Street was Gordon's place of business, such evidence is insufficient to overcome the absence of proof that service was delivered to a person of suitable age and discretion, namely, Kimba and that the summons and complaint were mailed to Gordon as required by the statute.

Accordingly, the complaint against Gordon is dismissed.

Service on Dr. Marquis

Like Dr. Gordon, Dr. Marquis testified that her office is not located at 525 East 68th Street, but at a separate location at 505 East 70th Street and that the office of pediatric neurology did not maintain an office at 525 East 68th Street, but maintained an office at 505 East 70th Street. Marquis credibly testified that she does not have a room, office space, desk or chair inside of 525 East 68th Street. However, unlike Gordon, whose letterhead bears an address different from 525 East 68th Street, Marquis' professional letterhead says 525 East 68th Street and she drafted a letter on October 9, 2018 using letterhead with this address. Marquis also testified that the hospital at 525 East 68th Street is the only place where she has admitting privileges and that she works there for one week each month for two hours a day. While she treated infant plaintiff at her outpatient office at 505 East 70th Street, she also treated the patient at the hospital at 525 East 68th Street. At the hospital, she has credentials to log-in to patient medical records, and she input notes about the infant patient using one of the computer terminals there. This court finds that the evidence is sufficient to establish 525 East 68th Street at Marquis' place of business. The record is insufficient, however, to overcome the deficiencies in plaintiffs' evidence that the summons was delivered to a person of suitable age and discretion and that the summons was also mailed to Marquis.

Marquis denied ever receiving a copy of the summons and complaint at her home, place of business or through the mail. She credibly testified that he only found out she was being sued by Dr. Samuels who alerted her. She denied knowing anyone named Kimba Smith and did not authorize a receptionist or anyone else at 525 East 68th Street to accept service on her behalf. Furthermore, there is insufficient evidence on this record that the summons was served by mail, as

Marquis testified that the zip code for the address at 525 East 68th Street is 10065 and not 10021, which is the zip code indicated on the summons.

Service on Dr. Samuels

Lastly, as to Dr. Samuels, it is undisputed that her office and place of business are located inside 525 East 68th Street, as this is the address on the NYP website and she works in the psychiatry department that has a mailroom on the 11th Floor. She testified that a copy of the summons was inside the mail slot assigned to her in a locked mailroom that is accessible by 50-100 people. She does not know who put the papers int eh mailbox. As has been set forth throughout and as more fully set forth below, evidence of service upon a person named Kimba is both incredible and unpersuasive. Samuels credibly testified that she did not know the receptionist at the main desk; did not consider them co-workers; and did not authorize any of them to accept papers of deliveries on her behalf. In any event, even if the papers were properly placed inside Samuels' mailbox, the record is still lacking in proof that the summons was properly mailed to Samuels as she credibly testified that the zip code for 525 East 68th Street is 10065 and she did not receive a copy of the summons by postal service mail.

Kimba

All of the doctors deny knowing anyone named Kimba or authorizing anyone by that name or any receptionist at 525 to accept service on their behalf. Here, plaintiffs have failed to establish that service was made upon someone of suitable age and discretion and who was authorized to accept service on the doctors' behalf. Even more importantly, plaintiffs failed to credibly establish that the person described in the affidavits of service as having accepted service was a person named Kimba Smith or that a person by that name even exists.

Here, contrary to his own practice, Meisel did not put quotation marks around the name Smith in either his log book or in his affidavit of service to indicate that any part of the name Kimba Smith was fictitious. Importantly, in his supplemental affidavit, dated January 21, 2020 Meisel did not indicate that the last name Smith was fictitious. Instead, he maintained that the person upon whom he had delivered service was named Kimba Smith. He maintained this position in the face of defendant doctors' challenge that no one by that name could be identified in the record of hospital employees (Defendants' Exhibit E).

Meisel ultimately testified that he indicated in his handwritten log book that the name Smith was fictitious by putting quotation marks around it. Interestingly, the handwritten page of the log book was not produced until the day before his testimony at the traverse hearing, even though the log book had been in Meisel's possession. In his supplemental affidavit, which was sworn to one year later in January 21, 2021, Meisel did not indicate in any way that the name Smith was fictitious.

While plaintiffs contend further that Kimba was a receptionist at the hospital authorized to accept service, the mere existence of an employee named Kimba is belied by the record. A search of the employee records from 1996 to present, conducted by Nayisha Luquis, revealed that there were no hospital employees named Kimba Smith or anyone employed with a variation of that name. Luquis ran queries with a variation of the name "Kimberly Smith" and Kim Smith" across eight different NYP sites in Westchester, Lower Manhattan, Brooklyn Methodist, Queens, Hudson Valley and Weil Cornell and did not find anyone with that name (Defendants' Exhibit E).

Moreover, John Phillips testified that on June 21, 2019 there were only three clerks assigned to the information desk, none of whom were named Kimba. The clerks were: Rachel Ryer, Adolfo Romero and Judith Price. The clerks were required to wear identification badges visibly displaying their first and last name and none of the clerks matched the description given in the affidavits of service. More importantly information clerks are firmly instructed never to accept any deliveries and are not authorized to accept legal papers or packages for anyone.

While Meisel considered the missing quotation marks as only a minor discrepancy, it raises serious issues of credibility before this court, especially, whereas here, at the heart of the case is the identity of the person upon whom service was effectuated. Throughout these proceedings, defendants have maintained that they did not know anyone named Kimba Smith nor did they authorize anyone by that name or any semblance thereof to accept service on their behalf. Notwithstanding the challenges to the identity of the person named in the affidavit of service as Kimba Smith, Meisel again provided this name in his supplemental affidavit. With regard to plaintiff's contention that service was made upon Kimba Wood, a person of suitable age and discretion, this court finds that plaintiffs have not met their burden. Issues surrounding Meisel's

credibility are further compounded by the addresses to which Meisel testified that he mailed the summons and complaint.

This court finds this account to be incredible. First the record is devoid of any evidence that this conversation with the hospital operator ever took place, as Meisel himself testified that he did not make a record of the call and that he is no longer in possession of the phone from which the call was allegedly made. Meisel knew from his experience serving NYP that not every doctor affiliated with NYP could be served at the 525 East 68th Street address. Despite this knowledge, he did not look on-line to ascertain the doctors' room numbers of the area of the hospital where they worked; he did not look on-line to see what addresses were associated with the doctors' practices; and he did not even attempt to serve Dr. Marquis at 505 East 70th Street, which is the address that is explicitly stated on the face of the summons.

As to service by mail, Meisel averred that he mailed three separate envelopes, one to each doctor defendant at: 525 East 68th Street, New York, New York **10021** not **10065**. Only Dr. Samuels acknowledged having received the summons in her mailbox, but the papers were loose, and not in an envelope to suggest any indicia that they were sent my postal mail. Furthermore, both Gordon and Marquis credibly testified that they never received a copy of the summons by mail and that the 10021 zip code stated on the summons is incorrect and that the correct zip code is 10065. Not only is the record lacking in proof of service upon a person of suitable age and discretion, but it is also lacking in credible proof to establish that the summons had been properly mailed.

