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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

PRESENT: _____ **Justice**

PART IA PART 16

Index Number : 116085/2007
WILSON, JANE
vs.
SOUTHAMPTON URGENT MEDICAL
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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~~ by Southampton Hospital for summary judgment is moot, as counsel discontinued all claims against the Hospital by Stipulation dated April 16, 2012. The cross-motion by defendants Southampton Urgent Medical Care, P.C., Mark R. Kot, and Andrea Libutti for partial summary judgment is denied in accordance with the accompanying memorandum decision.

FILED

AUG 15 2012

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: AUG 14 2012

_____, **J.S.C.**
ALICE SCHLESINGER

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **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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JANE WILSON, as Administratrix of the Goods Chattels and Credits which were of TRACY A. ALLEN, Deceased,

Plaintiff,

-against-

SOUTHAMPTON URGENT MEDICAL CARE, P.C., MARK R. KOT, 24/7 EMERGENCY CARE, P.C., ALAN GANDOLFI, MICHAEL AMERES, SOUTHAMPTON RADIOLOGY, P.C., BRADLEY GLUCK, ANDREA LIBUTTI, and SOUTHAMPTON HOSPITAL,

Defendants.

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Index No. 116085/07
Motion Seq. No. 003

SCHLESINGER, J.:

This Court on earlier occasions has disposed of other motions involving other defendants. At this point, only three defendants remain in the action, Dr. Mark R. Kot, Dr. Andrea Libutti and Southampton Urgent Medical Care, P.C., ("Southampton Medical"), the place where the doctors worked. They are now moving for partial summary judgment pursuant to CPLR §214-a and §3211(a)(5). Specifically, they are asking to dismiss all claims which have their predicate in events that occurred before June 4, 2005.[1]

Dates and what occurred on those dates are very important here. These are some of the more relevant ones. This is an action that sounds in medical malpractice and wrongful death. It was commenced on December 4, 2007. The decedent Tracey A. Allen died on December 20, 2005. Ms. Allen received treatment from Southampton Medical from September 1, 2003 to July 21, 2005.

[1]The instant motion is actually a cross-motion to the motion for summary judgment made by defendant Southampton Hospital. That motion was rendered moot when the plaintiff voluntarily discontinued the action against the Hospital.

The thrust of the claim against these defendants relates to the alleged failure to diagnose lung cancer. The plaintiff, in opposition to this motion, contends that treatment going back to August 2004 began a course of continuous treatment for the same condition that gave rise to Ms. Allen's ultimate diagnosis of lung cancer. Therefore, she urges that events beginning then must be included in the claims against these defendants. Ms. Allen, as stated above, first went to Southampton Medical on September 1, 2003. She then began using this facility as her primary care provider. It is a walk-in clinic where no appointment was necessary.

In 2003, Ms. Allen went to the Clinic two times, the September visit for a right ankle sprain and a November visit for a right ear ache. Counsel is rightfully not arguing for the inclusion of these dates. The following year, 2004, between January 7 and July 25, Ms. Allen went to Southampton Medical five times. At the first visit, she complained of upper abdominal pain. On April 7, 19 and May 8, she presented with issues involving a plantar wart on her right foot. On June 21, she visited with complaints of pain in her neck and right upper back. Finally, on July 25, 2004, Ms. Allen came to the Clinic also with complaints of neck pain and a chest rash. All of these visits, plaintiff essentially acknowledges, are excludable.

But not so on her next visit of August 9, 2004. It is this date and the ones after where the dispute arises. Counsel for the movants, citing to the Court of Appeals' decision in *Nykorchuck v Henriques*, 78 NY2d 255 (1991), urges that none of the appointments up to June 4, 2005 should be included in the claims; in other words, they are time-barred because they are more than two and one-half years before the action was commenced and none of the visits, including two in August 2004 and eight in 2005 through May 18, were relevant to a course of treatment for the condition that gave rise to this lawsuit.

However, plaintiff disagrees. On August 9, 2004, Ms. Allen was seen at the Clinic by defendant Dr. Mark Kot. At that visit, Ms. Allen complained of nasal congestion, a sore throat, fever and chills. A physical examination revealed findings of rhonchi and wheezing. The diagnosis was acute sinusitis, bronchitis and upper respiratory infection. A chest x-ray was recommended. She was given a prescription for antibiotics and cough medicine and was told to return in three to four days, which she did.

