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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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GEORGI EREMEYEV and OLGA EREMEYEV,

Plaintiffs,

- against -

MOUNT SINAI HOSPITAL, BACHIR TAOULI, M.D., BURTON DRAYER, M.D., WAYNE E. KEATHLEY, JOHN HART, MONTEFIORE MEDICAL CENTER, STEVEN M. SAFYER, M.D., MILAN KINKHABWALA, M.D., JOHN F. REINUS, M.D., EDWARD S. AMIS, M.D., NYU LANGONE MEDICAL CENTER, MICHAEL MACARI, M.D., DANNY C. KIM, M.D., MICHAEL P. RECHT, M.D., ROBERT A. PRESS, M.D., ROBERT I. GROSSMAN, M.D., NEW YORK-PRESBYTERIAN HOSPITAL, MARTIN PRINCE, M.D., BEATRIU REIG, M.D., JONATHAN SUSMAN, M.D., "JOHN DOE", M.D., JEAN C. EMOND, M.D., HERBERT PARDES, M.D., STEVEN J. CORWIN, M.D., ROBERT E. KELLY, M.D., ELIOT J. LAZAR, M.D., RICHARD S. LIEBOWITZ, M.D., MEMORIAL SLOAN-KETTERING CANCER CENTER (MSKCC), WILLIAM R. JARNAGIN, M.D., CRAIG B. THOMSON, M.D., JORGE CAPOTE, R.N., EMBLEMHEALTH/GHI HEALTH INSURANCE CO., WILLIAM A. GILLESPIE, M.D., FRANK J. BRANCHINI, DAWN CASTAGNA, MEDICAL LIABILITY MUTUAL INSURANCE COMPANY (MLMIC), NEW YORK STATE DEPARTMENT OF INSURANCE, the law firms: MARTIN, CLEARWATER & BELL; KRAMER, DILLOF, LIVINGSTON & MOORE; WOLF & FUHRMAN; and VARIOUS STAFF OF THE NYS SUPREME COURT, COUNTY OF BRONX (CIVIL DIVISION),

Defendants.

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DECISION AND ORDER

Index No. 250078/2012

PRESENT: Hon. Lucindo Suarez

As to Motion Sequence #1: upon the notice of motion dated February 23, 2012 of defendant Robert I. Grossman, M.D. and the affirmation, affidavit and exhibit submitted in support thereof; the notice of cross-motion dated March 6, 2012 of defendant Medical Liability Mutual Insurance Company and the affirmation, affidavit and exhibits submitted in support thereof; the notice of cross-motion dated March 19, 2012 of defendant New York University Hospitals Center s/h/a NYU Langone Medical Center and the affirmation submitted therewith;

the affirmation in reply dated March 26, 2012 of defendant Medical Liability Mutual Insurance Company;

as to Motion Sequence #2: upon the notice of motion dated March 5, 2012 of defendants Montefiore Medical Center, Steven M. Safyer, M.D., Milan Kinkhabwala, M.D., John F. Reinus, M.D., and E. Steven Amis, M.D. s/h/a Edward S. Amis, M.D. and the affirmation, affidavits (4), exhibits and memorandum of law submitted in support thereof; movants' affidavit dated March 15, 2012;

as to Motion Sequence #3: upon the notice of motion dated March 26, 2012 of defendants New York-Presbyterian Hospital, Martin Prince, M.D., Beatriu Reig, M.D., Jonathan Susman, M.D., Robert J. Min, M.D., Jean C. Emond, M.D., Herbert Pardes, M.D., Steven J. Corwin, M.D., Robert E. Kelly, M.D., Eliot J. Lazar, M.D. and Richard S. Liebowitz, M.D. and the affirmation, affidavits (8) and exhibits submitted in support thereof; movants' affirmation in reply dated April 16, 2012 and the exhibit submitted therewith;

as to Motion Sequence #4: upon the notice of motion dated March 26, 2012 of defendant Mount Sinai Hospital and the affirmation, exhibits and memorandum of law submitted in support thereof;

as to Motion Sequence #5: upon the notice of motion dated March 16, 2012 of defendants Group Health Incorporated s/h/a EmblemHealth/GHI Health Insurance Co., William A. Gillespie, M.D., Frank J. Branchini and Dawn Castagna and the affidavits (4) and memorandum of law submitted in support thereof;

as to Motion Sequence #6: upon the notice of motion dated April 16, 2012 of defendants Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan-Kettering Cancer Center (MSKCC), William R. Jarnagin, M.D., Craig B. Thompson, M.D. s/h/a Craig B.

Thomson, M.D. and Jorge Capote, R.N. and the affirmation, affidavits (4), exhibits and memorandum of law submitted in support thereof;

as to Motion Sequence #7: upon the notice of motion dated April 26, 2012 of defendant Group Health Incorporated s/h/a EmblemHealth/GHI Health Insurance Co. and the affirmation, exhibit and memorandum of law submitted in support thereof; movant's affirmation in reply dated May 15, 2012 and the affidavit, exhibit and memorandum of law submitted therewith;

as to Motion Sequence #8: upon the amended notice of motion dated May 1, 2012 and the affirmation, affidavits (3), exhibits and memorandum of law submitted in support thereof;

as to Motion Sequence #9: upon the notice of motion dated June 5, 2012 of defendant Martin Clearwater & Bell LLP s/h/a Martin, Clearwater & Bell and the affirmation and exhibits submitted in support thereof; movant's affirmation in reply dated June 25, 2012;

as to Motion Sequence #10: upon the notice of motion dated June 7, 2012 of defendant Kramer, Dillof, Livingston & Moore, Esqs. s/h/a Kramer, Dillof, Livingston & Moore and the affirmation and exhibits submitted in support thereof;

as to Motion Sequence #11: upon the notice of motion dated June 8, 2012 of defendant Kramer, Dillof, Livingston & Moore, Esqs. s/h/a Kramer, Dillof, Livingston & Moore and the affirmation and exhibits submitted in support thereof; the June 19, 2012 affirmation submitted on behalf of defendant John Higgitt;

as to Motion Sequence #12: upon the notice of motion dated June 12, 2012 of defendant John Higgitt and the affirmation and exhibit submitted in support thereof;

as to Motion Sequence #13: upon the notice of motion dated July 3, 2012 of defendant Judge Douglas E. McKeon and the affirmation and exhibit submitted in support thereof;

as to additional papers filed in this action: upon plaintiff's "Ex-Parte Motion for an Order

of Default-Judgment in Civil Action" filed March 23, 2012; plaintiff's "Addendum No. 3 to Affirmation in Support of Ex-Parte Motion for an Order of Default-Judgment in Civil Action" dated April 9, 2012; plaintiff's "Ex-Parte Motion for an Order of Default-Judgment in Civil Action" filed April 13, 2012; plaintiff's "Ex-Parte Motion for an Order of Default-Judgment in Civil Action" dated April 17, 2012 and the affidavit submitted therewith; plaintiff's "Ex-Parte Memorandum of Facts, Laws, Justice Ethics and Humanity" dated April 27, 2012; plaintiff's "Ex-Parte Motion for an Order of Default-Judgment in Civil Action" dated May 9, 2012; plaintiff's "Ex-Parte Motion for an Order of Default-Judgment, and Affirmation in Support" dated May 14, 2012; plaintiff's "Ex-Parte Motion for an Order of Default-Judgment in Civil Action" dated June 12, 2012; plaintiff's "Addendum to Ex-Parte Motion for an Order of Default Judgment in Civil Action" dated June 14, 2012; plaintiff's "Addendum to Ex-Parte Motion for an Order of Default Judgment in Civil Action" dated June 19, 2012; plaintiff's "Addendum to Ex-Parte Motion for an Order of Default Judgment by a Jury" dated June 21, 2012; plaintiff's July 13, 2012 "Notice of Motion in Opposition and Demand for Default Judgment by a Jury" and the affidavit submitted therewith; the May 21, 2012 affirmation in opposition of defendants Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan-Kettering Cancer Center (MSKCC), William R. Jarnagin, M.D., Craig B. Thompson, M.D. s/h/a Craig B. Thomson, M.D. and Jorge Capote, R.N.; the June 27, 2012 affirmation in opposition of defendant Medical Liability Mutual Insurance Company;

and upon due deliberation; the court finds:

Plaintiff's underlying medical malpractice action filed against Lenox Hill Hospital under index number 13107/2003 is pending in this court. The present matter was commenced by plaintiff *pro se* by the filing of a summons and complaint on January 20, 2012. Plaintiff alleges

that wrongful surgery was performed on him at Lenox Hill Hospital in August 2002 causing injuries and that numerous medical and legal professionals have conspired to conceal the original and subsequent malpractice and to deprive plaintiff of resolution of the original malpractice action. Plaintiff alleges that movants conspired to conceal plaintiff's injuries allegedly sustained at Lenox Hill Hospital by knowingly and intentionally engaging in conspiratorial, fraudulent and illegal actions, intentionally mistreating him and extensively abusing the legal process in a criminal conspiracy to deny him access to medical care.

The following defendants now move to dismiss the complaint: Robert I. Grossman, M.D. ("Grossman"), Medical Liability Mutual Insurance Company ("MLMIC") and New York University Hospitals Center s/h/a NYU Langone Medical Center ("NYU") (Motion Sequence #1); Montefiore Medical Center ("Montefiore"), Steven M. Safyer, M.D. ("Safyer"), Milan Kinkhabwala, M.D. ("Kinkhabwala"), John F. Reinus, M.D. ("Reinus"), and E. Steven Amis, M.D. s/h/a Edward S. Amis, M.D. ("Amis") (Motion Sequence #2); New York-Presbyterian Hospital ("NYPH"), Martin Prince, M.D. ("Prince"), Beatriu Reig, M.D. ("Reig"), Jonathan Susman, M.D. ("Susman"), Robert J. Min, M.D. ("Min"), Jean C. Emond, M.D. ("Emond"), Herbert Pardes, M.D. ("Pardes"), Steven J. Corwin, M.D. ("Corwin"), Robert E. Kelly, M.D. ("Kelly"), Eliot J. Lazar, M.D. ("Lazar") and Richard S. Liebowitz, M.D. ("Liebowitz") (Motion Sequence #3); Mount Sinai Hospital ("Mount Sinai") (Motion Sequence #4); Group Health Incorporated s/h/a EmblemHealth/GHI Health Insurance Co. ("GHI"), William A. Gillespie, M.D. ("Gillespie"), Frank J. Branchini ("Branchini") and Dawn Castagna ("Castagna") (Motion Sequence #5); Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan-Kettering Cancer Center (MSKCC) ("MHCAD"), William R. Jarnagin, M.D. ("Jarnagin"), Craig B. Thompson, M.D. s/h/a Craig B. Thomson, M.D. ("Thompson") and Jorge Capote, R.N.

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("Capote") (Motion Sequence #6); GHI (Motion Sequence #7); Bachir Taouli, M.D. ("Taouli"), Burton Drayer, M.D. ("Drayer"), Wayne E. Keathley ("Keathley") and John Hart ("Hart") (Motion Sequence #8); Martin Clearwater & Bell LLP s/h/a Martin, Clearwater & Bell ("MCB") (Motion Sequence #9); Kramer, Dillof, Livingston & Moore, Esqs. s/h/a Kramer, Dillof, Livingston & Moore ("KDLM") (Motion Sequences #10 and #11); John Higgitt ("Higgitt") (Motion Sequence #12); and Judge Douglas E. McKeon ("McKeon") (Motion Sequence #13).

The motions are consolidated for decision herein and granted. The court finds that even affording the *pro se* plaintiff great leeway, the complaint is, *inter alia*, unsubstantiated, fails to state causes of action, is not properly before the court due to a lack of both personal and subject matter jurisdiction and the claims of intentional torts are barred by the statute of limitations.

Personal Jurisdiction

Grossman, MLMIC, Montefiore, Safyer, Kinkhabwala, Reinus, Amis, GHI, Gillespie, Branchini, Castagna, Jarnagin, Thompson, Capote, MCB and KDLM move to dismiss the complaint on the ground of lack of personal jurisdiction.

Grossman, Safyer, Kinkhabwala, Amis, GHI, Jarnagin and Capote were not served either personally or in any other manner sanctioned by the Civil Practice Law and Rules. It appears that incomplete copies of the complaint were transmitted by facsimile, a method not authorized by CPLR 308 or 311. Plaintiff attempted to serve MLMIC by faxing the complaint to a third party.

Plaintiff served the summons and complaint upon MCB and KDLM by regular mail. This is not a method of service that confers personal jurisdiction over MCB, a limited liability partnership, *see* CPLR 310-a, or KDLM, a partnership, *see* CPLR 310.

Montefiore, Reinus, Gillespie, Branchini, Castagna and Thompson were not served at all.

Whether defendants ultimately became aware of the action is irrelevant to the propriety of

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the service. *See Raschel v. Rish*, 69 N.Y.2d 694, 504 N.E.2d 389, 512 N.Y.S.2d 22 (1986). The time in which to serve defendants has expired. The court has neither authorized an alternative method of service upon defendants nor enlarged the time in which to serve them. By failing to appropriately serve these defendants, plaintiff has failed to acquire personal jurisdiction over them, and the complaint against them must be dismissed. Even in the absence of a motion explicitly seeking such relief, where it has been determined that plaintiff has not acquired jurisdiction over the person of the defendant, dismissal must follow. *See Haberman v. Simon*, 303 A.D.2d 181, 755 N.Y.S.2d 596 (1st Dep't 2003); *see also NYCTL 2004-A Trust v. Faysal*, 62 A.D.3d 409, 877 N.Y.S.2d 686 (1st Dep't 2009); *Resolution Trust Corp. v. Beck*, 243 A.D.2d 307, 664 N.Y.S.2d 522 (1st Dep't 1997); *Long Is. Minimally Invasive Surgery, P.C. v. Lester*, 12 Misc.3d 1183A, 824 N.Y.S.2d 763 (App Term 1st Dep't 2006).

Medical Malpractice

Plaintiff's conclusory claim of medical malpractice against Grossman, MLMIC, Safyer, Amis, Min, Pardes, Corwin, Kelly, Lazar and Liebowitz is dismissed for failure to state a cause of action, as none of these defendants had a physician-patient relationship with plaintiff. *See McKinney v. Bellevue Hosp.*, 183 A.D.2d 563, 584 N.Y.S.2d 538 (1st Dep't 1992). Defendants Min, Pardes, Corwin, Kelly, Lazar and Liebowitz aver that they have never met plaintiff, and all defendants aver that they have never rendered treatment to him or had any professional relationship with him.

As to Montefiore, Safyer, Kinkhabwala, Reinus and Amis, plaintiff's claims for medical malpractice accrued on the dates of the allegedly negligent acts or omissions. *See Daniel J. v. New York City Health & Hosps. Corp.*, 77 N.Y.2d 630, 571 N.E.2d 704, 569 N.Y.S.2d 396 (1991). Plaintiff claims that movants are liable for the allegedly inaccurate diagnostic imaging

and diagnosis of a December 7, 2005 abdominal MRI which was allegedly improperly reported. As more than six years have passed, the allegations of medical malpractice for services rendered on December 2, 2005 are time-barred. Plaintiff has made no claim that various Magnetic Resonance Cholangiopancreatography ("MRCP") studies done at different medical facilities during the years 2006 to 2009 constituted continuous treatment. "[N]either the mere 'continuing relation between physician and patient' nor 'the continuing nature of a diagnosis' is sufficient to satisfy the requirements of the doctrine. In the absence of continuing efforts by a doctor to treat a particular condition, none of the policy reasons underlying the continuous treatment doctrine justify the patient's delay in bringing suit." *Nykorchuck v. Henriques*, 78 N.Y.2d 255, 259, 577 N.E.2d 1026, 1028, 573 N.Y.S.2d 434, 436 (1991).

As to NYPH, Prince, Reig, Susman and Emond, plaintiff's claims for medical malpractice and negligence against defendants NYPH and Prince, Reig, Susman and Emond are dismissed. Plaintiff argues that Susman and Emond failed to disclose the identities of various individuals to plaintiff. However, neither doctor owed plaintiff a legal duty to identify the various individuals in question; plaintiff therefore has not asserted a cognizable claim against them. Furthermore, as to Emond, there is no obligation under the New York Public Health Law that prevents a physician from discharging a patient from his practice. Plaintiff furthermore alleges that Prince and Reig refused to alter their opinions rendered in a July 22, 2009 report and refused to insert certain measurements on the images that plaintiff perceived to exist when he demanded that they do so. This study was not clinically indicated nor ordered by any physician for diagnostic purposes or otherwise. Reig was not obligated to perform this study but performed it at the request of plaintiff himself. Once the doctors undertook to perform the study they owed plaintiff a duty to properly perform it and interpret the images. However, neither doctor owed

plaintiff a duty to alter the report or insert measurements at his request; plaintiff therefore has not asserted a cognizable claim against them.