For all of the aforementioned reasons, this court finds that plaintiffs failed to meet their burden in establishing that service was properly effectuated upon the doctor defendants in conformance with the CPLR.

This court finds plaintiffs' remaining claims as to service unavailing, as defendant doctors asserted in their answer and maintained throughout the proceedings their objections to lack of service.

II. NYP, Gordon, Marquis, Samuels' Cross-Motion to Dismiss Pursuant to CPLR 3211 (a) (7)

As this court dismissed the action as against the individually named defendant doctors, pursuant to CPLR 3211 (a)(8), this court need now only address now, NYP's cross-motion for dismissal.

NYP argues that plaintiffs' claim for intentional infliction of emotional distress should be dismissed because NYP employees are mandated, pursuant to New York Social Services Law § 413, to report suspicions of child abuse; and because mandated reporters are immune from liability for reporting suspected abuse under New York Social Services Law § 419. NYP further contends that plaintiffs cannot establish that NYP's conduct was extreme or outrageous, and that New York Social Services Law, § 419 "presumes 'good faith' where the person reporting suspected child abuse is acting in discharge of his or her duties and within the scope of his or her employment, but does not shield such individuals where liability is the result of willful misconduct and gross negligence" (*Rine v Chase*, 309 AD2d 796, 797 [2d Dept 2003]).

Social Services Law, § 419 states, in part:

> "Any person, official, or institution participating in good faith in the providing of a service pursuant to section four hundred twenty-four of this title, the making of a report, the taking of photographs, the removal or keeping of a child pursuant to this title, or the disclosure of child protective services information in compliance with sections . . . shall have immunity from any liability, civil or criminal. . . . For the purpose of any proceeding, civil or criminal, the good faith of any such person, official or institution required to report cases of child abuse or maltreatment . . . shall be presumed, provided such person, official or institution was acting in discharge of their duties and within the scope of their employment, and that such liability did not result from the willful misconduct or gross negligence of such person, official or institution."

According to the related practice commentaries: "Qualified immunity only attaches to mandated reporters when there is both reasonable cause to suspect child abuse or neglect and the reporting party was acting in good faith" (Social Services Law § 419, Practice Commentaries, Joan Baim *citing Goldberg v Edison*, 41 AD3d 428, 428 [2d Dept 2007]).

With respect to plaintiffs' claims, *inter alia*, for: intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, false imprisonment and abuse of process, breach of physician-patient confidentiality, violation of the right to intimate association, negligent hiring/training/ supervision/retention, this court finds that NYP is entitled to qualified immunity. Assuming, arguendo, for purposes of this motion, that the named defendant doctors are employees of NYP, as physicians, they are mandated reporters entitled to a presumption of good faith. As such, there are no non-conclusory allegations in the complaint that they acted with gross negligence or from willful misconduct to overcome this presumption of good faith.

Additionally, regarding plaintiffs' claims in which they allege that NYP inhibited plaintiffs' right to make medical decisions or caused harm by delaying the surgery, including, *inter alia*, the claims for intentional infliction, negligent infliction and negligence, plaintiffs' also allege this harm in only a conclusory fashion.

In the complaint, plaintiffs quote Dr. Greenfield, the doctor who recommended the surgery, as saying to ACS: "The surgery . . . has to be done at some point" (*id.*, ¶ 31). Additionally, according to the complaint, the surgery was done by Dr. Greenfield on April 8, 2019. Other than stating in a conclusory fashion that the delay of the surgery was harmful to PA, there are no facts or medical opinions supporting this claim. The court, therefore, grants NYP's motion to dismiss, pursuant to CPLR 3211 (a) (7).

III. The City's Motion to Amend It's Answer

The City seeks to amend its answer, pursuant to CPLR 3025(b), to include certain affirmative defenses including governmental immunity, apportionment of damages and comparative negligence. Specifically, the City seeks to add, *inter alia*, the "defenses common to negligence and malicious prosecution claims, *e.g.*, comparative negligence, apportionment of damages, governmental immunity, and probable cause defenses." The City argues that these defenses were not previously interposed in tis answer because the case was removed to federal court and the division at Corporation Counsel that handled the federal court case does not have familiarity with these defenses. The City argues that now that the matter is in state court, these defenses are necessary to its litigation of the action and do not pose any prejudice or surprise to plaintiffs as they are customary and common in City negligence cases.

Plaintiffs oppose the City's motion on the ground that the City has not offered a reasonable excuse for the delay in asserting the amendments. Plaintiffs argue that it was not until August 15, 2019 that the City moved, by letter application, for an extension of time to respond to the complaint in federal court and that the federal Judge granted a 15-day extension. Plaintiffs further argue that it was not until six months after issue was joined and the matter was remanded to state court, that the City filed this motion seeking leave to amend the answer.

CPLR § 3025 (b) permits a party to:

> 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 stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

"Leave to amend a pleading is freely granted within the court's discretion in the absence of prejudice or surprise" (*Mezzacappa Bros., Inc. v City of New York*, 29 AD3d 494, 494 [1st Dept 2006][internal citations omitted]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983][internal quotation marks and citations omitted]). Prejudice requires some showing that the adversary had been "hindered in the preparation of [the] case or has been prevented from taking some measure in support of his position" (*Brennan v City of New York*, 99 AD2d 445, 447 [1st Dept 1984][internal quotation marks and citations omitted]).

"In determining whether to grant a motion to amend an answer, the court should consider the merits of the proposed defense and whether the plaintiff will be prejudiced by the delay in raising it" (*Lanpont v Savvas Cab Corp., Inc.*, 244 AD2d 208, 209 [1st Dept 1997]). "Although leave to amend a pleading is freely granted, such leave should 'not be granted upon mere request, without appropriate substantiation'" (*Hoppe v Board of Directors of 51-78 Owners Corp.*, 49 AD3d 477, 477 [1st Dept 2008][internal citations omitted]). "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered'" (*American Bldrs. & Contrs. Supply Co., Inc. v US Allegro*, 177 AD3d 836, 838 [2d Dept 2019][internal citation omitted]).

Here, there has been little to no discovery in this case and neither side asserts any alleged prejudice. Accordingly, leave is hereby granted for the City to amend its answer.

IV. Plaintiffs' Cross-Motion to Amend the Complaint

Pursuant to CPLR 3025(b), plaintiffs cross-move to amend the verified complaint to, *inter alia*, clarify existing causes of action, and to add additional claims. Specifically, with regard to a claim for malicious prosecution, plaintiffs seek to add allegations arising from an April 20, 2020 administrative proceeding to appeal an indicated determination of child abuse.

Leave to amend a complaint generally will be granted as long as the opponent is not surprised or prejudiced by the proposed amendment (*Benyo v Sikorjak*, 50 AD3d 1074, 1076 [2d Dept 2008]). However, if the "proposed amendment 'is palpably improper or insufficient as a matter of law'" leave to amend will be denied (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012][internal citation omitted]). "Prejudice to warrant denial of leave to amend requires "'some indication that the defendant has been hindered in the preparation of [their] care or has been prevented from taking some measure in support of [their] position'" [*id.* [internal citation omitted]).

