Tropaitis v Buterman
2012 NY Slip Op 33257(U)
January 26, 2012
Sup Ct, Nassau County
Docket Number: 2868/11
Judge: Karen V. Murphy

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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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PETER TROPAITIS, as Administrator of the Estate of KALLE BELESIS TROPAITIS, and PETER TROPAITIS, individually,

Plaintiff(s),

-against-

IRVING BUTERMAN, M.D. and RANDI ROTHSTEIN, M.D.,

Defendant(s).

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Index No. 2868/11

Motion Submitted: 12/1/11
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant Buterman moves this Court for an Order dismissing all claims against him on the ground that plaintiff's claims are time-barred.[1] Plaintiff opposes the requested relief.

This is a medical malpractice and wrongful death action alleging, in sum and substance, a failure to diagnose cervical and endometrial cancer, which ultimately caused the death of Kalle Belesis Tropaitis ("the decedent"), in December 2009, at age 39.

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[1]Counsel for defendant Buterman also represents defendant Rothstein.

The original complaint was filed in Queens County on October 29, 2009. Following her death, Peter Tropaitis, decedent's husband, was substituted as administrator of decedent's estate,[2] and the complaint was amended to include a cause of action for wrongful death. Venue was also changed to Nassau County (O'Donoghue, J.).

The Bill of Particulars in this matter alleges that defendant Buterman committed negligent acts between August 24, 2005 and December 2007.

Defendant Buterman alleges that his last contact with the decedent occurred on August 28, 2006, thus rendering the claims against him untimely pursuant to CPLR § 214-a.

"On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (***Baptiste v. Eastlyn Harding-Marin***, 88 A.D.3d 752, 753, 930 N.Y.S.2d 670 (2d Dept., 2011); ***Texeria v. BAB Nuclear Radiology, P.C.***, 43 A.D.3d 403, 840 N.Y.S.2d 417 [2d Dept., 2007]).

Specifically pursuant to CPLR § 214-a, "an action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure . . . ."

The continuous treatment doctrine consists of three elements. The first is that the plaintiff continued to seek and obtain an actual course of treatment from the physician during the relevant period, including surgery, therapy, or medications. The second element is that the course of treatment provided by the physician be for the same condition or complaint underlying the malpractice action, and the third element is that the physician's treatment be deemed "continuous." Continuity is often found to exist when further treatment is evidenced by a scheduled appointment for the near future, consistent with periodic past appointments, or, if a patient is discharged by a physician, when a patient initiates a return visit in a timely fashion to complain about/seek treatment for the same condition (***Gomez v. Katz***, 61 A.D.3d 108, 111-113, 874 N.Y.S.2d 161 [2d Dept., 2009]).

In this case, defendant Buterman has supplied the decedent's medical records as kept by his medical office, including a computerized list of billing records containing the

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[2]Peter Tropaitis also alleges claims against defendants in an individual capacity.

procedures performed, insurance codes, and fees charged. Defendant Buterman has also included an affidavit attesting to his last date of treatment of decedent.

The records and affidavit submitted establish that decedent's last date of treatment with defendant Buterman occurred on August 28, 2006.[3] According to defendant Buterman's affidavit, decedent never scheduled a follow-up appointment as instructed during her last visit of August 28, 2006, and decedent never contacted defendant's office again until August 20, 2009 to request a copy of her medical records.

It is undisputed that the malpractice action was commenced on October 29, 2009.

Accordingly, defendant Buterman has established, prima facie, that plaintiff/ decedent's time in which to commence the action was expired by approximately eight months at the time the original complaint was filed in Queens County.

In opposition, plaintiff has submitted, *inter alia*, decedent's telephone records, affidavits from decedent's husband and coworker, and a copy of an e-mail.

The telephone records reflect two calls to defendant Buterman's office. The first call was placed on August 10, 2007, and the second one on August 24, 2007.[4] The duration of the calls were four and three minutes, respectively. There is no indication from the records as to the identity of the parties to the conversation, and/or the content of the conversation.

The Court notes that these two telephone calls occurred approximately one year after the date of the last appointment as alleged by defendant Buterman, which is consistent with defendant's instructions to plaintiff to "call the office to schedule an appointment in 6-12 months for follow-up" (Buterman affidavit, paragraph 6) .

The affidavit of decedent's husband asserts that decedent spoke directly to defendant Buterman on the occasion of those two telephone calls, and that they discussed the same condition that she had been treated for in the past, which form the gravamen of the

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[3]In his reply, and in response to a previous demand for discovery, defendant Buterman has also supplied his electronic appointment sheets for decedent's scheduled appointments, and his insurance claim forms, which show that the last scheduled appointment and last claim were for August 28, 2006.

[4]Defendant Buterman does not dispute that the telephone number listed in the records is his office number, and defendant does not deny in his reply that plaintiff contacted his office on the dates of those telephone calls.

underlying malpractice action. Decedent's husband also avers that decedent went to defendant's office in August 2007, and in "the fall" of 2007," although it does not appear from the affidavit that he has personal knowledge of her visit, i.e., that he accompanied her to those visits.

Decedent's coworker's affidavit avers that decedent visited defendant Buterman in the fall of 2007, but does not state the basis for the coworker's "awareness" of such a visit. The coworker also attested to the decedent's habit of e-mailing herself reminders for appointments or tasks.

Toward that end, plaintiff has included a copy of an e-mail purportedly sent from decedent to herself on October 15, 2007, which reads, "Dr buterman halloween cars for godsons."

The Court does not find that decedent's coworker's affidavit, or the e-mail, are sufficient to raise a question of fact; however, the telephone calls to defendant Buterman's office in August 2007, combined with decedent's husband's alleged recognition of defendant's voice, raises a question of fact as to whether the statute of limitations is tolled by the continuous treatment doctrine.

In addition, defendant Buterman's records provided as Exhibit L upon the instant motion reflect decedent's request for her medical records on August 27, 2009 as a "visit," but defendant's Exhibits BB and CC submitted in reply (electronic appointment sheets) does not reflect the August 27, 2009 contact. Thus, there appears to be a discrepancy in defendant Buterman's own records/record keeping, giving rise to a further issue of fact.

Accordingly, plaintiff's opposition is sufficient to defeat defendant's motion, especially in view of the fact that defendant Buterman has not yet been deposed.

Thus, defendant's motion to dismiss is denied without prejudice to renewal upon the completion of discovery.

The foregoing constitutes the Order of this Court.

Dated: January 26, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.