

Lee v Laurence R. Danziger, D.M.D., P.C.
2017 NY Slip Op 31182(U)
May 22, 2017
Supreme Court, New York County
Docket Number: 805349/2016
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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EDMINA C. LEE,

Plaintiff,

Index No. 805349/2016

-against-

**Decision, Order
and Judgment**

LAURENCE R. DANZINGER, D.M.D., P.C., Individually
And doing business as UNIVERSAL DENTAL and/or
TOOTHSAVERS, TOOTHSAVERS DENTAL SERVICES,
P.C., Individually and doing business as TOOTHSAVERS,
ROBERT WINEGARDEN, D.D.S., P.C., ROBERT
WINEGARDEN, D.D.S., TATYANA BERMAN, D.D.S.,
MARK H. ZAhLER, D.D.S., and YAN LI, D.D.S.,

Defendants.

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This is a dental malpractice action. Currently the Court has two pre-answer motions before it. In motion sequence number one, defendant Tatyana Berman, D.D.S. moves for dismissal of all claims against her on the ground that the complaint fails to state a cause of action. Motion number two, by defendant Yan Li, D.D.S., alleges that the action as against him is untimely. Plaintiff opposes both motions. These motions are consolidated for disposition. For the reasons below, the Court denies Dr. Berman's motion and grants Dr. Li's motion.

Dr. Berman alleges that, during the period in question, she was a contract dentist at defendant ToothsaVERS. She further states that she did not treat Ms. Lee at any time. Ms. Lee's affidavit states that, despite the evidence Dr. Berman has submitted, Dr. Berman did treat her at her second visit. As Ms. Lee argues, this raises a factual question and not one proper for resolution under CPLR § 3211(a)(7). For the doctor to prevail based on failure to state a claim, she would have to prove that the claim as articulated in the complaint, accepting all its statements as true, has

not made out a cause of action. Here, Dr. Berman challenges the truth of the contentions in the complaint rather than their sufficiency. The pleadings are sufficient to survive a CPLR § 3211 motion. Therefore, this prong of the motion is denied. Plaintiff also questions whether the doctor's records are comprehensive; she distinctly recalls Dr. Danzinger writing notes when she treated with him, for one thing, and there are no notes in the records. However, this goes to the factual issues.

The Court next turns to the question of the statute of limitations. Dr. Berman submitted and served her motion on November 16, 2016, and did not raise the issue in her papers. The parties adjourned the matter several times, and plaintiff served her opposition on March 7, 2017. In a footnote in her opposition to Dr. Berman's motion, plaintiff wrote the following:

No Statute of Limitations argument has been presented by BERMAN in her moving papers, and if this is attempted in the reply, so that the Plaintiff cannot address it in opposition, the Court should refuse to consider it.

Aff. in Opp. to Berman, p.2 fn.1. Dr. Berman did not file reply papers. Instead, she filed an amended motion on April 3, 2017 which added the statute of limitations argument. The matter was submitted on April 7, 2017. Plaintiff did not have the opportunity to reply.¹ The Court rejects Dr. Berman's amended motion. Dr. Berman had no right to file amended motion papers five months after she originally made her motion. An amendment to the motion, moreover, cannot be used to enable Dr. Berman to add an argument she previously overlooked, and which she was required to

¹ Dr. Berman's counsel submitted a letter to this Court on April 28, in violation of the Part rules. Therefore, the Court does not consider it.

include in the motion or waive. See CPLR § 3211(e). To the extent that the doctor takes issue with the opposition, she should have replied to those contentions only, in reply papers.

Dr. Li moves to dismiss based solely on the issue of timeliness. Under CPLR § 214-a, plaintiff had two-and-a-half years from the date of the alleged malpractice to commence her lawsuit. Plaintiff alleges the action is timely based on the continuous treatment doctrine. Dr. Li states she last treated plaintiff on June 13, 2013 and the complaint was not served on her until December 9, 2016. She further indicates through her affidavit that she was an independent contractor and that she last worked for the defendant practice in January of the following year. In response, plaintiff states that although she does not know exactly which dentist treated her at which appointments, it is probable that Dr. Li is correct that she last treated plaintiff on June 13, 2013. She adds that she ran into the doctor at the clinic on a few occasions before January 2014, and that Dr. Li stated she was surprised plaintiff was still being treated. Further, plaintiff argues that Dr. Li treated her in accordance with the clinic's treatment plan so can be charged with liability throughout the course of its implementation.

The Court grants Dr. Li's motion. Regardless of whether Dr. Li was liable for implementation of the treatment plan while she worked with defendants, her liability ended when she left defendants in January 2014, more than two-and-a-half years before plaintiff served Dr. Li with the summons and complaint. "Where . . . a plaintiff seeks to impute a subsequently-treating physician's continued treatment of a patient to a physician alleged to have earlier committed malpractice who is no longer involved in the patient's care, the continuous treatment doctrine is not available unless there is evidence of some relevant continuing relation between the patient and

physician.” Pierre-Louis v. Hwa, 182 A.D.2d 55, 58 (2nd Dep’t 1992) (citation and internal quotation marks omitted). Here, plaintiff has not shown either ongoing involvement by Dr. Li or the existence of an agency relationship. Thus, the statute of limitations bars plaintiff’s claims against her. See id. at 59; Urow v. Ohrentreich Med. Grp., 10 A.D.3d 552, 552-53 (1st Dep’t 2004).

Defendants Dr. Winegarten and his P.C. oppose Dr. Li’s motion, stating that they may assert claims for contribution against Dr. Li. As Dr. Li has not answered the complaint, however, and they have not commenced a third-party action against her, there is no issue to decide at this time.

Therefore, it is

ORDERED that motion sequence number one is denied; and it is further

ORDERED that Dr. Berman shall have 30 days from the date of this order to file and serve her answer; and it is further

ORDERED that motion sequence number two is granted and the action is dismissed as against Dr. Li; and it is further

ORDERED that the caption is amended to reflect the dismissal, and the new caption shall read as follows:

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

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EDMINA C. LEE,

Plaintiff,

Index No. 805349/2016

-against-

LAURENCE R. DANZINGER, D.M.D., P.C., Individually
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WINEGARDEN, D.D.S., TATYANA BERMAN, D.D.S.,
and MARK H. ZAhLER, D.D.S.,

Defendants.


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All future papers shall include the amended caption, and the Trial Support and County Clerks are directed to amend the caption accordingly and to enter a judgment of dismissal as against Dr. Li; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on July 25, 2017 or any date thereafter to be determined by the Justice to whom this matter is transferred upon my upcoming retirement.

Dated: *May 22*, 2017

ENTER:



JOAN B. LOBIS, J.S.C.