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

PRESENT: LOBIS Justice PART 6

MARIE DONNELLY

-v-

ALAN COPPERMAN, M.D.

INDEX NO. 800349/11

MOTION DATE 10/15/13

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 12/10/13

JOAN B. LOBIS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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MARIE DENNEHY and JAMES DENNEHY,

Plaintiffs,

-against-

ALAN COPPERMAN, M.D., REPRODUCTIVE MEDICINE ASSOCIATES OF NEW YORK, LLP, and REPRODUCTIVE MEDICINE ASSOCIATES - INTERNATIONAL, LLP,

Defendants.

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Index No. 800349/11

Decision, Order and Judgment

JOAN B. LOBIS, J.S.C.:

This case arises out of the failure of Defendants Alan Copperman, M.D., Reproductive Medicine Associates of New York, LLP, and Reproductive Medicine Associates - International, LLP, to screen an egg donor for Fragile X Syndrome before implantation of the donor's fertilized egg. Defendants move pursuant to Rule 3211 of the Civil Practice Law and Rules in motion sequence numbers 1 and 2 to dismiss the claims brought by Plaintiffs Marie Dennehy and James Dennehy, parents of infant, T.D. Defendants seek dismissal on the grounds that certain claims are untimely and certain claims fail to state a cause of action. For purposes of this decision, order and judgment, those motions have been consolidated. As set forth below, Defendants' motions to dismiss are granted in part, and denied in part.

T.D. was born on April 11, 2009, at Mt. Sinai Hospital. He had been conceived through in vitro fertilization provided by Dr. Alan Copperman at Reproductive Medicine Associates of New York, LLP. His parents, Marie and James Dennehy, used RMA's services to successfully fertilize eggs of an anonymous donor with the sperm of Mr. Dennehy.

In May 2010, Mrs. Dennehy was contacted by Dr. Copperman. He informed her that there was concern that her egg donor was a carrier of Fragile X. Later that month, tests confirmed that T.D. had a full mutation of the Fragile X chromosome. The report indicated that a normal range would be 43 repeats, while full mutations would be over 200 repeats. T.D. has over 1,000 repeats.

In the bill of particulars, Plaintiffs allege that T.D.'s injuries include, among others, intellectual disability, developmental delay, low muscle tone, attention problems, and sensory processing difficulties. He requires speech, physical and occupational therapy, as well as special instruction. Treatment is ongoing.

The Dennehys first began treating at RMA for in vitro fertilization services at the end of August 2007. Mrs. Dennehy met with various individuals at RMA, including Dr. Copperman. She was told that testing would be done to the extent available. In deciding whether to proceed with in vitro fertilization through RMA, the Dennehys attended an ovum donation class, and received materials regarding donor recruitment, screening and matching, including a power point presentation and a folder with handouts. In April 2008, the Dennehys were offered an egg donor. They accepted and received a recipient letter, a booklet, a handout, and consent forms.

That same month, the Dennehys signed consents for the in vitro fertilization procedure. In August, the donor's eggs were retrieved, fertilized and implanted into Mrs. Dennehy. Her pregnancy was confirmed that same month. On September 26, 2008, the Dennehys were discharged from RMA to the care of Mrs. Dennehy's obstetrician/gynecologist.

Dr. Copperman's papers indicate that in February 2010 the Dennehys' egg donor tested positive for Fragile X Syndrome. Dr. Copperman received a copy of that report on February 22, 2010. Several months later, in May, he telephoned Mrs. Dennehy with the news. That conversation prompted her to test T.D.

Plaintiffs filed a summons and complaint against Dr. Copperman and the RMA entities on October 11, 2011. The complaint alleges six causes of action. The first cause of action, medical malpractice, claims that the Defendants departed from proper standards of care in providing in vitro fertilization treatment to the Dennehys. The second cause of action, lack of informed consent, alleges that the Defendants' conduct deprived the Plaintiffs of providing informed consent for the treatment and procedures. The third cause of action, breach of contract, alleges that the parties entered into an oral and/or written contract for in vitro services, including a properly-screened egg donor, in exchange for consideration in an amount in excess of $21,000, and that Defendants breached that contract. The fourth cause of action, breach of express and implied warranties and warranty of merchantability, contends that the Defendants breached their warranties regarding the donor's egg. The fifth cause of action, negligence, alleges that the Defendants, among other things, failed to warn the Plaintiffs that testing for Fragile X Syndrome was not conducted. Lastly the sixth cause of action, captioned for "punitive damages" [sic], claims that the Defendants' conduct in concealing the lack of testing and misrepresentations regarding their services misled Plaintiffs, who relied upon that conduct to their detriment. That conduct, moreover, they allege was intentional, purposeful, willful, knowing, fraudulent, and wanton. Following the filing of Plaintiffs' complaint, in February 2012, Defendants joined issue. In their answers they preserved the affirmative defense

of statute of limitations and also raised the issue of failure to state a claim.

