pt 63

At ~~MMTRP~~ of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 10th day of July, 2023.

PRESENT:

HON. ELLEN M. SPODEK,
Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 504927/2021

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ELI LOUZ,

DECISION AND ORDER

Plaintiff,

mt #2

-against-

JACK FATIHA, M.D., AND JACK FATIHA M.D., P.C.,

Defendants.

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Defendants Jack Fatiha, M.D., and Jack Fatiha, M.D., P.C., move pursuant to CPLR §§ 3211(a)(5) and 3212 for an order dismissing all allegations of negligence against Defendants regarding treatment rendered between December 4, 2016 and January 16, 2018, and dismissing all remaining allegations and medical malpractice claims against defendants and directing an entry of judgment in favor of defendants. Plaintiff opposes the motion.

Factual Background

This case arises out of treatment received by plaintiff, Eli Louz between December, 2016 and March 2021. Mr. Louz alleges that defendant Dr. Jack Fatiha, his primary care physician, failed to

diagnose his chronic kidney disease, leading to a hospitalization and kidney transplant in 2021. Mr. Louz was first seen by Dr. Fatiha on December 4, 2016, for a routine check-up. At the time of the first visit, the plaintiff was 19 years old. He had no complaints and did not take any prescribed medications. His vital signs were: Temp 98.7 H.R. 49, BP 98/78, O2Sat 98%. He weighed 142 lbs with a BMI of 20.97. His physical exam and lab results were within normal limits except high ALT - 63 (<40), high Lipoprotien – 102 (<100), and high Potassium – 5.9 (3.5 – 5.5). *Exhibit J pp. 82-84.*

Prior to seeing Dr. Fatiha on December 6, 2016, plaintiff had been a patient of Dr. Albert Bassoul (pediatrician) since 2007. Despite transferring his care to Dr. Fatiha, plaintiff had additional visits with Dr. Bassoul on August 24, 2017 (streptococcal pharyngitis), October 24, 2017 (general medical exam, acute pharyngitis, acute frontal sinusitis), January 25, 2019 (acute frontal sinusitis), December 11, 2020 (acute upper respiratory infection), January 3, 2022 (acute pharyngitis, contact with and exposure to viral communicable diseases), January 12, 2022 (cough, contact with exposure to viral communicable disease), and January 25, 2022 (acute upper respiratory infection). *Exhibit K, Dr. Bassoul's rec's.*

Plaintiff was again seen by Dr. Fatiha on January 18, 2017 for fever, chills, sore throat and abdominal pain for 24 hours. His vital signs were as follows: Temp 102.3, HR 108, BP 107/57, O2Sat 95%. The physical exam revealed swollen red tonsils with white exudate and uvula deviated to the right. He was diagnosed with acute tonsillitis and infectious mononucleosis. The treatment plan included Ceftin 500 mg twice a day for ten days and Medrol 4 mg for five days. His lab results were significant for WBC - 18.23, Polys - 85.0, Lymphocytes 5.1. The strep test came back negative. Plaintiff was notified about the abnormal test results and advised to follow up in one week. *Exhibit J, Dr. Fatiha's rec's, pp.78-80.*

Plaintiff was again seen by Dr. Fatiha for a follow-up on February 5, 2017. At that time, his vital signs were as follows: Temp 98.2, H.R. 75, BP 122/69, O2Sat 95%. The assessment was

improving acute tonsillitis and improving hypertrophy of tonsils with hypertrophy of adenoids. He was advised to stop Ceftin and follow up on an as-needed basis *Exhibit J, Dr. Fatiha's rec's, pp.76-77.*

On April 27, 2017, the plaintiff presented at Dr. Fatiha's office complaining of lower back and bilateral flank pain for two days. No history of kidney calculus was noted. It was, however, noted that the plaintiff was sexually active. His vital signs were as follows: temp 98.0, HR 75, BP 111/64, O2Sat 99%. The physical exam was within normal limit. The urine test revealed 2+ protein, a large amount of blood, low Glucose 67, high WBC 18.23, high Polys 85, and low Lymphocytes – 5.1. The Creatinine level was normal at 1.021. The assessment was unspecified abdominal pain, lower back pain and micro hematuria. The plan of care included abdominal, pelvis and kidneys ultrasound and lumbar spine ultrasound. *Exhibit J, Dr. Fatiha's rec's, pp.73-75.*

The x-ray and ultrasound were performed at Lenox Hill Radiology on April 27, 2017 and revealed no abnormal findings. *Exhibit J, Dr. Fatiha's rec's, pp.6-7.*

Plaintiff did not return to see Dr. Fatiha until a year later, on April 23, 2018. In between, plaintiff saw Dr. Albert Bassoul on August 24, 2017 for streptococcal pharyngitis, and October 24, 2017 for a general medical exam, acute pharyngitis and acute frontal sinusitis. *Exhibit J; Exhibit K.*

Dr. Fatiha again saw the plaintiff on April 23, 2018. He presented at Dr. Fatiha's office complaining of leg pain. His vital signs were: temp 98.5, HR 68, BP 115/57, O2Sat 99%. He weighed 150 lbs with a BMI of 22.15. Plaintiff was diagnosed with cellulitis of the right lower limb and prescribed Keflex 500 mg every 12 hours for ten days. He was also advised to follow up in two weeks. Plaintiff did not have any other complaints. *Exhibit J, Dr. Fatiha's rec's, pp. 71-72.*

Plaintiff again presented at Dr. Fatiha's office on August 6, 2018. The reason for the visit was a sore throat. Plaintiff's vital signs were: Temp 100.4, HR 108, BP 127/76, O2Sat 98%. The physical exam revealed swollen red tonsils with white exudate, and the uvula deviated to the left with a

peritonsillar abscess. There were no additional complaints noted or reported. Plaintiff was diagnosed with acute streptococcal tonsillitis and hypertrophy of tonsils with hypertrophy of adenoids. The plan of care included Augmentin 875-125 mg every 12 hours for ten days. *Exhibit J, Dr. Fatiha's rec's, pp. 69-70.*

Dr. Fatiha again saw Plaintiff on August 7, 2018. He presented with a rash on his hands and back. The assessment was a possible reaction to Augmentin. Dr. Fatiha recommended Diphenhydramine HC1 25 M.G. every 8 hours for five days and following up on an as-needed basis. Plaintiff did not have any other complaints. *Exhibit J, Dr. Fatiha's rec's, pp. 67-68.*

Plaintiff returned to Dr. Fatiha's office on August 9, 2018. He complained of sore throat and severe perioral herpes. There were no additional complaints noted or reported. Dr. Fatiha performed a physical exam and diagnosed plaintiff with viral vesicular dermatitis, gingivostomatitis, pharyngotonsillitis, and acute tonsillitis. The treatment plan included Valtrex 1g once a day, Azithromycin 250 mg, two tablets on the first day, and one tablet daily for four days. Plaintiff was instructed to follow up on an as-needed basis. Dr. Fatiha also ordered a blood test. The blood was drawn at Dr. Fatiha's office, but the test was not performed. *Exhibit J, Dr. Fatiha's rec's, pp. 65-66.*

Plaintiff again presented at Dr. Fatiha's office on December 27, 2018. He complained of leg pain and was diagnosed with cellulitis of the right foot and tinea pedis. The care plan included Keflex 500 mg every 12 hours for days and Ketoconazole Cream 2 %, one application to the affected area for 14 days. There were no additional complaints noted or reported. Plaintiff was again instructed to follow up on an as-needed basis. *Exhibit J, Dr. Fatiha's rec's, p. 63.*

Dr. Fatiha saw the plaintiff again for another "sick visit" on September 15, 2020. Plaintiff complained of fever, ear pain and sore throat. His vital signs were as follows: Temp 98.2, HR. 77, O2Sat 98%. Plaintiff was tested for Covid-19 and was diagnosed with acute pharyngitis with a negative Strep test. *Exhibit J, Dr. Fatiha's rec's, pp. 60-61.*

On September 16, 2020, the plaintiff had a telemedicine appointment with Dr. Fatiha due to a positive Covid-19 test. It was noted that the plaintiff was feeling well. He denied fever, chills and shortness of breath but complained of fatigue and headache without any signs of complications. He was advised to continue Azithromycin 250 MG for five days and quarantine for 14 days. There were no additional complaints noted or reported. *Exhibit J, Dr. Fatiha's rec's, pp.58-59.*

Plaintiff was again seen by Dr. Fatiha on September 21, 2020, for a follow-up and loss of smell and taste. His vital signs were: Temp 97.7, HR 100, BP 121/88, O2Sat 96%. The assessment included: Covid-19, chest pain on breathing and shortness of breath. He was advised to take Ibuprofen every 3-4 hours, alternating with Tylenol for chest pain, and to go to an emergency room if shortness of breath persists. The follow-up was scheduled for two weeks. *Exhibit J, Dr. Fatiha's rec's, pp. 55-56.*

On September 29, 2020, the plaintiff spoke with Dr. Fatiha and reported a mild fever of up to 100. He was advised to quarantine and continue the current treatment. There were no additional complaints noted or reported. *Exhibit J, Dr. Fatiha's rec's, p. 53.*

On January 11, 2021, the plaintiff was seen by Dr. Fatiha for a routine check-up. His vital signs were as follows: Temp 97.9, HR 79, BP 162/112, O2Sat 95%. Following the physical exam, the visit assessment included elevated blood pressure reading and hematospermia (reported by the plaintiff). A blood test was ordered and reported abnormal for high BUN 38, high Creatinine 3.76, low Hemoglobin 11.6, high LDL/HDL Ratio 3.64 and high TSH 4.020. The labs were reviewed on January 17th, and the plaintiff was advised to follow up the following day for a repeat blood test. *Exhibit J, Dr. Fatiha's rec's, pp. 48-51.* That was the first time Plaintiff's blood test results showed abnormal kidney function while he was under the care of *Dr. Fatiha. Exhibit J.*

Dr. Fatiha again saw Plaintiff on January 18, 2021 for a repeat blood test. At that time, his vital signs were as follows: Temp 98.3, HR 71, BP 159/98, O2Sat 99%. The repeat labs were

significant for low Hematocrit of 33.3 and high Creatinine of 4.33. The assessment included hematospermia, hypertensive urgency, abnormal blood chemistry findings, hyperlipidemia, iron deficiency, hypothyroidism, and hematuria. The plaintiff was advised to stop Cefuroxime 500 mg and was referred to New York Methodist for a CT scan. He was also prescribed Amlodipine 5 mg once a day and referred to cardiologist Dr. Khasky. The same day, the plaintiff was referred to NYU Langone Hospital to be seen by Dr. Matalon (nephrology). *Exhibit J, Dr. Fatiha's rec's, pp. 41-46.*

On January 18, 2021, the plaintiff was admitted to NYU Langone Hospital under the care of Dr. Matalon. On January 20, he underwent a kidney biopsy and was diagnosed with IgA nephropathy. On January 22, he was discharged home. The treatment plan included Prednisone 60 mg every other day, Lopressor 100 mg twice a day, Amlodipine 10 mg and weekly blood tests to monitor kidney function. *Exhibit L, NYU Langone – Discharge Summary.*

Weekly blood tests were performed at Dr. Fatiha's office until March 1, 2021. *Exhibit J, Dr. Fatiha's rec's, pp. 25-40.*

Plaintiff continued his treatment with Dr. Matalon (nephrologist) and NYU Langone Transplant Institute. On September 10, 2021, the plaintiff received a kidney transplant from a living donor. He was discharged home on September 13, 2021, in good condition. *Exhibit M, NYU Langone – Discharge Summary.*

Dr. Fatiha and his staff were not involved in the plaintiff's care and treatment following March 1, 2021.

Discussion

Defendants seek dismissal pursuant to CPLR §§ 3211 (a)(5), § 3212, and § 214-a, as time barred medical malpractice claims relating to the treatment rendered prior to January 16, 2018. Defendants argue that the claims related to treatment rendered prior to January 16, 2018, are time

barred as plaintiff failed to timely commence the action. Defendants also argue that the continuous treatment doctrine is not applicable to the plaintiff's medical malpractice claims.

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 malpractice. *Schwelnus v. Urological Assoc. of L.I., P.C., 94 A.D.3d, 971, 943 N.Y.S.2d 141, 143 (2d Dept. 2012)*. However, if there was continuous treatment of the plaintiff for the same illness, injury or condition, which gave rise to the malpractice claim, then the statute of limitations begins to run when that treatment is completed. CPLR § 214-a. "A defendant who seeks dismissal of a complaint on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired." *Mello v Long Isl. Vitreo-Retinal Consultant, P.C., 172 AD3d at 850.*

Here, the defendants have made a prima facie showing of entitlement to dismissal as a matter of law, for the lapse of the statute of limitations for the treatment which occurred before January 16, 2018. The plaintiff bears the burden of demonstrating that continuous treatment occurred, tolling the statute of limitations. *Hofsiss v. Goodman, 128 A.D.3d 898, 900 9 N.Y.S.3d 614, 615 (2d Dept. 2015)*. Under the continuous treatment doctrine, the limitations period does not begin to run until the end of the course of treatment if three conditions are met: (1) the patient continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period, (2) the course of treatment was for the same conditions or complaints underlying the plaintiff's medical malpractice claim, and (3) the treatment is continuous. *Gomez v. Katz, 61 A.D.3d 108, 874 N.Y.S.2d 161 (2d Dept. 1995)*. The Court of Appeals has held that routine examinations conducted repeatedly over time or continuing efforts to arrive at a diagnosis are not considered a "course of treatment". *Massie v. Crawford, 78 N.Y.2d 516, 583 N.E.2d 935, 577 N.Y.S.2d 223 (1991)*. The Court also held

that treatment unrelated to previous visits was considered a resumption of treatment rather than continuous treatment and does not toll the statute of limitations. *Id.*

Plaintiff's affirmation in opposition does not dispute that the claims for treatment prior to January 16, 2018 are time-barred. *Aff. In Opp. Para.* 11. Instead, plaintiff asserts that even if those claims are time-barred, the claims related to treatment from April 2018, August 2018, December 2018, and September 2020 are not. *Id.* Plaintiff offers no evidence that the treatment received prior to January 16, 2018, meets the three factors set forth by the Appellate Division. Therefore, the claims for treatment received prior to January 16, 2018, are dismissed as an action for these claims was not timely commenced and therefore they are barred by the statute of limitations.

In support of his remaining claims, plaintiff submits the expert affirmation of a medical doctor licensed to practice in the state of California with Board Certifications in Internal Medicine and Nephrology. Defendants submit the expert affirmation of Dr. William Bennet, a physician licensed to practice in the state of New York with a Board certification in Family Medicine.

On a motion for summary judgment dismissing a medical malpractice cause of action, a defendant has the prima facie burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries. *Brinkley v. Nassau Health Care Corp., 120 A.D.3d 1287 (2d Dept. 2014); Stukas v Streiter, 83 AD3d 18, 24-26 (2d Dept. 2011).*

Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact. *Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Brinkley v. Nassau Health Care Corp., supra; Fritz v. Burman, 107 A.D.3d 936, 940 (2d Dept. 2013); Lingfei Sun v. City of New York, 99 AD3d 673, 675 (2d Dept. 2012); Bezerman v. Bailine, 95 AD3d 1153, 1154 (2d Dept. 2012); Stukas v. Streiter, at 24.* A plaintiff succeeds in a

medical malpractice action by showing that a defendant deviated from accepted standards of medical practice AND that this deviation proximately caused plaintiff's injury. *Contreras v Adeyemi, 102 AD3d 720, 721 (2d Dept. 2013); Gillespie v New York Hosp. Queens, 96 A.D.3d 901, 902 (2d Dept. 2012); Semel v Guzman, 84 AD3d 1054, 1055-56 (2d Dept. 2011)*. The plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing. *Stukas, at 24.*

The Second department has held that "summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions since such conflicting expert opinions will raise credibility issues which can only be resolved by a jury. However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact. In order not to be considered speculative or conclusory opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record." *Lowe v. Japal, 170 AD3d 701, 702-703, 95 NY.S.3d 363 (2d Dept 2019) (internal quotation marks, brackets, and citations omitted).* Mere "conclusions, expressions of hope or unsubstantiated allegations or assertions" are insufficient to defeat summary judgment. *Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).*

Defendant's expert argues that Dr. Fatiha did not depart from good and accepted standards of medical practice during any of Mr. Louz's visits after January 16, 2018. He argues that there was no need for any testing or evaluation for kidney disease during his visits between April of 2018 and January of 2021, because Mr. Louz did not complain of any symptoms related to kidney disease or renal failure. Dr. Bennett explains that Mr. Louz's condition, IgA nephropathy, occurs when an antibody called immunoglobulin A (IgA) builds up in kidneys. *Def. Exh. A Para.* 6. He states that the signs and symptoms of IgA nephropathy include repeated episodes of cola-or tea-colored urine (caused by red blood cells in the urine), foamy urine from protein leaking into the patient's urine

(proteinuria), pain in one or both sides of the patient's back below the ribs, swelling (edema) in the patient's hands and feet, and high blood pressure. *Id.* Dr. Bennet points out that Mr. Louz did not complain of nor did he demonstrate any of these symptoms during his visits after January 16, 2018 and prior to January 11, 2021.

Plaintiff's expert relies heavily on the fact that Mr. Louz had an abnormal urine test on April 27, 2017. He/she argues that because Dr. Fatiha did not inform Mr. Louz about this abnormal result, each subsequent visit involved a departure from the standard of care to the extent that the result was not discussed. *Pltf. Exp. Aff. Para.* 13. However, any testing done in 2017 is no longer at issue in this case because it is time-barred. Plaintiff's expert also claims that urinalysis and a referral to a nephrologist should have been done during Mr. Louz's visits between April 2018 and September 2020. Plaintiff's expert does not explain why those tests would have been indicated or necessary given the specific complaints for which Mr. Louz was seeking treatment during those visits e.g., cellulitis, tonsilitis, and COVID-19. Plaintiff's expert concludes, "earlier diagnosis would have reduced the number of kidney transplants that Mr. Louz is likely to require over the course of his life, reduced the likelihood of Mr. Louz requiring dialysis, and would have lessened the degree of injury to his kidneys and his general health, including his risks of cardiovascular disease (for example, heart attack, heart failure, arrhythmia, and stroke) and would have made it less likely major decrements in his health-related quality of life and functional capacity. An earlier diagnosis would have also significantly increased Mr. Louz's life expectancy." *Pltf. Exp. Aff. Para.* 15..

Here, plaintiff's expert does not directly address Dr. Bennett's claims, nor does he/she explain his/her basis for his/her conclusions. Plaintiff's expert fails to establish triable issues of fact or create any causal link between Dr. Fatiha's treatment of Mr. Louz and his kidney disease. By failing to substantiate his/her conclusions with facts or evidence, plaintiff's expert offers no more than speculation regarding Mr. Louz's potential health outcomes.

Conclusion

Defendants' motion is granted in its entirety. The claims against Dr. Fatiha are dismissed.

This constitutes the decision and order of the Court.

ENTER:

J.S.C.

Honorable Ellen M. Spodek

KINGS COUNTY CLERK
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