Sigismondi v Central Suffolk Hosp.
2013 NY Slip Op 32087(U)
September 3, 2013
Supreme Court, Suffolk County
Docket Number: 05-13726
Judge: Hector LaSalle

[* 1]

SHORT FORM ORDER

INDEX No. 05-13726
CAL No. 13-00200MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 6-25-13
ADJ. DATE 7-9-13
Mot. Seq. # 005 - MG
006 - MD; CASEDISP

GERARD L. SIGISMONDI,	:	GERARD L. SIGISMONDI, ProSe
	:	83 Drew Drive
Plaintiff,	:	Eastport, New York 11941
	:	
- against -	:	FUMUSO, KELLY, DEVERNA, SNYDER,
	:	SWART & FARRELL, LLP
CENTRAL SUFFOLK HOSPITAL,	:	Attorney for Defendant Central Suffolk Hospital
	:	110 Marcus Boulevard, Suite 500
Defendant.	:	Hauppauge, New York 11788

Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005)1 - 17; Notice of Cross Motion and supporting papers (006) 18-28; Answering Affidavits and supporting papers 29-39; Replying Affidavits and supporting papers ____; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (005) by defendant, Central Suffolk Hospital, pursuant to CPLR 3211(a) (5) and 214-a for an order dismissing the plaintiff's complaint on the basis that the action is barred by the applicable statute of limitations is granted and the complaint is dismissed; and it is further

ORDERED that motion (006) by plaintiff, Gerard L. Sigismondi, for summary judgment in his favor has been rendered academic in light of dismissal of the action relating to motion (005), and is denied.

Gerard L. Sigismondi commenced an action under Index No. 05-13726 against defendant Central Suffolk Hospital on the basis of the failure of the defendant to disclose adverse laboratory tests results to him and or his primary care physician, Dr. Lawrence Goldman, whom the plaintiff stated was on staff at defendant hospital. The plaintiff commenced an action under Index No. 05-13727 against defendant Central Suffolk Hospital on the basis that it failed to treat him in a timely fashion for ascites while he was a patient in the emergency room at Central Suffolk Hospital on June 6, 2002. By way of the order dated March 1, 2010 (Molia, J.) the actions pending under Index No. 05-13727 and 05-13726 were consolidated sua sponte under Index No.

(RR

05-13726, in that both actions arose from the same transaction in the hospital. The gravamen of the plaintiff's complaints is essentially that the defendant hospital, by its employees, failed to advise him and treat him for marked ascites and failed to provide his laboratory test results and records to his treating physician. In the plaintiff's papers submitted in support of motion (006) and in opposition to motion (005), the plaintiff set forth that the action filed under Index No. 05-13726 is based upon the defendant not informing him that he had cirrhosis and in failing to furnish his primary care physician with the results and findings of his emergency room visit of June 3, 2002. The plaintiff further contends in the action commenced under Index No. 05-13727, that he did not receive treatment for ascites. Medication was given and a paracentesis was performed one year later, which was not done at his June 6, 2002 visit.

In support of motion (005), defendant, Central Suffolk Hospital, has submitted, inter alia, an attorney's affirmation; copy of the summons with notice filed June 3, 2005 for Index No. 05-13727; notice of appearance with demand for a complaint; "complaint for negligence and plaintiff demands trial by jury;" defendant's answer; plaintiff's verified bill of particulars; supplemental answers to demand for a verified bill of particulars with exhibits; compliance conference order dated September 23, 2012 directing that the plaintiff file a note of issue with a copy of the order on, or within twenty days after, October 23, 2012; note of issue with certificate of readiness; certified records for Peconic Bay Medical Center dated June 6, 2002 and October 3, 2003; June 6, 2002, August 28, 2003, and October 3, 2003; and the transcript of the examination before trial of Gerard Sigismondi dated August 2, 2011.

Procedurally, in the action pending under Index No. 05-13727, defendant withdrew motion (001) for dismissal of the complaint which was brought pursuant to CPLR 214-a, as noted in the order dated November 30, 2006 (Molia, J.). No other motions are outstanding.

In motion (005), Central Suffolk Hospital seeks summary judgment dismissing the complaint on the basis that this action is for medical malpractice which allegedly occurred on June 6, 2002 at Central Suffolk Hospital, is subject to a two and one-half year statute of limitations pursuant to CPLR 214-a, and is barred by the applicable statute of limitations. This action was commenced by the filing of the summons and complaint on June 3, 2005, and therefore, treatment rendered on June 6, 2002 is not within the applicable two and one-half year statute of limitations provided in CPLR 214-a. While the plaintiff asserts that this action is bound by the three year negligence statute of limitations, this court determines that the causes of action set forth in the consolidated actions are premised upon the alleged medical malpractice of the employees and staff at defendant Central Suffolk Hospital. Although the plaintiff uses the date of treatment at the emergency room at Central Suffolk Hospital interchangeably from June 3, 2002 with June 6, 2002, the actual date of treatment was June 6, 2002, as evidenced by the hospital record and evidentiary proof.

