Preston v Janssen Pharms., Inc.
2018 NY Slip Op 31140(U)
June 5, 2018
Supreme Court, New York County
Docket Number: 158570/17
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11
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ZAYRE PRESTON, INDEX NO. 158570/17

Plaintiff,
-against-

JANSSEN PHARMACEUTICALS, INC., JANSSEN ORTHO, LLC, JANSSEN PHARMS, GLENMARK PHARMACEUTICALS, INC., USA, GLENMARK PHARMACEUTICALS USA INC., GLENMARK GENERICS, INC., USA, GLENMARK GENERICS and Dr. RAIHANA KHORASANEE, M.D.,

Defendants.
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JOAN A. MADDEN, J.:

In this action for medical malpractice, negligence and products' liability, plaintiff moves for an order pursuant to General Municipal Law §50-e(5) granting leave to serve a late notice of claim nunc pro tunc, and an order pursuant to CPLR 305, 1003 and 3025, granting leave to serve and file a supplemental summons and amended complaint adding The City of New York and New York City Health and Hospitals Corporations as party defendants. Defendant Khorasanee opposes the motion.

In support of the motion, plaintiff submits an affidavit that she began treating at Metropolitan Hospital Center on or about April 16, 2014 for a "psychiatric condition" and defendant Dr. Khorasanee prescribed the drug known as Topamax/Topiramate. She states that in April 2015, she was "still treating regularly and continually" with Dr. Khorasanee at Metropolitan Hospital for the same psychiatric condition and was still taking Topamax/Topiramate, when she "began experiencing pain in the left eye." On May 5, 2015, she

went to the Metropolitan Hospital Emergency Room when she "started losing vision" and was told to see an eye specialist. She saw an eye specialist and "was diagnosed with uveitis and other eye disorders and since have lost most of my vision in both eyes." Plaintiff states she "did not know until on or about May 24, 2017 that this eye disorder could be caused by the drug until I spoke to an attorney," and she also "did not know that a notice of claim had to be filed with the City of New York Health and Hospitals Corporation within 90-days of the onset of the injury which would have been 90 days from on or about April 28, 2015." Plaintiff asserts that the pharmacy records show that she has "continuously treated" with Dr. Khorasanee at Metropolitan Hospital since April 16, 2014 to the present for the same psychiatric condition." [1]

On September 27, 2017, plaintiff commenced the instant action against several drug manufacturers and Dr. Khorasanee, asserting claims for medical malpractice, negligence and products' liability. Plaintiff is now moving for leave to serve and file a late notice claim and argues that from April 16, 2014, she has "continuously treated" with Dr. Khorasanee at Metropolitan Hospital Center for a psychiatric condition where Topamax/Topiramate was prescribed, and that the continuous treatment with Dr. Khorasanee "continues to the present" as she is still treating with Dr. Khorasanee for the "same psychiatric condition." Plaintiff also argues that since she was "never warned of the dangers of the drug to the eyes and she did not know it could cause these eye problems," and was "continually prescribed the drug," she should not be "burdened" with the requirement to file a notice of claim. She further argues that neither Dr. Khorasanee nor the hospital is prejudiced by the delay, since they had actual knowledge of

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[1] At oral argument the Court asked plaintiff's counsel when plaintiff ceased taking Topamax/Topiramate, and counsel was not sure. By letter dated March 29, 2018, counsel advised the Court that plaintiff stopped taking the medication in June 2017.

the facts constituting claim based on the hospital's own records made contemporaneously with the events giving rise to plaintiff's claim.