The amendments plaintiffs seek to include are as follows:

Malicious Prosecution Claims

On or about May 8, 2019, Andorfer-Lopez appealed the "indicated" determination of the October 5, 2018 report to the SCR. "ACS opposed that request and an administrative proceeding, pursuant to § 422 of the Social Services Law, commenced. . . . On or about April 30, 2020 the administrative proceeding was terminated in favor of the Plaintiff" (Robinson affirmation, exhibit O, [proposed amended complaint], ¶¶ 116-117), and the report dated October 5, 2018 was amended to "unfounded" and sealed (Robinson affirmation, exhibit M). Plaintiffs allege that this proceeding was initiated and/or continued in the absence of probable cause and without actual malice.

Plaintiffs further allege that the City has a practice or policy of "maliciously prosecuting individuals despite the lack of probable cause" (*id.*, ¶ 136).

In opposition to the proposed amended malicious prosecution claims, the City argues that such amendments would be futile because the administrative proceeding that plaintiffs allege to have been maliciously undertaken was instituted by plaintiffs, not by the City (NYSCEF Doc. No. 78, at 2) (containing the decision of the Administrative Law Judge in the Office of Children and Family Services [the "OCFS decision"]). The OCFS decision states that Andorfer-Lopez requested that the report be amended to unfounded and sealed, but the "Central Register did not do so, and a hearing was then scheduled in accordance with the requirements of Social Services Law (SSL) § 422(8)(b)," which is the statutory mechanism for the commencement of such a hearing. The City specifically argues that the plaintiffs cannot meet their burden of proof for a malicious prosecution claim, either state or federal.

The City further argues that plaintiffs' allegation that ACS unlawfully "continued [the administrative proceeding] in the absence of probable cause" is baseless because it is contradicted by the Office of Children and Family Services, which states that ACS "was not presenting any evidence in support of the indicated report" (NYSCEF Doc. 78 at 2).

"The tort of malicious prosecution requires proof of: (1) the commencement or continuation of a . . . proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the [plaintiff]; (3) the absence of probable cause for the . . . proceeding; and (4) actual malice'" (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st dept 2005][internal citations omitted]). "A plaintiff must also allege and prove 'special injury'" (*id.* citing *Engel v CBS, Inc.*, 93 NY2d 195, 201 [1999]).

Here, plaintiffs are unable to establish that the City commenced or continued this administrative proceeding to change the report from "indicated" to "unfounded." This court therefore finds that an amendment to add this claim would be futile.

As for plaintiffs' federal claim of malicious prosecution, it is likewise futile as "only those claims of malicious prosecution that implicated Fourth Amendment rights were appropriate bases for malicious prosecution claims brought under § 1983 (*Washington v County of Rockland*, 373 F3d 310, 316 [2d Cir 2004]["'[I]t is unlikely that a civil proceeding . . . would implicate constitutional rights in a manner that would warrant redress under § 1983.'"]). "Section 1983 'was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution'" (*Singer v Fulton County Sheriff*, 63 F3d 110, 116 [2d Cir 1995][internal citations omitted]). "[I]t is only the violation of the constitutional right that is actionable and compensable under § 1983" (*id.*). "The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person—*i.e.*, the right to be free of unreasonable or unwarranted restraints on personal liberty. A plaintiff asserting a Fourth Amendment malicious prosecution claim under § 1983 must therefore show some deprivation of liberty consistent with the concept of 'seizure'" (*Singer*, 63 F3d at 116).

Plaintiffs' federal malicious prosecution claim fails for the reason that plaintiffs have not alleged that they were seized as a result of the administrative proceeding on which they base their claim. Additionally, plaintiffs' federal claim under 42 USC § 1983, that the City engaged in a practice or policy that violated Andorfer-Lopez's constitutional rights also fails. Plaintiffs' offer no facts about what policy was exercised by the City in this case or who exercised it. Instead,

plaintiffs rely on *People United*, to make the argument that because the court found an ACS practice or policy in that case, to support municipal liability, it must apply here. However, as part of the complaint in that case, plaintiffs alleged facts about "a number of system-wide deficiencies in ACS's administration of New York City's child welfare program," plaintiffs expressly identify the practice or policy being challenged, and provide statistics and "set forth the circumstances of a number of individuals who have allegedly been subjected to the challenged policies and practices of defendants" (*id*. at 280-283). Here, plaintiffs have not alleged such facts and cannot rely on the legal conclusions in *People United* to make their claim.

Lastly, although plaintiffs contend that they are able satisfy the first element of a malicious prosecution claim as the City opposed plaintiff Andorfer-Lopez's request to appeal the indicated determination, and as a result, pursuant to Social Services Law § 422, the proceeding to consider plaintiff's request to change the indicated determination was automatically commenced. However, this is a circumstance acknowledged by the applicable statute. Pursuant to Social Services Law § 422(8) (a) (i);

> "At any time subsequent to the completion of the investigation but in no event later than ninety days after the subject of the report is notified that the report is indicated the subject may request the commissioner to amend the record of the report. If the commissioner does not amend the report in accordance with such request within ninety days of receiving the request, the subject shall have the right to a fair hearing . . ."

Because these claims for malicious prosecution would be futile, this court denies plaintiffs' motion to amend the complaint to add these claims.

Social Services Law Claims

In support of their cross-motion plaintiffs contend that a new cause of action arose, pursuant to section 422 of the Social Services Law, when on or about August 30, 2019, the "City uploaded its verified answer to the Public Access to Court Electronic Records (PACER) public access system of the United States District Court for the Southern District of New York" (proposed amended complaint, ¶ 137). Plaintiffs allege that the City, in its verified answer, disclosed confidential information related to "an unfounded and sealed report to the SCR originally made by ACS personnel on or about March 26, 2019" (*id.*, ¶ 138). According to the proposed amended complaint, this disclosure violated Social Services Law § 422, as it "did not fall within one of the exceptions enumerated within the statute" (*id.*).

Pursuant to Social Services Law § 422 (4), "[r]eports made pursuant to this title as well as any other information obtained, reports written or photographs taken concerning such reports in the possession of the office or local departments shall be confidential," and "shall only be made available to" certain persons and entities listed in the statute.

The language in paragraph 37 of the original answer states:

> "Deny the allegations set forth in paragraph "37' of the Complaint, except admit that [PA] was returned to [Andorfer-Lopez's] custody on March 12, 2019 and affirmatively state that from that date to March 21, 2019 ACS investigated a further SCR report about Plaintiff which resulted in Plaintiff's consent to home visits and drug screening"

(Thayer affirmation, exhibit C, ¶ 37).

In opposition, the City argues that plaintiffs did not file a notice of claim within 90 days of the accrual of this claim, and, although plaintiffs filed a notice of claim in May of 2020, within one year and 90 days of the accrual, plaintiffs have not offered a reason for the delay.

Pursuant to Social Services Law § 422 (4) (v) (i), the Comptroller or officers of the City of New York may receive/release the information, but only to perform an auditing function and only to persons who require the information for purposes of the audit. The consequence of a violation of this subsection is set forth in § 422 (4) (v) (ii):

> "any failure to maintain the confidentiality of client-identifiable information shall subject such comptroller or officer to denial of any further access to records until such time as the audit agency has reviewed its procedures concerning controls and prohibitions imposed on the dissemination of such information and has taken all reasonable and appropriate steps to eliminate such lapses in maintaining confidentiality to the satisfaction of the office of children and family services . . . Any person given access to information pursuant to this subparagraph who releases data or information to persons or agencies not authorized to receive such information shall be guilty of a class A misdemeanor."