The essential question to be answered in determining the applicable statute of limitations is whether the conduct at issue constitutes an integral part of the process of rendering medical treatment to a patient (***Rodriguez v Mount Sinai Medical Center***, 5 Misc3d 1009 (A), 798 NYS2d 713 [Sup. Ct. Bronx County 2004]). For a cause of action to survive the shorter statute to limitations applicable to medical malpractice and continue to be viable under the longer statute of limitations applicable to negligence, the gravamen of the complaint should not be negligence in furnishing medical treatment or conduct which bears a substantial relationship to the rendition of medical treatment by a licensed physician, but rather must point to the hospital's failure in fulfilling a different duty. Courts must therefore look for the reality and essence of the action and not its mere name (***DeLeon v Hospital of Albert Einstein College of Medicine***, 164 AD2d 742 NYS2d 213 [1st

Dept 1991]). Conduct may be deemed malpractice, rather than negligence, when it constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician. When the incompetence alleged is of a specialized medical nature, deriving from the physician-patient relationship, and substantially related to medical diagnosis and treatment, the action it gives rise to is by definition one for medical malpractice rather than negligence (***Payette v Rockefeller University***, 220 AD2d 69, 643 NYS2d 79 [1st Dept 1996]). The claims in the instant action arise out of the rendition of care and treatment provided to the plaintiff in the emergency room.

By way of his bill of particulars dated August 25, 2005 and January 30, 2007, the plaintiff asserts that the acts complained of occurred on June 3, 2002, at 16:16 hours, in the emergency room at Central Suffolk Hospital on the basis he was not provided a diagnosis or an explanation as to the cause of his symptoms. He alleges that he was not advised that he had ascites, and that he was not treated for that condition during that emergency room visit by the physician's assistant, Peter Clark, who told him he had "bloatedness caused by excessive acid in his body creating excessive fluid" and that he should "take caution because if this condition persisted it can affect the lungs and plaintiff could stop breathing." The plaintiff further contends that his doctor was not advised of his test results. The plaintiff further claimed that the emergency room physicians and the radiologist who completed the abdominal CT should be accountable as the CT scan was incorrectly read and interpreted. The plaintiff continues that the defendant made an erroneous diagnosis and ignored his signs and symptoms, afforded improper treatment and contraindicated drugs, and improperly took and administered tests. The plaintiff continues in a conclusive and speculative statement in his bill of particulars, without evidentiary proof, to assert that the emergency room records were altered. The plaintiff claims that he suffered liver failure, and end stage cirrhosis, varicies of the esophagus, portal vein hypertension, massive volume ascites, encephalopathy, gynecomastica, and herniated umbilical cord (sic) as a result of the defendant's negligence in treating him.

The plaintiff testified that he did not believe that "fatty liver-ascites" was written on his discharge sheet, and he was not told that was what he had. He testified that he did not keep his discharge sheet. Although he identified his signature on the discharge sheet, he stated that his sheet did not advise him to follow up with Dr. Mehta or provide Dr. Mehta's telephone number. He further testified that he was not told to avoid alcohol. He testified that he was told to follow up with Dr. Goldman whom he saw within a week or two afterwards. He believed he told Dr. Goldman that he had blood work and a CAT scan. He further testified that Dr. Goldman stated he did not have the reports, but that he would get them. Such reports were included in Dr. Goldman's records. Dr. Goldman saw him about three times and sent him for blood work. The plaintiff also saw Dr. Schulman who ordered a CT scan. He never told Dr. Schulman that he had ascites. The plaintiff attached a copy of the discharge sheet which had the diagnosis of "ascites" written on it. The radiology report at issue was attached to his complaint.

Based upon the foregoing, it is clear that plaintiff's claims are premised upon medical malpractice based upon alleged departures from the standards of care and treatment by emergency room physicians, hospital employees, and staff, requiring expert testimony upon summary judgment or at trial. Thus, the two and one half year statute of limitations is applicable and bars this action which was not timely commenced by the plaintiff. However, whether or not there was continuous treatment must also be considered.

As set forth in ***Gomez v Katz***, 61 AD3d 108, 874 NYS2d 162 [2d Dept 2009], pursuant to CPLR 214-a, an action for medical malpractice must be commenced within two years and six months of the act, omission

or failure complained of. However, the statute has a built-in toll that delays the running of the limitations period where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission, or failure. Under the continuous treatment doctrine, the 2 ½ year period does not begin to run until the end of the course of treatment, 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. The underlying premise of the continuous treatment doctrine is that the doctor-patient relationship is marked by continuing trust and confidence and that the patient should not be put to the disadvantage of questioning the doctor's skill in the midst of treatment, since the commencement of litigation during ongoing treatment necessarily interrupts the course of treatment itself. Implicitly, the doctrine also recognizes that treating physicians are in the best position to identify their own malpractice and to rectify their negligent acts or omissions.