Service of a notice of claim within 90 days of the alleged malpractice is a condition precedent to maintaining an action against The City of New York and the New York City Health and Hospitals Corporation. See General Municipal Law §§50-e(1)(a), 50-i; McKinney's Uncons Laws of NY §7401(2) [New York City Health and Hospitals Corporation Act §20(2); L 1969, ch 1016, §1, as amended]; Plummer v. New York City Health and Hospitals Corp, 98 NY2d 263, 266 (2002). Under General Municipal Law §50-e(5), a party may move for leave to serve a late notice of claim either before or after the commencement of the action, but not more than one year and 90 days after the cause of action accrued, unless the statute of limitations is tolled. See General Municipal Law §50-e(5); Pierson v. City of New York, 56 NY2d 950 (1982); Zayed v. New York City Department of Design & Construction, 157 AD3d 410 (1st Dept 2018). Here, plaintiff concedes the applicable statute of limitations has expired, as she relies on the continuous treatment doctrine to toll the statute of limitations.

Under the continuous treatment doctrine, the statute of limitations for medical malpractice "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 same original condition or complaint.'" Nykorchuck v. Henriques, 78 NY2d 255, 258 (1991) (quoting McDermott v. Torre, 56 NY2d 399). "[E]ssential to the application of the doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit," and "neither the mere 'continuing relationship between physician and patient' nor 'the continuing nature of a diagnosis' is sufficient to satisfy the requirements of the doctrine." Id

at 258-259 (quoting McDermott v. Torre, supra). "CPLR 214-a explicitly requires that, for the toll to apply, the continuous treatment must be 'for the same illness, injury or condition which gave rise to the . . . act, omission or failure' complained of." Id at 259.

The case defendant Khorasanee cites, Boyle v. Fox, 51 AD3d 1243 (3rd Dept), lv app den 11 NY3d 701 (2008), is directly on point. The plaintiff in Boyle was prescribed Gentamicin for endocarditis, and alleged that as a result of the negligent administration and monitoring of that drug, she suffered inner ear damage affecting her vision and balance, and causing headaches. The Third Department held that the continuous treatment doctrine did not apply, determining that while defendants' medical records showed that plaintiff developed "ototoxitcity from the Gentamicin with vestibular problems" and complained about her vision and balance for a few months after the discontinuance of Gentamicin, the record failed to demonstrate a continuous course of treatment by defendants for the condition at issue in the malpractice action, i.e. the inner ear damage affecting her vision and balance. Id at 1246.

The facts in the case at bar are nearly identical to those in Boyle. Here, plaintiff alleges she has suffered vision loss, balance problems and headaches as a result of the negligent administration of the drug Topimax/Topiramate, prescribed by Dr. Khorasanee for a psychiatric condition. Just as in Boyle, plaintiff fails to demonstrate a continuous course of treatment for the vision, balance and headache conditions giving rise to the malpractice claim. Given the narrow application of the continuous treatment doctrine, the Court is constrained to hold that the doctrine does not apply to toll the statute of limitations, and as such, the Court "lack[s] the power to authorize" the late filing of the notice of claim. Pierson v. City of New York, supra at 956; see Zayed v. New York City Department of Design & Construction, supra; Young v. New York City

Health & Hospitals Corp, 147 AD3d 509 (1st Dept 2017). Thus, the branch of plaintiff's motion for leave to serve a late notice of claim is denied.

The branch of plaintiff's motion to amend the complaint to add The City of New York and New York City Health and Hospitals Corporations as party defendants, is likewise denied. Although motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise, leave to amend should be denied if the proposed amendment "fails to state a cause of action or is palpably insufficient as a matter of law." Thompson v. Cooper, 24 AD3d 203 (1st Dept 2005); accord Aerolineas Galapagos, SA v. Sundowner Alexandria, LLC, 74 AD3d 652 (1st Dept 2010); Blake v. Ford Motor Co, 41 AD3d 150 (1st Dept 2007); 397 West 12th St. Corp v. Zupa, 34 AD3d 236 (1st Dept 2006), lv app den 8 NY3d 815 (2007). As determined above, a notice of claim is necessary for plaintiff to maintain an action against both proposed new defendants. Thus, given the denial of plaintiff's application to serve a late notice of claim, the amendment must be denied as "palpably insufficient as a matter of law." Thompson v. Cooper, supra.

Accordingly, it is

ORDERED that plaintiff's motion is denied in its entirety.

DATED: June 5 , 2018

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C.