Furthermore, Social Services Law § 422 (12) states: "any person who willfully permits and any person who encourages the release of any data and information contained in the central register to persons or agencies not permitted by this title shall be guilty of a class A misdemeanor."

There is no authority for a plenary action based on the facts in the proposed allegation. Social Services Law § 422 states that releasing the information or data to anyone not authorized to receive it is guilty of a misdemeanor; while § 422-a speaks of the Commissioner's decision-making with respect to the ACS reports and information, which would require an Article 78 to challenge it. This court finds that an amendment to the complaint to add this claim would be futile, and is therefore denied.

Standard for a Motion to Dismiss

In deciding a motion to dismiss for failure to state a cause of action, the court must accept all allegations in the complaint as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). "It is well settled that a court, when deciding whether to grant a motion to dismiss, pursuant to CPLR 3211, must take the allegations asserted within a plaintiff's complaint as true and accord plaintiff the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory" (*Samiento v World Yacht, Inc.*, 10 NY3d 70, 79 [2008]). The complaint must be liberally construed, viewed in the light most favorable to the plaintiff, and the plaintiff must be given the benefit of all reasonable inferences (*Allianz Underwriters Ins. Co.*, 13 AD3d at 174). The court determines "only whether the facts as alleged fit within any cognizable legal theory" *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). "The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id*. at 88 [internal quotation marks and citation omitted]).

Abuse of Process Claim

ACS instituted a child abuse proceeding in the New York State Family Court on October 12, 2018, and named plaintiff as the respondent. Therefore, according to the City, October 12, 2018 is the date when the claim arose. The City argues that plaintiff was required to file the notice of claim prior to the dismissal of the underlying action, and argues that plaintiff should have filed the notice of claim no later than January 10, 2019.

Plaintiff filed her first notice of claim on March 27, 2019, which alleged, among other causes of action, abuse of process and malicious prosecution. Plaintiff field a second notice of claim on May 6, 2020. On or about June 18, 2019, plaintiff filed a verified complaint in state court. Plaintiff argues that any defects in the initial notice of claim were cured by the filing of the verified complaint and, even if they were not, the City had actual knowledge of the facts and a lack of prejudice, by the time the complaint and second notice of claim were filed.

"Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Under New York State law, a claim for abuse of process occurs, at the latest, when the criminal proceeding is terminated (*Beninati v Nicotra*, 239 AD2d 242, 242-243 [1st Dept 1997]).

With respect to the timing of the abuse of process claim, "a claim for abuse of process accrues at such time as the criminal process is set in motion, unless a plaintiff is unaware, through no fault of his own, of facts supporting the claim, in which case the cause of action accrues upon discovery" (*Pinter v City of New York*, 976 F Supp 2d 539, 570 [SD NY 2013][internal quotation marks and citation omitted]). "The accrual of a cause of action for abuse of process need not wait until the termination of an action in claimant's favor" (*Cunningham v State*, 53 NY2d 851, 853 [1981]).

According to plaintiff, her cause of action for abuse of process did not accrue on October 12, 2018, because, at that time, she was unable to allege she suffered harm without excuse or justification, an essential element for abuse of process. Plaintiff argues that her claim for abuse of process accrued on April 29, 2019 when the neglect proceedings against her were finally

concluded, favorably to her. Therefore, it is plaintiff's position that the notice of claim is timely as it had been filed, on May 6, 2020, within one year and 90 days of the accrual date.

General Municipal Law (GML) § 50-e "requires that a notice of claim be filed within 90 days of accrual of a claim prior to commencing a tort action against a municipality" (*Vitale v Hagan*, 132 AD2d 468, 469 [1st Dept 1987]). The court has discretion under the statute to grant leave to file a late notice of claim, but leave must be sought within the one year and 90 days statutory time limit for commencement of the tort action against the municipality. When exercising its discretion, pursuant to GML § 50-e, key factors a court must consider are:

> "'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense'"

(*Corwin v City of New York*, 141 AD3d 484, 489 [1st Dept 2016][internal citations omitted]).

"The presence or absence of any one factor is not determinative" (*id.*). The courts note that the "'most important factor' is whether the municipality 'acquired actual knowledge of the essential facts constituting the claim within the time specified" (*id.*).

Plaintiff further argues, in the alternative, that if the court does not grant plaintiff leave to serve and file the May 6, 2020 notice of claim, the court should deem plaintiffs' initial notice of claim as timely because any defects have been cured by service of plaintiffs' complaint.

In *Vitale*, the plaintiff commenced the action by service of a summons and a verified complaint, including a claim for malicious prosecution, within 90 days of dismissal of the criminal charges. However, the plaintiff filed a premature notice of claim, before those charges were dismissed. The Court found that, although plaintiff did not seek leave to file a late notice of claim or to have the premature one deemed timely *nunc pro tunc*, the filing of the summons and

complaint within 90 days after the dismissal of the criminal charges cured the defect in the premature notice of claim, and concluded that the claim was timely (*id*. at 470; *see also Quintero v Long Is. Rl. R.*, 31 AD2d 844 (2d Dept. 1969). Defendant City is correct in arguing that if the cause of action did accrue on April 29, 2019, plaintiffs' notice of claim was then premature as it was filed on March 27, 2019. However, the court finds that, because the notice of claim was premature, and the complaint was filed within one year and ninety days of the accrual of the claim, there is no prejudice to the City in deeming the later notice of claim as timely. As Andorfer-Lopez filed her summons and complaint alleging a cause of action for abuse of process on or about June 21, 2019 – within 90 days of the accrual of such claim- her claim must be deemed timely.

On the merits, the City moves to dismiss the abuse of process claim, arguing that plaintiff fails to plead the "collateral objective" for which the otherwise lawful process was issued, and plaintiff instead relies on a conclusory recitation of the elements of the claim. (Compl. ¶ 59). Specifically, the City contends that "Her 'vague and conclusory' pleading is insufficient to give the City notice of the facts underlying her claims, and the abuse of process claim should therefore be dismissed on this additional ground" (City memo in support at 10, citing *Gordon v Dino De Laurentiss Corp*., 141 AD2d 435, 436 [1st Dept 1988].

The City further argues that while plaintiff contends that the collateral objective of ACS in abusively using process was to harass Ms. Andorfer-Lopez and to injure her reputation, character, and image. (NYSCEF Doc. No. 80, at ¶ 59), plaintiff fails to identify when, how or what process ACS allegedly abusively used to injure Ms. Andorfer-Lopez's reputation or to harass her.

