

Terryn v Pflugfelder
2013 NY Slip Op 32781(U)
May 20, 2013
Sup Ct, Nassau County
Docket Number: 9900-2012
Judge: Norman Janowitz
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SUPREME COURT OF THE STATE OF NEW YORK – NASSAU COUNTY

P R E S E N T: HON. NORMAN JANOWITZ,

Justice.

LAURA TERRY,

Plaintiff,

-against-

Trial/ IAS Part 21
Index No.: 9900-2012
Motion Seq. # : 001,002
Submit Date: May 1, 2013

DR. ROGER PFLUGFELDER, THE GELLER DENTAL GROUP, P.C. and DR. MICHELE M. HARUTUNIAN and M. MICHELE HARUTUNIAN, D.D.S., P.C.,

Defendant.

The following papers having been read on this Notice of Motion by defendant Dr. Roger Pflugfelder and Notice of Motion by defendant The Geller Dental Group P.C.:

Motion Sequence No. 1:

Notice of Motion, Affirmation & Exhibits.....1
Affirmation in Opposition, Affidavit and Exhibits.....2
Reply Affirmation and Exhibits.....3

Motion Sequence No. 2:

Notice of Motion, Affirmation & Exhibits.....1
Affidavit in Opposition, Affirmation and Exhibits.....2
Reply Affirmation and Exhibit.....3

Defendant Dr. Roger Pflugfelder (defendant “Doctor”) moves for an Order dismissing the action due to lack of jurisdiction pursuant to CPLR §3211(a)(8) and due to expiration of the statute of limitations pursuant to CPLR §3211 (a)(5). Defendant The Geller Dental Group P.C. (defendant “Dental Group”)also moves for an Order pursuant to CPLR 3211(a)(5) dismissing the action against them due to the expiration of the applicable Statute of Limitations, and they incorporate the arguments set forth in defendant Doctor’s papers. Plaintiff opposes both motions.

Upon the foregoing papers, the instant motions to dismiss are decided as follows:

This action was commenced August 3, 2012 by the filing of a Summons with Notice. On September 25, 2012, an Amended Summons with Notice and Verified Complaint were filed. The Complaint alleges negligent dental care and treatment by defendants Doctor and the Dental Group (collectively, "Defendants") based upon the improper placement of crowns and caps, and failing to adequately treat plaintiff's underlying root canal issues.

Defendant Doctor's Motion to Dismiss Pursuant to CPLR §3211(a)(8):

Defendant Doctor states that an inspection of the Affidavit of Service filed by plaintiff reflects that it is fatally defective on its face in that it contains a number of defects and inconsistencies, requiring dismissal of this case as against Defendant Doctor. Specifically, Defendant Doctor states that according to the Affidavit of Service the Amended Summons and Complaint were served upon a female individual identified as a person of suitable age and discretion at Defendant Doctor's place of business on October 3, 2012, and that a copy of the amended Summons and Complaint was previously mailed to Defendant Doctor's place of business on September 5, 2012-- 28 days prior to delivery of the papers at Defendant's business and not within the 20 day time limit prescribed by CPLR §308(2). He further states that the date of the mailing on September 5, 2012 predates the Amended Summons and Complaint (dated September 19, 2012) by 14 days. Additionally, Defendant Doctor alleges that no copy of the Amended Summons and Complaint was received in the mail at his place of business around September 5, 2012 as indicated in the Affidavit of Service.

Plaintiff states that on October 3, 2012 Defendant Doctor was served by service upon a person of suitable age and discretion at his place of business, and that on October 5, 2012 the Amended Summons and Complaint were mailed to the same address. Plaintiff attaches an "Amended" Affidavit of Service identical in content to the original Affidavit of Service, except that the Amended Affidavit states that mailing was done October 5, 2012 instead of September 5, 2012, and that it was filed November 9, 2012. Plaintiff alleges that the original Affidavit of Service contained a typographical error which stated that mailing was on September 5, 2012. She attaches an affidavit from the process server which basically asserts the foregoing. Notably, in his

reply papers Defendant Doctor does not refute or contest plaintiff's contention with respect to the September 5, 2010 mailing date in the Amended Affidavit of Service or the typographical error in the original Affidavit of Service.

Defendants' Motion to Dismiss Pursuant to CPLR §3211(a)(5):

Defendants Doctor and Dental Group contend that plaintiff's claims for recovery for dental malpractice are time barred by the applicable two and a half year Statute of Limitations under CPLR §214-a, and that the continuous treatment doctrine is not applicable here. Specifically, defendants states that their records reflect that Defendant Doctor rendered treatment to plaintiff between September 19, 2006 and October 11, 2008, when plaintiff was last seen and treated; and that between October 2008 and July 2011 their records only reflect discussions with plaintiff regarding care and treatment from other providers and potential reimbursement for prior dental treatment. As such, defendants argues that plaintiff was required to commence action by April 11, 2011, and not nearly four years later in September 2012.

In opposition, plaintiff states that she began her treatment with Defendants in September 2006 and continued to receive treatments for pain, swelling and bleeding caused by the improper work done by defendants up until June 2011; that in or about June 2010, she came back to defendants' office, with her mother, seeking that Defendants treat and correct improperly placed crowns; that at the June 2010 visit Defendant Doctor examined plaintiff and failed to diagnose and treat her problem; and that, thereafter, she saw Dr. Geller of the Dental Group until June 2011. Plaintiff's alleged June 2010 visit is not reflected in plaintiff's dental records or any of defendants' records; however, affidavits are provided by both plaintiff and her mother with respect to the June 2010 visit.

DECISION AND ORDER

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. *Rakusin v. Miano*, 84 A.D.3d 1051; *Romanelli v. Disilvio*, 76 A.D.3d 553; *6D Farm Corp. V. Carr*, 63 A.D.3d903;

Texeria v. BAB Nuclear Radiology, P.C., 43 A.D.3d 403. Here, plaintiff raised a question of fact as to whether there was a continuous course of care and treatment of the plaintiff by Defendants through June 2010. Although Defendants raise various issues and problems with respect to plaintiff's contention that she was seen by Defendants in June 2010, they relate to the weight and/or credibility of her contention.

Based on the foregoing, Defendants' Dr. Roger Pflugfelder and The Geller Dental Group P.C. respective motions are **DENIED** in their entirety.

DATED: May 20, 2013
Mineola, NY

ENTER:

HON. NORMAN JANOWITZ
J.S.C.

ENTERED
MAY 24 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE