

Slavin v Feder

2021 NY Slip Op 33737(U)

January 19, 2021

Supreme Court, Nassau County

Docket Number: Index No. 617589/2019

Judge: Steven M. Jaeger

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: TRIAL/IAS PART 33**

PRESENT: HON. STEVEN M. JAEGER

X

ALEXANDRA SLAVIN,

Plaintiff,

XXXX

-against-

Index No.: 617589/2019
Motion Seq. No.: 001
Mot. Submitted: 08/20/2020

**JOHN MARTIN FEDER, M.D., NORTHWELL
HEALTH INC., and ORLIN & COHEN ORTHOPEDIC
ASSOCIATES, LLP.,**

Defendants.

X

Papers submitted on the motion:

Notice of Motion	x
Affidavit in Opposition	x
Reply Affidavit	x

Upon the foregoing papers, the motion by the Defendants, JOHN MARTIN FEDER, M.D., and ORLIN & COHEN ORTHOPEDIC ASSOCIATES, LLP., (“Defendants”) for an order pursuant to CPLR § 3211 (a)(5), dismissing the Plaintiff’s complaint is decided as hereinafter provided.

This medical malpractice action arises out of the medical care/treatment Plaintiff received on May 25, 2017, at South Shore Ambulatory Surgery Center. Plaintiff commenced this cause of action on December 18, 2019. According to the pleadings, the intra-operative and post-surgical care rendered to Plaintiff was rendered in a careless and negligent manner by Defendants in that Defendants negligently prescribed Ancef and

Cefazolin¹ to be administered to Plaintiff despite being informed that Plaintiff is allergic to Penicillin. The verified bill of particulars (A copy of the Verified Bill of Particulars is annexed to Plaintiff's Reply Affidavit as **Exhibit "A"**) further alleges that the administration of the Cefazolin caused allergic reactions in Plaintiff which could have been avoided had Defendants followed proper procedures during Plaintiff's admission to the facility. The Court notes that the case was discontinued by stipulation as against Defendant Northwell Health Inc. The remaining Defendants move to dismiss with prejudice pursuant to CPLR 214-a arguing that the statute of limitations has run.

A medical malpractice cause of action accrues on the date of the alleged act, omission or failure complained of, and is subject to a two-and-one-half year statute of limitations. *CPLR § 214-a; Nespola v Strang Cancer Prevention Center*, 36 A.D.3d 774 [2nd Dept. 2007]; *Gaspard v Herard*, 20 A.D.3d 504, 505 [2nd Dept. 2005]. Under the continuous treatment doctrine, however, the statute of limitations is tolled when the course of treatment, i.e., affirmative and ongoing conduct², which includes the wrongful acts or omissions, has run continuously and is related to the same original condition or complaint. *Mule v Peloro*, 60 A.D.3d 649, 650 [2nd Dept. 2009]. The doctrine contains three principal elements: 1) the plaintiff continued to seek and, in fact, obtained an actual course of

¹ Ancef is a brand of Cefazolin and according to the verified complaint, is a derivative of Penicillin.

² Mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll. *Nykorchuck v Henriques*, 78 N.Y.2d 255, 259 [1991].

treatment from the defendant physician during the relevant period; 2) the course of treatment provided by the physician was for the same conditions or complaints underlying the malpractice claim; and 3) the physician's treatment is deemed "continuous" i.e., further treatment is explicitly anticipated by both physician and patient as manifested by a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past. The law recognizes, however, that a discharge by a physician does not preclude application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for conditions related to earlier treatment. *Gomez v Katz*, 61 A.D.3d 108, 112 [2nd Dept. 2009]. Neither a general physician/patient relationship, routine examinations nor visits concerning matters unrelated to the condition giving rise to the malpractice claim are sufficient to invoke the benefit of the doctrine. *Boyle v Fox*, 51 A.D.3d 1243, 1244 [3rd Dept. 2008], *lv to appeal denied* 11 N.Y.3d 701 [2008].

According to Plaintiff's verified bill of particulars, she was administered the Cefazolin on May 25, 2017. Though she argues that the statute was tolled by the continuous treatment doctrine, it appears from a review of the record, that the continuing treatment by the remaining Defendants did not relate to her allergic reaction to the Cefazolin administered on May 25, 2017. As such, this action, commenced on December 18, 2019, is time barred as to the Defendants JOHN MARTIN FEDER, M.D. and ORLIN & COHEN ORTHOPEDIC ASSOCIATES, LLP.

Accordingly, it is hereby

ORDERED, that the Defendants' motion to dismiss the complaint against said Defendants, is **GRANTED**.

This constitutes the decision and order of the Court.

DATED: January 19, 2021
Mineola, New York

ENTERED

Jan 21 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Steven M. Jaeger

Steven M. Jaeger
Acting Justice of the Supreme Court

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