Plaintiff fails to state causes of action for medical malpractice and negligence against defendants NYPH, Min, Pardes, Corwin, Kelly, Lazar and Liebowitz. Plaintiff's claim that Min, Pardes, Corwin, Kelly, Lazar and Liebowitz ignored and/or failed to properly respond to plaintiff's complaints regarding an allegedly inaccurate July 22, 2009 MRCP study and failed to restore treatment to him cannot support a malpractice claim. The doctors owed no duty to treat plaintiff or respond in the manner demanded by plaintiff as they were not involved in plaintiff's medical treatment.

As to Mount Sinai, Taouli, Drayer, Keathley and Hart, movants point out that the complaint as to them does not in fact allege medical malpractice but the intentional falsifying of a radiological study report. Being that the claims against movants are premised on intentional acts, there is accordingly no valid medical malpractice claim against these defendants. In addition, Drayer, Keathley and Hart aver that they never had a physician-patient relationship with plaintiff. Keathley and Hart are not medical professionals.

As to MHCAD, Thompson and Capote, Thompson was the president and chief executive officer of Memorial Sloan-Kettering Cancer Center. He rendered no care to plaintiff and did not have a physician-patient relationship with plaintiff, nor did he control or supervise any care rendered to plaintiff. There is therefore no valid medical malpractice claim as to Thompson. Nor is Thompson personally liable for the acts or omissions of others. The sole allegation against him is that he failed to respond to plaintiff's demands. There is, however, no indication that Thompson had a duty to accede to plaintiff's demands. The complaint thus fails to state a cognizable claim against Thompson. Likewise, the sole allegation against Capote, Director of

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Patient Representative Office, is that he informed plaintiff that "MSKCC cannot help [plaintiff]." Capote rendered no care to plaintiff and interacted with plaintiff not as a nurse but solely in his capacity as an administrator. The complaint fails to state a cognizable claim against Capote.

Professional Malpractice

MCB and KDLM move to dismiss the complaint to the extent that a claim for professional non-medical malpractice is discernable. MCB represents the defendants in plaintiff's underlying pending medical malpractice action. KDLM was plaintiff's counsel in the underlying medical malpractice action and was permitted to withdraw as plaintiff's counsel by decision and order of the court (Hon. Douglas E. McKeon, J.S.C.) dated October 2, 2009. As to MCB and KDLM, the complaint in the present action alleges that they

> knowingly, intentionally, unconscionably, dishonestly, fraudulently and conspiratorially contributed to and/or allowed the [alleged medical malpractice]; and . . . mistreated plaintiff by extensive miserable litigation, oppressive injustice, unjust partiality, obstruction of justice and concealed conspiracy in favor of the deeply corrupt [defendant Medical Liability Mutual Insurance Company]. Each and all, individually and collectively, of the defendants . . . have knowingly, intentionally, unconscionably, dishonestly, fraudulently and conspiratorially acted to (a.) - obstruct, hinder, weaken, undermine and delay the fair, just and timely resolution of plaintiff's case of medical malpractice No. 13107-2003; (b.) - intimidate and pressure medical experts to prevent them from testifying about the medical facts concerning plaintiff's case of medical malpractice, (c.) - through extreme delay of case resolution, have endangered plaintiff's health and life by depriving plaintiff of the financial ability to obtain needed medical care and preventive treatment.

To the extent that plaintiff has attempted to allege professional malpractice, the complaint fails to establish the elements of such a claim. "In order to sustain a claim for legal malpractice, a plaintiff must establish [] that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff." *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 434, 866 N.E.2d 1033, 1036, 834 N.Y.S.2d 705, 708 (2007); *Estate of Nevelson v. Carro, Spanbock,*

Kaster & Cuiffo, 259 A.D.2d 282, 686 N.Y.S.2d 404 (1st Dep't 1999), *appeal denied*, 1999 N.Y. App. Div. LEXIS 5188 (1st Dep't Apr. 27, 1999). Plaintiff must also establish that "'but for' the attorney's negligence, plaintiff would have prevailed in the matter at issue or would not have sustained any damages." *Between the Bread Realty Corp. v. Salans Hertzfeld Heilbronn Christy & Viener*, 290 A.D.2d 380, 736 N.Y.S.2d 666 (1st Dep't 2002), *appeal denied*, 98 N.Y.2d 603, 772 N.E.2d 605, 745 N.Y.S.2d 502 (2002). Plaintiff's complaint with regard to any professional malpractice is conclusory, *see Bishop v. Maurer*, 9 N.Y.3d 910, 875 N.E.2d 883, 844 N.Y.S.2d 165 (2007), and otherwise insufficient. Furthermore, as the underlying action remains pending, plaintiff has not suffered an adverse result.

Intentional Tort

Grossman, Montefiore, Safyer, Kinkhabwala, Reinus, Amis, MHCAD, Jarnagin, Thompson, Capote, MCB and KDLM move to dismiss plaintiffs claims founded on intentional tort on the basis of the one-year statute of limitations. *See e.g. Gold v. Schuster*, 264 A.D.2d 547, 694 N.Y.S.2d 646 (1st Dep't 1999).

To the extent that the complaint against Grossman alleges intentional tortious conduct premised upon the purported refusal to perform certain radiological diagnostic studies between February and March 2010, such a cause of action carries a one-year statute of limitations and is time-barred, as the complaint was not filed until January 20, 2012. The complaint alleges no specific acts attributable to MHCAD, Jarnagin, Thompson, Capote, MCB or KDLM occurring within the one year prior to the filing of the complaint. Accordingly, all claims founded upon intentional acts are dismissed.

As to Montefiore, Safyer, Kinkhabwala, Reinus and Amis, the first medical record referencing treatment by Dr. Kinkhabwala at Montefiore Medical Center is dated June 11, 2007.

On September 30, 2010, due to plaintiff's increasingly aggressive behavior, Dr. Kinkhabwala expressly discharged plaintiff from his care and from the care of Montefiore Einstein Medical Center. On August 15, 2010, Dr. Reinus had his only professional contact with plaintiff, during which plaintiff was informed that his blood work was normal, that he had no symptoms, that there was no evidence of liver disease and that plaintiff did not require treatment. Neither Dr. Safyer nor Dr. Amis ever had professional contact or a physician-patient relationship with plaintiff. Billing records from Montefiore indicate that the last treatment rendered to plaintiff at the hospital was an unrelated left hip MRI taken on October 15, 2010. Plaintiff presented to Montefiore on October 18, 2010 without an appointment. As he had done in the past, he harassed the staff and was advised not to enter the location. A security officer approached him and advised him to leave. Plaintiff then behaved in a disruptive manner and was handcuffed. Officers of the New York City Police Department responded to the scene and issued plaintiff a summons for trespassing and harassment. As all operative acts or omissions with respect to these defendants occurred in 2010 at the latest, the claims for intentional tort are dismissed as barred by the one-year statute of limitations. *See* CPLR 215. As plaintiff admits that Montefiore terminated his care in or about October 2010, more than one year has elapsed between any care rendered by movants and the filing of the complaint. Therefore, the statute of limitations has expired with respect to all claims of intentional tort.

There is no valid claim for concealment of malpractice, as plaintiff's complaint makes clear that he at all stages has confronted defendants when faced with diagnostic results that differed from prior results or what he perceives to be his diagnoses, and demanded that tests be redone or reports amended. Nor is there any allegation of reliance upon any alleged misrepresentations or damages flowing from such reliance. *See e.g. Bayuk v. Gilbert*, 57 A.D.3d

227, 868 N.Y.S.2d 645 (1st Dep't 2008), *appeal denied*, 12 N.Y.3d 705, 906 N.E.2d 1085, 879 N.Y.S.2d 51 (2009).

Fraud

To the extent that plaintiff's complaint contains a claim of fraud, dismissal is also required as the alleged fraud is not pleaded in requisite detail as required by CPLR 3016(b). Plaintiff has failed to properly plead a cause of action alleging fraud as comports with the requirements of *Simcuski v. Saeli*, 44 N.Y.2d 442, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978). "To establish a *prima facie* case for fraud, plaintiffs would have to prove that '(1) defendant made a representation as to a material fact; (2) such representation was false; (3) defendant[] intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) as a result of such reliance plaintiff sustained pecuniary loss.'" *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 488, 868 N.E.2d 189, 195, 836 N.Y.S.2d 509, 515 (2007). Plaintiff has failed to allege that he relied on the alleged misrepresentations and there is no indication that defendants knowingly misrepresented diagnostic or other findings to plaintiff. Here plaintiff has not identified any injuries and has not asserted that any injuries are attributable to any alleged fraud as opposed to the intentional tortious conduct alleged by plaintiff.

Conspiracy

Plaintiff has furthermore failed to state a cause of action for conspiracy. New York does not recognize a separate cause of action for civil conspiracy, although "a plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan." *American Preferred Prescription, Inc. v. Health Mgmt.*, 252 A.D.2d 414, 416, 678 N.Y.S.2d 1, 3 (1st Dep't

1998). The claim stands or falls with the underlying tort. *See Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc., LLC*, 82 A.D.3d 1035, 920 N.Y.S.2d 123 (2d Dep't 2011). Here, as plaintiff has failed to state an actionable underlying tort, he has also failed to state a cause of action for conspiracy.

In Motion Sequence #7, GHI moves to dismiss the complaint for failure to state a cause of action for conspiracy. As the court has found above that plaintiff failed to acquire personal jurisdiction over GHI and the complaint against GHI must be dismissed, the motion is moot. Were the court to reach the merits of the motion, as plaintiff has alleged no underlying tort with respect to GHI, the complaint must be dismissed.

Abuse of Process

The claim of abuse of process is also dismissed for failure to state a cause of action. Such a cause of action requires "(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 N.Y.2d 113, 116, 469 N.E.2d 1324, 1326, 480 N.Y.S.2d 466, 468 (1984). There is no allegation or proof that defendants have issued such process and defendants have issued no such process against plaintiff.

Subject Matter Jurisdiction: Criminal Activity

Plaintiff's claims founded in criminality are dismissed for lack of subject matter jurisdiction, as criminal matters are within the jurisdiction of criminal, not civil, courts. Plaintiff is bound by his decision to pursue his claims in a civil action. *See* CPLR 106 ("Where the violation of a right admits of both a civil and criminal prosecution, the one is not merged in the other."); *see e.g. State v. Master Plumbers Assoc.*, 47 Misc.2d 187, 262 N.Y.S.2d 323 (Sup Ct Onondaga County 1965). Plaintiff has alleged no purportedly criminal activity beyond that upon

which causes of action dismissed herein are premised. *See Mairs v. Baltimore and Ohio R.R. Co.*, 175 N.Y. 409, 67 N.E. 901 (1903).

Subject Matter Jurisdiction: State Actor

Higgitt moves to dismiss plaintiff's complaint on the ground that the Supreme Court lacks subject matter jurisdiction, as the Court of Claims has exclusive jurisdiction over actions against the State of New York. Higgitt is the Principal Court Attorney to the Administrative Judge of the Supreme Court of Bronx County, Civil Division, and is sued in his official capacity for allegedly negligent and/or intentional acts with respect to the present action and the underlying medical malpractice action.

"Whether a suit is against the state is not determined solely by looking at the parties named, but depends also upon the nature of the litigation, the relief sought and the way in which it affects the state." *Glassman v. Glassman*, 309 N.Y. 436, 131 N.E.2d 721 (1956). In the performance of his duties as Principal Court Attorney to the Administrative Judge of the Supreme Court of Bronx County, Civil Division, Higgitt acts as a State officer. *See Ashland Equities Co. v. Clerk of New York County*, 110 A.D.2d 60, 64, 493 N.Y.S.2d 133, 136 (1st Dep't 1985). As Higgitt has been sued for acts or omissions in the performance of his official duties as a State officer, the Court of Claims has exclusive jurisdiction over the claims against him and the action must be dismissed. *See id.* at 65, 493 N.Y.S.2d at137.

Judicial Immunity

Defendant Judge Douglas E. McKeon moves to dismiss plaintiff's complaint on the ground of judicial immunity. Justice McKeon is the Administrative Judge of the Supreme Court of Bronx County, Civil Division, and was, until recently, the Judge to whom the present action and plaintiff's underlying medical malpractice action were assigned. Insofar as discernable, the

complaint extends the above-cited allegations against MCB and KDLM to Justice McKeon and alleged that Justice McKeon has failed to respond to plaintiff's correspondence. Justice McKeon is sued in his official capacity for acts undertaken as a Justice of the Supreme Court.

"Judges of courts possessing superior or general jurisdiction are immune from civil liability for their judicial acts even though such acts are in excess of their authority or are alleged to have been done maliciously or corruptly, provided that liability may ensue only where a Judge acts in 'the clear absence of all jurisdiction.'" *Murph v. State*, 98 Misc.2d 324, 413 N.Y.S.2d 854 (Ct Cl 1979), *reh'g denied*, 105 Misc.2d 684, 432 N.Y.S.2d 833 (Ct Cl 1980). "Courts have recognized that it is imperative to the nature of the judicial function that Judges be free to make decisions without fear of retribution through accusations of malicious wrongdoing. It has been adjudged worth the price of leaving some injured parties without a remedy to allow such officials to exercise the independence of judgment critical to our judicial system without harassment or intimidation." *Tarter v. State*, 68 N.Y.2d 511, 518, 503 N.E.2d 84, 86-87, 510 N.Y.S.2d 528, 530-31 (1986). As plaintiff's vague allegations relate to Justice McKeon's handling of plaintiff's actions, not merely as an administrator but as the Justice presiding over the actions, Justice McKeon is immune from suit.

Punitive Damages

To the extent that the complaint seeks punitive damages,

> Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but "evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations." In *Prozeralik v Capital Cities Communications, Inc.* (82 N.Y.2d 466, 479, 626 N.E.2d 34, 605 N.Y.S.2d 218 (1993)), the Court wrote that punitive damages may be sought when the wrongdoing was deliberate "'and has the character of outrage frequently associated with crime'" (citation omitted). The misconduct must be exceptional, "as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or

wanton disregard of safety or rights."

Ross, 8 N.Y.3d at 489, 868 N.E.2d at 196, 836 N.Y.S.2d at 516 (citations omitted). Furthermore, "punitive damages in medical malpractice actions are not recoverable unless the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless." *Schiffer v. Speaker*, 36 A.D.3d 520, 828 N.Y.S.2d 363 (1st Dep't 2007). Despite plaintiff's personal feelings regarding the course of his medical care and his perceived treatment during the course of litigation, the complaint does not depict any acts or omissions rising to such a level as to warrant punitive damages. All substantive causes of action are being dismissed herein, and a claim for punitive damages cannot stand on its own. *See Rocanova v. Equitable Life Assur. Soc'y*, 83 N.Y.2d 603, 634 N.E.2d 940, 612 N.Y.S.2d 339 (1994).

Injunctive Relief as to Future Litigation

Montefiore, Safyer, Kinkhabwala, Reinus, Amis, NYPH, Prince, Reig, Susman, Emond, Pardes, Corwin, Kelly, Lazar, Liebowitz, Min, MHCAD, Jarnagin, Thompson, Capote, Taouli, Drayer, Keathley, Hart, MCB and KDLM move to enjoin plaintiff from initiating future litigation against them without leave of court. It is a proper exercise of the court's discretion to enjoin plaintiff from initiating any further litigation against these defendants to prevent plaintiff from using legal proceedings as a means of harassment, and to prevent waste of the time and resources of the parties and the judiciary. *See Jones v. Maples*, 286 A.D.2d 639, 731 N.Y.S.2d 356 (1st Dep't 2001). The court therefore grants this facet of the motions.

Injunctive Relief as to Communication and Contact

Montefiore, Safyer, Kinkhabwala, Reinus, Amis, NYPH, Prince, Reig, Susman, Emond, Pardes, Corwin, Kelly, Lazar, Liebowitz, Min, MHCAD, Jarnagin, Thompson, Capote, Taouli, Drayer, Keathley, Hart also move for relief pursuant to CPLR 3103(a). Such relief is granted.

Pursuant to CPLR 3103(a), plaintiff is enjoined from contacting defendants or entering defendants' facilities. As the defendants are represented by counsel, plaintiff may not communicate with them directly. Plaintiff's conduct, multiple filings and correspondence to defendants have become increasingly antagonistic and abusive. The court believes that under these circumstances a protective order is appropriate to prevent further harassment from an increasingly hostile plaintiff. The court is convinced that defendants are significantly concerned for their safety and the safety of their employees and others present at their facilities.

Papers Filed by Plaintiff

Plaintiff has inundated this court and multiple offices within the County and Court Clerk with *ex parte* filings and facsimile-transmitted *ex parte* communications. With the exception of the plaintiff's "Addendum to Ex-Parte Motion for an Order of Default Judgment in Civil Action" dated June 19, 2012, there is no proof that plaintiff has ever served any of the documents listed above as "additional papers filed in this action" on any other party, and the June 19, 2012 document was served solely upon MCB and KDLM. The court notes that reply papers have been submitted in Motion Sequences 1, 3, 7 and 9 and two affirmations in opposition to plaintiff's purported applications have been submitted; however, the court does not assume the manner in which the defendants have been made aware of plaintiff's documents. Given the frequency of plaintiff's filings and the free-associative nature of plaintiff's prose, it is impossible to tell which motion he is responding to, if any. Regardless of whether there is indication of service of plaintiff's papers and regardless of whether the record contains responsive affirmations from defendants, plaintiff's submissions have been acknowledged by this court, read in their entirety and fully considered. Out of deference to and recognition of plaintiff's *pro se* status, all submissions are collected here to be included in and be deemed part of the record. Plaintiff is

again advised, however, that the chambers of the undersigned has informed him on numerous occasions of the appropriate manner in which to make and serve a motion or request and that the courtesy of including his papers in the record will not be extended in the future where the papers have not been served and filed in a manner comporting with the Civil Practice Law and Rules, regulations, and state and local filing rules.

To the extent plaintiff attempted to interpose opposition to the applications, the court notes that with the exception noted above, plaintiff's submissions were not served upon any other party to the action, let alone movants. Regardless, the submissions are considered to the extent that they may constitute opposition to the motions. However, plaintiff's various "Ex-Parte Motions for an Order of Default Judgment in Civil Action," to the extent that affirmative relief is sought, are denied for failure to place the other parties on notice of the purported applications. (Additionally, no proof is submitted as to alleged defaults and many of the purported applications fail to specify against whom relief is sought.) The court is aware that plaintiff is proceeding *pro se*; however, plaintiff has demonstrated himself to be not unsophisticated in the prosecution of this action. "[W]hile courts generally allow *pro se* litigants some leeway in the presentation of their case, *pro se* litigants must still abide by court procedures and calendars." *Stoves & Stones, Ltd. v. Rubens*, 237 A.D.2d 280, 280, 655 N.Y.S.2d 385, 385 (2d Dep't 1997); *2215-75 Cruger Apts. v. Stovel*, 196 Misc.2d 346, 769 N.Y.S.2d 347 (App. Term 1st Dep't 2003). In any event, the oppositions did not address the merits of the motions. The court notes that where a complaint has not been properly served, the time to answer it does not start to run, and a defendant may properly respond to a complaint by moving to dismiss it instead of answering it.

Accordingly, it is

ORDERED, that the motion of defendant Robert I. Grossman, M.D. for dismissal of the

complaint is granted (**Motion Sequence #1**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Robert I. Grossman, M.D. dismissing the complaint insofar as asserted against him; and it is further

ORDERED, that the cross-motion of defendant New York University Hospitals Center s/h/a NYU Langone Medical Center is granted (**Motion Sequence #1**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant New York University Hospitals Center s/h/a NYU Langone Medical Center dismissing the complaint insofar as asserted against it; and it is further

ORDERED, that the cross-motion of defendant Medical Liability Mutual Insurance Company is granted (**Motion Sequence #1**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Medical Liability Mutual Insurance Company dismissing the complaint insofar as asserted against it; and it is further

ORDERED, that the motion of defendants Montefiore Medical Center, Steven M. Safyer, M.D., Milan Kinkhabwala, M.D., John F. Reinus, M.D., and E. Steven Amis, M.D. s/h/a Edward S. Amis, M.D. for dismissal of the complaint is granted (**Motion Sequence #2**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Montefiore Medical Center, Steven M. Safyer, M.D., Milan Kinkhabwala, M.D., John F. Reinus, M.D. and E. Steven Amis, M.D. s/h/a Edward S. Amis, M.D. dismissing the complaint insofar as asserted against them; and it is further

ORDERED, that the motion of defendants New York-Presbyterian Hospital, Martin Prince, M.D., Beatriu Reig, M.D., Jonathan Susman, M.D., Robert J. Min, M.D., Jean C. Emond, M.D.,

Herbert Pardes, M.D., Steven J. Corwin, M.D., Robert E. Kelly, M.D., Eliot J. Lazar, M.D. and Richard S. Liebowitz, M.D. for dismissal of the complaint is granted (**Motion Sequence #3**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants New York-Presbyterian Hospital, Martin Prince, M.D., Beatriu Reig, M.D., Jonathan Susman, M.D., Robert J. Min, M.D., Jean C. Emond, M.D., Herbert Pardes, M.D., Steven J. Corwin, M.D., Robert E. Kelly, M.D., Eliot J. Lazar, M.D. and Richard S. Liebowitz, M.D. dismissing the complaint insofar as asserted against them; and it is further

ORDERED, that the motion of defendant Mount Sinai Hospital for dismissal of the complaint is granted (**Motion Sequence #4**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Mount Sinai Hospital dismissing the complaint insofar as asserted against it; and it is further

ORDERED, that the motion of defendants Group Health Incorporated s/h/a EmblemHealth/GHI Health Insurance Co., William A. Gillespie, M.D., Frank J. Branchini and Dawn Castagna for dismissal of the complaint is granted (**Motion Sequence #5**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Group Health Incorporated s/h/a EmblemHealth/GHI Health Insurance Co., William A. Gillespie, M.D., Frank J. Branchini and Dawn Castagna dismissing the complaint insofar as asserted against them; and it is further

ORDERED, that the motion of defendants Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan-Kettering Cancer Center (MSKCC), William R. Jarnagin, M.D., Craig B. Thompson, M.D. s/h/a Craig B. Thomson, M.D. and Jorge Capote, R.N. for dismissal of the complaint is granted (**Motion Sequence #6**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan-Kettering Cancer Center (MSKCC), William R. Jarnagin, M.D., Craig B. Thompson, M.D. s/h/a Craig B. Thomson, M.D. and Jorge Capote, R.N. dismissing the complaint insofar as asserted against them; and it is further

ORDERED, that the motion of defendant Group Health Incorporated s/h/a EmblemHealth/GHI Health Insurance Co. for dismissal of the complaint is denied as moot, in light of the decision in Motion Sequence #5 which previously dismissed the action as against movant (**Motion Sequence #7**); and it is further

ORDERED, that the motion of defendants Bachir Taouli, M.D., Burton Drayer, M.D., Wayne E. Keathley and John Hart for dismissal of the complaint is granted (**Motion Sequence #8**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Bachir Taouli, M.D., Burton Drayer, M.D., Wayne E. Keathley and John Hart dismissing the complaint insofar as asserted against them; and it is further

ORDERED, that the motion of defendant Martin Clearwater & Bell LLP s/h/a Martin, Clearwater & Bell for dismissal of the complaint is granted (**Motion Sequence #9**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Martin Clearwater & Bell LLP s/h/a Martin, Clearwater & Bell dismissing the complaint insofar as asserted against them; and it is further

ORDERED, that the motion of defendant Kramer, Dillof, Livingston & Moore, Esqs. s/h/a Kramer, Dillof, Livingston & Moore seeking dismissal of the complaint is denied as moot, as the motion has been superseded by an amended notice of motion which is treated in Motion Sequence

#11 (**Motion Sequence #10**); and it is further

ORDERED, that the motion of defendant Kramer, Dillof, Livingston & Moore, Esqs. s/h/a Kramer, Dillof, Livingston & Moore for dismissal of the complaint is granted (**Motion Sequence #11**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Kramer, Dillof, Livingston & Moore, Esqs. s/h/a Kramer, Dillof, Livingston & Moore dismissing the complaint insofar as asserted against them; and it is further

ORDERED, that the motion of defendant John Higgitt for dismissal of the complaint is granted (**Motion Sequence #12**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant John Higgitt dismissing the complaint insofar as asserted against him; and it is further

ORDERED, that the motion of defendant Judge Douglas E. McKeon for dismissal of the complaint is granted (**Motion Sequence #13**); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Judge Douglas E. McKeon dismissing the complaint insofar as asserted against him; and it is further

ORDERED, that plaintiff is enjoined from commencing any legal action or proceeding against Montefiore Medical Center, Steven M. Safyer, M.D., Milan Kinkhabwala, M.D., John F. Reinus, M.D., E. Steven Amis, M.D. s/h/a Edward S. Amis, M.D., New York-Presbyterian Hospital, Martin Prince, M.D., Beatriu Reig, M.D., Jonathan Susman, M.D., Robert J. Min, M.D., Jean C. Emond, M.D., Herbert Pardes, M.D., Steven J. Corwin, M.D., Robert E. Kelly, M.D., Eliot J. Lazar, M.D., Richard S. Liebowitz, M.D., Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan-Kettering Cancer Center (MSKCC), William R. Jarnagin, M.D., Craig B.

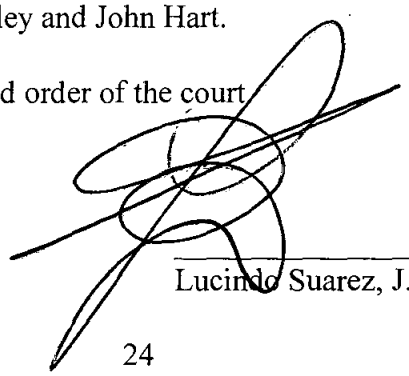
Thompson, M.D. s/h/a Craig B. Thomson, M.D., Jorge Capote, R.N., Bachir Taouli, M.D., Burton Drayer, M.D., Wayne E. Keathley, John Hart, Martin Clearwater & Bell LLP s/h/a Martin, Clearwater & Bell and Kramer, Dillof, Livingston & Moore, Esqs. s/h/a Kramer, Dillof, Livingston & Moore without leave of court; and it is further

ORDERED, that plaintiff is enjoined from contacting Montefiore Medical Center, Steven M. Safyer, M.D., Milan Kinkhabwala, M.D., John F. Reinus, M.D., E. Steven Amis, M.D. s/h/a Edward S. Amis, M.D., New York-Presbyterian Hospital, Martin Prince, M.D., Beatriu Reig, M.D., Jonathan Susman, M.D., Robert J. Min, M.D., Jean C. Emond, M.D., Herbert Pardes, M.D., Steven J. Corwin, M.D., Robert E. Kelly, M.D., Eliot J. Lazar, M.D., Richard S. Liebowitz, M.D., Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan-Kettering Cancer Center (MSKCC), William R. Jarnagin, M.D., Craig B. Thompson, M.D. s/h/a Craig B. Thomson, M.D., Jorge Capote, R.N., Bachir Taouli, M.D., Burton Drayer, M.D., Wayne E. Keathley and John Hart; and it is further

ORDERED, that plaintiff is enjoined from entering facilities owned by, operated by or constituting the place of business of Montefiore Medical Center, Steven M. Safyer, M.D., Milan Kinkhabwala, M.D., John F. Reinus, M.D., E. Steven Amis, M.D. s/h/a Edward S. Amis, M.D., New York-Presbyterian Hospital, Martin Prince, M.D., Beatriu Reig, M.D., Jonathan Susman, M.D., Robert J. Min, M.D., Jean C. Emond, M.D., Herbert Pardes, M.D., Steven J. Corwin, M.D., Robert E. Kelly, M.D., Eliot J. Lazar, M.D., Richard S. Liebowitz, M.D., Bachir Taouli, M.D., Burton Drayer, M.D., Wayne E. Keathley and John Hart.

This constitutes the decision and order of the court.

Dated: August 31, 2012



Lucindo Suarez, J.S.C.