SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK

PRESENT:

HON. BRUCE D. ALPERT

Justice
TRIAL/IAS, PART 4

ROSA MORRA and DANIEL MORRA,

Plaintiffs,

Motion Sequence Nos. 8-11
Index No. 8966/99

Motion Date: April 28, 2005

-against-

NORTH SHORE UNIVERSITY HOSPITAL AT GLEN COVE, NORTH SHORE UNIVERSITY HOSPITAL, EDWARD E. HILL, M.D., CAROL LERMAN, M.D., MARK EISENBERG, M.D., MITCHELL LEVINE, M.D., KENNETH CRYSTAL, M.D., BARRY ROOT, M.D., ERIC HOCHBERG, M.D., STEPHEN FORTUNOFF, M.D., UROLOGY ASSOCIATES, P.C., ROBERT S. WALDBAUM, M.D.,HARRY T. BARBARIS, M.D., LAWRENCE A. FISH, M.D., FELIX L. BADILLO, M.D., LEONARD J.MONDESCEIN, M.D., and JOPH STECKEL, M.D.,

Defendants.

The following papers read on these motions for relief: 1) under CPLR 3216
2-3) under CPLR 3216, 3126 or 3124
4) under CPLR 3126 and 3212

1)	Notice of Motion	X
2-4)	Notices of Cross-motion	XXX
	Opposing Affirmations	XXX
	Reply Papers	XXX

Upon the foregoing papers it is ordered that the motion by defendants, Mark Eisenberg, M.D. and Mitchell Levine, M.D., for an order dismissing the complaint pursuant to CPLR 3216

for failure to prosecute is granted, and the complaint against them is dismissed.

The cross-motion by defendant, Carole Lerman, M.D., for an order dismissing the complaint pursuant to CPLR 3126, 3216 or, in the alternative, an order pursuant to CPLR 3124 compelling plaintiffs to provide outstanding discovery is denied.

The cross-motion by defendants, North Shore University Hospital, Edward E. Hill, M.D., Kenneth Crystal, M.D. and Barry Root, M.D., for an order dismissing the complaint against them pursuant to CPLR 3126 or 3216 or, in the alternative, an order pursuant to CPLR 3124 compelling plaintiffs to provide outstanding discovery is denied.

The cross-motion by plaintiffs for, inter alia, an order pursuant to CPLR 3126, 3212 striking defendants' Answers and granting them summary judgment on liability, or, an order establishing a discovery schedule and extending their time to file a Note of Issue is granted to the extent provided herein.

This is an action to recover damages for medical malpractice. Plaintiffs allege that, as a result of the defendants' negligence throughout Ms. Morra's pregnancy and during the birth of her child, she suffered a brain hemorrhage which necessitated two operations and resulted in permanent significant brain damage, including cognitive and physical deficits.

Although this action was commenced on or about April 9, 1999, due, in part, to the fact that it was initiated by the plaintiffs pro se, and in part, to the addition of defendants and the retention and substitution of counsel, there were numerous interruptions and delays in discovery. Indeed, multiple motions were made, conferences held and orders issued.

Plaintiffs' depositions were not completed despite this Court's directive at a compliance conference that they be held by July 26, 2004. Apparently as a result of the ensuing difficulty scheduling the remaining depositions, defendants Eisenberg and Levine served a 90-day notice

pursuant to CPLR 3216(b)(3) on July 26, 2004.

By both telephone and letter dated July 29, 2004, plaintiffs' attorney rejected the 90-day notice on account of the outstanding and ongoing discovery pursuant to the most recent Preliminary Conference Order dated December 8, 2003.

Ultimately, on February 8, 2005, defendants Eisenberg and Levine moved for dismissal of the complaint pursuant to CPLR 3216 for failure to prosecute. On March 2, 2005, defendant Lerman moved for dismissal of the complaint pursuant to CPLR 3126 or 3216 or, in the alternative, to compel outstanding discovery pursuant to CPLR 3124. On March 11, 2005, defendants North Shore University Hospital at Glen Cove, North Shore University Hospital and Doctors Hill, Crystal and Root also sought dismissal of the complaint pursuant to CPLR 3126 or 3216 or to compel outstanding discovery pursuant to CPLR 3124.

Discovery continued following the service of the 90-day notice and for a period of time subsequent to the service of the above-referenced applications.

On March 23, 2005, plaintiffs moved to strike defendants' Answers pursuant to CPLR 3126 apparently due to the adjournment *sine die* of defendant Hill's ongoing deposition, as well as other outstanding discovery. Plaintiffs also sought to extend their time to file a Note of Issue.

Turning to defendants' applications, "[o]nce the 90-day notice was served and received, the plaintiffs were required to comply with it by filing a note of issue or by moving, before the default date, to either vacate the notice or to extend the 90-day period (citations omitted)." Allen v Makhnevich, 15 AD3d 425,426)

CPLR 3216(a) provides:

> "Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably

fails to serve and file a note of issue, the court . . . may dismiss the party's pleading on terms."

CPLR 3216(b)(3) provides "**[t]he party seeking such relief . . . shall have served a written demand** . . . requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion **by the party serving said demand** for dismissal **as against him** for unreasonably neglecting to proceed." (emphasis added)

A complaint is subject to dismissal where a party neither complies with the ninety day notice nor moves for extension relief prior to the expiration of the deadline, unless he or she shows a justifiable excuse for the delay and a meritorious cause of action. (see, Garcia v Roopnarine, __AD3d__, 795 NYS2d 611)

Of the moving defendants only Eisenberg and Levine served a 90-day notice. As such, only they can obtain relief under CPLR 3216. While plaintiffs have proffered an excuse for their dual defaults (see, Betty v City of New York, 12 AD3d 472), they did not establish a meritorious cause of action as against these defendant doctors. Accordingly, the complaint against defendants Eisenberg and Levine is dismissed.

The remaining moving defendants did not serve a 90-day demand and, consequently, can obtain no relief under CPLR 3216. (see, Mirabile v Good Samaritan Hospital and Medical Center, 306 AD2d 389; see also, Donnell v Madison Avenue-53rd Street Corp., 214 AD2d 307 [1st Dept.])

As for the respective prayers pursuant to CPLR 3126, the Court notes the existence of a

strong public policy which favors the disposition of actions on the merits. (see, Sanchez v Serje, 17 AD3d 562)

"Striking a pleading pursuant to CPLR 3126 is a drastic remedy which is warranted where a party's conduct is shown to be willful and contumacious (citations omitted)." (Suto v Folkes Heating, Cooling & Burner Service, Inc., 15 AD3d 469) At this juncture, plaintiffs' counsel has acknowledged that the stall in discovery on which their 3126 application is based i.e., the adjournment, *sine die*, of Dr. Hill's examination-before-trial, has been adequately explained and that striking defendants' Answers under CPLR 3126 based upon that is inappropriate.

Notably, the type of conduct justifying dismissal pursuant to CPLR 3126 has not been established by any of the moving parties. Indeed, the numerous delays that have plagued this litigation appear to be attributable to all parties.

As for their refusal to produce fetal monitoring strips, defendants argue that they are insulated from disclosure as same relate only to the well-being of the child who is not a party to this action.

"[D]isclosure should be permitted as long as the information sought bears on the controversy and will assist in the preparation for trial; the ultimate test is one of 'usefulness and reason.' " (Matter of New York County DES Litigation v Eli Lilly and Company, 171 AD2d 119, 123 [1st Dept.], quoting O'Neil v Oakgrove Construction, Inc., 71 NY2d 521, 526; see also, Fell v Presbyterian Hospital in the City of New York at Columbia- Presbyterian Medical Center, 98 AD2d 624, 625 (1st Dept.])

While the refusal to voluntarily produce the fetal monitoring strips should not be subject to sanction for contumacy, it has been previously recognized that "fetal monitoring strips are the most critical evidence to determine [not only] fetal well-being at the time of treatment, [but] in

evaluating the conduct of health care providers with regard to obstetrical management thereafter." (Baglio v St. John's Queens Hospital, 303 AD2d 341,342)

Under the circumstances presented, this Court finds that they are discoverable and should be exchanged within thirty days of the service of a copy of this Order with notice of entry. Admissibility thereof will be determined at trial. Re-cuts of the pathology slides have been made available for plaintiffs' review.

The plaintiffs' motion for an extension of time to file a Note of Issue is granted.

Counsel for the respective parties are directed to appear for conference at IAS Part 4 of this Court on August 18, 2005 at 9:30a.m., at which time any remaining discovery proceedings will be scheduled.

DATED: June 30, 2005

J.S.C.

ENTERED

JUL 06 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE