

You v Mandalay Dental Care, P.C.

2013 NY Slip Op 30689(U)

April 3, 2013

Sup Ct, New York County

Docket Number: 100845/10

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 100845/2010
YOU, MU DI
vs.
MANDALAY DENTAL CARE
SEQUENCE NUMBER : 001
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 granted and the Clerk is directed to enter judgment in favor of the defendants dismissing the action in accordance with the accompanying memorandum decision.

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

FILED

APR -9 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: APR 03 2013

Alice Schlesinger, 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

-----X
MU DI YOU

Plaintiff,

-against-

MANDALAY DENTAL CARE, P.C., and
TIN TIN SAN MA, DMD,

Defendants.

Index No. 100845/10
Motion Seq. No.001

FILED
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COUNTY CLERK'S OFFICE
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SCHLESINGER, J.:

In this dental malpractice case, the defendants are moving to dismiss the entire complaint. They are moving pursuant to CPLR §3212, but in reality, with regard to the two causes of action sounding in lack of informed consent and negligent hiring, they are actually moving pursuant to CPLR §3211(a)(7) for failure to state a cause of action. The motion vis-a-vis dismissal of the claim sounding in dental malpractice is being made on the basis of a violation of the statute of limitations or CPLR §214-a.

When the Court refers to various causes of action, that is not really true, which is one of the problems here. The complaint filed on January 21, 2010, has only one cause of action. Virtually every claim made against the defendants appears in ¶20 of that complaint. This form of pleading is unacceptable, particularly with regard to lack of informed consent. That cause of action must be asserted separately, and its various elements must be stated with particularity. "The pleadings must establish, *inter alia*, that there was some unconsented - to affirmative violation of the plaintiff's physical integrity." *Martin v. Hudson Val. Assoc.*, 13 AD3d 419 (Second Dept 2004).

Public Health Law §2805-d also requires, in part, a statement that a reasonably prudent person under the same circumstances would not have undergone that procedure had he been informed of the risks and alternatives to it and that lack of informed consent was a proximate cause of his injuries. As stated above, the only thing asserted by the plaintiff in ¶20 of the complaint is as follows:

in failing to obtain informed consent; in failing to inform the plaintiff of the risks inherent in, the purpose of, and the advantage of the procedures to be employed, or the lack thereof, the risk to health and life of proceeding or not proceeding, the available alternatives and the risks and advantages involved therein.

The complaint then concludes in the last four paragraphs with indications that “by reason of the foregoing,” the plaintiff was injured or rendered sore or lame, etc. That is not enough. As stated before, lack of informed consent must be a separate cause of action and all the elements contained therein must be specifically stated. Further, the bill of particular adds nothing more.

With regard to negligent hiring, not only is that claim not stated separately, but there is absolutely no basis for it. I say this because Dr. Ma is a sole practitioner and Mandalay Dental Care, P.C. is her own P.C. with no employees. Therefore, there were no hirings of anyone and thus there cannot be any “negligent hiring”. Therefore, these two claims, contained in the one and only cause of action, are both dismissed for failing to state a cause of action.

The plaintiff here Mu Di You went to Dr. Ma for dental treatment from the period of November 17, 2005 through September 14, 2008. The action was commenced, as stated earlier, on January 21, 2010. Based on those dates, the moving defendants

argue that all claims with regard to treatment before August 15, 2007, are barred by the applicable 2½ year statute of limitations. Further, moving counsel points out that the root canal treatment on teeth #5 and #6, the treatment complained of, was performed in April of 2006, well before the August 2007 date.

Counsel argues further that once this time frame is established, the burden shifts to the plaintiff to show, if he can, that there was continuous treatment vis-a-vis the allegedly injured teeth after August 15, 2007. Finally, moving counsel points out that the records, as well as Dr. Ma's testimony, established clearly that in fact there was no continuous treatment with regard to these two teeth.

The plaintiff acknowledges that the root canal on teeth #5 and #6 were performed in April 2006. In an affidavit accompanying his opposition papers, he says that he still had pain after the root canal treatment and that Dr. Ma gave him medication for that pain. He also says that these two teeth are still sensitive and cause pain when he drinks or eats food that is either too hot or too cold. However, the defendants' dental records indicate with regard to these two teeth that the only further procedure done on either one was to fill a cavity on tooth #5 on September 14, 2008. But, there is no claim that this particular work was negligently done.

Plaintiff's counsel makes the argument that summary judgment should be denied because his client, Mr. You, is still feeling pain in these two teeth and that they were defectively treated. He also argues that summary judgment is inappropriate here because of the long dental relationship which existed from November 2005 continually through September 4, 2008.

However, the arguments made in opposition do not convince. It is clear, pursuant to the Court of Appeals' case of *Nykorchuck v. Henriques*, 78 NY2d 255 (1991), that the mere continuation of a physician/patient relationship (here dentist/patient relationship) does not constitute the requisite continuous treatment which is needed to toll the 2½ year statute of limitations. Specifically, there must be treatment for a particular condition, here the root canal work on teeth #5 and #6 in order to justify the tolling of the statute. In the Third Department case of *Iazzetta v. Vicenzi*, 200 AD2d 209 (1994), the court citing to *Nykorchuck, supra*, dismissed a dental malpractice case advising that the 22-year period of the dental relationship could not establish continuous treatment with respect to a condition that gave rise to the action.

Similarly, in the First Department case of *Marrone v. Klein*, 33 AD3d 546 (2006), the court citing to *Iazzetta* and *Nykorchuck, supra*, affirmed the dismissal of a dental malpractice case because the circumstances of a seven-year professional relationship did not successfully show that there was continuous treatment for a single condition or complaint. There, since only isolated and discrete procedures were mentioned, the continuous treatment doctrine could not toll the statute and save the complaint.

That is the situation here. The only work talked about with regard to tooth #5 is a filling two years after the root canal work which in no way refers back to the earlier condition and the treatment needed then, the root canal work. With regard to tooth #6, there was no subsequent work after April 2006, at all. Therefore, the continuous treatment doctrine cannot be utilized by the plaintiff.

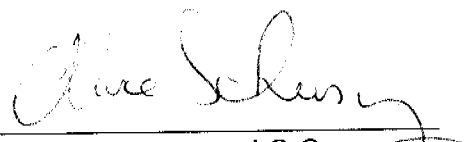
Further, with regard to any of the other work done on Mr You's mouth, there is no claim of any negligent dentistry. Thus, since there is no claim of negligence asserted after August 5, 2007, as the sole alleged negligent treatment occurred in April 2006, well beyond the statute of limitations, the complaint is dismissed.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted, and the Clerk is directed to enter judgment in favor of the defendants dismissing this action in its entirety.

Dated: April 3, 2013

APR 03 2013



J.S.C.
ALICE SCHLESINGER

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