In opposition, plaintiff argues that:

> "NYC's issue of process was not for the purpose of determining whether Plaintiff posed imminent risk of harm to infant-Plaintiff's life or health were he to be in the care and custody of Plaintiff as process was issued without probable cause as it was: in spite of a diagnosis of FDIA and/or evaluation of Plaintiff for FDIA, despite a medical professional's testimony asserting [PA] needed the corrective surgery, despite [PA] undergoing corrective surgery, and ACS personnel making their own report to the subsequent SCR against Plaintiff that triggered a collateral investigation and accompanying late night 'emergency' home visit to her residence after the surgery was completed. Rather, process was issued with the sole objective to harass and injure Plaintiff's reputation, character, and image as this case was a 'public relation nightmare'"

(Plaintiffs' affirmation in opp at 21-22, citing complaint, ¶ 25).

Notwithstanding plaintiff's contentions, a malicious motive alone does not give rise to a cause of action to recover damages for abuse of process (*Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556 [2d Dept 2010]); *see Curiano v Suozzi*, 63 NY2d at 117. If process has a legitimate purpose, the allegation that it was misused does not suffice to state a claim for abuse of process (*see Roberts v Pollack*, 92 AD2d 440, 445 [1983]).

"The essence of the tort of abuse of process lies in the improper use of process, *viz.*, unlawful interference with one's person or property under color of process" (*Roberts v Pollack*, 92 AD2d 440, 444 [1st Dept 1983][internal citations omitted]). "The element of interference is satisfied when regularly issued process, civil or criminal, has been used to compel "the performance or forbearance of some prescribed act" (*id.*).

Here, taking the allegations in the complaint as true, there is no factual basis, beyond mere conclusion or speculation, to find that plaintiffs were subjected to the wrongful use of process with the intent, without economic or social excuse or justification, to harm plaintiffs (*see Otiniano v Magier*, 181 AD2d 438, 439 [1st Dept 1992]). The City, through ACS, received information from NYP and WCMC, based upon an interdisciplinary committee review and upon PA's medical

history, that plaintiff Andorfer-Lopez might be engaged in abusive treatment of PA. There is no factual basis offered by plaintiffs that the City, through ACS, acted upon any other interest, motive or intent. Accordingly, this claim must fail.

Claim for Malicious Prosecution

The City argues that plaintiffs' claim for malicious prosecution should be dismissed as the notice of claim was not filed timely. In order to establish a claim for malicious prosecution based upon a prior civil action, a plaintiff must prove: "that a prior proceeding terminated in [his or her] favor, a patent lack of probable cause for that proceeding, malice and special damages" (*Thyroff v Nationwide. Mut. Ins. Co.,* 57 AD3d 1433, 1435 [4th Dept 2008]. Because a malicious prosecution claim arises when the underlying claim is dismissed in the plaintiff's favor, and, here, the Family Court dismissed the case against Andorfer-Lopez on April 29, 2019, the notice of claim with respect to this claim should have been filed after April 29, 2019, but before July 28, 2019. Because the notice of claim was filed prematurely on March 27, 2019, the City argues that this claim should be dismissed.

In opposition, plaintiffs state that on or about May 6, 2020, they "timely filed a second notice of claim with the NYC Comptroller's Office which included the nature of the claim, the date, time, and location thereof, and the manner in which the claim arose" (Andorfer-Lopez's affirmation in opp to City motion at 6). Plaintiffs argue that the court should deem timely, *nunc pro tunc,* plaintiffs' second notice of claim upon the City. Plaintiffs argue, in the alternative, that the court should grant them leave to file a new notice of claim, *nunc pro tunc,* upon the City.

Specifically, plaintiffs argue:

> "The Court should grant this relief as: (a) the instant application is brought within the time in which the action could have been commenced against the City; (b) the City acquired actual knowledge of the essential facts constituting the causes of action within 90 days of their accrual; (c) Plaintiff's failure to timely serve the Notice of Claim is excusable; and (d) the delay in serving the Notice of Claim did not substantially prejudice the City in maintaining its defense on the merits"

(Andorfer-Lopez's aff in opp to City's motion at 13).

First, plaintiffs argue in opposition that the complaint, as well as plaintiffs' motion, was brought within the one year and ninety-day time limit. According to plaintiffs, the claims for malicious prosecution and abuse of process relating to the Family Court proceeding accrued on April 29, 2019 when Judge Shim dismissed the Article Ten proceeding with prejudice against Andorfer-Lopez. One year and ninety days from that date is July 28, 2020. The claim for improper disclosure of confidential information accrued on August 20, 2019 when the City served its Verified Answer. One year and ninety days from that date is November 18, 2020.

The May 6, 2020 notice of claim also includes claims for malicious prosecution and abuse of process related to the administrative proceeding. Those claims accrued on April 30, 2020 when ALJ Harris amended the report to unfounded and sealed the records. Those claims were brought within the ninety day window (July 29, 2020 being the deadline) and are unquestionably timely.

This court finds, with respect to plaintiffs' malicious prosecution claim, that the first notice of claim was filed prematurely on March 27, 2019, as a claim for malicious prosecution requires a dismissal in the plaintiff's favor. The dismissal in Andorfer-Lopez's favor in this action occurred on April 19, 2019, making the March 27, 2019 notice of claim premature and void. However, both parties acknowledge that the ninety-day deadline for plaintiffs' timely notice of claim was July 28,

2019, and, pursuant to General Municipal Law § 50-e (5), plaintiffs ask the court to deem the May 6, 2020 notice of claim as timely filed.

Pursuant to General Municipal Law § 50-e (5), "the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or secretary of state." This section of the General Municipal Law further states:

> In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances
>
> [. . .]
>
> These factors have also been described as follows:
>
> The criteria a court must consider in determining whether to exercise its discretion to allow a late notice of claim include: (1) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter; (2) whether the delay substantially prejudiced the public corporation in maintaining its defense on the merits; and (3) whether the claimant has demonstrated a reasonable excuse for the delay.

(Matter of Leon v New York City Health & Hosps. Corp., 163 AD3d 670, 671 [2d Dept 2018]).

"'Actual knowledge of the essential facts [constituting the claim, in particular,] is an important factor in determining whether to grant an extension, and should be accorded great weight'" (*id*. at 671). "However, the presence or absence of any one of the factors is not necessarily dispositive" (*id.* at 671-672; see also *Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]), "and the absence of a reasonable excuse is not, standing alone, fatal to the application" (*Porcaro*, 20 AD3d at 358).

According to the Appellate Division First Department, "[t]he statute is remedial in nature and, therefore, should be liberally construed" (*Porcaro*, 20 AD3d at 358). Thus, the time to file a notice of claim may be extended to no more than one year and ninety days "after the cause of action accrued" (*Pierson v City of New York*, 56 NY2d 950, 954 [1982]), and the application for the extension may be made before or after the commencement of the action (*id*. at 954).

For the reasons set forth above, this court finds that, although premature, the City had actual knowledge of the plaintiffs' claim for malicious prosecution as this claim was set forth and described in the March 27, 2019 notice of claim. The City had ample time to investigate plaintiffs' claims prior to the commencement of this litigation, as plaintiffs' claim for malicious prosecution accrued on April 29, 2019, when Judge Shim dismissed the underlying proceeding with prejudice. Thus, plaintiffs' May 6, 2020 notice of claim was within one year and ninety days of the accrual. This court further finds that plaintiffs' filing of the notice of claim with respect to this cause of action was timely.

