STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CAROLE T. MONTEPARE
and JAMES E. MONTEPARE,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 6644-09
RJI NO. 01-10-99166

COMMUNITY CARE PHYSICIANS, P.C. and
DEBBIE F. YOUNGELMAN, M.D., F.A.C.S.,

Defendants.

Supreme Court Albany County All Purpose Term, August 8, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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William Yoquinto, Esq.
Attorneys for Defendants Community Care Physicians, PC and Debbie F. Youngelman, M.D., F.A.C.S.
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TERESI, J.:

On June 16, 2006 doctor Debbie F. Youngelman (hereinafter "Youngelman") performed a colonoscopy on Carole Montepare (hereinafter "Montepare"). Youngelman informed Montepare that the procedure resulted in normal findings.

Thereafter, on July 13, 2007 Youngelman performed a second colonoscopy on Montepare and found a firm mass at the third rectal fold. Biopsies were taken, which eventually led to Montepare being diagnosed as suffering from Stage IV colon cancer.

Plaintiffs commenced this action to recover the damages they sustained due to Youngelman's allegedly negligent non-diagnosis in 2006. Issue was joined by Defendants, discovery is complete and a trial date certain set. Defendants now move for summary judgment dismissing the complaint, claiming that the statute of limitations applicable to Plaintiffs' claim expired prior to their commencement of this action. Plaintiffs oppose the motion, alleging the continuous treatment doctrine tolled the applicable statute of limitations. Because Defendants demonstrated their entitlement to judgment as a matter of law and Plaintiffs failed to raise a triable issue of fact, Defendants' motion is granted.[1]

As is well established "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (Cox v. Kingsboro Medical Group, 88 NY2d 904, 906 [1996], quoting Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once the movant makes this prima facie showing the burden then shifts "to plaintiff to proffer evidence creating a triable issue of fact." (Black v. Kohl's Dept. Stores, Inc., 80 AD3d 958, 960 [3d Dept. 2011]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Here, Defendants established their entitlement to judgment as a matter of law by demonstrating that this action was commenced more than two and one half years after the allegedly negligent act occurred. (CPLR §214-a; Simons v. Bassett Health Care, 73 AD3d 1252 [3d Dept. 2010]; Boyle v. Fox, 51 AD3d 1243 [3d Dept. 2008]; Waring v Kingston Diagnostic Radiology Ctr., 13 AD3d 1024 [3d Dept. 2004]). As correctly noted by Defendants, Plaintiffs'

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[1] To the extent that Defendants also seeks summary judgment upon a claim that Youngelman's care of Montepare conformed to the applicable standard of care, this portion of their motion is denied as moot in light of the within statute of limitations dismissal.

Complaint and Bill of Particulars both specify Youngelman's negligent acts as occurring on or about June 16, 2006, when she performed Montepare's first colonoscopy and allegedly failed to identify, diagnose and treat her colon cancer. Because it is uncontested that this action was not commenced until August 5, 2009, more than three years after the allegedly negligent acts occurred, "Defendants met their initial burden of establishing entitlement to summary judgment." (Simons v. Bassett Health Care, supra 1254).

With the burden shifted, Plaintiffs failed "to present evidentiary facts establishing the applicability of the continuous treatment doctrine." (Boyle v. Fox, supra at 1244).

A "continuous treatment" toll occurs when "further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past." (Richardson v. Orentreich, 64 NY2d 896, 898-99 [1985][emphasis added]; Cox v. Kingsboro Medical Group, supra; Aulita v. Chang, 44 AD3d 1206 [3d Dept. 2007]; Casale v. Hena, 270 AD2d 680 [3d Dept. 2000]). "Essentially, plaintiffs must proffer evidence supporting an established course of treatment with respect to the condition that gave rise to the lawsuit." (Boyle v. Fox, supra at 1244).

The purpose of this doctrine is to "enforce the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action." (Williamson v PricewaterhouseCoopers LLP, 9 NY3d 1, 9 [2007], quoting Young v. New York City Health & Hospitals Corp., 91 NY2d 291 [1998]). However, where a "plaintiff... lack[s] awareness of a condition warranting further treatment, the purpose of the continuous treatment

doctrine would not be served by its application." (Young v. New York City Health & Hospitals Corp., supra 297).

Although Plaintiffs correctly rely on Montepare's medical records and the deposition transcripts of Montepare and Youngelman, such proof failed to establish the applicability of the continuous treatment doctrine. At her deposition, Montepare recalled Youngelman telling her that "everything was fine" with her June 2006 colonoscopy. Because of this positive outcome, she made no specific followup appointment with Youngelman. Instead, she recalled being told to followup with another colonoscopy appointment in ten years, but also stated that she received "a form that said five years." Such "form" was submitted and stated that: "it is recommended that you have a colonoscopy again in 5 year(s)... You may follow-up in the office in 5 year(s) or as needed prior to that time." Montepare further admitted that she had "no intention to follow up with Dr. Youngelman until the five years came for the [second] colonoscopy," that she did not "recall having any concerns" in June 2006 and that she never saw Youngelman "clinically." Montepare also described her 2006 hospital discharge sheet as not scheduling an actual appointment. Rather, it advised her to "call and make an appointment in five to ten years."

The above proof, despite Plaintiffs' attorney's characterizations to the contrary, neither establishes the existence of a "course of treatment" nor demonstrates that further treatment was "explicitly anticipated by both physician and patient." (Boyle v. Fox, supra at 1244; Richardson v. Orentreich, supra at 898). Moreover, because neither Montepare nor Youngelman knew of an existing condition in 2006, the second conlonoscopy did not constitute a "diagnostic examination... prescribed as part of ongoing care for [Montepare's] existing condition." (Waring v Kingston Diagnostic Radiology Ctr., supra at 1026, quoting Elkin v Goodman, 285 AD2d 484

[2d Dept. 2001]). Montepare's second colonoscopy, to be scheduled either within five to ten years or as needed, was not, as a matter of law, continuous treatment for the allegedly negligently performed first colonoscopy that gave rise to this suit.

"Although [this Court is] cognizant of the seemingly unfair result in this case, [especially in light of the admissions Youngelman allegedly made and the opinions expressed by Plaintiffs' expert,] the statute does not provide for tolling of the Statute of Limitations in such situations involving a failure to establish a course of treatment." (Casale v. Hena, supra at 682).

Accordingly, Defendants' motion is granted and Plaintiffs' complaint is dismissed.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: August 18, 2011
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated June 24, 2011, Affidavit of William Yoquinto, dated June 24, 2011, Affidavit of Debbie Youngelman, dated June 23, 2011, with attached Exhibits A-L.
2. Affirmation in E. Stewart Jones, dated August 1, 2011, with Attached Exhibits A-B.
3. Affidavit of William Yoquinto, dated August 5, 2011.