SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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BARBARA ROBINS,

Plaintiff,

-against-

PROCURE TREATMENT CENTERS, INC., PRINCETON PROCURE MANAGEMENT LLC, PROCURE PROTON THERAPY CENTER, PRINCETON RADIATION ONCOLOGY, OREN CAHLON, MD, HENRY K. TSAI, MD, EUGEN B. HUG, MD, BRIAN H. CHON, MD, ROBERT M. CARDINALE, MD, DOUGLAS A. FEIN, MD, DENNIS MAH, AVRIL BLAIR a/k/a AVRIL O'RYAN-BLAIR, RAMONE PERALTA, JACQUELYN COLLINS, LISA "DOE" (JANE DOE #1), JOSE "DOE" (JOHN DOE #1), RAJ SHRIVASTAVA, MD, THE MOUNT SINAI HOSPITAL AND IBI PROTON THERAPY, INC. a/k/a IBI PROTON EQUIPMENT,

Defendants.

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Index No. 805644-2015

DECISION/ORDER

Motion Sequence 001

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Defendants' Notice of Motion, Memorandum in Support, Affirmations & Collective Exhibits Annexed	1, 2, 3, 4
Plaintiff's Notice of Cross Motion, Memorandum in Support and in Opposition to Defendants' Motion, Answering Affirmation & Exhibits Annexed	5, 6, 7, 8
Defendants' Affirmation in Reply and Opposition to Cross Motion	9

In an underlying action for medical malpractice and negligence, plaintiff Barbara Robins ("Plaintiff") alleges defendants Princeton Procure Management, LLC ("PPM"), doing business as, and also sued herein as Procure Proton Therapy Center ("PPTC"), Princeton Radiation Oncology ("PRO"), Procure Treatment Centers, Inc. ("PTC"), The Mount Sinai Hospital ("Mt.

Sinai"), IBI Proton Therapy ("IBI", collectively, "Corporate Defendants"), along with Oren Cahlon, M.D. ("Cahlon"), Henry K. Tsai, M.D. ("Tsai"), Eugen B. Hug, M.D. ("Hug"), Brian H. Chon, M.D. ("Chon"), Robert M. Cardinale, M.D. ("Cardinale"), Douglas A. Fein, M.D. ("Fein"), Raj Shrivastava, M.D. ("Shrivastava"), Dennis Mah ("Mah"), Avril Blair ("Blair"), Ramone Peralta ("Peralta"), Jacquelyn Collins ("Collins", collectively "Individual Defendants") committed medical malpractice and negligence in providing, planning, and administrating proton beam radiation which caused radiation toxicity of both of Plaintiff's optic nerves, resulting in bilateral blindness (Danzi Aff. at ¶ 2).

Defendants PPM (d/b/a, s/h/a PPTC), Mah, Blair, Peralta, and Collins (collectively, "Defendants") move for an order, pursuant to CPLR § 3211(a)(8), dismissing the complaint in its entirety for lack of personal jurisdiction, and for improper service as to defendant Blair. Specifically, Defendants challenge Plaintiff's assertion that this Court has personal jurisdiction over Defendants pursuant to CPLR § 301, 302(a)(1), 302(a)(3), and 302(a)(4). Plaintiff opposes and cross-moves for an order, pursuant to CPLR § 8106, granting costs and sanctions against PPTC, and against affiant Tom Hsin-Chieh Wang ("Wang"). Defendants PTC, Mt. Sinai, IBI, and Shrivastava do not challenge the Court's jurisdiction over them. Defendants PRO, Tsai, Chon, Cardinale, and Fein also move for an order dismissing the complaint, but do so in a separate motion, motion sequence 002.

Plaintiff is a retired New York City school psychologist who resides in Manhattan (Danzi Aff. at ¶ 2). In the months preceding February 27, 2013, Plaintiff began to experience double vision, and was diagnosed with a clival chordoma (non-malignant tumor) (*Id.* at ¶ 7). On February 27, 2013, Plaintiff underwent a successful resection of a benign brain tumor performed by Joshua Bederson, M.D. at Mt. Sinai (*Id.*). After the surgery, Plaintiff's vision returned to nearly normal, and she was able to resume her ordinary affairs (*Id.*). After a review by the Mt. Sinai tumor board, Dr. Cheryl Greene ("Greene") of Mt. Sinai recommended that Plaintiff undergo a course of proton radiation treatments at PPTC, the proton radiation treatment facility owned and operated by PPM in Somerset, New Jersey (*Id.* at ¶ 2). According to Plaintiff's affidavit, Greene sent Plaintiff directly to defendant Cahlon (Robins' Aff. at ¶ 5).

Plaintiff met with Cahlon at PPTC in March 2013, and from April 10, 2013 to June 12, 2013, underwent at least 42 sessions of proton beam therapy at PPTC (Danzi Aff. at ¶ 10). There were generally five sessions per week (*Id.*). According to Plaintiff's affidavit, radiation technicians at PPTC generally worked in pairs, and thus Plaintiff had extensive daily contact with two or more radiation technicians on each of her treatment days (Robins' Aff. at ¶ 11).

In November 2013, Plaintiff experienced a bilateral loss of vision and sought treatment at Mt. Sinai on an emergency basis (Danzi Aff. at ¶ 13). Plaintiff was treated with steroids, without success, to restore her sight (*Id.*). Thereafter, MRIs confirmed the diagnosis of bilateral blindness caused by radiation toxicity of both optic nerves (*Id.*). On September 15, 2015, Plaintiff commenced the present action by the filing of Summons and Verified Complaint. Thereafter, Defendants filed the present motion challenging this Court's jurisdiction over them. Plaintiff

opposes the motion and alleges Defendants' connections to New York are as follows:

Defendant PPM is incorporated in Delaware and owns and operates PPTC, which is located in Somerset, New Jersey. The parties disagree as to whether the Somerset, New Jersey location acts as PPM's principal place of business or whether that is actually an office in New York. As PPM reported to the State of New Jersey, Department of the Treasury, PPM listed it's "Main Business or Principal Business Address" as "192 Lexington Ave., 4th Floor, New York, NY 10016"(*Id.* at Ex. B1). Plaintiff further alleges that PPM engaged in a commercial agreement with five major New York City hospitals as part of a consortium to service patients from New York City (*Id.* at ¶¶ 4[d], 23). Plaintiff further alleges, that under this agreement, in exchange for providing New York City patients to PPM, physicians from the five New York City hospitals receive treating privileges at PPTC (*Id.*).

PPM advertises heavily in New York City (*Id.* at ¶ 4[e]), and in "marketing, brochures, website and social media, represent and hold themselves out as providing services for the New York metropolitan area, and regularly solicit business from New York City" (*Id.* at ¶ 4[f]). Further, PPM obtains substantial revenue from patients who reside in New York State (*Id.* at ¶ 4[m]). Indeed, Plaintiff's billing as of June 26, 2013 exceeded $239,000.00 (Id. at Ex. T).

In an interview with WABC, a New York City radio station, PPM's Medical Director, Oran Cahlon, M.D., stated that the Somerset, NJ site was selected in order for "all the patients of North Jersey, New York, and the tristate area would have easier access," and emphasized that it is the only facility offering proton therapy in the "tristate area" (*Id.* at Ex. K). In another radio advertisement, PPTC's Medical Director, Brian Chon, M.D., noted PPTC is the "only center of its kind in the New York metro area ... the most extensive proton therapy experience in the New York metro area" (*Id.* at ¶ 27).

Defendant Mah is the Physics Director at PPM, and was recruited from Montefiore Medical Center, Bronx, New York, and Albert Einstein Medical College, Bronx, New York to run the physics program at PPM (*Id.* at ¶ 4[j]). Plaintiff further alleges that Montefiore Medical Center is a member of the New York City Hospital consortium (*Id.*). Mah also maintained a professional association with RAMPS, the Radiological and Medical Physics Society of New York, Inc., within Memorial Sloan-Kettering Hospital in New York City, "at least five months beyond the time in which he provided services to Ms. Robins" (*Id.*).

Defendant Blair was, at the relevant times, the Director of Dosimetry for PPM and for co-defendant Procure Treatment Centers, Inc., a New-York-based company (*Id.* at ¶ 4[k]).

Defendant Peralta and Defendant Collins were both radiation therapists at PPM and had extensive daily contact with Plaintiff, including providing radiation technician services to Plaintiff (Danzi. Aff. at ¶ 42). Both Peralta and Collins were aware that Plaintiff lived in New York City (*Id.*).

As an initial matter, Defendants, in a letter to the Court dated November 30, 2015 but e-filed on November 25, 2015, object to Plaintiff's reply dated November 25, 2015 (the "Danzi Reply") as a procedurally improper surreply, and ask that it not be considered. Plaintiff, in a letter to the Court dated November 27, 2015 argues that the Danzi Reply was a reply to Defendants' opposition to Plaintiff's cross-motion, and as such, was properly made. The CPLR does not provide for a reply to opposition papers on a cross-motion, and therefore the Danzi Reply was not considered by this Court (CPLR § 2214). Similarly, the exhibits attached to the Danzi Reply were not considered because the material was improperly submitted for the first time in Plaintiff's reply papers and Defendants did not have an opportunity to oppose (see, CPLR 2214; *All State Flooring Distributors*, 131 AD3d at 835-836; *Voytek Tech., Inc. v Rapid Access Consulting, Inc.*, 279 AD2d 470, 471 [2d Dept 2001]).

Further, Plaintiff submitted a supplemental affirmation to this Court on February 12, 2016, two days after oral arguments on the present motion, and after the motion was fully submitted. Defendant objects to this affirmation in a letter to the Court also dated February 12, 2016. Pursuant to CPLR § 2214(b), the Court is permitted to consider three types of papers for any motion, a notice of motion with supporting affidavits, answering affidavits, and reply affidavits (CPLR § 2214[b]). Further, CPLR 2214(b) requires that answering papers be "served at least one day" before the return day" (*Id.*). Presently, the return day here was originally November 12, 2015, and was subsequently adjourned by stipulation to November 30, 2015. Thus, Plaintiff's supplemental affirmation is untimely and was therefore not considered by the Court.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be construed liberally (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The court must accept the facts alleged in the complaint as true and accord the plaintiffs the benefit of every possible favorable inference" (*Amaro ex rel. Almazan v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Further, personal jurisdiction must be authorized under the CPLR and consistent with the Due Process Clause of the United States Constitution (*Walden v Fiore*, 134 S. Ct. 1115, 1121 [2014]). In order to defeat a motion to dismiss for lack of personal jurisdiction, "the opposing party need only demonstrate that facts 'may exist' whereby to defeat the motion" (*Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 466 [1974]; *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007]; CPLR § 3211[d]). A prima facie showing of jurisdiction "simply is not required" (*Peterson*, 33 NY2d at 467). Further, where a plaintiff seeks disclosure on the issue of personal jurisdiction pursuant to CPLR § 3211(d), the plaintiff need only set forth a "sufficient start" and show that its position is "not frivolous" (*Peterson*, 33 NY2d at 467).

Under constitutional due process principles, a court must have a jurisdictional basis before exercising its powers over a party (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 [1988]). In general, New York courts may obtain personal jurisdiction over a party based on (1) consent to jurisdiction in New York, (2) domicile in New York (CPLR § 301), (3) general

jurisdiction (CPLR § 301), (4) or specific jurisdiction by means of the long arm statute as to a non-domiciliary (CPLR § 302). Consent exists when a party voluntarily agrees to submit to the jurisdiction of this Court. (*Transasia Commodities Ltd. v. Newlead JMEG, LLC*, 45 Misc. 3d 1217(A), 7 N.Y.S.3d 245 (NY Sup Ct 2014).

General Personal Jurisdiction Under CPLR § 301

Defendants challenge Plaintiff's assertion that this Court has jurisdiction over Defendants pursuant to CPLR § 301, or general personal jurisdiction. Defendants argue that individual defendants cannot be subject to general personal jurisdiction because they were not doing business in New York individually. Defendants further argue that because corporate defendant PPM is incorporated in Delaware, and that New Jersey is PPM's principal place of business because it's facility is located in Somerset, New Jersey, corporate defendants are similarly not subject to general personal jurisdiction in New York (Def. Mem. Supp. at 1). Plaintiff argues that PPM's principal place of business is New York, and that PPM is estopped from putting forth arguments that are directly contrary to documents filed with the New Jersey Department of the Treasury,

First, a non-resident individual cannot be subject to general jurisdiction under CPLR § 301 unless he or she is doing business individually, and not on behalf of a corporation (*See Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152 [1st Dept 1992]). Here, the Court does not have personal jurisdiction, pursuant to CPLR § 301, over individual defendants moving here because none of those individual defendants were doing business individually (*Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152 [1st Dept 1992]). As such, that portion of Defendants' motion is granted.

Second, New York courts may not exercise jurisdiction, pursuant to CPLR § 301, over a corporate defendant that is neither "incorporated in New York State nor has its principal place of business here" (*D & R Glob. Selections, S.L. v Pineiro*, 128 AD3d 486, 487 [1s Dept 2015] citing *Daimler AG v Bauman*, 571 US —, 134 S Ct 746 [2014] ["With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction."]). Previously, in its decision in *Hertz Corp. v Friend*, the Supreme Court held that "the principal place of business" is a company's headquarters, or nerve-center (*Hertz Corp. v Friend*, 559 US 77, 92-93 [2010]. The Court noted that the nerve center is the place "where a corporation's officers direct, control, and coordinate the corporation's activities" (*Id.*). Practically speaking, in order to be a nerve-center, the headquarters must be the "actual center of direction, control, and coordination ... and not simply an office where the corporation holds its board meetings"(*Id.*).

Further, quasi-estoppel is an equitable remedy, applicable where a party asserts a position inconsistent with a position previously asserted, particularly where the inconsistent positions are to the disadvantage of another, or otherwise threaten the integrity of the judicial process (*see Am. Mfrs. Mut. Ins. Co. v Payton Lane Nursing Home, Inc.*, 704 F. Supp. 2d 177, 193 [EDNY 2010]).

Quasi-estoppel "forbids a party from accepting the benefit of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects" (*Armstrong v Collins*, No 01CIV 2437(PAC), 2010 WL 1141158, at *31 [SDNY Mar. 24, 2010] citing *In re Davidson*, 947 F2d 1294, 1297 [5th Cir 1991]). Further, as an equitable doctrine, quasi-estoppel must be given a liberal interpretation and applied to promote equity (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415 [2009]).

Quasi-estoppel's most common application has been in the context of IRS filings, where Courts have regularly adopted quasi-estoppel to bar a party from asserting a factual position in court that is contrary to a position previously taken on a tax return *(see Mahoney-Buntzman*, 12 NY3d at 422; *Meyer v Insurance Co. of Am.*, 1998 WL 709854, 1998 US Dist LEXIS 15863 [SDNY 1998]; *Naghavi v New York Life Ins. Co.*, 260 AD2d 252 [1st Dept.1999]). The doctrine has also been applied to bar parties from asserting factual positions contrary to those asserted before administrative agencies (*see e.g., Am. Mfrs. Mut. Ins. Co. v Payton Lane Nursing Home, Inc.*, 704 F Supp 2d 177, 193 [EDNY 2010]; *Cline v Western Horseman, Inc.*, 922 F Supp 442 [DColo 1996]; *Simo v Home Health & Hospice Care*, 906 F Supp 714 [DNH 1995]; *Muellner v Mars, Inc.*, 714 F Supp 351 [NDIll 1989]). Further, courts have extended the doctrine to apply to other official documents filed under penalty of perjury (*Eisenhauer v Bruno*, 41 Misc 3d 667, 2013 NY Slip Op 23299 [Sup Ct, Westchester County 2013]; *ePlus Grp. Inc. v SNR Denton LLP*, 111 AD3d 494, 495-96 [1st Dept 2013]). For example, in *Eisenhauer*, the Court estopped decedent's estate from asserting a right of ownership in a co-op, where the decedent had failed to list the co-op on a sworn statement of net worth submitted as part of a divorce proceeding (41 Misc 3d 667). In *ePlus*, the Court estopped defendant from denying that it was a successor in interest to a party, where it had represented that is was the party's successor in interest for the purpose of obtaining a novation on contracts entered into with the federal government (111 AD3d at 495-96).

However, although quasi-estoppel has been extended to cover multiple scenarios, this Court could find no instances of quasi-estoppel being extended to cover previous statements not made under the penalty of perjury. Further, at least in the context of federal diversity jurisdiction, the Supreme Court has rejected the argument that the "mere filing of a form like the Securities and Exchange Commission's Form 10-K listing a corporation's 'principal executive offices' would, without more, be sufficient proof to establish a corporation's 'nerve center'" (*Hertz Corp. v Friend*, 559 US 77, 97 [2010]). Indeed, the form in question here was not filed under penalty of perjury (*see* Public Records filing for New Business Entity, 12A NJ Forms Legal & Bus §30:90). Similar to the form at issue here, the form in *Hertz* – the Securities and Exchange Commission's Form 10-K – is also not filed under penalty of perjury (*see* SEC Form 10-K, online at https://www.sec.gov/about/forms/form10-k.pdf [as visited May 5, 2016]). Thus, because the form at issue was not filed under penalty of perjury, quasi-estoppel is not appropriate here.

However, even though Defendants are not estopped from asserting that their principal place of business is New Jersey, the mere assertion by Defendants that New Jersey is their principal place of business does not end the matter. Indeed, Plaintiff has made a "sufficient start"

in demonstrating that personal jurisdiction exists over corporate defendants pursuant to CPLR § 301, such that dismissal would not be appropriate at this time (*Peterson*, 33 NY2d at 467; *cf. SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004] [denying plaintiff's request for jurisdictional discovery where plaintiff's affidavit in opposition to the motion to dismiss failed to request such discovery, and where plaintiff failed to offer "some tangible evidence" constituting a "sufficient start"] citing *Mandel v Busch Entertainment Corp.*, 215 AD2d 455, [2d Dept 1995]). Specifically, the filing of the New Jersey tax documents listing the 192 Lexington Ave address as the principal executives offices, together with evidence submitted by Plaintiff demonstrating an agreement between PPM, PPTC and New York-area hospitals is sufficient to show a "sufficient start" and that more discovery is necessary in order to determine whether this Court has jurisdiction over Defendants pursuant to CPLR § 301. As such, Defendants' motion to dismiss pursuant to CPLR § 301 is denied as it pertains to corporate defendants.

Consent Jurisdiction

Defendants next challenge Plaintiff's assertion that this Court has jurisdiction over PPM pursuant to CPLR § 301, based on PPM's consent. "[A] corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent" (*Bailen v Air & Liquid Systems Corp.*, 2014 WL 3885949, *4 [NY Sup, NY County 2014] citing *Neirbo Co. v Bethlehem Shipbuilding Corp.*, 308 US 165, 170, 175 [1939]; *Application of Amarnick*, 558 F2d 110, 113 [2d Cir 1977]; *Rockefeller Univ. v Ligand Pharms. Inc.*, 581 F Supp 2d 461, 466 [SDNY 2008]. The language used in the relevant case law cited above requires both the "registering as a foreign corporation *and* designating a local agent" (emphasis added) (*Id.*). Here, Plaintiff submits an affidavit of service that demonstrates service was made upon Tricia Woods, "who specifically stated ... she was authorized to accept service on behalf of" PPM at 192 Lexington (*Id.* at Ex. F). However, while Plaintiff submits evidence that co-defendant Procure Treatment Centers, Inc., registered with the New York Secretary of State (Danzi Aff. at Ex. D), Plaintiff fails to demonstrate that PPM similarly registered with the New York Secretary of State. As such, because the record does not demonstrate that PPM is registered to do business in New York, PPM cannot be subject to consent jurisdiction, despite accepting service (*Bailen v Air & Liquid Systems Corp.*, 2014 WL 3885949, *4 [NY Sup, NY County 2014]; *cf. Chatwal Hotels & Resorts LLC v Dollywood Co.*, 90 F Supp 3d 97, 105 [SDNY 2015] [declining consent jurisdiction, post-*Daimler*, even where defendant had registered to do business in New York but had not made other significant contacts with the forum state]). As such, that portion of Defendant's motion is granted.

Specific Personal Jurisdiction

Defendant further challenges Plaintiff's assertions that this Court has personal jurisdiction over corporate Defendants under CPLR § 302(a)(1), (3) and (4), so-called specific personal jurisdiction, and as such, also has jurisdiction over the individually-named defendants.

First, under CPLR § 302(a)(1), a court may exercise personal jurisdiction over a

non-domiciliary who, in person or through an agent, transacts any business within the State, provided that the cause of action arises out of the transaction of business. (CPLR § 302 [a][1]; *Lebel v Tello*, 272 AD2d 103, 103-04 [1st Dept 2000]). Additionally, courts must ensure that traditional notions of due process are not offended by the exercise of jurisdiction (*Walden v Fiore*, 134 S Ct at 1121). As such, under the "transacts any business" provision, the Court must focus on: (1) whether the defendant transacted business within the forum state; (2) whether the cause of action arose from that transaction of business, and lastly; (3) whether the exercise of jurisdiction is consistent with due process (*see Copp v Ramirez*, 62 AD3d 23 [1st Dept 2009]; *Lebel*, 272 AD2d 103).

Under the first prong, the connection between the transaction of business and the state must be purposeful (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept 2003]). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). Alternatively, cumulative minor activities may provide sufficient grounds for "transaction of business" jurisdiction pursuant to CPLR § 302(a)(1), so long as the cumulative effect creates a "significant presence" in the State. *(O'Brien*, 305 AD2d at 200; CPLR § 302 [a][1]). In either event, "it is the quality of the defendants' New York contacts that is the primary consideration" (*Fischbarg*, 9 NY3d at 380). The "test is whether the defendant has engaged in some purposeful activity in New York in connection with the matter in controversy" (*Otterbourg, Steindler, Houston & Rosen, P.C. v Shreve City Apartments*, 147 AD2d 327, 331 [1st Dept 1989]). However, contacts after the date of injury cannot be the basis for establishing defendant's relationship with New York because they do not serve as the basis for the underlying medical malpractice claim" (*see Harlow v Children's Hosp.*, 432 F3d 50, 62 [1st Cir 2005]). Further, CPLR § 302(a)(1) is a "single act statute", and "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, as long as the requisite purposeful activities and the connection between the activities and the transaction are shown" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 21 AD3d 90, 93-94 [1st Dept 2005]).

Further, the "arising from" prong of § 302(a)(1) "does not require a causal link between the defendant's New York business activity and a plaintiff's injury," (*Cohen v BMW Invs. L.P.*, 2015 US Dist LEXIS 147557, *9 [SDNY Oct 30, 2015] quoting *Licci ex rel. Licci v Lebanese Canadian Bank, SAL*, 732 F3d 161, 168 [2d Cir 2013]) and "the inquiry under the statute is relatively permissive"(*Licci v Lebanese Canadian Bank*, 20 NY3d 327, 339 [2012]). What is required, at a minium, is some relation between the transaction and the legal claim, "such that the latter is not completely unmoored from the former" (*Id.* at 339).

Lastly, under the Due Process Clause, a nonresident generally must have "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (*International Shoe Co. v Washington*, 326 US 310, 316, [1945]). In order for a state to exercise specific jurisdiction over a non-resident defendant consistent with due process, the non-resident defendant's "suit-related conduct" must create a

"substantial connection" with the forum state (*Walden*, 134 S Ct at 1121). This connection must arise from contacts that the "defendant himself creates with the forum state" (*Id.* at 1122, quoting *Burger King Corp. v Rudzewicz*, 471 US 462, 475 [1985]). The "minimum contacts" analysis examines the defendant's contacts with the forum state itself, not the defendant's contacts with persons who reside there (*Walden*, 134 S Ct at 1122). Further, while the mere solicitation of business within the forum state does not constitute the "transaction of business" under CPLR § 302(a)(1), solicitation supplemented by business transactions occurring in the state, or solicitation accompanied by a fair measure of the defendant's permanence and continuity in New York would establish a New York presence for the purposes of CPLR § 302(a)(1) (*O'Brien*, 305 AD2d at 201).

Here, Plaintiff has successfully made a "sufficient start" in demonstrating that personal jurisdiction exists over corporate Defendants pursuant to CPLR § 302(a)(1), as there is sufficient evidence that PPM "transact[ed] business within [New York State]" (CPLR § 302[a][1]), and that such business was related to the underlying claim (*see Milletich v Behavior Research Inst., Inc.*, No. CV-86-1204, 1986 WL 14606, at *2 [EDNY Nov 5, 1986] [finding personal jurisdiction where nondomiciliary defendant had an ongoing contractual relationship with a New York domiciliary, under which plaintiff, a New York resident, received treatment at defendant's out-of-state facility]). Accepting Plaintiff's allegations as true, Plaintiff asserts that Defendants entered into a contract with New York area hospitals for the purpose of recruiting and sending patients of New York area hospitals to Defendant's New Jersey facility. In exchange, doctors at the New York area hospitals would be given treating privileges at PPM's New Jersey facility. Plaintiff further alleges that corporate Defendants used their real property at 192 Lexington to negotiate and enter into said contract. Plaintiff further submits evidence in the form of a PPM press release promoting an agreement between PPM and New York-area Hospitals similar to what is alleged by Plaintiff (Danzi Aff. at Ex. S). Accordingly, Plaintiff makes a "sufficient start" in demonstrating personal jurisdiction over corporate Defendants pursuant to CPLR § 302(a)(1) such that dismissal would not be appropriate at this time (*see Angelic Real Estate, LLC v Johnson Development Associates, Inc.*, 2015 NY Slip Op 31182[U], 2015 WL 4164862 [NY Sup, NY County 2015]).

However, Plaintiff has failed to demonstrate a "sufficient start" under CPLR § 302(a)(1) as it pertains to individual defendants Mah, Blair, Peralta, and Collins. The only contact the individual defendants have with the State of New York are via Plaintiff's connections to New York. This is what the *Walden* Court cautioned against when it noted, the "connection must arise from contacts that the 'defendant himself creates with the forum state,'"and not the defendant's contacts with persons who reside in the forum state (*Walden*, 132 S Ct at 1122). As such, this Court does not have personal jurisdiction over individual defendants pursuant to CPLR § 302(a)(1), and that portion of Defendants' motion is granted.

Defendants next challenge Plaintiff's assertion that personal jurisdiction exists pursuant to CPLR § 302(a)(3). Under CPLR § 302(a)(3), the exercise of jurisdiction rests on five elements: (1) The defendant committed a tortious act outside the state, and; (2) the cause of

action arose from that act, and; (3) the act caused injury to a person or property within the state, and either; (4) the defendant expected or should reasonably have expected the act to have consequences in the state, or; (5) the defendant derives substantial revenue from interstate or international commerce (*LaMarca v Pak–Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). Further, in a medical malpractice case, "the injury occurs where the malpractice took place" (*Jackson v Sanchez-Pena*, 104 AD3d 574, 575 [1st Dept 2013] citing *O'Brien*, 305 AD2d at 202). Accordingly, the injury here occurred in New Jersey, not in New York, and personal jurisdiction cannot exist pursuant to CPLR § 302(a)(3) (*Minella v Restifo*, 124 AD3d 486, 486-87 [1st Dept 2015]). As such, Defendant's motion is granted as it pertains to personal jurisdiction governed by CPLR § 302(a)(3).

Lastly, Defendants challenge Plaintiff's assertion that personal jurisdiction exists pursuant to CPLR § 302(a)(4). Plaintiff claims Defendants are subject to personal jurisdiction under CPLR § 302(a)(4) because their officers, directors, and employees use or used the real property located at 192 Lexington (Plaintiff's Rep. Mem. at 7).

Under CPLR § 302(a)(4), a court has jurisdiction over a party where that party, "owns, uses or possesses any real property within the state" (CPLR § 302[a][4]). Including, "whether or not the non-domiciliary was using the property at the time the action was commenced (*see Genesee Scrap & Tin Baling Corp. v Lake Erie Bumper Plating Corp.*, 57 AD2d 1068 [4th Dept 1977]). CPLR § 302(a)(4) also "requires a relationship between the property and the cause of action sued upon" (*Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 159 [1st Dept 1992]). Further, CPLR § 302(a)(4) requires a more causal link between the property and the cause of action in order to qualify as a "relationship" than does CPLR § 302(a)(1) as discussed above and enunciated by the Court of Appeals in the *Licci* case. For example, in *Marie v Altshuler*, where plaintiff sought to enforce an oral agreement she had accepted in New York, the First Department found that a New York cooperative apartment that was the main focus of the dispute between the plaintiff and one of the defendants, was still not sufficient to create 302(a)(4) jurisdiction because the cause of action did "not *directly* implicate its ownership, possession or use" (emphasis added) (30 AD3d 271, 272 [1st Dept 2006]). The *Marie* Court reasoned that because it was "not alleged that the oral agreement require[d] that the property be transferred to plaintiff" the New York property was only incidental to the cause of action (*Id.*).

Here, Plaintiff argues that PPM used the real property at 192 Lexington to enter into an agreement with NYC-based hospitals whereby New York patients, like Plaintiff, would be sent to PPM's New Jersey facility. Even if true, the use of the New York property does not provide a basis for jurisdiction under CPLR 302(a)(4), since the action does not directly implicate its ownership, possession or use (*Marie v Altshuler*, 30 AD3d 271, 272 [1st Dept 2006]). As such, the Court does not have personal jurisdiction over Defendants under CPLR § 301(a)(4).

Plaintiff's Cross-Motion for Costs and Sanctions

Finally, Plaintiff cross-moves, pursuant to CPLR § 8106, for costs associated with the

present motion, and for sanctions against corporate movants and their president, Tom Hsin-Chieh Wang ("Wang") because their designation of 192 Lexington as their principal place of business on documents filed with the State of New Jersey is contrary to their moving papers and to an affidavit filed by Wang. "Motion costs are entirely within the discretion of the court" *(Kavares v Motor Vehicle Acc. Indemnification Corp.*, 29 A.2d 68, 72, [1st Dept 1967], aff'd, 28 N.Y.2d 939, 271 N.E.2d 915 [1971]). Similarly, the court has discretion to impose sanctions to prevent wasteful use of judicial resources (*See People v I.L.*, 143 Misc 2d 1061, 1066 [Sup Ct, Bronx County 1989]). However, after fully considering Plaintiff's arguments the Court finds them unavailing. As such, the Court declines to issue costs or sanctions against Defendants and Plaintiff's cross-motion is denied, and it is hereby

ORDERED that the motion to dismiss the complaint is granted to the extent that the complaint is dismissed as against defendants Mah, Blair, Peralta, and Collins, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion to dismiss the complaint is denied as to corporate defendants Princeton Procure Management, LLC and Procure Proton Therapy Center; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that Plaintiff's cross-motion is denied; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the parties are to appear for a preliminary conference on June 21, 2017 at 2:00 p.m. at Part 10, Room 422, 60 Centre St. New York, NY 10007; and it is further

ORDERED that Defendant PPM is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

George J. Silver J.S.C.

Dated: April 18, 2017
New York County

GEORGE J. SILVER