SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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DAVID MOLINA as Proposed Administrator of the Estate of PEDRO MOLINA, Deceased, and Individually,

Plaintiff,

- v -

MOUNT SINAI MORNINGSIDE HOSPITAL, MOUNT SINAI MEDICAL CENTER FOUNDATION INC., BRIAN AFRICA, M.D., SAIRA MEHMOOD, M.D., MANZAR RIZVI, M.D., MICHAEL HERSHER, M.D., COURTNEY CASSELLA, M.D., and DOCTORS "JOHN DOE" 1-10 and NURSES "JANE DOE" 1-10,

Defendants.

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INDEX NO. 805314/2021

MOTION DATE 07/12/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for DISMISSAL.

In this action to recover damages for medical malpractice, common-law negligence, negligent infliction of emotional distress, and wrongful death, the defendants Mount Sinai Morningside Hospital (Morningside), Brian Africa, M.D., Manzar Rizvi, M.D., and Michael Hersher, M.D., together move pursuant to CPLR 3211(a)(5) to dismiss, as time-barred, the medical malpractice causes of action (1st cause of action and 4th cause of action, the latter asserting a "survival claim" for medical malpractice damages under EPTL 11-3.2[b]) insofar as asserted against them, and pursuant to CPLR 3211(a)(7) to dismiss the negligent infliction of emotional distress cause of action (2nd cause of action) insofar as asserted against them for failure to state a cause of action. The plaintiff opposes the motion. The branches of the motion seeking relief pursuant to CPLR 3211(a)(5) are deemed to be branches of a motion seeking summary judgment dismissing the relevant causes of action on the ground that they are time-barred, those branches of the motion thereupon are granted, the branch of motion seeking relief

pursuant to CPLR 3211(a)(7) dismssing the negligent infliction of emotion distress cause of action is granted, and the 1st, 2nd, and 4th causes of action are dismissed insofar as asserted against the movants.

The crux of the plaintiff's claim against the movants is that they failed to diagnose his decedent's brain cancer, thus causing his decedent to experience conscious pain and suffering and, ultimately, causing his death.

The decedent, who was then 79 years old, presented to the Morningside emergency room on February 4, 2018, February 22, 2018, and March 2, 2018. The February 4, 2018 visit was necessitated by the decedent's fall, in which he suffered a laceration to the back of his head. Specifically, he lost his balance and fell backwards, hitting his head on the floor. Although he reported traumatic pain to the back of his head, he denied loss of consciousness, neck or back pain, dizziness, nausea, vomiting, diarrhea, fever, cough, or shortness of breath, while his airway, breathing, and circulation were unremarkable. He was treated for the laceration and released.

At the decedent's February 22, 2018 visit, he complained of possible pneumonia, based on an ongoing cough and shortness of breath. His chart for that visit indicated that he had a medical history, going back to 2015, that included arthritis, hypertension, impaired skin integrity related to venous stasis ulcers, a high risk for falling, exacerbation of congestive heart failure, activity intolerance, body image disturbance, fluid volume excess, an ineffective breathing pattern, and a foot ulcer. During this visit, he was prescribed amlodipine and carvedilol to treat high blood pressure, docusate sodium and sennosides to treat constipation, acetaminophen to treat pain and fever, ferrous sulfate for iron deficiency, baby aspirin and heparin to thin his blood, and azithromycin and ceftriaxone to treat a bacterial infection. The decedent also underwent various blood tests and urinalysis, revealing slightly elevated levels of urea nitrogen and slightly depressed levels of calcium, along with various minor deviations from the reference range with respect to complete blood count (CBC) testing. He also underwent an

electrocardiogram, which revealed minor bradycardia, submitted to a nutritional consultation, and had several x-rays taken. During this visit, he was oriented as to person, place, and time, and his condition was otherwise unremarkable, except for a finding of possible olecranon bursitis, suggestive of a recent trauma, as well as pleural effusion related to the pneumonia. He was discharged on February 23, 2018.

On March 2, 2018, the decedent again presented to the Morningside emergency room, having been taken by ambulance there, after sustaining what the chart described as a minor, closed injury to his head, again caused by a fall. Upon presentation, emergency room personnel noted a small laceration to the decedent's right forehead. Emergency room physician Giselle Cruz, M.D., noted in the decedent's chart that,

> "Pt states he was reaching for urinal, lost balance and fell out of bed, hit head, states he did not lose consciousness, called for daughter immediately and daughter confirms she heard him fall and then heard him call for her, Pt does not know his medications or if he is on anticoagulation. Pt states head hurts and he hit head but denies nausea, vomiting, ex pain, dizziness, sob, ex pain, any other pain or trauma or injury. The history was provided by the patient. The history is limited by nothing - patient appears as reliable historian."

After undertaking an examination and taking several x-ray scans, Morningside's medical staff discharged the decedent on March 3, 2018, reporting no slurred speech, visual impairments, or other neurological symptoms.

Morningside maintained no subsequent medical records documenting any treatment of the decedent subsequent to March 3, 2018.

The only documented date that the decedent treated with the defendant geriatric medicine specialist Africa was February 9, 2018, at which time Africa performed an annual physical, although the decedent did engage in subsequent telephone calls with Africa's office to confirm orders for home medical equipment, as requested by the decedent's home nurse. The only documented date that the decedent treated with the defendant radiologist Rizvi was March 2, 2018, when Rizvi interpreted a computed tomography (CT) scan of the decedent's head at Morningside.

The only documented date that the decedent treated with internist Michael Herscher, incorrectly sued herein as Michael Hersher, was June 14, 2018, as set forth in medical records generated by non-party Mount Sinai Hospital during an emergency room presentation between June 12, 2018 to June 14, 2018, again in response to a fall. Mount Sinai Hospital staff recorded that the decedent had a history of arthritis, drug-induced bradycardia, congestive heart failure with an ejection fraction of 25%, chronic systolic heart failure, coronary artery disease, essential primary and benign hypertension, supraventricular tachycardia, and senile dementia (uncomplicated), as well as a personal history of noncompliance with medical treatment, presenting hazards to his health.

According to the movants, there are no additional medical records or documents in their possession, or in the possession of Mount Sinai Hospital, that post-date June 14, 2018, and the plaintiff has pointed to nothing, including any documentary evidence, that even suggested that any of the named defendants treated the decedent at any time during 2019.

Morningside's charts from both the February 4, 2018 and March 2, 2018 visits noted the presence of a right frontal cerebral convexity meningioma in the decedent's brain, as did charts and medical records from Temple Health in Philadelphia, Pennsylvania, dated January 5, 2019, which reported that, in light of the decedent's low levels of antibody-drug conjugate, "atypical" meningioma remained a possible diagnosis. A meningioma is a known benign central nervous system tumor, commonly arising from the meninges of the brain and spinal cord, that may impinge upon the brain, while an "atypical" meningioma, which the Temple Health physicians suspected, but never diagnosed, is a mid-grade tumor that, while not malignant, has a higher chance of recurrence after removal than a benign meningioma. There is no mention of "cancer" in any of the decedent's medical charts, including the Temple Health chart, and the only mentions of malignancy in that chart referred to a potential malignancy near the C-1 verterbra and a finding on imaging that was "worrisome" for renal cell carcinoma. No physician ever diagnosed the decedent with brain cancer or a malignant brain tumor, and the medical records

do not reflect any such diagnosis, despite the fact that the plaintiff alleged that the decedent was diagnosed with brain cancer in June 2019, and his bills of particulars identify his primary claim as the defendants' failure to diagnose brain cancer or a malignant tumor. The plaintiff, however, did not identify the physician who made that diagnosis, and whether it was communicated to him by that physician.

Initially, the court notes that the movants are seeking relief pursuant to CPLR 3211(a)(5) with respect to the medical malpractice causes of action. Reliance on that statute, however, is improper. CPLR 3211(e) provides that,

> "At any time *before service of the responsive pleading* is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading"

(emphasis added). The court notes that the movants have preserved the affirmative defense of the statute of limitations by asserting it in their respective answers; however, in light of the provisions of CPLR 3211(e),

> "[a] motion to dismiss the complaint based on a ground listed in CPLR 3211(a) . . . must be made before answering (*see* CPLR 3211[e]: Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:21). A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading (*id*.). Summary judgment is, therefore, a post answer device (*id*.). Any of the grounds on which a CPLR 3211 motion could have been made here . . . can he used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (CPLR 3211[e]: Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:20). Having preserved the affirmative defense in their answer, defendants were not also entitled to serve a pre-answer motion to dismiss, which is a procedural irregularity. Defendants [are] required to move for summary judgment on the [CPLR 3211(a)] issue inasmuch as they had served their answer"