Defendants raise two grounds in moving to dismiss Plaintiffs' causes of action: certain claims are untimely under Rule 3211(a)(5) of the Civil Practice Law and Rules, and certain claims fail to state a cause of action under Subsection (a)(7) of that Rule. Specifically, Defendants claim that the statute of limitations has expired on the first and second causes of action, Plaintiffs' medical malpractice and lack of informed consent claims. Defendants further claim that the remaining claims, causes of action 3-6, fail to state a cause of action.

Plaintiffs oppose the Defendants' motions to dismiss. They contend that the Defendants' statute of limitations claims are unfounded, and cite controlling case law that provides that the statute of limitations on the challenged claims begin to run on T.D.'s date of birth, which was within two and one-half years of filing of the claims for medical malpractice and lack of informed consent. They ask this Court for sanctions on the grounds that moving to dismiss the claims as untimely is frivolous, and counsel failed to adequately inform the Court of controlling case law. Plaintiffs further contend that causes of action 3 through 6 state independent causes of action.

The law favors disposition of controversies on the merits. E.g., Pagan v. Estate of Anglero, 22 A.D.3d 285, 286 (1st Dep't 2005). In reviewing motions to dismiss, it is axiomatic that this Court reviews the record in the light most favorable to the non-moving party and accords that party the benefit of every possible favorable inference. E.g., Leon v. Martinez, 84 NY.2d 83, 88 (1994); see also AG Capital Funding Partners, L.P. v. State Street Bank and Tr., 5 N.Y.3d 582, 590-91 (2005) (moving party must show documentary evidence conclusively refutes plaintiff's

allegations); id. at 476 (any deficiencies in complaint may be amplified by supplemental pleadings and other evidence).

This Court first considers Defendants' contention that Plaintiffs' s first and second causes of action for medical malpractice and lack of informed consent are untimely. See CP.L.R. Rule 3211(a)(5). As a rule, medical malpractice actions must be brought within two and one half years of the act, omission or failure of which the plaintiff is complaining. C.P.L.R. § 214-a. Exceptions apply, however. For example, where there is continuous treatment for the same condition that gave rise to the complaint, the action may be brought within two years and six months of the last treatment. Id. In actions like this one, arising out of injury to an infant, appellate authority provides that the parents' cause of actions accrue upon the birth of the infant. E.g., Ciceron v. Jamaica Hosp., 264 A.D.2d 497, 498 (2d Dep't 1999).[1] In this case, T.D. was born on April 11, 2009, and the summons and complaint was filed on October 11, 2011. See C.P.L.R. § 304(a), (c). Accordingly, Plaintiffs' claims are timely.

This Court next considers those branches of the Defendants' motions to dismiss causes of action 3 through 6 of Plaintiffs' complaint for failure to state a cause of action. See

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[1]Plaintiffs' request for sanctions arises out of Rule 3.3(a)(2) of the New York Rules of Professional Conduct, which prohibits lawyers from knowingly failing to disclose controlling adverse legal authority. This Court notes that counsel for the RMA entities at one point claims "Plaintiffs DENNEHY May Not Claim that The Cause of Action Accrued on the Date of Their Son's Birth." Later in a footnote, however, the affirmation acknowledges Ciceron, 264 A.D.2d at 497, and other controlling authority. To the extent Defendants seek to preserve their right to challenge the current legal landscape on any appeal, it would be advisable for counsel to avoid such unqualified assertions as quoted above and expressly state that intention in setting forth their arguments against that authority, rather than risk any claims of unethical conduct.

C.P.L.R. Rule 3211(a)(7). As an initial matter, I note that disclosure has not been completed in this action. To date only the Plaintiffs have been deposed.[2]

Rule 3101 of the Civil Practice Law and Rules mandates, in pertinent part, that there shall be "full disclosure of all matter material and necessary in the prosecution" of an action. In this case, Defendants' motion for accelerated judgment has been submitted before any of Defendants' depositions have been able to have been conducted. Rule 3211(d) makes plain that where facts are unavailable to a party opposing a motion for accelerated judgment this Court may deny that motion to permit disclosure to be had.

In this case, there is no doubt that given the allegations in causes of action 3, 5, and 6, for breach of an oral and/or written contract, negligence, and misrepresentation, respectively, the Defendants must be deposed to ascertain what they knew, said, and did as well as when in the course of these events.[3] In challenging whether Plaintiffs' claims are well-pleaded, Defendants attach selective portions of the record and contend that these items of extrinsic evidence warrant dismissal. By example, Copperman concedes that he had notice that the donor was a carrier of the Fragile X trait as of February 2010, months before he notified Mrs. Dennehy of that information. It would be an abuse of discretion for this Court to dismiss the action at this stage of the litigation based on the

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[2]The lead Defendant, Defendant Copperman, was scheduled to be deposed on July 19, 2013, but that deposition did not go forward in light of Defendants' motions presently before this Court, which were brought on July 10, and August 22, 2013.

[3]Given this action is still in the pre-note of issue, disclosure stage, the Defendants' extensive reliance on Scalisi v. New York University Medical Center, 24 A.D.3d 145 (1st Dep't 2005), which was decided on a motion for summary judgment, to claim that Plaintiffs' claims are redundant, accordingly, is misplaced.

Defendants' one-sided recounting of the events that transpired in this case. E.g., Marcus v. Hemphill Harris Travel Corp., 193 A.D.2d 543, 544 (1st Dep't 1993) (claims sufficiently pleaded on their facts should not have been dismissed particularly where plaintiffs had not been accorded opportunity to complete discovery relating to critical facts in exclusive possession of defendants); see also Anonymous v. High Sch. for Envtl. Studies, 32 A.D.3d 353, 358 (1st Dep't 2006) (finding defendants abused Article 31 of the Civil Practice Law and Rules and requiring full disclosure of any facts bearing on controversy that will help in trial preparation regardless of burden of proof). Thus, Defendants' challenges for failure to state a cause of action regarding causes of action 3, 5 and 6 are denied as premature.

This Court further considers Defendants' argument that Plaintiffs' claim for punitive damages set forth in the sixth cause of action should be dismissed. Punitive damages are not an independent claim. As a form of relief, they flow from action that is wilful, wanton or reckless. E.g., Home Ins. Co. v. Am. Home Prods. Corp.,75 N.Y.2d 196, 204 (1990). In this case Plaintiffs allege causes of action that may warrant punitive damages, including, for example, the fifth cause of action, negligence, which alleges that Defendants failed to warn Plaintiffs that they do not test for Fragile X Syndrome. Defendants' challenges to that and other causes of action as failing to state causes of action have been denied as premature. Any striking of that form of relief from the complaint, therefore, is similarly premature.[4]

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[4]The RMA Defendants contend that Plaintiffs may not recover emotional damages in the first cause of action, alleging medical malpractice. Defendants rely on Sheppard-Mobley v. King, 4 N.Y.2d 109 (1977), which held that a mother's emotional harm based on infant's physical injuries is not recoverable. In their opposition, Plaintiffs do not dispute that contention, but at this juncture, this Court will not speculate regarding the extent of any other harm alleged in the first cause of action, such as that flowing from learning that Mrs. Dennehy was implanted

This Court next takes up Plaintiffs' remaining claim, the fourth cause of action, and finds that Defendants' motions to dismiss that cause of action for failure to state a claim are warranted. The claim is premised on the notion that the human tissue in this case, the donated egg, is a good. Plaintiffs fail to cite any controlling New York authority to support that contention, however. Indeed, the only authority cited is a newspaper article. This Court is not persuaded. At most, New York law does not prohibit that tissue's donation and authorizes reimbursement for expenses incurred in that donation process. Pub. Health Law § 4307 (prohibiting sales and purchases of human organs and defining organs to include tissue); see also id. § 4364(5) (prohibiting sale of tissue by banks or storage facilities but excluding reasonable costs associated with procuring, processing, storing, or distributing tissue). Accordingly, it is

ADJUDGED that Defendants' motions to dismiss are granted in part to the extent that the fourth cause of action of Plaintiffs' complaint is dismissed; it is further

ORDERED that Defendants' motions to dismiss are denied on all other remaining causes of action; and it is further

ORDERED that the parties shall appear for a status conference on January 28, 2014, at 9:30 am.

Dated: December 10, 2013

ENTER:

JOAN B. LOBIS, J.S.C.

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with a defective ovum. Id. at 637 (mother can seek damages for emotional harm suffered as a result of an independent injury).