On that day, August 13, 2004, Ms. Allen did have a chest -ray, a single frontal view which was read by Dr. Kot as normal. He believed further testing was not necessary. However, Ms. Allen was still complaining of nasal sinus congestion and a cough. Dr. Kot's examination found continued rhonchi and wheezing. He gave her a Peak Flow Test with a hand held spirometer. This is a test to measure vital breathing capacity. While a normal reading is around 550, Ms. Allen's results showed a diminished flow of 350. She was diagnosed that day with an upper respiratory infection and asthma, acute sinusitis and bronchitis. She was continued on the antibiotic Bioxin and started on a steroid, Prednisone. She was also prescribed an Albuterol Inhaler.

Counsel for the plaintiff supports her opposition with an affirmation from Dr. Jonathan S. Luchs, a Board Certified Radiologist who specializes in diagnostic radiology. He states that in this capacity, he has "reviewed numerous chest x-rays to detect and diagnose the radiological signs and symptoms of lung cancer" (p. 1). Relevant here, among the records he has reviewed, are those for the two visits in August 2004 at Southampton Medical and the chest x-ray of August 13 recommended and interpreted by Dr. Kot.

Dr. Luchs then opines, to a reasonable degree of medical certainty, that the August 13, 2004 x-ray was abnormal and required further clinical investigation and medical

evaluation. He states that the abnormalities required a chest CT scan to fully evaluate them. What he found specifically was an "abnormal region of attenuation in the right lung apex, asymmetric to that of the left," associated linear regions of attenuation in the right lung apex, and a focal ill-defined region of attenuation in the left lower lobe (p.2).

Dr. Luchs believes these findings should have given rise to an initial differential diagnosis of chronic scarring, chronic tuberculosis and tumor. But additional testing was needed to arrive at a final diagnosis. He opines that it was malpractice not to follow up, and he further believes, to a reasonable degree of medical certainty, that if there had been additional testing on the basis of the abnormal x-ray and clinical presentation on August 9 and 13, 2004, there would have been at that time a diagnosis of lung cancer. As it was, such a diagnosis was not made until one year later, in late August 2005. Specifically, on September 2, 2005 at Stony Brook Hospital, following MRI's of the brain on August 30, 2005 and a CT scan of her chest and a bronchoscopy and fine needle aspiration, Ms. Allen was diagnosed with non-small cell lung cancer with metastasis to the brain, stage 4. She died of this cancer on December 20, 2005.

Plaintiff's counsel argues that *Nykorchuck* has been distinguished in many subsequent decisions which have held that the continuous treatment doctrine does apply in situations where patients are being treated for conditions that later turn out to be cancer, although the providers did not diagnose the cancer at the time, which is arguably what occurred here.

Before I discuss the cases cited and why I believe that the plaintiff is correct in her analysis of the current state of the law, the events that occurred between August 2004 and August 2005 should be set down. Following the August 13 visit with Dr. Kot, Ms. Allen on

January 10, 2005 presented to the Emergency Room of Southampton Hospital with complaints of lower groin and bilateral flank pain. She received treatment, an antibiotic, and was advised to follow up soon with her primary care physician. On January 19, she did go to Southampton Medical and was seen by Dr. Kot. He noted a resolving urinary tract infection and advised continuing the antibiotic.

On March 10, 2005, Ms. Allen went back to the defendant facility with complaints of right-sided headache with floaters. Dr. Kot, after an examination, diagnosed a migraine headache and prescribed Imitrex. On March 14, the patient called to say she felt no better. She was advised to come in, which she did. Ms. Allen was then seen by Dr. Kot, who continued her medication. On March 30, Ms. Allen came in again, still complaining of the headache which was now accompanied by tingling numbness on the right side of her face. She also complained of night sweats and lethargy. On the 30th, she was seen by defendant Dr. Libutti who referred the patient to Southampton Hospital for a CT scan of her head. This scan was read as normal and the patient was referred back to Dr. Libutti. This defendant then prescribed Vicodin for pain and an antibiotic to treat Lyme disease. No further work-ups were ordered.

On April 9, Ms. Allen went back to the Clinic and was seen once more by Dr. Kot. She complained of a constant headache and blurred vision. He ordered blood work which he believed was consistent with a possible diagnosis of temporal arteritis, which is an inflammation to blood vessels. He gave the patient an injection of Kenalog for this condition. About a month later, in May, Ms. Allen returned to the Clinic complaining of dizziness, nausea and vomiting and right TMJ pain. Dr. Kot's diagnosis was hypertension because of a high blood pressure reading and an adverse reaction to Ultracet. Ms. Allen

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was given Celebrex for pain. Five days later, she came to the Clinic to check on her blood pressure, which now was normal.

On May 18, Ms. Allen returned with complaints of multiple tick bites and was prescribed an antibiotic. On June 15, 2005, she returned with complaints of TMJ and right-sided chest pain. She was again given Celebrex by Dr. Kot. On June 29, Ms. Allen returned, still complaining of TMJ. Dr. Kot gave her a different medication, Anaprox. On July 10, she came to the Clinic complaining of bilateral flank pain and she presented with fever, chills, sweats, body aches for three days and a headache. Dr. Kot diagnosed and treated her for Lyme disease.

On July 21, 2005, Ms. Allen came back to the Clinic with complaints of a headache. Dr. Libutti saw her and referred her to a neurologist, Dr. Henry Moreta, who saw the patient on August 12. This doctor diagnosed Ms. Allen with a progressive right hemicranial headache. He recommended a brain MRI to rule out significant intracranial pathology, including a cerebral arteriovenous malformation (AVM), an aneurysm or a tumor. Before an MRI was done, Ms. Allen presented to the Emergency Room at Southampton Hospital with continued complaints of daily headaches with right-sided throbbing. The brain MRI was done on August 30. It was abnormal and showed "lesions of the right and left brain with associated vasogenic edema". Ms. Allen was then admitted to that Hospital where a work-up revealed a 3cm mass in the right lung.

As stated earlier, a final work-up at Stony Brook Hospital revealed inoperative lung cancer with metastasis to the brain. Ms. Allen was given palliative radiation and chemotherapy and her death followed four months later.

Discussion

The moving defendants here rely almost exclusively on the 1991 decision, *Nykorchuck v. Henriques (supra).* That case involved a gynecologist's discovery of a lump in the plaintiff's breast in 1979 and a detection of an enlargement of that lump in 1985, which led to a referral to an oncologist and a diagnosis of breast cancer. The Court held that the continuous treatment doctrine did not apply to toll the statute of limitations so as to include the earlier lump discovery. The reason given by the majority was that there had been no course of treatment in connection with the patient's breast condition; she was being treated for endometriosis. Therefore, under CPLR §214-a, this was not the "same illness, injury, or condition which gave rise to the said act, omission or failure" complained of. Instead, there were only isolated breast examinations. The Court concluded that the "gravamen of plaintiff's claim is not that the doctor performed certain negligent acts or omissions during a course of treatment for the breast condition, but rather that the doctor was negligent in failing to establish a course of treatment at all." 78 NY2d at 259.

Moving counsel here urges that the facts now before the Court dictate a similar result; that the claim that the doctors at Southampton Medical failed to order a proper diagnostic work-up was also not a course of treatment. If this is so, then the toll of the statute of limitations would not apply to include the August 2004 visits.

However, there have been many decisions in the First Department since *Nykorchuck* which have refined the holding there. We now know that the focus should be on the symptoms or complaints with which the patient presents or articulates to her physician that determine whether the doctrine of continuous treatment applies. It is not a question of correctly naming and treating a particular illness or condition. If that were the

case, then any claim involving a failure to correctly name or diagnose a particular condition would fail.

So, for example, in *Hill v Manhattan W. Med. Group - H.I.P*, 242 AD2d 255 (1st Dep't 1997), there was a question of fact presented as to whether certain of the decedent's visits to the Group had been for the treatment of symptoms associated with colon cancer, despite the fact that such a diagnosis had not been made. In *Dellert v Kramer*, 280 AD2d 438 (1st Dep't 2001), the plaintiff was suffering from ovarian cancer which was not initially diagnosed by defendants. But it was a fact that these defendants did treat the plaintiff "continuously over the relevant time period for symptoms ultimately traceable to this cancerous condition". Therefore, the continuous treatment doctrine did apply.

As applied to the facts here, the moving defendants did treat Ms. Allen in August 2004, when she presented with symptoms which they diagnosed and treated as a respiratory infection. This care also included a diagnostic chest x-ray. The fact, according to Dr. Luchs' opinion, that this presentation showed early signs of lung cancer that was not diagnosed by the defendants, does not mean that Ms. Allen did not receive treatment (albeit arguably inadequate treatment) for the condition which was later diagnosed as cancer. Thus, her Estate is entitled to the benefit of the continuous treatment toll.

In *Marun v Coleburn*, 291 AD2d 340, also a First Department decision from 2002, the plaintiff received treatment from the defendant Medical Group for urinary tract complaints going back to 1994. He complained of symptoms such as discomfort and pain in urination upon his referral to the defendant, a urologist. Also, blood and pus were found in his urine. These complaints and findings continued year after year with no cystoscopy ordered. Finally, in July 1977, the defendant ordered such a procedure on an emergency

basis, and the plaintiff was diagnosed with an invasive carcinoma involving almost his entire penis, which was found to be inoperable. The Court found that it was clear that Mr. Marun had received treatment for a urological condition as far back as 1994, even though a diagnosis was not made for three years. The Court said: "Contrary to defendants' intimation, their failure to initially diagnose cancer does not mandate the conclusion, for the purposes of continuity, that they made no attempt to provide treatment for decedent's urological complaints ..." 291 AD2d at 341(citations omitted).

The same could be said here. Although Ms. Allen was not diagnosed with lung cancer until August 2005, the year before she had been treated for symptoms allegedly for this very disease.

In *Hein v Cornwall Hospital,* 302 AD2d 170 (1st Dep't 2003), the Court applied the continuous treatment doctrine to what turned out to be a small bowel obstruction needing surgery, even though the defendants had failed to diagnose this condition. Similar to this motion, the defendants there moved for partial summary judgment based on *Nykorchuck* to exclude visits to their Emergency Department which had occurred more than two and one-half years before the action was commenced. But the appellate court, citing to *Dellert (supra)* and *Marun (supra),* stated that: "This Court has repeatedly ruled that the failure to make the correct diagnosis as to the underlying condition while continuing to treat the symptoms does not mean for purposes of continuity, that there has not been treatment ..."302 AD2d at174.

It was the defendants' inability in *Hein* to diagnose the obstruction, notwithstanding the various tests and medication they had administered, that was "the very nub of the

malpractice claim against them." *Id.* at 175. Similarly here, the diagnosis of a respiratory infection in August 2004, followed by the various work-ups and medication for Ms. Allen's continuing complaints of right-sided headaches in March 2005 and forward that are the underlying acts which form the very nub of the plaintiff's claim here of the defendants' failure to diagnose lung cancer in 2004, which then metastasized to the brain in 2005.

Finally, as made clear in decisions such as *Hill (supra)*, the fact that Ms. Allen also saw the moving defendants for complaints unrelated to her lung cancer is not a reason to find no course of treatment for the conditions related to the cancer. Since Southampton Medical was the plaintiff's regular medical provider, it would be expected that Ms. Allen would go there for all her health-related complaints.

Therefore, the defendants' motion to exclude the visits and the treatment provided in the visits prior to June 2005 is denied. The symptoms Ms. Allen complained of in August 2004, together with her clinical presentation and the August 13, 2004 chest x-ray as interpreted by radiologist Dr. Luchs, sufficiently show a continuity of treatment for a condition that tragically turned into a devastating diagnosis of metastatic lung cancer one year later.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Southampton Hospital is moot, as counsel stipulated on April 16, 2012 to discontinue all claims against that defendant with prejudice; and it is further

ORDERED that the motion for partial summary judgment by defendants Mark R. Kot, Andrea Libutti, and Southampton Urgent Medical Care, P.C., is denied; and it is further

ORDERED that counsel for the remaining parties shall appear before this Court on Wednesday, October 11, 2012 at 11:00 a.m. for a pre-trial conference prepared to discuss settlement and select a firm trial date.

Dated: August 14, 2012

AUG 14 2012

J.S.C.
ALICE SCHLESINGER

FILED

AUG 15 2012

NEW YORK
COUNTY CLERK'S OFFICE