(*Lusitano Enters., Inc. v Horton Bros., Inc.*, 2018 NY Slip Op 32011[U], *2-3, 2018 NY Misc LEXIS 3587, *4 [Sup Ct, Suffolk County, Aug. 14, 2018]; *see Castro v Fraser*, 2022 NY Slip Op 30903[U], *5, 2022 NY Misc LEXIS 1368, *7 [Sup Ct, N.Y. County, Mar. 15, 2022] [Kelley, J.]; *Higgins v Goyer*, 2018 NY Slip Op 33520[U], *2, 2018 NY Misc LEXIS 9607, *3 [Sup Ct,

Rensselaer County, Nov. 1, 2018]; *see also McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]).

Consequently, to the extent that the movants seek relief on a ground enumerated in CPLR 3211(a)(5), such relief is unavailable pursuant to that statute at this juncture, but is available only via a motion for summary judgment pursuant to CPLR 3212 (*see Rich v Lefkovits*, 56 NY2d 276, 282 [1982] ["we answer in the affirmative the question . . . concerning whether defendant may move after answer for summary judgment on his jurisdictional defense"]). The court concludes that, in this case, there are no disputed issues of fact with respect to when the movants last treated the decedent, or whether he was ever diagnosed with cancer (*see* discussion below), leaving only a pure issue of law for the court to consider, and the parties clearly have charted a summary judgment course. Hence, the court deems the motion pursuant to CPLR 3211(a)(5) to be a motion for summary judgment dismissing the medical malpractice causes of action on the ground that they were time-barred, without the need for providing additional notice to the parties pursuant to CPLR 3211(c) (*see Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; *Ramos v Kalsow*, 2023 NY Slip Op 32954[U], *2-3, 2023 NY Misc LEXIS 4648, *2-3 [Sup Ct, N.Y. County, Aug. 24, 2023] [Kelley, J.]; *see also Mic Prop. & Cas. Ins. Corp. v Custom Craftsman of Brooklyn, Inc.*, 269 AD2d 333, 334 [1st Dept 2000]).

In connection with a motion for summary judgment dismissing a complaint as time-barred, "a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made," the burden shifts to the plaintiff to raise a triable issue of fact as to "whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP,* 138 AD3d 1085, 1085-1086 [2d Dept 2016]; *see MLB Sub I, LLC v Clark,* 201 AD3d 925, 927 [2d Dept 2022]; *Murray v Charap*, 150 AD3d 752 [2d Dept 2017]; *Precision Window Sys., Inc. v*

EMB Contr. Corp., 149 AD3d 883, 884 [2d Dept 2017]; *Guzy v New York City*, 129 AD3d 614, 615 [1st Dept 2015]; *Williams v New York City Health & Hosps. Corp*., 84 AD3d 1358 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051 [2d Dept 2011]).

The court notes that, in accordance with L 2020, ch 23, § 2 (eff Mar. 3, 2020), the Legislature amended Executive Law § 29-a to authorize the Governor to issue, by executive order, any directive necessary to respond to the state disaster emergency arising from the COVID-19 pandemic, including a declaration that all statutory periods for the service and filing of papers in legal actions were tolled. On March 20, 2020, the Governor, pursuant to that authority, issued Executive Order (EO) 202.8, which provided, in relevant part:

> "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, *any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules* . . . , or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, *is hereby tolled from the date of this executive order until April 19, 2020."*

(emphasis added). The terms of that EO, including the tolling deadlines set forth therein, were extended 13 times between March 20, 2020 and October 4, 2020. On October 4, 2020, the Governor issued EO 202.67, providing for a final extension of the tolling deadline until November 3, 2020, with the toll no longer in effect as of November 4, 2020 (*see Brash v Richards*, 195 AD3d 582 [2d Dept 2021] [explicitly concluding that the executive orders effectuated a toll and not a mere suspension of filing deadlines]). "A toll suspends the running of the applicable period of limitation for a finite time period, and '[t]he period of the toll is excluded from the calculation of the [relevant time period]'" (*id*. at 582, quoting *Chavez v Occidental Chem. Corp*., 35 NY3d 492, 505, n 8 [2020]; *see Landwehrle v Bianchi,* 2022 NY Slip Op 50649[U], *2, 2022 NY Misc LEXIS 3094, *5 [Sup Ct, N.Y. County, Jun. 24. 2022] [Kelley, J.]; *Pollock v Rengasamy*, 2022 NY Slip Op 22160, *5, 2022 NY Misc LEXIS 2154, *10 [Sup Ct, Washington County, May 18, 2022]).

The plaintiff commenced this action on October 10, 2021.

CPLR 214-a provides, as relevant here, that,

> "[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; provided, however, that: . . . (b) where the action is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within two years and six months of the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition. For the purpose of this section the term 'continuous treatment' shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition. . ."

Applying the COVID-19 toll to the acts or omissions asserted by the plaintiff against the individual movants, the plaintiff was required to interpose the medical malpractice causes of action against Morningside on April 19, 2021, against Africa on March 29, 2021, against Rizvi on April 18, 2021, and against Herscher on July 30, 2021, unless the additional toll based on continuous treatment is applicable here, or the plaintiff can establish that the date of discovery rule for cancer or malignant tumors applies to this case.

The "continuous treatment" provision of CPLR 214-a posits that the limitations period "does not begin to run until the end of the course of treatment when the course of treatment which includes the wrongful acts or omissions has run continuously and is *related to the same original condition or complaint*" (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991] [internal quotation marks omitted] [emphasis added]; *see Massie v Crawford*, 78 NY2d 516, 519 [1991]; *McDermott v Torre*, 56 NY2d 399, 405 [1982]; *Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *Jajoute v New York City Health & Hosps. Corp.*, 242 AD2d 674, 676 [1st Dept 1997]).

The Appellate Division, First Department, has not adopted the bright-line rule articulated by the Appellate Division, Second Department, in decisions such as *Sherry v Queens Kidney*

Ctr. (117 AD2d 663, 664 [2d Dept 1986]), which holds "that treatment is not considered continuous when the interval between treatments exceeds the period of limitation." Rather, the First Department has articulated a more nuanced rule that takes account of a "plaintiff's belief" that he or she "was under the active treatment of defendant at all times, so long as" the treatments did not "result in an appreciable improvement" in the patient's condition (*Devadas v Niksarli*, 120 AD3d at 1006). Even where a "plaintiff pursued no treatment for over 30 months after" the initial, allegedly negligent surgical treatment (*id*. at 1005),

> "[i]n determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he [or she] sought such treatment (*see Rizk v Cohen*, 73 NY2d 98, 104 [1989]). Further, this Court has suggested that a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician (*Ramirez v Friedman*, 287 AD2d 376, 377 [1st Dept 2001])."

(*id*. at 1006). Where such a situation obtains,

> "[c]ases such as *Clayton v Memorial Hosp. for Cancer & Allied Diseases* (58 AD3d 548 [1st Dept 2009]) are inapplicable . . . , to the extent they reiterate that 'continuous treatment exists "when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past"' (58 AD3d at 549, quoting *Richardson v Orentreich*, 64 NY2d at 898-899)"

(*id*. at 1007).

The movants established, prima facie, that all of the medical malpractice causes of action were time-barred as to the movants. In opposition to this showing, the plaintiff did not even attempt to establish that the continuous treatment doctrine further tolled the limitations period applicable to those causes of action. Moreover, to the extent that the plaintiff alleged that his malpractice claims also involved garden-variety negligence, subject to the three-year limitations period of CPLR 214, any such contention must be rejected, since the gravamen of those claims---failure to diagnose a medical condition---sounds solely in medical malpractice.

Nonetheless, "where the action is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within

two years and six months" (CPLR 214-a [b]) of the time the plaintiff knew or reasonably should have known of such alleged negligent act or omission. Here, in opposition to the movants' "prima facie showing that the time in which to commence a medical malpractice action against [them] had expired, the plaintiff failed to submit competent evidence sufficient to raise a question of fact as to whether the statute of limitations was tolled by the discovery rule of CPLR 214-a(b)" (*Ciancarelli v Timmins*, 226 AD3d 643, 644-645 [2d Dept 2024] [citations omitted]), not only because the Temple Health records were uncertified (*see* CPLR 4518[c]; *Sherrod v Mount Sinai St. Luke's*, 204 AD3d 1053, 1057 [2d Dept 2022]; *McLoud v Reyes*, 82 AD3d 848 [2d Dept 2011]), but because none of the records raised a triable issue of fact as to whether the decedent actually had cancer or a malignant tumor.

In addition, the court agrees with the movants that CPLR 210(a), which extends the limitations period for one additional year after a claimant's death where that claimant had a viable, timely underlying cause of action at the time of his or death, cannot be invoked to save the plaintiff's medical malpractice causes of action. The decedent died on October 11, 2019, and his medical malpractice causes of action were viable as of the date of his death. Although CPLR 210(a) is meant to extend a limitations period for claims that were viable as of the date of the claimant's death, not to shorten it (*see Gelpi v New York City Health & Hosps. Corp*., 90 AD2d 503 [2d Dept 1982]; *Ruping v Great Atl. & Pac. Tea Co*., 279 App Div 322 [3d Dept 1952]), upon application of CPLR 210(a), as well as the 228-day COVID-19 toll, the date by which the plaintiff was obligated to interpose the medical malpractice claims on behalf of his decedent was May 27, 2021, and the commencement of this action on October 21, 2021 rendered those claims untimely.

Although CPLR 3212(f) permits a court to deny a summary judgment motion where "facts essential to justify opposition may exist but cannot then be stated," the plaintiff here failed to demonstrate how further discovery might lead to relevant evidence (*see Alcor Life Extension Found. v Johnson*, 136 AD3d 464 [1st Dept. 2016]). "The 'mere hope' of [plaintiff] that evidence

sufficient to defeat such a motion may be uncovered during the discovery process is not enough" (*Frierson v Concourse Plaza Assoc*., 189 AD2d 609, 610 [1st Dept 1993]). To properly oppose the defendants' motion by virtue of CPLR 3212(f), or to obtain further discovery to enable it to oppose the motion, the plaintiff was "bound to show there was a likelihood of discovery leading to such evidence, i.e., that facts may exist but cannot be stated at that time" (*id.*). The plaintiff, however, failed to make such a showing here (*see Gyabbah v Rivlab Transp. Corp*., 129 AD3d 447 [1st Dept 2015]).

A motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action may be made at any time (*see* CPLR 3211[e]). When considering a motion to dismiss pursuant to CPLR 3211(a)(7), a court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiff[ ] every possible favorable inference" (*Sassi v Mobile Life Support Servs., Inc*., 37 NY3d 236, 239 [2021]). "The question is whether the complaint adequately alleged facts giving rise to a cause of action" (*id.*). Hence, such a motion may be premised upon the ground that the pleading did not allege facts which, if true, would establish all of the elements of a cause of action (*see Chen v Romona Keveza Collection LLC,* 208 AD3d 152, 160 [1st Dept 2022] [plaintiff failed to allege facts supporting a cause of action seeking to pierce the corporate veil]; *Gidumal v Cagney*, 144 AD3d 550, 551-552 [1st Dept 2016] [plaintiff "failed to allege facts to support the[ ] elements" of an abuse of process cause of action]).

"A cause of action for negligent infliction of emotional distress generally requires [the] plaintiff to show a breach of duty owed to [him or] her which unreasonably endangered [his or] her physical safety, or caused [him or] her to fear for [his or] her own safety" *(A.M.P. v Benjamin*, 201 AD3d 50, 57 [2d Dept 2021] [citations and internal quotation marks omitted]; see *Schultes v Kane*, 50 AD3d 1277, 1278 [3d Dept 2008]). The cause of action sounding in negligent infliction of emotional distress, as asserted on behalf of the decedent, did not allege that any breach of duty owed by the movants to him caused him to fear for his own safety (*see Padilla v Verczky-Porter*, 66 AD3d 1481, 1483 [4th Dept 2009]). In fact, the failure to diagnose

a medical condition, by its very nature, cannot support a contention that the patient was placed in fear for his own safety, since mere silence would not have placed the patient in a situation in which he would have experienced such fear. Hence, to the extent that the claim to recover for negligent infliction of emotional distress was asserted on behalf of the decedent, it must be dismissed for failure to state a cause of action.

Where a person other than an injured party seeks to recover for negligent infliction of emotional distress, New York only recognizes a right of recovery where the claimant is a close family member of the injured party and was within the zone of danger generated by the tortfeasor, so that the claimant himself or herself also could have been injured by the tortfeasor's wrongful conduct. In other words, the claimant must be an at-risk bystander and a witness to the occurrence that caused injury to his or her family member (*see Greene v Esplanade Venture Partnership*, 36 NY3d 513, 525-526 [2021]; *Bovsun v Sanperi*, 61 NY2d 21, 223-224 [1984]). The plaintiff did not allege that he was in any way, shape, or form placed personally at risk by the movants' alleged failure to diagnose cancer in his decedent. Hence, he failed to state a cause of action on his own behalf to recover for negligent infliction of emotional distress, and any such claim must be dismissed pursuant to CPLR 3211(a)(7).

The court notes that, while the movants did not address any portion of their motion to the plaintiff's third cause of action, which sought to recover for wrongful death, that cause of action did not allege pecuniary loss to the decedent's estate, but only alleged that the decedent experienced conscious pain and suffering during his final two years of life, and that the plaintiff lost the consortium of his deceased father and suffered emotional distress from the loss. "'In a wrongful death action, an award of damages is limited to the fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought'" (*Leger v Chasky*, 55 AD3d 564, 565 [2d Dept 2008], quoting *Plotkin v New York City Health & Hosps. Corp.*, 221 AD2d 425, 426 [2d Dept 1995]; *see* EPTL 5-4.3[a]). EPTL 5-4.3 does not permit the representative of a decedent's estate to recover for grief, loss of

society, or loss of companionship (*see Liff v Schildkrout,* 49 NY2d 622, 633 [1980]; *Bumpurs v New York City Housing Auth.,* 139 AD2d 438, 439 [1st Dept 1988]; *Bell v Cox*, 54 AD2d 920, 920 [2d Dept 1976]). Nor is a wrongful death cause of action under EPTL 5-4.1-5-4.3 a proper vehicle for recovery of emotional distress damages (*see Garland v Herrin*, 724 F2d 16, 19-20 [2d Cir 1983] [applying New York law]), and a claim to recover for wrongful death is completely distinct from a claim for conscious pain and suffering (*see Yoo v New York City Health & Hosps. Corp*., 239 AD2d 267, 267 [1st Dept 1997]). Moreover, with certain narrow exceptions not relevant here, New York does not recognize a cause of action on behalf of a child, even a minor child, to recover for the loss of a parent's consortium and companionship (*see De Angelis v Lutheran Med. Ctr*., 84 AD2d 17, 25-26 [2d Dept 1981]). Since, however, the movants elected not to address those issues, the court has no basis upon which to dismiss that cause of action and, for the time being at least, it remains viable.

In light of the foregoing, it is,

ORDERED that branches of the motion pursuant to CPLR 3211(a)(5) seeking to dismiss, as time-barred, the medical malpractice/negligence and survival claim causes of action insofar as asserted against the defendants Mount Sinai Morningside Hospital, Brian Africa, M.D., Manzar Rizvi, M.D., and Michael Hersher, M.D., are deemed to be branches of the motion which are for summary judgment dismissing those causes of action on that ground; and it is further,

ORDERED that the motion is thereupon granted in its entirety, summary judgment is awarded to the defendants Mount Sinai Morningside Hospital, Brian Africa, M.D., Manzar Rizvi, M.D., and Michael Hersher, M.D., dismissing the medical malpractice/negligence and survival claim causes of action as time-barred insofar as asserted against them, those causes of action are thereupon dismissed insofar as asserted against the defendants Mount Sinai Morningside Hospital, Brian Africa, M.D., Manzar Rizvi, M.D., and Michael Hersher, M.D., and the cause of action seeking to recover for negligent infliction of emotional distress is dismissed insofar as

asserted against the defendants Mount Sinai Morningside Hospital, Brian Africa, M.D., Manzar Rizvi, M.D., and Michael Hersher, M.D., for failure to state a cause of action.

This constitutes the Decision and Order of the court.

7/8/2024
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE