

Perez v Baez
2018 NY Slip Op 32228(U)
August 16, 2018
Supreme Court, Kings County
Docket Number: 508880/2016
Judge: Ellen M. Spodek
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PRESENT:

HON. ELLEN M. SPODEK, Justice

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AMALIA PEREZ, as Administratrix of the Estate
Of MOISES PEREZ, deceased,

Plaintiff,

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in ad for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York on the 16th day of August 2018.

-against-

DAYSI BAEZ, M.D., FOREST HILLS HOSPITAL
And SERGIO MARTINEZ, M.D.

Defendants.
-----X

DECISION AND ORDER

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Defendant LONG ISLAND JEWISH FORSEST HILLS, a division of Long Island Jewish Medical Center f/k/a FOREST HILLS HOSPITAL ("FHH") and defendant SERGIO MARTINEZ, M.D. move pursuant to CPLR 3211 for an order dismissing the plaintiff's complaint. Plaintiff opposed the motion.

On July 20, 2013, Moises Perez ("decendent") presented to defendant FHH emergency department at the direction of his primary care physician, defendant DR. DAYSI BAEZ. Dr. Baez advised him that his potassium and sodium levels were dangerously low, putting him at risk of falling into a coma.

While decendent was in the FHH emergency room, plaintiff, Amalia Perez, testified that the decendent underwent a few tests, including a chest x-ray. Decendent was subsequently

admitted to FHH for treatment of hyponatremia or low sodium levels. During the admission to FHH, decedent treated with pulmonologist, defendant Dr. Sergio Martinez.

Plaintiff testified that Dr. Martinez informed decedent and plaintiff that decedent had a spot on his left lung. Plaintiff further testified that Dr. Martinez advised them that the spot was old and attributable to decedent having had contact in the past with someone with Tuberculosis.

On August 1, 2013, the decedent underwent a bronchoscopy with Dr. Martinez, which indicated a mass to decedent's upper left lobe with cavitation. Decedent was discharged from FHH on August 1, 2013. At that time, decedent's sodium levels had improved from 116 to 128.

The resulting pathology report dated August 5, 2013 – four days after plaintiff's discharge from FHH indicates that Dr. Martinez was notified of the results.

Upon his discharge, plaintiff testified that a man who Dr. Martinez had previously identified as his assistant, provided plaintiff and decedent with a set of discharge papers. Plaintiff testified that she looked at some, but not all, of these papers before handing them to Dr. Baez at decedent's next visit with her.

The discharge papers state "recommendations" follow up [with] Dr. Martinez, Sergio within 1 week." Plaintiff testified that it was her and her husband's understanding that his treatment at FHH was complete as of August 1, 2013.

Plaintiff testified that decedent did not receive treatment from FHH or from Dr. Martinez during the remainder of 2013 and all of 2014. Plaintiff testified that decedent did continue treating with Dr. Baez following his 2013 discharge from FHH.

On July 23, 2015, plaintiff and her children brought decedent to the FHH emergency department after he lost consciousness. While he was being treated in the emergency department, Dr. Martinez read a CT scan taken of decedent in the weeks prior and informed plaintiff that decedent had lung cancer. He was ultimately admitted to FHH from the emergency department, where he remained until his August 5, 2015 discharge.

Decedent subsequently underwent two chemotherapy sessions before being admitted to Jamaica Hospital, where he passed away due to complications from cancer on August 29, 2015.

Under CPLR 214, an action for medical malpractice must be commenced within two years and six months following the act, omission or failure complained thereof. The statute of limitations begins to run on the date of the alleged medical malpractice. Schwelnus v. Urological Assoc. of L.I, P.C., 94 A.D.3d, 971, 943 N.Y.S.2d 141. 143 (2nd Dept. 2012). The continuous treatment doctrine tolls the statute of limitations for a medical malpractice action when the plaintiff can demonstrate that they continued to receive treatment such as surgery, therapy or the prescription of medication, from the defendant. *Id.*

The defendants sustained the burden of prima facie entitlement to dismissal as a matter of law for the statute of limitations. The burden of proof falls on the plaintiff to demonstrate continuous treatment which would toll the statute of limitations. Leale v. NYC Health and Hospitals Corporation, 634 N.Y.S.2d 536 (2nd Dept., 1995).

In Gomez v. Katz, 61 AD3d 108 (2nd Dept., 2009), the Second Department held that the continuous treatment doctrine contains three 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. Falling short of this requirement is the mere continuation of a general doctor-patient relationship, continuing efforts to arrive at a diagnosis or failure by a physician to properly diagnose a condition that prevents treatment altogether.

The second element of the doctrine is that the course of treatment provided by the physician must be for the same condition of complaints underlying the plaintiff's malpractice claim.

Massie v. Crawford, 78 N.Y.2d 516 (1991) (continuous treatment doctrine inapplicable where routine periodic gynecological examinations were not related to the pelvic inflammatory disease allegedly caused by the intrauterine device installed by the physician fourteen years earlier).

The third element of the doctrine is that the physician's treatment be deemed "continuous". The court further held in Gomez that the underlying premise of the continuous treatment doctrine is that the doctor-patient relationship is marked by continuing trust and confidence 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 would interrupt the course of treatment itself.

Routine examinations or visits concerning issues unrelated to the condition at issue and giving rise to the claim, are insufficient to invoke the benefit of the continuous treatment doctrine. Schister v. City of NY, 882 N.Y.S.2d 224 (2nd Dept., 2009).

Applying these elements to the instant case, plaintiff decedent was discharged from FHH on August 1, 2013. According to plaintiff's testimony, she and her husband believed at the time that decedent's treatment at FHH was complete as of August 1, 2013. Plaintiff and

decedent did not return to FHH until two years later which is not continuous treatment, but instead is a resumption of treatment.

This action was commenced on May 26, 2016, by electronic filing of plaintiff's Summons & Complaint. The limitations period for allegations relating to this admission expired on February 1, 2016. Plaintiff's allegations against FHH and Dr. Martinez relating to decedent's 2013 admission are barred by the statute of limitations.

The plaintiff has failed to meet her evidentiary burden and the causes of action related to decedent's 2013 hospitalization against FHH and Dr. Martinez are dismissed as a matter of law as beyond the statute of limitations governing medical malpractice actions.

This constitutes the decision and order of the court.

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