Burgess v Fleischman
2016 NY Slip Op 32677(U)
December 6, 2016
Supreme Court, Bronx County
Docket Number: 24101/2016E
Judge: Mary Ann Brigantti
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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ALFONSO BURGESS,

Plaintiff,

-against-

DECISION / ORDER
Index No. 24101/2016E

JAY FLEISCHMAN, M.D., et als.,

Defendants.

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The following papers numbered 1 to 6 read on the below motion noticed on August 22, 2016 and duly submitted on the Part IA15 Motion calendar of **August 22, 2016:**

Papers Submitted	Numbered
Defs.' Notice of Motion, Exhibits	1,2
Pl. Aff. In Opp., Exhibits	3,4
Defs' Aff. in Reply, Exhibits	5,6

Upon the foregoing papers, defendants Ambulatory Surgery Center of Greater New York ("Ambulatory"), Jay Fleischman, M.D. ("Fleischman"), and Retina & Laser Consultants, LLC. ("Retina") (collectively, "Defendants") move in lieu of an Answer for an Order:

(1) pursuant to CPLR 3211(a)(5), dismissing the causes of action for medical malpractice and lack of informed consent, as these causes of action are time-barred;

(2) pursuant to CPLR 3211(a)(5), dismissing the cause of action for negligent infliction of emotional distress, as this cause of action is time-barred, or in the alternative, dismissing this cause of action as being improperly and insufficiently plead pursuant to CPLR 3211(a)(7), and

(3) dismissing the cause of action called "loss of enjoyment of life," pursuant to CPLR 3211(a)(7), as this cause of action does not exist, and

(4) such other, further, and different relief as this Court deems just, proper, and equitable.

The plaintiff Alfonso Burgess ("Plaintiff") opposes the motion.

I. Background

Plaintiff has brought this action sounding in medical malpractice as a result of eye surgery and other medical treatment rendered by Defendants from around May 2011 through February

2015. Plaintiff's complaint alleges that on July 18, 2011, defendant Ambulatory provided him medical care and treatment. Defendant Fleischman is an opthalmologist who maintained offices in the Bronx, Harrison New York, and Stamford, Connecticut. At relevant times, Fleischman was employed by defendants Ambulatory, Retina, and Stamford Vision Care, LLC ("Stamford"). Plaintiff claims, *inter alia*, that Defendants neglected to use reasonable care and departed from accepted practices and procedures during their treatment resulting in injuries and damages, including but not limited to the loss of Plaintiff's left eye. Defendants Fleischman, Retina, and Ambulatory now move to dismiss, *inter alia*, Plaintiff's medical malpractice claims because they were commenced outside of the applicable statute of limitations.

In an affidavit, Fleischman asserts that he treated the plaintiff at various times and dates between October 18, 2010 and February 20, 2012. Fleischman states that after examining Plaintiff on February 20, 2012, he instructed Plaintiff to return for a follow-up visit on April 2, 2012. Plaintiff, however, did not return, and Fleischman did not see him again after February 20, 2012. Fleischman provides his clinical charts and billings records to demonstrate that Plaintiff's last treatment date was February 20, 2012. Fleischman acknowledges that he is the only shareholder and owner of defendant Retina, however no employee or agent of Retina ever treated Plaintiff aside from himself. Fleischman concludes his affidavit by stating that he rented space from defendant Stamford, but he was never affiliated with Stamford in any way. Defendants claim that Plaintiff has not alleged any "continuous treatment," and his claim that he was treated through "at least February 2015" is "simply incorrect." Defendants assert that Plaintiff commenced this action on December 15, 2016, more than 2 ½ years after his last date of treatment. Accordingly, Plaintiff's medical malpractice and lack of informed consent causes of action must be dismissed.

Defendants also provide an affidavit from the administrator of Ambulatory, Erin Duffy, R.N. Nurse Duffy states that Ambulatory's facility only treated Plaintiff once, on August 17, 2011, when Plaintiff went to the facility to have eye surgery performed by Fleischman. Specifically, on that date, Fleischman performed a "Pars Plana Vitrectomy with Membranectomy and Lensectomy with AC IOL insertion" in Plaintiff's left eye. Nurse Duffy states that Fleischman has privileges at Ambulatory but he was not an employee there.

Defendants further contend that they are entitled to dismissal of Plaintiff's cause of action for negligent infliction of emotional distress because it is untimely, and moreover, Plaintiff has not allegedly sufficiently "extreme or outrageous" conduct. Finally, Defendants argue that Plaintiff's "loss of enjoyment of life" claim should be dismissed because this is an element of damages, and not a separate cause of action.

In an affidavit submitted in opposition to the motion, Plaintiff states that he treated with "Defendants" (Fleischman, Retina, Ambulatory, and Stamford) to evaluate his bilateral eye health because he was experiencing, among other things, discomfort, pain, and blurred vision in his left eye. He notes that Stamford advertises four physicians - including Fleischman - on their website, and Fleischman holds office hours in his Stamford office at least one day per week.

Plaintiff first had his left eye examined by a Dr. "Maiolo" in 2011. Dr. Maiolo recommended that Plaintiff see Fleischman for further evaluation and treatment. Fleischman examined Plaintiff and recommended surgery in the left eye - specifically, left eye phacoemulsification, insertion of a posterior chamber intraocular lens (PCIOL), and removal of a cataract. Fleischman performed this surgery on August 17, 2011 at the Ambulatory facility. After the surgery, Plaintiff continued to have problems with his eye, and he believed that these problems were supposed to have been resolved by the surgery. Plaintiff states that he "continued" treatment with "defendants Fleischman, Retina, and Stamford" and he provides treatment records containing Stamford letterhead signed by Drs. Robert Maiolo and John DeCarlo, reflecting treatment dates of 2013 and 2015.

Plaintiff asserts that "[a]fter some time," the Defendants referred him to Dr. Robert Noecker for further evaluation. Dr. Noecker determined that Plaintiff required a second surgery to his left eye in order to resolve the continuous pain, discomfort, and blurred vision he was experiencing after the Fleischman surgery. Plaintiff states that he was referred to Dr. Noekcer "by an associate of Defendants' named Dr. Maiolo and by Defendant, Fleischman," at which time Dr. Noecker determined that a second surgery was required. Dr. Noecker performed the second surgery in December 2011. After that surgery, Plaintiff continued to have pain and other issues in his eye. As a result, in March 2013, Dr. Noecker performed yet another surgery on the eye. In or around 2014, after numerous further evaluations and consultations, it was determined

that Plaintiff's left eye needed to be removed. This surgery was performed at Yale-New Haven Medical Center. Plaintiff, however, continued his eye examinations and treatment with "Defendants" through February 2015. Plaintiff attaches a treatment record from Stamford, signed by doctor John P. DeCarlo, dated February 6, 2015. He states that it was his hope that Fleischman, Stamford, and Dr. Noecker would be able to work together, and consult with each other, to remedy the left eye issues and to continue treatment even after it was removed. He further alleges that he continued treatment with Stamford through February 2015 in an effort to maintain his health and evaluate his eyes. Plaintiff commenced this action on June 15, 2016.

Plaintiff contends that, in light of the foregoing, the statute of limitations on his medical malpractice and lack of informed consent claims against Defendants was tolled by the "continuous treatment" doctrine. Even though Plaintiff did not treat directly with Fleischman within the applicable statute of limitations, he continuously treated with doctors from Stamford, and Fleischman "clearly works together with, and is a part" of Stamford. While Fleischman asserts that he only rented space from Stamford, Plaintiff provides a computer print-out of Stamford's web page entitled "our doctors" that includes Fleischman. Plaintiff claims that his subsequent treatment with Stamford and Dr. Noecker may be imputed to Fleischman, as that treatment was directly related and in response to the surgery that Fleischman performed in 2011. Regarding his emotional distress claims, Plaintiff asserts that one could reasonably believe that the alleged acts of malpractice resulting in the loss of an eye would cause a mental injury.

In reply, Defendants note that Plaintiff has not contested dismissal of the complaint as to Ambulatory or dismissal of his "loss of enjoyment of life" claim. Defendants argue that Plaintiff's "continuous treatment" claim must fail because Fleischman and/or Retina have no affiliation or association with Stamford. In another affidavit, Fleischman reaffirms that he only rents space from Stamford to see his own patients or patients referred to him by Stamford. Such a relationship is insufficient for the purposes of the continuing treatment doctrine. Fleischman does not have joint billing or any other business relationship with Stamford. Fleischman asserts that he was unaware that Stamford was using his photograph on their web site and furthermore, the web site was dated August 2016, which was well after the events that gave rise to this action. In any event, Defendants state that Fleischman was either an independent contractor or consultant

to Stamford, and he was not a partner, agent, or employee of this entity. Fleischman further states that he had absolutely no involvement with the treatment of Plaintiff after February 2012, and he never referred Plaintiff to treat with anyone else, and in fact, Plaintiff was supposed to return for a follow up visit later in 2012, but never did so. Defendants further argue that only one entity may be liable vicariously for a physician's actions at any one time. If, as Plaintiff claims, Fleischman and Retain are somehow connected through a business relationship with Stamford, there would be no reason to sue them independent of Stamford. Defendants further argue that Plaintiff was not continuously treating for symptoms stemming from the Fleischman surgery, but for symptoms relating to his chronic diabetic retinopathy. Finally, Defendants assert that Plaintiff has not sufficiently alleged a cause of action for negligent infliction of emotional distress.

II. Standard of Review

CPLR 3211(a)(5)

In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, the defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired (*see City of Yonkers v. 58A JVD Indus., Ltd.*, 115 A.D.3d 635 [2d Dep't 2014]) "The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period" (*Id.*).

CPLR 3211(a)(7)

On a motion to dismiss pursuant to this section of the CPLR 3211(a)(7), a court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton*

Manufacturing Co., Inc. v. Blumberg, 242 A.D.2d 205 [1st Dept. 1997][on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory"(*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1st Dept. 1992]).

The Court of Appeals has recognized that, even when moving under CPLR 3211(a)(7), a defendant may submit evidence in support of its motion to attack a well-pleaded, cognizable claim (*see Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128 [1st Dept. 2014], citing *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633 [1976]). When documentary evidence is submitted by a defendant, "the standard morphs from whether the plaintiff has stated a cause of action to whether it has one" (John R. Higgitt, CPLR 3211[a][7]*: Demurrer or Merits - Testing Device?*, 73 Albany Law Review 99, 110 [2009]). Dismissal is appropriate only where the documentary evidence flatly rejects a plaintiff's well-pleaded and cognizable claim (*Basis Yield Alpha Fund (Master)*, *supra* at 136 [internal citations omitted]), or conclusively establishes a defense to the asserted claims as a matter of law (*see Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]).

III. Applicable Law and Analysis

Statute of Limitations

An action sounding in medical malpractice or lack of informed consent must be commenced "within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure;" (CPLR 214-a). In this matter, Defendants established their prima facie entitlement to judgment as a matter of law by asserting, with respect to Ambulatory, that Plaintiff's last date of treatment was August 17, 2011, and with respect to

Fleischman and Retina, his last treatment date was February 20, 2012. Since Plaintiff did not commence this action until June 15, 2016, over 2 ½ years later, the Defendants carried their initial burden of demonstrating that his claims sounding in medical malpractice and lack of informed consent were time barred (*see Wilson v. Southhampton Urgent Medical-Care, P.C.*, 112 A.D.3d 499 [1st Dept. 2013]). The burden therefore shifted to Plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable as to each defendant (*id.*, citing *Cox v. Kingsboro Med. Group*, 88 N.Y.2d 904, 906, 646 N.Y.S.2d 659, 669 N.E.2d 817 [1996]).

In opposition to the motion, Plaintiff alleges that the statute of limitations as to the moving Defendants was tolled because of the "continuous treatment" doctrine. A medical malpractice action generally accrues from the date of the alleged wrongful act (*see Chestnut v. Bobb-McKoy*, 94 A.D.3d 659 [1st Dept. 2012]; CPLR 214-a). Where, however, "there is a continuous course of treatment for the conditions giving rise to the malpractice action, the running of the applicable statutory period is tolled during the period of continuous treatment" (*id.*, citing *Young v. New York City Health & Hosps. Corp.*, 91 N.Y.2d 291[1998]; *Langsam v. Terraciano*, 22 A.D.3d 414, 802 N.Y.S.2d 449 [2005]). The policy reasons supporting the doctrine are that "a plaintiff should not have to interrupt ongoing treatment to bring a lawsuit, because the doctor not only is in a position to identify and correct the malpractice, but also is best placed to do so" (*id.*, [internal quotations omitted]). Where there are no continuing efforts by a doctor "to treat a particular condition or complaint, however, those policy reasons do not justify the patient's delay in bringing suit" (*id.*, [internal citations omitted]). In determining whether the "continuous treatment" doctrine applies, "the focus is on whether the patient believed that further treatment was necessary, and whether he sought such treatment" (*see Devadas v. Niksarli*, 120 A.D.3d 1000 [1st Dept. 2014], citing *Rizk v. Cohen*, 73 N.Y.2d 98, 104 [1989]). Furthermore, "a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician (*id.*, citing *Ramirez v. Friedman*, 287 A.D.2d 376, 377 [1st Dept. 2001]).

In this matter, Plaintiff does not dispute that he did not treat directly with Dr. Fleischman or Retina at any point after February 20, 2012. Instead, Plaintiff alleges that he sought

continuous treatment from other doctors – Dr. Noecker, and doctors affiliated with Stamford – for a condition that allegedly arose from, or was not resolved by, Fleischman's August 2011 surgery. Where, as here, the alleged continuous treatment "is provided by someone other than the allegedly negligent practitioner, there must be "'an agency or other relevant relationship'" between the health care providers" (*see Allende v. New York City Health & Hosps. Corp.*, 90 N.Y.2d 333, 339 [1997], citing *Meath v Mishrick*, 68 NY2d 992, 994 [1986], quoting *McDermott v Torre*, 56 NY2d 399, 403 [1982]).

After careful review of the complaint and the Plaintiff's additional submissions with respect to Fleischman and Retina, this Court finds that Plaintiff's contentions in his complaint and affidavit permit the inference that Plaintiff's ongoing treatment, wherein subsequent doctors addressed a condition that allegedly stemmed from surgery performed by Fleischman in August of 2011, was attributable to Fleischman, because Fleischman maintained some affiliation or "relevant relationship" with Stamford at relevant times (*see, e.g., Blaier v. Cramer*, 303 A.D.2d 301 [1st Dept. 2003]). On a motion to dismiss, the allegations in the complaint supplemented by any additional submissions of the plaintiff must be given "their most favorable intendment" (*see Derrick v. American Intern. Group, Inc.*, 126 A.D.3d 576 [1st Dept. 2015], quoting *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 442-43 [1982], *cert. den.*, 459 U.S. 1146 [1983]).

Plaintiff alleges that he commenced treatment with Dr. Maiolo, a doctor affiliated with Stamford, in 2011. Dr. Maiolo then referred Plaintiff to Fleischman, who Plaintiff noted was one of the four physicians advertised on Stamford's web site. Plaintiff claims that after Fleischman performed surgery on Plaintiff's left eye in August 2011, he and another doctor from Stamford referred Plaintiff to Dr. Noecker to address persisting and continuing eye pain, irritation, and other issues that were supposed to be resolved by the surgery. Dr. Noecker administered treatment thereafter, including further surgery. Eventually, it was determined that Plaintiff's left eye had to be removed. While Dr. Noecker was not affiliated with Fleischman or Stamford, Plaintiff provides evidence that Dr. Noecker corresponded with doctors from Stamford to regularly update them regarding Plaintiff's treatment progression (*see Keith v. Schulman*, 265 A.D.2d 380 [2nd Dept. 1999]). Plaintiff also provides records indicating that he followed up with other Stamford doctors in 2013 and 2015 regarding ongoing eye issues. Accepting these

allegations as true, Plaintiff has sufficiently alleged the existence of some legally "relevant relationship" between Fleischman and the doctors at Stamford so as to impute their continued treatment onto Fleischman (*see Allende*, 90 N.Y.2d 333, 338-339). These allegations further evince that the end of Plainiff's treatment with Fleischmann did not sever his "continuing trust and confidence" in the original provider, as he believed that he was seeking medical help to resolve an ongoing issue, and it cannot be said as a matter of law that he and Fleischmann did not anticipate or contemplate any further consultation or treatment relating to the surgery (*see id.*). It bears repeating that at this pre-answer, pre-discovery posture, the Court is required to accept Plaintiff's allegations as true unless those allegations are flatly contradicted by documentary evidence (*see Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128; *see also Ferraro v. New York City Dept. of Educ.*, 115 A.D.3d 497 [1st Dept. 2014]). Fleischman provides two affidavits wherein he denies any business relationship with Stamford, denies ever referring Plaintiff to other doctors, states that Stamford used his name and photograph on its website without permission, and disputes the accuracy of Plaintiff's allegations of treatment through February 2015. However, these affidavits do not constitute "documentary evidence" for purposes of a motion predicated upon CPLR 3211 (*see Flowers v. 73rd Townhouse, LLC.*, 99 A.D.3d 431 [1st Dept. 2012]; *see also Asmar v. 20th and Seventh Associates, LLC.*, 125 A.D.3d 563 [1st Dept. 2015]). Furthermore, Fleischman's billing and treatment records, alone, do not "utterly refute[] plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law" (*see Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 [2002]). Fleischman's further contentions in reply that Plaintiff's course of treatment was for his general condition of diabetic retinopathy, and not for symptoms arising out of the August 2011 surgery, only serve to raise issues of fact at this stage of the proceedings. In light of the foregoing, defendants Fleischman and Retina are not entitled to dismissal of Plaintiff's medical malpractice and lack of informed consent claims pursuant to CPLR 3211(a)(5).

Plaintiff's medical malpractice and lack of informed consent claims against defendant Ambulatory, however, must be dismissed as time-barred. It is undisputed that Plaintiff's surgery at this facility took place on August 18, 2011, and Plaintiff never returned to the facility at any point thereafter. Plaintiff's claims against Ambulatory sound in vicarious liability due to

Fleischman's alleged negligence during the August 18 procedure. Accordingly, Plaintiff's claims against Ambulatory accrued on that date, thus rendering his December 15, 2016 commencement of this action against Ambulatory untimely as a matter of law (*see DiFilippi v. Huntington Hosp.*, 203 A.D.2d 321 [2nd Dept. 1994]).

Negligent Inflictions of Emotional Distress, Loss of Enjoyment of Life

Even if it were considered timely, Plaintiff's claims of negligent infliction of emotional distress must be dismissed as to all defendants pursuant to CPLR 3211(a)(7). A cause of action for negligent infliction of emotional distress "must be supported by allegations of conduct by the defendants " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' " (*Sheila C. v. Povich*, 11 A.D.3d 120 [1st Dept. 2004], citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983],1 quoting Restatement [Second] of Torts § 46, Comment d; *Dillon v. City of New York*, 261 A.D.2d 34 [1st Dept. 1999]). "Such extreme and outrageous conduct must be clearly alleged in order for the complaint to survive a motion to dismiss" (*id.*, citing *Dillon v. City of New York, supra*). Here, the Plaintiff's complaint, even when coupled with the allegations contained in his affidavit, do not set forth conduct that is sufficiently "outrageous" "extreme" or "utterly intolerable in a civilized community" (*see Kornicki v. Shur*, 132 A.D.3d 403 [1st Dept. 2015]).

Finally, Plaintiff's cause of action labeled "loss of enjoyment of life" is dismissed because this is a component of plaintiff's pain and suffering claim, and not a separate cause of action (*see Nussbaum v. Gibstein*, 73 N.Y.2d 912 [1989]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants' motion to dismiss Plaintiff's causes of action asserted against Ambulatory is granted, and those claims are dismissed, and it is further,

ORDERED, that Defendants' motion to dismiss Plaintiff's cause of action for negligent infliction of emotional distress is granted, and that claim is dismissed, and it is further,

ORDERED, that Defendants' motion to dismiss Plaintiff's medical malpractice and lack of informed consent causes of action against Fleischman and Retina is denied, and it is further,

ORDERED, that Defendants' motion to dismiss Plaintiff's cause of action for "loss of enjoyment of life" is granted, and that claim is dismissed.

This constitutes the Decision and Order of this Court.

Dated: 12/6, 2016

Hon. Mary Ann Brigantti, J.S.C.