The court continued that the continuous treatment doctrine applicable to medical malpractice actions contains three principal elements. The first is that the plaintiff continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period. The term, course of treatment, speaks to affirmative and ongoing conduct by the physician such as surgery, therapy, or the prescription of medications. A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll. Similarly, continuing efforts to arrive at a diagnosis fall short of a course of treatment, as does a physician's failure to properly diagnose a condition that prevents treatment altogether. Based upon the facts of this case, it is determined as a matter of law that there was no continuous treatment by the defendant hospital for the condition complained of. The plaintiff obtained aftercare with Dr. Goldman and Dr. Schulman, and later with Dr. Mehta, and did not obtain regular care and treatment from Central Suffolk Hospital for his ascites which was diagnosed in the emergency room at Central Suffolk Hospital on June 6, 2002. The plaintiff was aware upon discharge from the emergency room that his care and treatment was to be provided by his primary physicians, with whom he was instructed to follow up, including specifically, Dr. Mehta.

The second element of the continuous treatment doctrine applicable to medical malpractice actions is that the course of treatment provided by the physician be for the same conditions or complaints underlying the plaintiff's medical malpractice claim. When the plaintiff presented to Central Suffolk Hospital on August 25, 2003, approximately fifteen months after the June 6, 2002 visit, it was for a new and separate incidence of lower abdominal pain after the plaintiff had undergone surgery for repair of an umbilical hernia at Southampton Hospital in July 2003. He was admitted to Central Suffolk Hospital with the diagnosis of intestinal obstruction, accompanied with complaints of abdominal distention and constipation for one and a half weeks. Thus, the plaintiff was not treated for, diagnosed with, nor admitted for ascites, and presented with different complaints for a condition which later developed just prior to August 25, 2003. Thus, the defendant did not present with the same condition alleged in the complaint, and the second element of the continuous treatment doctrine is inapplicable to extend the statute of limitations.

The third element of the continuous treatment doctrine applicable to medical malpractice actions is that the physician's treatment be deemed continuous. Continuity of treatment is often found to exist when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past. The law recognizes, however, that a discharge by a physician does not preclude application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for conditions related to the earlier

treatment. Regardless of the absence of physical or personal contact between the plaintiff and the defendant in the interim, where the physician and patient reasonably intended the patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress, the requirement for continuous care and treatment for the purpose of the statute of limitations is certainly satisfied (***Richardson v Orentreich***, 64 NY2d 896, 487 NYS2d 731 [1985]; ***Balaban v Bachrach***, 2011 NY Slip Op 32734 (U) [Sup Ct New York County 2011]). Here, it is determined that the plaintiff was discharged with specific instructions to follow up with his primary care physician and was provided the name and telephone number of Dr. Mehta. The plaintiff was not scheduled to return to the emergency department to follow up for additional testing, blood work, or other treatment. Thus, there is no continuous treatment with regard to the third prong of the test to determine whether or not the statute of limitations should be extended or tolled.

Accordingly, it is determined that this action premised upon the alleged medical malpractice and departure from the accepted standards of care by the defendant is barred by CPLR 214-a, as it was not timely commenced within the two and one half year statute of limitations, which has not been tolled by the continuous treatment doctrine. Accordingly, the complaint is dismissed.

Turning to motion (006), the plaintiff seeks summary judgment in his favor, however, this motion has been rendered academic by dismissal of the action in motion (005). In addition to being barred by CPLR 214-a, plaintiff's motion (006) is deemed to have been untimely served. The note of issue was filed in this action on January 30, 2013 as reflected by the court's computer records. The last date for plaintiff to serve a motion for summary judgment on liability was on May 30, 2013. It is noted that plaintiff's cross motion (006) was served on June 13, 2013, pursuant to his affidavit of service, beyond the 120 days in which to file such motion. Gerard Sigismondi offers no excuse for the untimely submission of motion (006). "Good cause" in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion-a satisfactory explanation for the untimeliness-rather than simply permitting meritorious, non-prejudical filings, however tardy. No excuse at all, or a perfunctory excuse, cannot be "good cause" (*see* ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***First Union Auto Finance, Inc.***, 16 AD3d 372, 791 NYS2d 596 [2d Dept 2005]; ***Tucci v Colella,*** 26 Misc 3d 1234A, 907 NYS2d 441 [Sup Ct, Kings County 2010]). Based upon the failure of plaintiff to offer any excuse, good cause has not been demonstrated to consider this motion for summary judgment. Motion (006) seeks relief very different from motion (005), that is, for a determination of liability, not whether the action is barred by the statute of limitations. When the relief sought in an untimely motion is not identical to the relief sought in a timely motion, this court cannot consider the untimely motion. Thus, plaintiff's motion (006) is deemed untimely.

It is further determined that even if motion (006) were timely served, that the plaintiff has failed to support his motion for summary judgment in his favor with an expert affirmation or affidavit. The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503[2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley,***

252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]). The plaintiff has failed to do so, rendering his application insufficient as a matter of law.

Accordingly, motion (006) by the plaintiff for summary judgment in his favor is denied.

Dated: September 3, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION