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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

PRESENT: SCHLESINGER Justice

PART IA PART 16

Index Number : 800035/2012
CRACOLICI, VINCENT
vs.
SIMON BARKAGAN, M.D.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ and cross-motion are decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: JUL 26 2013

ALICE SCHLESINGER J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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VINCENT M. CRACOLICI and
STEFANIA CRACOLICI,

Plaintiffs,

-against-

SIMON BARKAGAN, M.D., et al.,

Defendants.

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Index No. 800035/12
Motion Seq. No. 001

SCHLESINGER, J.:

Before this Court is a pre-answer motion to dismiss made by all of the defendants. Vincent Cracolici was a patient of Dr. Simon Barkagan, a urologist. He is claiming here that during a surgical procedure that was performed on August 9, 1995, Dr. Barkagan committed malpractice. He also asserts that he continued to see this doctor for injuries resulting from the surgery through April 2008. Further, he states that on December 16, 2008, he received a copy of the operative report from the surgery that had been dictated by Dr. Barkagan on June 27, 1996. On September 8, 2011, he received other medical records, which included the 1995 operative report. Finally, the last date of significance for purposes of this motion is February 3, 2012, the day the action was commenced.

Defendants have moved to dismiss pursuant to three theories. The first is that, under CPLR §3211(a)(5) and §214-a, the action is time-barred in that it violates the applicable statute of limitations. The second basis is pursuant to CPLR §3211(a)(7), arguing that the Verified Complaint fails to state a viable cause of action. Finally, the defendants request dismissal pursuant to CPLR §3211(a)(4), as there is another action pending between these same parties asking for the same relief. That action is one

sounding in medical malpractice under Index No. 800067/10 wherein Dr. Barkagan is a named defendant.[1]

The plaintiff has opposed and cross-moved for leave to file an amended complaint, but in that regard and as pointed out by moving counsel, plaintiff does not include a proposed amended complaint in his papers. It is Mr. Cracolici's position that the records he received have significant alterations and erasures, as well as important omissions. For example, though he recalls that his surgery occurred on August 9, 1995, some of the records show the surgery on August 10, 1995. Further, he points out that the operative report for August 10, 1995 lists "Dr. Delima" as the anesthesiologist, but the anesthesia record lists "Merenda" as the anesthesiologist. Finally on this point, the operative report dictated by Dr. Barkagan shows no anesthesiologist at all.

Plaintiff's First Cause of Action sounds in negligence and asserts that because he was a patient of Dr. Barkagan until April 4, 2008, "under the continuous treatment theory, plaintiff had until October 4, 2010 to file a claim ..." (¶41 of complaint, Exh A to moving papers).

The Second Cause of Action relies on plaintiff's receipt of additional hospital records on September 8, 2011. Mr. Cracolici states that these records were false in part, by including contradictory dates and altered entries, and that "this record was provided to cover up a medical error in their Hospital..." This assertion is in ¶47, which then enumerates in "A-N" (pages 12-14 of complaint) "evidence of falsity". As stated earlier, these examples for the most part give inconsistent dates and times that procedures occurred, which do not match up with the original records plaintiff received in 2008.

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[1]Dr. Barkagan has moved to dismiss that earlier action as untimely.

Frankly, I find it somewhat unclear what these claims attempt to do. The best I can discern, particularly noting paragraphs 48-52 wherein plaintiff states he had a right to rely on the 2008 records given to him (¶51) not knowing that they were false (¶49), is that he was damaged in not commencing a malpractice claim within the statutorily allowed time (¶52).[2]

The moving defendants here are correct in their understanding of the law as it pertains to the Statute of Limitations in medical malpractice actions and to concurrent charges of fraud. The Statute of Limitations is two and one-half years pursuant to CPLR § 214-a. Here, for purposes of this argument, defendants do not even challenge plaintiff's statement that there was continuous treatment through April 4, 2008. But if that is the latest date, then all agree here that the Statute of Limitations expired on October 4, 2010, more than a year before this action was commenced.

However, what it appears the plaintiff is trying to do here is extend the Statute of Limitations by having it run from his discovery of the "fraud" when he received what he says were "altered" records in September 2011. Frankly, counsel does not spell out this theory in his opposition and cross-motion. Rather, he argues that the motion is premature, that he is entitled to discovery, and that he has met the standard of pleading for fraud spelled out by the First Department in *Atton v. Bier*, 12 AD3d 240 (2004). And if all else fails, he urges the Court to allow an amendment of the complaint, although, as indicated earlier, what that amendment would seek to do is unclear.

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[2]The Third Cause of Action is a derivative one by plaintiff's wife Stefania Cracolici. Finally, plaintiffs ask for punitive damages, alleging in ¶67 that the "Defendants have acted intentionally, maliciously, and outrageously towards plaintiffs and should be punished accordingly."

The leading case in this area, one cited in *Atton,* is *Simcuski v. Saeli*, 44 NY2d 442 (1978). That action concerned a claim that the defendant surgeon had intentionally misled his patient as to the events of the surgery and, by doing so, had deprived the plaintiff "of an opportunity for escape from a medical predicament which the physician by his own negligence had initially inflicted on his patient" (p. 454). The opinion emphasizes that there are two claims which plaintiff must assert and prove to gain more time to sue based on the defendant's alleged commission of the intentional tort of fraud.

The plaintiff must first demonstrate that the doctor knew or had reason to know that he committed malpractice and that, by doing so, injured the patient. Second, plaintiff must demonstrate that the physician, knowing of his/her malpractice, made material misrepresentations to the patient which the doctor knew to be false regarding the events of the malpractice and what could be done about it, and that the patient justifiably relied upon those statements in not bringing a timely action.

In *Simcuski*, the plaintiff underwent a surgical excision of a node from her neck at the hands of the defendant in October 1970. She alleged in her complaint, filed in 1976, that the surgeon had negligently injured a spinal-accessory nerve in her cheek and had also injured branches of her cervical plexus. After the surgery, when the patient, complained of numbness on the right side of her face and neck and that it was difficult and painful for her to raise her right arm, the defendant doctor, aware of what he had done in creating a permanent injury, falsely told her that her post-operative problems were transient and would disappear after a regimen of physiotherapy.

Pursuant to this reassurance and advice, plaintiff continued with her therapy until 1974. Then in January 1974, she saw another physician in another part of New York State

who told her the true nature of her injury, which was probably caused at the time of defendant's surgery. By now, she was told, corrective surgery was unlikely to succeed. Plaintiff commenced the action in April 1976 and, similar to our case, the defendant Dr. Saeli moved to dismiss the action as barred by the Statute of Limitations.

Under the above circumstances, the Court said (at p 448) that "principles of equitable estoppel are applicable to relieve plaintiff from the proscriptions of the statute." In *Atton,* the Appellate Division relied on this rationale to dismiss the plaintiff's amendment of her complaint. There, while the allegations showed that the defendants had failed to disclose their own malpractice, there was nothing to show that they were aware of such malpractice and deliberately made false representations to their patient.

That is the situation here. Plaintiff states that just before he was knocked out with a general anesthesia in the 1995 surgery, the defendant Dr. Barkagan told him that he had not injured him during the initial stages of the procedure and that any roughness was part of the procedure (¶22). But in December 2008, the defendants purportedly provided false records to the plaintiff "in an effort to fraudulently conceal their malpractice" (¶24). Further, plaintiff claims that Dr. Barkagan did this so that Mr. Cracolici would not sue him, and he did not. Later on, in 2011 when the plaintiff received other conflicting records, he says that he then knew the true facts and brought the untimely suit.

But none of this is convincing by a review of the papers. Also, there is no allegation that Dr. Barkagan knew he had committed malpractice and had lied to his patient to conceal this fact so that Cracolici would not sue. The 2011 records show only some confusion about dates and times and certain omissions. There is nothing in the later records to show that the earlier ones were fraudulent and purposely so, in order to lead the plaintiff to believe that all had gone well.

That being the case, no equitable principles apply here to give plaintiff additional time after receiving the 2011 records to commence a lawsuit. Finally, other than conclusory allegations of misrepresentation and fraud, the plaintiff fails to show any such thing.

Accordingly, it is hereby

ORDERED that the defendants' motion to dismiss this action as time-barred pursuant to CPLR §§ 214-a and 3211(a)(5) is granted; and it is further

ORDERED that the plaintiff's cross-motion to amend the complaint is denied.

The Clerk is directed to enter judgment in favor of the defendants dismissing this action in its entirety.

Dated: July 26, 2013 JUL 26 2013

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J.S.C.

ALICE SCHLESINGER

FILED

AUG 01 2013

COUNTY CLERK'S OFFICE
NEW YORK