

**Singh v Sukhu**

2017 NY Slip Op 32552(U)

December 4, 2017

Supreme Court, Queens County

Docket Number: 23947/12

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2  
Justice

NAZELA SINGH,

Plaintiff,

-against-

MOHABIR SUKHU, DIMPLE SUKHU, DANY  
CANGE, ODUBER LOPEZ, DNJC CONTRACTING,  
INC., DNJC, INC., JAMAICA HOSPITAL  
MEDICAL CENTER, NATALIE HUBBARD, M.D.,  
and DEVENDRA BRAHMBHATT, M.D.,

Defendants.

Index No.: 23947/12

Motion Date: 9/1/17

Motion Seq. No.: 10, 11

Motions Seq. #10 and #11 are combined for disposition.

The following numbered papers 1 to 16 read on this motion (Seq.#10) by defendant, DEVENDRA BRAHMBHATT, M.D, for an Order dismissing the complaint insofar as it is asserted against her pursuant to CPLR 3211(a) (5) as being barred by the applicable statute of limitations; and papers numbered 1 to 12 read on the motion Seq.#11 by defendant, JAMAICA HOSPITAL MEDICAL CENTER (JHMC), for an Order vacating the court's Order dated March 17, 2017 granting plaintiff leave to amend the complaint pursuant to CPLR 5015(a) (4) & (5); or in the alternative, dismissing the complaint insofar as it is asserted against JHMC as being barred by the applicable statute of limitations pursuant to CPLR 3211(a) (5); and deeming the complaint a nullity pursuant to CPLR 3012-a as to the claims for medical malpractice.

	<u>PAPERS NUMBERED</u>
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Upon the foregoing papers it is ordered that these motions are determined as follows.

The plaintiff sustained severe injuries on November 4, 2012 when she was struck by a motor vehicle while she was standing on the sidewalk. Plaintiff was taken to the emergency department of JHMC. In view of the severity of her injuries she was moved to the operating room within an hour of her arrival, where she underwent bilateral leg amputations performed by Dr. Natalie Hubbard, surgeon, and Dr. Devendra Brahmbhatt, a vascular surgeon. On November 5, 2012 plaintiff was discharged from the emergency department and transferred to JHMC's surgical intensive care unit under the care of Dr. Hubbard. On November 9, 2012 a plastic surgery consult was requested to which Dr. Nicholas Batista responded. Dr. Batista performed several unspecified surgical procedures at JHMC presumably with respect to the amputation sites. On November 21, 2012 plaintiff was discharged from JHMC and transferred to North Shore University-LIJ Medical Center (NSUH-LIJ) and admitted under the care of Dr. Batista.

Plaintiff commenced this action on December 3, 2012 against the owners and operators of the motor vehicles involved in the accident. In February, 2017 the plaintiff moved for leave to amend the complaint to add JHMC, Dr. Natalie Hubbard and Dr. Devendra Brahmbhatt as additional defendants and to add a causes of action for medical malpractice as against the newly added defendants. The motion was granted by Order dated March 17, 2017. Plaintiff commenced the action as against the newly joined defendants by filing the amended pleadings on March 27, 2017.

The defendant, JHMC appeared by service of its answer asserting the statute of limitations as its third affirmative defense and now moves for, inter alia, dismissal of the complaint insofar as it is asserted against it on that ground.

Dr. Brahmbhatt did not serve an answer, but rather, moved by pre-answer motion to dismiss the complaint insofar as it is asserted against her pursuant to CPLR 3211(a)(5), expiration of the statute of limitations.

With respect to the plaintiff's opposition to defendant, Dr. Brahmbhatt's motion on the grounds that it is untimely, it is without merit.

A motion pursuant to CPLR 3211(a)(5) must be made "[a]t a time before the service of the responsive pleading is required..." (CPLR 3211[e]). The defendant, Dr. Brahmbhatt, was

served with the summons and complaint on April 26, 2017 pursuant to CPLR 308(2). Proof of service was filed on May 8, 2017. Pursuant to CPLR 309(2) service is complete and the defendant's time to answer commenced 10 days after filing proof of service, i.e. May 18, 2017. Thus, defendant had 30 days, until June 17, 2017<sup>1</sup> to answer or otherwise move in response to the plaintiff's complaint (see CPLR 308[2]; CPLR 320[a]; Whitby v Whitby, 106 AD3d 729 [2013]). Dr. Brahmhatt served this motion on June 8, 2011 (CPLR 2211), thus, the motion is timely.

The branch of JHMC's motion to vacate the Order dated March 17, 2017 pursuant to CPLR 5015(a)(4) & (5) for failure to serve the motion on JHMC is denied.

The court had jurisdiction to determine the motion inasmuch as service of the motion on the proposed newly added defendants was not required (see Liberty Mut. Ins. Co. v Bohl, 262 AD2d 645, 646 [1999]; Schultze v Ocean Acc. & Guar. Corp., 239 AD 309, 311 [1933]). Moreover, even if as JHMC claims the plaintiff's medical malpractice cause of action was time barred when the plaintiff moved to amend the complaint, the defense of the statute of limitations is a waivable defense unless raised by a preanswer motion or in a responsive pleading (see CPLR 3211[e]; CPLR 3018[b]).

The branch of JHMC's motion for an order deeming the complaint a nullity pursuant to CPLR 3012-a with respect to the claims for medical malpractice, which is tantamount to a dismissal, is also denied. The failure to file a Certificate of Merit in compliance with CPLR 3012-a is not a fatal defect and dismissal is not authorized as a sanction for failure to comply (see Tewari v Tsoutsouras, 75 NY2d 1 [1989]; Russo v Pennings, 46 AD3d 795 [2007]).

The motion of defendant Dr. Brahmhatt, and the branch of JHMC's motion for an Order dismissing the claim for medical malpractice in the complaint insofar as it is asserted against Dr. Brahmhatt and JHMC respectively as being barred by the applicable 2 1/2 year statute of limitations is granted.

An action for medical malpractice must be commenced within two years and six months of the date of accrual (CPLR 214-a). A cause of action for medical malpractice accrues on the date the alleged malpractice takes place (see CPLR 214-a; Nykorchuck v Henriques, 78 NY2d 255 [1991] Davis v City of New York, 38 NY2d

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<sup>1</sup>Extended to June 19, 2017 pursuant to Gen. Constr. Law § 25-a

257, 259 [1975]). A party moving to dismiss a complaint pursuant to CPLR 3211(a) (5) as barred by the applicable statute of limitations bears the initial burden of demonstrating, prima facie, that the period in which to commence the action has expired (see Leace v Kohlroser, 151 AD3d 707, 708 [2017]; Murray v Charap, 150 AD3d 752, 753 [2017]). If defendant meets its burden, then the burden then shifts to the plaintiff to present evidence sufficient to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period (see Cox v Kingsboro Med. Group, 88 NY2d 904, 906 [1996]; Singh v New York City Health & Hosps. Corp. (Bellevue Hosp. Ctr. & Queens Hosp. Ctr.), 107 AD3d 780, 781 [2013]; Williams v New York City Health & Hosps. Corp., 84 AD3d 1358 [2011]).

The defendants, JHMC and Dr. Brahmbhatt, satisfied their initial burden by demonstrating that the action as against them was commenced by filing the Amended Verified Complaint on March 27, 2017 which was after the expiration of the 2 1/2 year Statute of Limitations period for the medical malpractice claims at issue herein (see, CPLR 214-a). The evidence submitted demonstrates that the acts of malpractice alleged in the plaintiff's amended verified complaint including, inter alia, the failure to properly assess and diagnose the condition of the left leg and amputation of the left leg, occurred on November 4, 2012 and the plaintiff was discharged from JHMC and the doctors' care on November 21, 2012 with respect to the November 4, 2012 operation; that no further treatment by JHMC or Dr. Brahmbhatt was planned or anticipated since the plaintiff was transferred to NSUH-LIJ and came under the care of Dr. Batista, a plastic surgeon.

In opposition, the plaintiff argues that while the 2 1/2 year statute of limitations applicable to the medical malpractice claims may have elapsed, issues of fact exist as to whether the limitations period was tolled by the continuous treatment doctrine (see CPLR 214-a).

The continuous treatment doctrine tolls the Statute of Limitations for a medical malpractice action "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (Borgia v City of New York, 12 NY2d 151, 155 [1962]). The purpose of the doctrine is to "maintain the physician-patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure" (Nykorchuck v Henriques, supra at 258-259

[1991] quoting McDermott v Torre, 56 NY2d 399, 408 [1982]; Grellet v City of New York, 118 AD2d 141, 147 [1986]). A patient is not entitled to the benefit of the toll in the absence of continuing efforts by a doctor to treat a particular condition because the policy reasons underlying the continuous treatment doctrine do not justify the patient's delay in bringing suit in such circumstances (Nykorchuck v Henriques, supra at 259; see also, Grellet v City of New York, supra at 147-148).

The plaintiff failed to sustain her burden of demonstrating that the continuous treatment exception applies or to raise a triable issue in this regard.

The only procedure performed at JHMC in which Dr. Brahmhatt participated was the amputation of the plaintiffs legs. Follow-up surgical care was performed at JHMC under the care of Dr. Hubbard until November 21, 2012. On November 21, 2012 the plaintiff was discharged from JHMC to another facility and into the care of Dr. Batista.

The plaintiff's claim of continuing treatment based upon her return to and treatment at JHMC on November 4, 2015 and February 20, 2017 is misplaced. On November 4, 2015 plaintiff went to the emergency room of JHMC complaining of dizziness and shortness of breath. On February 20, 2017 she went to JHMC for complaints of coughing and congestion. Neither of these are the same original condition or complaint which gave rise to the decision to amputate. The fact that the medical records of those dates noted the continuing nature of plaintiff's condition of "traumatic amputation" does not itself constitute "continuous treatment" (see McDermott v Torre, supra at 406; Fauci v Wolan, 238 AD2d 305, 306 [1997]).

Contrary to plaintiff's claim, Dr. Batista's post amputation treatment after November 21, 2012 is not continuation of the course of treatment for the condition which originally gave rise to the alleged malpractice, i.e. amputation (see CPLR 214-a; Almodovar v St. Vincent's Hosp. & Med. Ctr. of N.Y., 236 AD2d 435 [1997]). Nor can Dr. Batista's treatment be imputed to the defendants for the purposes of establishing "continuous treatment" inasmuch as the plaintiff has failed to submit any evidence of an agency or other relevant relationship between the defendants, JHMC and/or Dr. Brahmhatt, and Dr. Batista (see Cox v Kingsboro Med. Group, 214 AD2d 150, 153-154 [1995] aff'd 88 NY2d 904 [1996]).

Moreover, to impute Dr. Batista's treatment of plaintiff to the JHMC and/or Dr. Brahmhatt and consider it "continuous

treatment" would result in extending the statute of limitations indefinitely and possibly for the remainder of plaintiff's life for any prospective treatment of the plaintiff by Dr. Batista. In other words, the underlying purpose for the application of the "continuing treatment" doctrine no longer existed once plaintiff was discharged from JHMC and the care of Dr. Brahmbhatt and into the care of Dr. Batista (see Nykorchuck v Henriques, supra at 259; Grellet v City of New York, supra at 147-148).

Accordingly, the complaint insofar as it is asserted against JHMC and Dr. Brahmbhatt are dismissed as they are barred by the applicable statute of limitations.

Dated: December 4, 2017  
D# 56

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J.S.C.