McLoughlin v New York Eye Specialists
2022 NY Slip Op 32520(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 805001/2022
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 805001/2022

MOTION DATE 05/16/2022

MOTION SEQ. NO. 001

MERCEDES MCLOUGHLIN,

Plaintiff,

- v -

NEW YORK EYE SPECIALISTS and KEN MOADEL, M.D.,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice based upon alleged departures from good and accepted practice and failure to obtain informed consent, the defendants move pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred. The plaintiff opposes the motion. The motion is denied.

The plaintiff commenced this action on December 30, 2021 by filing a summons and complaint on that date (*see* CPLR 304[a]). In her complaint, she alleged that she began treating with the defendant New York Eye Specialists (NYES) and the defendant ophthalmologist Ken Moadel, M.D., on August 5, 2013. She averred that, on May 8, 2019, Moadel performed refractive eye surgery on her left eye at NYES, and that she remained under the care of the defendants in connection with that surgery until August 28, 2019. The plaintiff alleged that, as a consequence of the defendants' malpractice in performing the surgery, she was caused to sustain injury to her left eye. She further alleged that the defendants failed to obtain her fully informed consent to the surgical procedure that they employed.

In their motion, the defendants agreed with the plaintiff that they began treating her on August 5, 2013. They alleged that Moadel performed LASIK surgery upon the plaintiff on that

date. Their certified records reflect that they examined the patient on December 16, 2014 and again on June 6, 2015, followed by a "touch up" procedure on July 7, 2015, and an examination on July 8, 2015. According to the defendants, the plaintiff returned for further care from Moadel on May 8, 2018, although their records do not reflect a visit on that date. Rather, the records reveal that they next examined the plaintiff on October 2, 2018, that she again returned on May 8, 2019, at which time Moadel performed refractive eye surgery on her left eye, and that she returned for follow-up visits on May 10, 2019 and May 18, 2019. The defendants alleged that the plaintiff was scheduled to return for another follow-up visit on May 21, 2019, but that she cancelled the appointment and never returned for any further treatment from them. The defendants thus contended that the applicable 2-year-and-six-month limitations period of CPLR 214-a must be measured from the date of last treatment on May 18, 2019, and that the limitations period expired on November 18, 2021. They argued that this action, commenced on December 30, 2021, was time-barred.

In opposition to the defendants' motion, the plaintiff submitted her own affidavit, in which she stated that

> "I then went back to Dr. Moadel's office in June of 2019 and was examined by a woman of European background in his office who was slim, middle aged, blond hair and spoke some Spanish. She also examined my eyes and advised me that my eyes were fine as I could read without wearing glasses. I made complaints of pain and discomfort to my left eye."

She averred that, between her May 18, 2019 visit and her June 2019 visit, she took Tylenol and other pain killers that caused her to become sick to her stomach. The plaintiff asserted that she

> "then contacted Dr. Moadel's office, and . . . requested to be examined personally by Dr. Moadel. I then saw Dr. Moadel in his office July of 2019, approximately one to two weeks after the July 4th holiday. At this examination I reported to Dr. Moadel that I was experiencing pain, tears and the outside of my left eye as dark. I also reported to Dr. Moadel that my left eye looked blood red. Dr. Moadel then did a very quick examination of my left eye and left the examination room. Dr. Moadel reported to me that he did not see any problems with my left eye."

In connection with a motion to dismiss a complaint as time-barred, "a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made," the burden shifts to the plaintiff to raise a question of fact as to "whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085, 1085-1086 [2d Dept 2016]; *see Murray v Charap*, 150 AD3d 752 [2d Dept 2017]; *Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051 [2d Dept 2011]). The statute of limitations applicable to actions to recover for medical malpractice against a private health-care provider is 2½ years, measured from "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act omission or failure" (CPLR 214-a). Likewise, the statute of limitations applicable to a cause of action sounding in lack of informed consent is 2½ years from the date of the alleged failure to provide the patient with information concerning the risks and benefits of a particular treatment or procedure (*see Wilson v Southampton Urgent Med-Care, P.C.*, 112 AD3d 499 [1st Dept 2013]).

