SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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SEHRA WAHEED,

Plaintiff,

- v -

DR. SONYA BARAR, M.D, THE MOUNT SINAI HEALTH SYSTEM, INC, THE MOUNT SINAI BETH ISRAEL, HOSPITAL, UNION SQUARE, and BETH ISRAEL COMPREHENSIVE CANCER CENTER WEST CAMPUS BE1,

Defendants.

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INDEX NO. 800002/2025

MOTION DATE 05/05/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 24, 25, 26, 27, 29, 30, 39, 40, 41, 64, 65

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, assault and battery, and negligent and intentional infliction of emotional distress, the defendants move pursuant to CPLR 3211(a) to dismiss the complaint on the grounds that all of the plaintiff's causes of action are barred by the applicable statutes of limitations (CPLR 3211[a][5]), that they have a defense founded on documentary evidence (CPLR 3211[a][1]), and that the complaint fails to state a cause of action (CPLR 3211[a][7]). The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed on the grounds that the action is time-barred and because the complaint fails to state cause of action against the defendant Mount Sinai Health System, Inc. (MSHS).

The pro se plaintiff commenced this action on February 4, 2025 by filing a summons and complaint (*see* CPLR 304[a]). In her prolix 38-page, single-spaced complaint, the plaintiff, in effect, alleged that the defendants committed medical malpractice by performing an unwanted hysterectomy upon her, thus also constituting an assault and battery, after having failed to

diagnose her with Asherman's syndrome, a rare uterine condition that occurs when scar tissue forms in the uterus or cervix, which they also failed to diagnose after the procedure. She further alleged that the defendants failed to address the nature and seriousness of the presence of two small dark "implants" on her bladder peritoneum. In addition, she averred that the defendants departed from good and accepted practice by failing to refer her to an obstetrician/gynecologist who also specialized in endocrinology and reproductive medicine, by failing to order a follow-up sonogram after the procedure, and by failing to prescribe estrogen. Moreover, she alleged that the defendants negligently and intentionally inflicted emotional distress upon her.

In support of their motion, the defendants submitted an attorney's affirmation, excerpts from the plaintiff's medical records, and the affidavit of Louis I. Schenkel, MSHS's Vice President for Compliance and Associate General Counsel. Counsel for the defendants noted that neither Brar nor any Mount Sinai employee performed a hysterectomy upon the plaintiff, but instead, that the medical records demonstrated that the defendant physician Sonya Brar, M.D., sued herein as Sonya Barar, M.D., actually performed a laparoscopic cystectomy upon the plaintiff. He further noted that the plaintiff herself alleged, at pages 5 and 7 of her complaint, that Brar performed the subject surgery on September 18, 2018. Counsel further noted that the plaintiff only continued to be treated by any of the defendants for her condition up until May 3, 2019, which was the second of the only two postoperative visits that Brar or any defendant had with the plaintiff. In addition, Schenkel explained that MSHS does not provide healthcare services to anyone, but is only the entity that manages or managed the business affairs of various entities, such as the now-closed Mount Sinai Beth Israel Hospital at Union Square.

Counsel argued that all of the plaintiff's claims against the defendants were barred by the applicable statute of limitations, and that, even accounting for applicable statutory tolls, the complaint was time-barred. Moreover, counsel contended that, inasmuch as MSHS provided no medical services to the plaintiff, the complaint failed to state a cause of action against it. In opposition to the motion, the plaintiff submitted her own affidavit and a memorandum of law, as

well as several articles by attorneys analyzing the continuous treatment doctrine. In her affidavit, she did not directly address the contentions raised by the defendants in the instant motion, but only described the physical, emotional, and financial problems that she was experiencing in her life, as well many of the 10 other unrelated civil actions that she had commenced in the Supreme Court, New York County, since 2005.

The limitations period applicable to the commencement of a medical malpractice action against private medical providers, such as the defendants here, is two years and six months from the date that the malpractice was committed, or two years and six months from the date of last treatment, where there was continuous treatment for the same illness, injury, or condition that gave rise to the alleged wrongful act, omission, or failure (*see* CPLR 214-a). The plaintiff alleged that the defendants committed malpractice on September 18, 2018, but that they continued to treat her until May 3, 2019 for the same condition that was purportedly addressed by that cystectomy. The court notes, however, 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]). Thus, the limitations periods applicable to the medical malpractice cause of action was tolled, not only until May 3, 2019, on account of the continuous treatment doctrine, but for an additional period of 228 days, from March 20, 2020 until November 3, 2020. Hence, the last day of the applicable two-year-and-six-month period, accounting for both the continuous treatment and the COVID-19 tolls, fell on June 23, 2022 (*see* General Construction Law §§ 20, 30, 31, 57, 58).

To the extent that any of the plaintiff's claims sounded in common-law negligence unrelated to medical malpractice, including negligent infliction of emotional distress, such a claim would be governed by the three-year limitations period of CPLR 214(5) (see *Kramer v Meridian Capital Group, LLC*, 201 AD3d 909, 912 [2d Dept 2022] [negligent infliction of emotional distress]; *De Leon v Hospital of Albert Einstein Coll. of Medicine*, 164 AD2d 743, 747 [1st Dept 1991] [hospital's negligent hiring of personnel]). Since the toll for continuous treatment does not apply to common-law negligence claims that do not allege medical malpractice (*see Bates v New York City Health & Hosps. Corp.,* 194 AD2d 422, 423-424 [1st Dept 1993]), any common-law negligence claim here accrued on September 19, 2018, when several of the defendants actually treated the plaintiff. Hence, the last day of the applicable three-year period, accounting for the COVID-19 toll, fell on May 6, 2022.

Moreover, a doctor who performs a medical or diagnostic procedure on a patient without any consent, in the absence of an emergency, is liable for assault and battery (*see VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1394-1395 [4th Dept 2012]; *Cerilli v Kezis*, 16 AD3d at 363-364; *Laskowitz v CIBA Vision Corp.*, 215 AD2d 25, 28 [2d Dept 1995]; *Rigie v Goldman*, 148 AD2d 23, 28 [2d Dept 1989]; *Oates v New York Hosp.*, 131 AD2d at 369). In contrast to the situation in which a patient consents to a medical procedure without being fully aware of the risks and consequences involved, a case such as this one, which involved medical personnel who purportedly performed invasive procedures on the plaintiff, despite her alleged refusal to consent thereto, sounds both in medical malpractice and assault and battery, and the doctrine of lack of informed consent thus is inapplicable (*see Oates v New York Hosp.*, 131 AD2d at 639). An action to recover for assault and battery must be commenced within one year of its accrual (*see* CPLR 215[3]). Similarly, an action to recover for intentional infliction of emotional distress must be commenced within one year of its accrual (*see Gallagher v Directors Guild of Am., Inc.*, 144 AD2d 261, 263 [1st Dept 1988]). The limitations period applicable to those causes of action thus accrued on September 19, 2018, and expired on September 19, 2019.

The failure to commence an action within the applicable limitations period bars the plaintiff from seeking a remedy (*see Tanges v Heidelberg N. Am., Inc.*, 93 NY2d 48 [1999]; *Paver & Wildfoerster v Catholic High Sch. Assn*, 38 NY2d 669 [1976]). It is well settled that a court may not extend a statute of limitations (*see* CPLR 201; *McCoy v Feinman*, 99 NY2d 295 [2002]), even by a single day (*see Bacalokonstantis v Nichols,* 141 AD2d 482 [2d Dept 1988]).

In connection with a motion to dismiss 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 an 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 defendants established, prima facie, that the plaintiff commenced this action on February 4, 2025, and, thus, beyond the expiration of the limitations periods applicable to all of her causes of action. In her opposition papers, she focused only on the alleged severity of the injuries that she purportedly sustained, and did not address the issue of whether she timely commenced this action. In this respect, she did not assert that, subsequent to May 9, 2019, the defendants continued to treat her for the conditions for which she initially sought treatment with them and, thus, did not raise an issue of fact as to whether the limitations period further was tolled or whether she actually commenced the action within the applicable period. Moreover, the plaintiff did not allege any facts that would permit this action to be commenced within the one-year limitations period after the discovery of a foreign object in her body (*see* CPLR 214-a). Hence, the complaint must be dismissed against all of the defendants on the ground that the action was time-barred.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id*. at 152; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 884 [2013]; *Simkin v Blank*, 19 NY3d 46, 52 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Taxi Tours, Inc. v Go New York Tours, Inc.,* 41 NY3d 991, 993 [2024]; *Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v*

Martinez, 84 NY2d 83, 87 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc*., 10 AD3d 267, 270-271 [1st Dept 2004]; CPLR 3026). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d at 152 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

Where, however, the court considers evidentiary material beyond the complaint, as it does here, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" (*id*.). Nonetheless, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

The court concludes that the defendants made a prima facie showing of entitlement to judgment as a matter of law with respect to the claims against MSHS by demonstrating that it did not provide medical care or treatment, and employed no one for the purpose of providing medical care or treatment. They thus established that MSHS cannot be held liable for medical malpractice or for any of the plaintiff's other claims (*see Koller v Kolev,* 2025 NY Slip Op 32869[U], *27, 2025 NY Misc LEXIS 6776, *50-51 [Sup Ct, N.Y. County, Jul. 18, 2025] [Kelley, J.]; *Vallone v Vulcano*, 2022 NY Slip Op 32099[U], *16, 2022 NY Misc LEXIS 11310, *29-30 [Sup Ct, N.Y. County, Jun. 30, 2022] [Kelley, J.]; *Garcia v Global Prop. Servs., Inc.*, 2018 NY Slip Op 30957[U], *7-8, 23, 2018 NY Misc LEXIS 1870, *9-10, 34 [Sup Ct, Bronx County, Apr. 3, 2018]). In opposition to that showing, the plaintiff did not address the issue and, hence, a fact claimed by the plaintiff is not a fact at all in connection with that issue. She thus has failed to establish that she has a cause of action against MSHS in connection with any of her claims, and the complaint must be dismissed insofar as asserted against MSHS on that ground as well.

Although the defendants also rely on CPLR 3211(a)(1) as a ground for dismissal of the complaint, a dismissal is warranted under that provision only "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see Ellington v EMI Music, Inc.*, 24 NY3d 239 [2014]). For evidence to qualify as "documentary," it must be unambiguous, authentic, and "essentially undeniable" (*Dixon v 105 W. 75th St., LLC*, 148 AD3d 623, 629 [1st Dept 2017], citing *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Affidavits or affirmations do not qualify as documentary evidence (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]; *Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d at 85; *Tsimerman v Janoff,* 40 AD3d 242 [1st Dept 2007]), and, other than the excerpt from the plaintiff's medical records, which the defendants employed as a basis for their statute of limitations defense, the defendants adverted to no documents that would conclusively establish a defense to any of the causes of action asserted by the plaintiff.

Accordingly, it is,

ORDERED that the defendants' motion to dismiss the complaint is granted on the grounds that all of the causes of action asserted by the plaintiff are time-barred and because the complaint fails to state a cause of action against the defendant Mount Sinai Health System, Inc., the complaint is dismissed, and the Clerk of the court is directed to enter judgment in favor of all of the defendants dismissing the complaint insofar as asserted against each of them.

This constitutes the Decision and Order of the court.

9/15/2025
DATE

JOHN J. KELLEY, J.S.C.

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