Nevertheless, this court dismisses plaintiffs' claim for malicious prosecution, pursuant to CPLR 3211 (a)(7), on the ground that plaintiffs have failed to state this claim. As set forth above, in order to establish a claim for malicious prosecution based upon a prior civil action, a plaintiff must prove: "that a prior proceeding terminated in [his or her] favor, a patent lack of probable cause for that proceeding, malice and special damages" (*Thyroff*, 57 AD3d at 1435 ["defendants presented evidence establishing that Nationwide had independent information that plaintiff husband was violating the noncompete clause of the agreement, and thus it cannot be said that the counterclaim was asserted with "a patent lack of probable cause ... and malice"][internal quotation marks and citations omitted]). A plaintiff must "'prove an entire lack of probable cause in the

prior proceeding'" (*347 Cent. Park Assoc., LLC v Pine Top Assoc., LLC*, 144 AD3d 785, 786 [2d Dept 2016][internal citation omitted]).

Here, the October 12, 2018 report from defendant doctors Gordon and Marquis to ACS was the ground for the underlying proceeding. In that report, the doctors set forth the basis for their medical opinions that Andorfer-Lopez was possibly abusing PA. That basis included records from the Arizona doctors, their own distrust of Andorfer-Lopez's statements based upon their observations of PA, and the observations of a pediatric multidisciplinary team at NYP. As a result of this independent information, ACS commenced an action in Family Court. Plaintiffs' conclusory claims that this investigation was commenced based solely on a desire of "harassing plaintiff and injuring her reputation, character and image" do not state a cause of action. Even if the City was aware that PA's biological father had made the allegation that Andorfer-Lopez suffered from FDIA, this neither undermines the City's reliance on the report from the hospital, nor does it provide proof of a conspiracy between the City and the hospital and the father, or of any improper motivation on the part of the City. Plaintiffs claim that there was "a patent lack of probable cause for the [underlying] proceeding," is belied by the record which fatally undermines plaintiffs' claim for malicious prosecution.

Plaintiffs' Claims for Negligent Investigation and Negligent Prosecution

The City argues that plaintiffs' negligence claims should be dismissed on the grounds that New York State does not recognize causes of action for negligent investigation or for negligent prosecution. In the complaint, under general negligence, plaintiffs allege that "it was the duty of Defendant NYC to ensure that families who came to the attention of ACS were investigated appropriately and in accordance with the subjective factual issues germane to said family. Moreover, it was the duty of Defendant NYC to ensure that attorneys advising and/or prosecuting child neglect and abuse proceedings did so diligently and in accordance with the relevant legal authority" (complaint, ¶ 69).

Next, the City argues that plaintiffs' allegation that the City breached a duty to "ensure that attorneys advising and/or prosecuting child neglect and abuse proceedings did so diligently and in accordance with the relevant legal authority," must fail as there is no cause of action for negligent investigation or negligent prosecution in New York (City memo in support at 11). As the City correctly argues, in regard to this claim, "New York does not recognize a cause of action sounding in . . . negligent prosecution" (*id.*, citing *Hines v City of New York*, 142 AD3d 586, 587 [2d Dept 2016]).

On this point, the City further argues that it is entitled to absolute immunity because "the investigation and decision by the Administration for Children's Services (ACS), resulting in the removal of plaintiff's son and the filing of a Family Court petition against plaintiffs, constituted quasi-judicial acts entitled to . . . absolute immunity" (*id.*, citing *Carossia v City of New York*, 39 AD3d 429, 430 [1st Dept 2007]). As the City correctly argues, "no cause of action for negligent investigation lies in New York" (*Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]).

Further, plaintiff alleges that the City breached its duty to "ensure that attorneys advising and/or prosecuting child neglect and abuse proceedings did so diligently and in accordance with the relevant legal authority" (complaint, ¶ 69). First, with regard to this claim, this court notes that "New York does not recognize a cause of action sounding in . . . negligent prosecution" (*Hines v City of New York* 142 AD3d 586, 587 [2d Dept 2016][internal citations omitted][court ruled that New York does not recognize claims of negligent investigation or negligent prosecution where plaintiff alleged City negligently handled report of child abuse]; *see also Hart v County of Erie*, 189 AD3d 2123, 883 [4th Dept 2020][allegations of negligent investigation against Child Protective Services office dismissed as not recognized in New York); *Coleman v Corporate Loss Prevention Assoc*., 282 AD2d 703 [2d Dept 2001]). Accordingly, this court dismisses these claims against the City.

Moreover, the City is entitled to immunity "for those governmental actions requiring expert judgment or the exercise of discretion. This immunity . . . is absolute when the action involves the conscious exercise of discretion of a judicial or quasi-judicial nature" (*Arteaga v State of New York*, 72 NY2d 212, 215-216 [1988] [citations omitted]; *Mon v City of New York*, 78 NY2d 309 [1991][absolute immunity applied to municipal defendants]).

Here, ACS's receipt of the report from the NYP doctors, containing their concerns about Andorfer-Lopez, the subsequent investigation and decision by ACS to commence the Hearing, which resulted in the temporary removal of Andorfer-Lopez's son, a delay of the medical procedure and the filing of a Family Court petition against Andorfer-Lopez, constituted quasi-judicial acts entitled to such absolute immunity (*see Carossia*, 39 AD3d at 430). Any allegations of bad acts that would prevent a finding of absolute immunity for the City are conclusory.

New York courts have "long followed the rule that an agency of government is not liable for the negligent performance of a governmental function unless there existed 'a special duty to the injured person, in contrast to a general duty owed to the public'" (*McLean v City of New York*, 12 NY3d 194, 199 [2009][internal citations omitted]). Such a duty is "'born of a special relationship between the plaintiff and the governmental entity'" *(id.*[internal citations omitted]).

The elements to establish a special relationship are not present in this case. Plaintiffs offer no "promises or actions" undertaken by the City to assume a duty to do something on PA's behalf. The City's duty to PA was "neither more nor less than its duty to any other parent and child" in such a situation where there is suspected abuse (*see McLean v City of New York*, 12 NY3d at 201). This court notes that plaintiffs did not bring this action against any individual employees of the City, but sued only the City itself. According to plaintiffs, the only direct contact Andorfer-Lopez had with ACS was a telephone call with ACS's Deputy Commissioner Martin to discuss her letter to the Mayor concerning her allegations of ACS's "unlawful" investigation. Thus, even an assumption of the City's negligence, which caused plaintiffs' injuries, does not support a finding of liability on the part of the City as the relationship between plaintiffs and the City was not "special" under the law.

This court dismisses these claims against the City.

Plaintiffs' Claim for Negligent Infliction of Emotional Distress

Plaintiffs allege that the City "negligently engaged in extreme and outrageous conduct by preventing plaintiff from exercising her right to elect for [PA] to undergo medical treatment at WCMC to alleviate symptoms and/or manifestations of a Chiari malformation" (complaint, ¶ 48). According to the City, plaintiffs' claim for negligent infliction of emotional distress should be dismissed.

"A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" (*Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]). "Extreme and outrageous conduct continues to be an essential element of a cause of action alleging negligent infliction of emotional distress" (*Xenias v Roosevelt Hosp,.* 180 AD3d 588, 589 [1st Dept 2020] *see also Holmes v City of New York*, 178 AD3d 496, 496 [1st Dept 2019]). Moreover, "failure to adequately allege extreme and outrageous conduct is not fatal to [a] cause of action alleging negligent infliction of emotional distress" (*Taggart v Costabile*, 131 AD3d 243, 256 [2d Dept 2015]).

Regarding the claim of negligent infliction of emotional distress, as stated above, New York courts, with respect to allegations of negligence against a government entity, have "long followed the rule that an agency of government is not liable for the negligent performance of a governmental function unless there existed 'a special duty to the injured person, in contrast to a general duty owed to the public'" (*McLean v City of New York*, 12 NY3d at 199[internal citations omitted]). Such a duty is "'born of a special relationship between the plaintiff and the governmental entity'" *(id.*[internal citations omitted]).

As for the first condition, plaintiffs argue that:

> Defendant NYC breached this duty once they prevented and indefinitely delayed Infant-Plaintiff from undergoing a potentially life saving surgery for his Chiari-malformation as medically recommended after their individual, separate, and objective evaluations of the subject child. As a result, the Infant Plaintiff's physical safety was unreasonably endangered as, if left untreated, Chiari-malformation can cause severe and life-threatening consequences

(Robinson affirmation in opp at 26).

Although the allegations state, in a conclusory fashion, that the delay of the surgery endangered PA's safety, there is no factual basis for this in the complaint. In fact, there is nothing in the report to ACS indicating a need for emergency surgery. According to the complaint, "on or about November 19, 2018, [ACS personnel] admitted to [Andorfer-Lopez] that ACS personnel had spoken to Dr. Greenfield directly and that he had said 'The surgery...has to be done at some point.' ACS personnel subsequently memorialized Dr. Greenfield's confirmation of the appropriateness of the surgery in a report summarizing the meeting held on that date" (complaint, ¶ 31).

Further, in Dr. Greenfield's December 7, 2018 communication with Andorfer-Lopez, he does not make any statements about a delay being hazardous to PA's health. Instead, he states that he believes his testimony before the Judge at the Hearing will be helpful. Further, there are no rulings by the Judge at the Hearing that the delay would harm PA's health. In fact, Dr. Greenfield did not testify until March 2019, although he had been subpoenaed to testify previously. Additionally, there are no allegations that either plaintiff feared for their own safety.

As set forth above, a special relationship is not present in this case. According to plaintiffs' submissions to the court, the only direct contact Andorfer-Lopez had with ACS was a telephone call with ACS's Deputy Commissioner Martin to discuss plaintiff's letter to the Mayor concerning her allegations of ACS's "unlawful" investigation. Thus, even an assumption of the

City's negligence, which caused plaintiffs' injuries, does not support a finding of liability on the part of the City as the relationship between plaintiff and the City was not "special" under the law. For the above reasons, this court dismisses this claim for negligent infliction of emotional distress against the City.

Plaintiffs' Claim for Negligent Hiring, Training, Supervision and Retention

The City argues that plaintiffs' claims for negligent hiring, training, supervision and retention should be dismissed because plaintiffs fail to establish that the city employees involved in the ACS action regarding plaintiffs, were acting outside the scope of their employment. Further, the City argues that fatal to this claim, is plaintiffs failure to identify the employees or what each employee did to support this claim against the City. The City argues ultimately, that the allegations support this claim are vague and conclusory.

The tort of negligent hiring and retention is applied equally to municipalities and to private employers (*Gonzalez v City of New York*, 133 AD3d 65, 67 [1st Dept 2015]). As has been held:

> The theory of employer liability should be distinguished from the established doctrine of 'respondeat superior,' where an employer is held liable for the wrongs or negligence of an employee acting within the scope of the employee's duties or in furtherance of the employer's interests. In contrast, under the theory of negligent hiring and retention, an employer may be liable for the acts of an employee acting outside the scope of his or her employment.

(*id., see also Malik v Ultraline Med. Testing, P.C.*, 177 AD3d 515. 516 [1st Dept 2019]; *Leftenant v City of New York*, 70 AD3d 596, 597 [1st Dept 2010]["And since the officers were acting within the scope of their employment, which plaintiff does not dispute, the claim of negligent hiring, training and supervision must also fail").

According to plaintiffs, the City's employees were acting outside the scope of their employment when they continued investigating plaintiffs after Judge Shim issued a decision to permit the surgery to go forward. In the complaint, Dr. Greenfield concluded his testimony on March 12, 2019 at the hearing before Judge Shim. That day, Judge Shim issued a ruling that PA was to return to the custody and care of his mother, plaintiff Andorfer-Lopez. NYP and WCMC would not reschedule Dr. Greenfield's recommended surgery until this decision was issued. Dr. Greenfield performed the surgery on April 8, 2019. Plaintiffs' complaint alleges:

> Remarkably, ACS personnel failed to immediately withdraw the child abuse proceeding. Rather they continued to prosecute Plaintiff with vigor over the next few weeks including ACS personnel making their own report to the SCR against Plaintiff (triggering a collateral investigation and accompanying late night "emergency home visit to [plaintiffs'] home.

(complaint, ¶¶34-37).

This court finds that plaintiffs' claim, as it is set forth in the complaint, is vague and conclusory and cannot withstand the City's motion to dismiss. First, plaintiffs fail to identify the employees against whom the allegations are made. Second, plaintiffs fail to specify the specific conduct these employees engaged in, or offer any explanation as to how/why the continued investigation of the matter, before the City withdrew the complaint and the case was dismissed on April 29, 2019, would be outside the scope of the unidentified employees' employment. Plaintiff's failure in this regard is fatal to this claim.

Plaintiffs' Claims Pursuant to 42 U.S.C. § 1983

The City moves to dismiss plaintiffs' claims pursuant to 42 USC § 1983 on the ground that plaintiffs fail to plead the existence of a policy, practice or custom of the City of New York that resulted in a violation of their federal statutory or constitutional rights.

In order to state a claim, pursuant to 42 USC. § 1983, "a plaintiff must allege that a person acting under color of state law deprived the plaintiff of federal statutory or constitutional rights" and this deprivation was caused by "a policy, custom, or practice of the municipal defendant" and must be pleaded with specific facts (*Monell v Department of Soc. Servs. of City of New York*, 436 US 658, 692-95 [1978]; *see also Pang Hung Leung v City of New York*, 216 AD2d 10, 11 [1st Dept 1995]). To support this claim, a plaintiff must allege that the constitutional violation was caused by:

> (1) a formal policy officially endorsed by the municipality; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policy-maker must have been aware; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees.

(*Calderon v City of New York*, 138 F Supp 3d 593, 611 [SD NY 2015]).

The City argues that plaintiffs fail to plead the existence of a policy, practice or custom of the City of New York that resulted in a violation of their statutory or constitutional rights. In opposition, plaintiffs argue that the City commenced an abuse hearing against plaintiff, pursuant to Article 10 of the Family Court Act, and that this was done without probable cause. Plaintiffs claim that NYC's policy, practice or custom of initiating, investigating and commencing proceedings, pursuant to Article Ten of the Family Court Act, reflects a deliberate indifference to plaintiffs' constitutional rights. Plaintiff further argues that the City had a practice of maliciously prosecuting individuals despite the lack of probable cause.

Plaintiffs offer no evidence of any practice, regular policy or custom of the City that reflects a deliberate indifference to plaintiffs' rights. At most, the allegations set forth by plaintiffs concerning a pattern or practice by the City to violate plaintiffs' constitutional rights are general and conclusory and, therefore, do not state a claim pursuant to 42 USC § 1983 (*see Carattini v Grinker,* 178 AD2d 307, 307 [1st Dept 1991]; *Pang Hung Leung,* 216 AD2d at 11).

Right to Intimate Association and Substantive Due Process

Plaintiff alleges that the City deprived her of her First Amendment right to intimate association with PA by "advocating for and/or ensuring" "the removal of PA from her care" (City' s memo in support at 15). In opposition, the City argues, that the "right to intimate association vis-a-vis parent-child relationships [are] analyzed . . . under the principles of substantive due process rather than the First Amendment" (City's memo in support at 15, citing *Licorish-Davis Mitchell,* 2013 WL 2217491, 2013 US Lexis 71917 [SD NY 2013]).

Plaintiffs additionally allege that the City deprived Andorfer-Lopez of her substantive due process rights by "'conducting a grossly insufficient and unprofessional investigation,' by commencing a proceeding in Family Court 'without probable cause;' 'by failing to aid the [Family] Court in reaching a timely determination as to threshold issues of imminent risk to the life or health of the child;" by "delaying and/or preventing recommended treatment for [PA],' and by 'divulging confidential medical and other wise protected information . . .'" (City memo in support at 15-16 citing complaint, ¶ 132).

The City argues that these claims must be dismissed as plaintiffs have not alleged a practice, policy or custom of the City that led to the violation of plaintiffs' constitutional rights. Plaintiffs argue in opposition that the City's "initiation, investigation, and proceedings, pursuant to Article Ten of the Family Court Act, are the specific policy, practice or custom that was both widespread and reflected a deliberate indifference to plaintiffs' constitutional rights.

"Only the most egregious official conduct is prohibited by substantive due process. 'Substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised'" (*People United for Children, Inc. v City of New York*, 108 F Supp 2d 275, 293 [SDNY 2000][internal citations omitted]). In order to assess plaintiffs' substantive due process claim, the court applies the three-part test set forth in *Joyner v Dumpson*, 712 F2d 770 [2d Cir 1983]. "First, the Court must examine the nature of the interest at stake to determine whether it is a fundamental right protected by the Fourteenth Amendment. Second, the court must determine whether defendants' actions have significantly infringed that fundamental right, and, third, the court must analyze whether an important state interest justifies the infringement" (*People United for Children, Inc.*, 108 F Supp 2d at 293.

This court finds that even if plaintiffs were able to satisfy the first two prongs, plaintiffs are unable to satisfy the third prong. Therefore, the claim fails. Here, plaintiffs allege that the City violated Andorfer-Lopez's "right to intimate association by advocating for and/or ensuring restriction of plaintiff's parental access to [PA], advocating for and/or ensuring the restriction upon residency of [PA], and/or advocating for and/or ensuring restrictions upon the right for Plaintiff to elect for [PA] to receive medical treatment" (verified amended complaint, ¶ 100). Plaintiffs further allege that the City violated "[Andorfer-Lopez's] fundamental liberty interest in the freedom to

raise her child by conducting a grossly insufficient and unprofessional investigation, by initiation and/or maintaining an abuse proceeding pursuant to Article Ten of the Family Court Act without probable cause to do so, failing to aid the Court in reaching a timely determination as to threshold issues of imminent risk to the life or health of the child, delaying and/or preventing recommended treatment for [PA] and/or divulging confidential medical and other wise protected information to improper parties without plaintiff's [sic]" (*id.*, ¶ 146).

Here, on October 5, 2018, NYP cancelled PA's suboccipital decompression and duraplasty and, sometime thereafter, sent a report to SCR regarding plaintiff. The report contained concerns about plaintiff Andorfer-Lopez's treatment of PA:

> According to the NYP-WCMC multidisciplinary team, including [Marquis] (Department of Pediatric Neurology/Epilepsy) and [Samuels] (Director of Child/Adolescent Psychiatry Consultation-Liaison Services),the subject child has had multiple hospitalizations, emergency department visits, and surgeries since March 2017, between living in Arizona and New York. According to same, the subject child has been a patient at NYP-WCMC since in or around July 2018 and, since that time, the medical team has become increasingly concerned that the description of the subject child's illness and medical course as represented by his mother does not match objective data about his current condition. According to same, the medical treatment team believes that the subject child is being subjected to invasive and unnecessary medical procedures and ongoing medical treatment that could have long-term complications, including the risk of unnecessary surgeries, infection and death.

(Robinson affirmation, exhibit A).

On this point, the City argues that its conduct was:

> in compliance with [ACS's] statutory obligations under New York Social Service Law to report and investigate allegations of suspected child [abuse],' to file an abuse petition against [plaintiff] 'based on the interviews conducted ,' and given that the Family Court subsequently authorized the removal of PA from plaintiff's custody [t]his was not extreme and outrageous conduct on the part of the City.

(*id.* at 13).

Thus, this court finds that the City had a legitimate interest in investigating the hospital's allegations and, if the City had knowledge of them, the father's allegations. Again, plaintiffs' allegations of malice or conspiracy are conclusory and have no basis in any alleged fact. On these grounds, this claim is dismissed.

Intentional Infliction of Emotional Distress

Finally, the City argues that plaintiffs' claim for intentional infliction of emotional distress must be dismissed. Plaintiffs claim that the City intentionally inflicted emotional distress upon plaintiffs. The City argues in opposition that public policy bars such claims against governmental entities.

Pursuant to *Melendez v City of New York*, 171 AD3d 566, 567 [1st Dept 2019] and *Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999]), plaintiffs' claim for intentional infliction of emotional distress against the City is "barred as a matter of public policy" (*Dillon v. City of New York*, 261 AD2d at 41) and, therefore, dismissed.

In accordance with all of the aforementioned reasons set forth herein, it is hereby:

ORDERED that the motion, (Motion Sequence #001), filed by defendant doctors Belinda Marquis, Lara Gordon, and Susan Samuels, to dismiss the complaint, pursuant to CPLR 3211 (a) (8), is GRANTED; and it is further hereby

ORDERED that the motion, (Motion Sequence #002), filed by defendant The City of New York, to amend the answer, pursuant to CPLR 3025, is GRANTED; and it is further hereby

ORDERED that the motion, (Motion Sequence #002), filed by defendant The City of New York, to dismiss the verified complaint, pursuant to CPLR 3211 (a)(7), is granted; and it is further hereby

ORDERED that the cross-motion filed by plaintiffs' Caterina Andorfer-Lopez and PA, pursuant to CPLR 3025, to amend the verified complaint is DENIED; and it is further hereby

ORDERED that the cross-motion filed by defendant New York Presbyterian (NYP), to dismiss the complaint, pursuant to CPLR 3211 (a)(7) is GRANTED

This is the Decision and Order of this court.

Dated: October 26, 2021
New York, New York

HON. J. MACHELLE SWEETING, J.S.C.