The "continuous treatment" provision of CPLR 214-a posits that the limitations period "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 the same original condition or complaint*" (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991] [internal quotation marks omitted] [emphasis added]; *see Massie v Crawford*, 78 NY2d 516, 519 [1991]; *McDermott v Torre*, 56 NY2d 399, 405 [1982]; *Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *Jajoute v New York City Health & Hosps. Corp.*, 242 AD2d 674, 676 [1st Dept 1997]). This rule applies both to claims of alleged departures from accepted practice and lack of informed consent (*see Murray v Charap*, 150 AD3d 752, 753-754 [2d Dept 2017]).

In analyzing whether to apply the continuous treatment doctrine, the Appellate Division, First Department, has articulated a nuanced rule that takes account of a "plaintiff's belief" that he or she "was under the active treatment of defendant at all times, so long as" the treatments did not "result in an appreciable improvement" in his or her condition (*Devadas v Niksarli*, 120 AD3d 1000, 1006 [1st Dept 2014]). Even where a "plaintiff pursued no treatment for over 30 months after" an initial, allegedly negligent surgical treatment (*id.* at 1005),

> "[i]n determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he [or she] sought such treatment (*see Rizk v Cohen*, 73 NY2d 98, 104 [1989]). Further, this Court has suggested that a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician (*Ramirez v Friedman*, 287 AD2d 376, 377 [1st Dept 2001]). Plaintiff's testimony that he considered defendant to be his '[doctor] for life,' and that the efficacy of the [treatment] was guaranteed, was a sufficient basis for the jury to conclude that such a relationship existed"

(*id.* at 1006). Where such a situation obtains,

> "[c]ases such as *Clayton v Memorial Hosp. for Cancer & Allied Diseases* (58 AD3d 548 [1st Dept 2009]) are inapplicable . . . , to the extent they reiterate that 'continuous treatment exists "when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past"' (58 AD3d at 549, quoting *Richardson v Orentreich*, 64 NY2d at 898-899)"

(*id.* at 1007).

Contrary to the plaintiff's contention, the defendants' certified office records constitute admissible evidence (*see* CPLR 4518[a]; *Matter of Bronstein-Becher v Becher*, 25 AD3d 796, 797 [2d Dept 2006]), and were sufficient to enable the defendants to make a prima facie showing that her last date of treatment was May 18, 2019. Nonetheless, applying the First Department's articulation of the law, as this court must (*see D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]), the plaintiff, by submitting a detailed affidavit as to her course of treatment with the defendants, and the dates thereof (*see Cohen v Gold*, 165 AD3d 879, 883 [2d Dept 2018]; *Connors v Eng*, 42 AD3d 511, 512 [2d Dept 2007]), has raised questions of fact as to

whether she continued to treat with the defendants with respect to problems arising from her May 8, 2019 surgery up to and including two weeks after July 4, 2019, or until on or about July 18, 2019. The affidavit also constituted proof that she continued to have a good-faith belief of an ongoing relationship of trust and confidence with the defendants. Inasmuch as the plaintiff did not personally verify the allegation in her complaint that her last date of treatment was August 28, 2019, the court cannot give evidentiary weight to that allegation. Her affidavit, however, was sufficient to raise questions of fact as to whether the defendants continuously treated her until on or about July 18, 2019, that the limitations period applicable to this dispute thus expired on or about January 18, 2022, and that her commencement of this action on December 30, 2021 was effectuated within the limitations period. The defendants' motion thus must be denied.

The court denies the defendants' request, made in their reply papers, to expedite discovery on the issue of continuous treatment and thereafter hold an evidentiary hearing thereon. To the extent that there remain disputed issues of fact as to when the plaintiff last treated with them, those issues must await the trial of this action.

Accordingly, it is

ORDERED that the defendants' motion is denied.

This constitutes the Decision and Order of the court.

7/22/2022
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE