

Martens v St. Luke's-Roosevelt Hosp. Ctr.

2014 NY Slip Op 31423(U)

May 29, 2014

Sup Ct, New York County

Docket Number: 107297/2010

Judge: Joan B. Lobis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

MARTENS, MICHAELA,
ETAL.

INDEX NO.

107297/10

MOTION DATE

4/22/14

MOTION SEQ. NO.

04

MOTION CAL. NO.

S.T. LUKE'S-ROOSEVELT
HOSPITAL CENTER, ETAL.

The following papers, numbered 1 to 5 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

1

Replying Affidavits _____

2, 3, 4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION + ORDER

Dated: 5/29/14

JOAN B. LOBIS
J.S.C.

FILED
JUN 02 2014
COUNTY CLERK'S OFFICE
NEW YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED

JUN 02 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

-----X
MICHAELA MARTENS and ANDREW MARTENS,

Plaintiffs,

-against-

ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,
ARNOLD BELGRAIER, M.D., DANIEL ROSEN, M.D.,
and SOPHIA WU, M.D.,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

Index No. 107297/2010

Decision and Order

This medical malpractice action arises out of Michaela Martens' diagnosis and treatment for a gastrointestinal stromal cell tumor ("GIST tumor"). Michaela and Andrew Martens sue St. Luke's-Roosevelt Hospital Center, Arnold Belgraier, M.D., and Sophia Wu, M.D., alleging that the Defendants failed to diagnose Ms. Martens with a GIST tumor. Dr. Wu moves for partial summary judgment pursuant to section 3212 and partial dismissal pursuant to 3211(a)(5) of the Civil Practice Law and Rules, dismissing claims of malpractice stemming from treatment occurring more than two and one-half years prior to the commencement of the action. For the following reasons, the motion for summary judgment is denied.

Michaela Martens first began treating with Dr. Sophia Wu, a board certified obstetrician and gynecologist, in June 2002. Ms. Martens was subsequently diagnosed with enlarged fibroid uterus. She decided not to have the fibroids removed at the time. In October 2002, Ms. Martens discovered that she was pregnant. Between October 2002 and June 2003, Ms. Martens saw Dr. Wu on at least a monthly basis for regular prenatal care, and in August 2003 for post-partum care. She again saw Dr. Wu in November 2003 for a routine gynecological

examination. At each visit, Ms. Martens and Dr. Wu discussed Ms. Martens' fibroids. Ms. Martens denied complaints related to the fibroids at each of those visits.

She did not return to see Dr. Wu until January 12, 2005, where Ms. Martens was diagnosed with a second pregnancy. She again saw Dr. Wu for regular prenatal care on a monthly basis between February and August 2005. Ms. Martens denied complaints related to fibroids at each visit. Ms. Martens did not see Dr. Wu again until April 19, 2007. Dr. Wu suggested a pelvic sonogram to evaluate the fibroids. Ms. Martens considered removing the fibroids but was undecided. During a telephone call in May 2007, Dr. Wu explained that the pelvic sonogram showed that the fibroids remained unchanged.

On May 18, 2007, Ms. Martens had a regular gynecological examination with Dr. Wu. Dr. Wu provided no care for Ms. Martens between May 2007 and September 2009. Ms. Martens last saw Dr. Wu on September 21, 2009, for general gynecological care and had no complaints regarding her fibroids. Ms. Martens was living in Seattle, Washington in February 2010 when she experienced dizziness and fainting episodes. After visiting the Swedish Hospital in Seattle, a pelvic sonogram revealed that she had a mass that the medical records described as atypical of a benign myoma. In March 2010, Ms. Martens underwent removal of the mass, which was diagnosed as a GIST tumor, emanating from the omentum.

Plaintiffs commenced this action on June 4, 2010. They allege that Dr. Wu was negligent in failing to diagnose and properly treat Ms. Martens for the GIST tumor, and that Dr. Wu misdiagnosed it as fibroids. Dr. Wu now moves for partial summary judgment, raising the

* 4]

statute of limitations for any treatment occurring prior to December 4, 2007, or two and one-half years prior to commencement of the action. Dr. Wu preserved this defense by raising it in her answer as an affirmative defense.

Dr. Wu argues that since the action was commenced on June 4, 2010, any treatment that occurred more than two and one-half years prior to the commencement is untimely. She states that there was no communication between Dr. Wu and Ms. Martens between May 18, 2007, and September 21, 2009. Dr. Wu contends that Plaintiffs will not be able to meet their burden in establishing that there was continuous treatment that should toll the statute of limitations. She maintains continuous treatment cannot apply in this matter because treatment rendered prior to December 4, 2007, was periodic, routine gynecological treatment where general complaints were discussed, including those related to fibroids. Dr. Wu asserts that there were significant gaps on two occasions, totaling 20 and 28 months respectively, that are inconsistent with a continuous course of treatment. Movant claims that failure to detect or diagnose does not constitute a course of treatment.

In opposition, Plaintiffs argue that continuous treatment applies to the facts of the case. Dr. Wu testified that Ms. Martens was at risk for uterine sarcoma and that she was watching and discussing the fibroids with Ms. Martens at every visit. Plaintiffs contend that Dr. Wu was monitoring a condition, and that monitoring of a specific condition is sufficient to toll the Statute of Limitations. They argue that this matter is similar to monitoring through mammography. Plaintiffs claim that the radiographic diagnostic examinations undertaken at regularly

contemplated intervals in this case to monitor Ms. Martens' existing condition constitute continuous treatment.

In support of their opposition, Plaintiffs provide an expert affirmation. The physician's name has been redacted. The physician is a New York licensed medical doctor who is board certified in obstetrics and gynecology. The expert opines to a reasonable degree of medical probability that the GIST tumor that was diagnosed in March 2010 was present during Dr. Wu's examinations as far back as June 2002. The expert affirms that fibroids are typically benign but require continuous monitoring because they can grow or affect other organs. Plaintiffs' expert claims that once a diagnosis for fibroids is made, a physician must continue to monitor and potentially treat the fibroids. The expert avers that Ms. Martens was monitored from year to year, and was questioned about new signs or symptoms associated with the fibroids.

Defendants St. Luke's-Roosevelt Hospital Center and Arnold Belgraiier, M.D., submit partial oppositions to Dr. Wu's motion. Both partial oppositions are for the purposes of preserving their rights under Article 16 of Civil Practice Law and Rules. Both oppositions adopt and incorporate the Plaintiffs' legal arguments.

In reply Dr. Wu argues that almost all of Ms. Martens' visits were for routine gynecological examinations, prenatal and postpartum care, and treatment for mastitis, a condition unrelated to fibroids. Movant asserts that Ms. Marten was advised that a very small percentage of masses could be uterine sarcoma, instead of a fibroid, but she declined to have the fibroids removed. Dr. Wu affirms that at no point prior to two and one half year statute of limitations

period was any treatment for the fibroids performed or planned, though the fibroids were discussed at every visit. Movant contends that discussions do not amount of continuous treatment.

Dr. Wu maintains that most of the pelvic sonograms performed on Ms. Martens were not for the purpose of monitoring fibroids, but for the monitoring of Ms. Martens' pregnancies. Movant claims that the current case is distinguishable from breast cancer cases involving continuous treatment because there was never monitoring for a cancerous condition or potentially cancerous condition, there was no high risk patient, and sonograms for the fibroids were not prescribed at regular intervals.

Dr. Wu provides the expert affirmation of James Howard, M.D., in support of the reply. Dr. Howard is board certified in obstetrics and gynecology. He opines that fibroids are a benign condition and no treatment is necessary unless fibroids become symptomatic or affect other organs. He maintains that asking a patient if she has any complaints regarding a condition such as fibroids does not constitute treatment when there are no complaints, symptoms, or prescribed treatments. Dr. Howard contends that all ultrasounds performed were in connection with routine gynecological examinations that do not reflect a continuous course of monitoring as understood by physicians.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). A movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The

affidavit must recite all material facts and show, where a defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown “sufficient to require a trial of any issue of fact.” Id.

Section 214-a of the Civil Practice Law and Rules establishes a two and one-half year statute of limitations for medical malpractice actions, starting from the final treatment. The statute further defines continuous treatment as excluding “examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient’s condition.” Id. Underlying the doctrine is the policy that the best interests of a patient warrant continued treatment with an existing provider, rather than stopping treatment, since the provider is best positioned to identify and correct any malpractice. E.g., Rudolph v. Lynn, D.D.S., P.C., 16 A.D.3d 261, 412 (1st Dep’t 2005). Treatment need not actually be performed provided it was timely sought. E.g., Stahl v. Smud, 210 A.D.2d 770, 771 (3d Dep’t 1994) (citing McDermott v. Torre, 56 N.Y.2d 399, 406 (1982)). Gaps in treatment do not necessarily preclude application of the doctrine where further treatment was contemplated. Rudolph, 16 A.D.3d at 413 (upholding 22 month gap in treatment).

The Court is not persuaded that there are no triable issues of fact as to continuous treatment. Dr. Wu monitored Ms. Martens’ treatment since 2002, at each visit asking about the fibroids and if there were related complaints. Ms. Martens’ visits were not sporadic and did not involve mere discussions of potential treatment options. Oksman v. New York, 271 A.D.2d 213, 214 (1st Dep’t 2000). Rather, Dr. Wu’s discussions of fibroids with Ms. Martens were part of Dr.

Wu's ongoing monitoring to ensure that the fibroids did not increase in size or affect any internal organs. After Ms. Martens initially declined to have the fibroids removed, monitoring became the alternative treatment and is sufficient to toll the statute of limitations. Cherise v. Braff, 50 A.D.3d 724 (2d Dep't 2008). Movant is unable to show that the 28 month gap prior to Ms. Martens' April 2007 visit to Dr. Wu necessarily leads to the conclusion that there was no continuous treatment. Accordingly, it is

ORDERED that Dr. Wu's motion is denied.

Dated: *May 29*, 2014

ENTER:

COUNTY CLERK'S OFFICE
NEW YORK



JOAN B. LOBIS, J.S.C.

FILED

JUN 02 2014