

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25226
O/prt

_____AD3d_____

Argued - November 5, 2009

WILLIAM F. MASTRO, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
LEONARD B. AUSTIN, JJ.

2008-09754

DECISION & ORDER

Michele Chambers, et al., appellants, v
Susan Mirkinson, et al., respondents,
et al., defendants.

(Index No. 3748/07)

Sullivan Papain Block McGrath & Cannavo, P.C., New York, N.Y. (Stephen C. Glasser of counsel), for appellants.

Farley, Glockner & Halpern, LLP, Mineola, N.Y. (Graceann Farley of counsel), for respondents Susan Mirkinson and Hillside Medical Associates, P.C.

Ivone, Devine & Jensen, LLP, Lake Success, N.Y. (Robert Devine of counsel), for respondents Marc S. Werner and Eye Guys, LLP, d/b/a Stahl Eye Associates.

In an action to recover damages for medical malpractice, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Martin, J.), entered October 1, 2008, as denied their motion pursuant to CPLR 3211(b) to dismiss the first affirmative defense of the defendants Marc S. Werner and Eye Guys, LLP, d/b/a Stahl Eye Associates, and granted those branches of the motion of those defendants and the separate motion of the defendants Susan Mirkinson and Hillside Medical Associates, P.C., which were for summary judgment dismissing, as time-barred, those causes of action which were to recover damages for medical malpractice committed prior to September 1, 2004, insofar as asserted against them.

ORDERED that the order is modified, on the law and the facts, by deleting the provision thereof granting that branch of the motion of the defendants Susan Mirkinson and Hillside

December 1, 2009

Page 1.

CHAMBERS v MIRKINSON

Medical Associates, P.C., which was for summary judgment dismissing the causes of action which were to recover damages for medical malpractice committed by those defendants on April 27, 2004, and July 14, 2004, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the defendants Marc S. Werner and Eye Guys, LLP, d/b/a Stahl Eye Associates, payable by the defendants Susan Mirkinson and Hillside Medical Associates, P.C., and one bill of costs to the defendants Susan Mirkinson and Hillside Medical Associates, P.C., payable by the plaintiffs.

On seven occasions from May 21, 2001, through April 13, 2006, the plaintiff Michele Chambers (hereinafter the plaintiff) consulted the defendant Marc S. Werner, M.D., or his associate at the defendant Eye Guys, LLP, d/b/a Stahl Eye Associates (hereinafter collectively Eye Guys), regarding decreased visual acuity and spots impairing the vision in her right eye. On nine occasions from August 9, 2000, through June 14, 2006, the plaintiff consulted practitioners including the defendant Susan Mirkinson, M.D., at the defendant Hillside Medical Associates, P.C. (hereinafter together Hillside), for various complaints, including impairment of vision, numbness in her legs, urinary incontinence, and upper respiratory ailments. On the last visit, Hillside referred the plaintiff to a neurologist, who ordered various tests and diagnosed multiple sclerosis (hereinafter MS). The plaintiff and her husband, derivatively, commenced this action by the filing of a summons and verified complaint on March 1, 2007. Subsequently, the plaintiffs moved pursuant to CPLR 3211(b) to dismiss Eye Guys' first affirmative defense. Eye Guys and Hillside separately moved, inter alia, for summary judgment dismissing, as time-barred, those causes of action which were to recover damages for medical malpractice committed prior to September 1, 2004, insofar as asserted against them, and the plaintiffs opposed the motions on the ground that the doctrine of continuous treatment tolled the statute of limitations. The Supreme Court denied the plaintiffs' motion and granted those branches of the separate motions of Eye Guys and Hillside. We modify.

In support of their respective motions, Eye Guys and Hillside established their prima facie entitlement to judgment as a matter of law dismissing, as time-barred, the plaintiffs' claims based upon alleged acts of malpractice committed by Eye Guys and Hillside prior to September 1, 2004, the period that was more than two years and six months prior to the commencement of the action (*see* CPLR 214-a; *Cox v Kingsboro Med. Group*, 88 NY2d 904, 906; *Capecce v Nash*, 65 AD3d 1270). In opposition to Eye Guys' motion, the plaintiffs failed to raise a triable issue of fact as to whether the doctrine of continuous treatment tolled the statute of limitations for claims premised upon office visits occurring prior to September 1, 2004 (*see Cox v Kingsboro Med. Group*, 88 NY2d at 906-907; *Anderson v Central Brooklyn Med. Group*, 56 AD3d 500, 501). Under the continuous treatment doctrine, the limitations period is tolled only if the defendants continuously rendered an "actual course of treatment" during the relevant period "for the same conditions or complaints underlying the plaintiff's medical malpractice claim" (*Gomez v Katz*, 61 AD3d 108, 111-112). The plaintiff's visits to Eye Guys in May 2001 and January 2003, however, were in the nature of "[r]outine diagnostic examinations" or "return visits on the patient's initiative, merely for the purpose of having [her] condition checked" (*Norum v Landau*, 22 AD3d 650, 652). "[C]ontinuing efforts to arrive at a diagnosis" or "a physician's failure to properly diagnose a condition that prevents treatment altogether" fall short of a course of treatment (*Gomez v Katz*, 61 AD3d at 112; *see Nykorchuck v Henriques*, 78 NY2d 255, 259; *McDermott v Torre*, 56 NY2d 399, 405-406). Moreover, on the record presented, the plaintiff and physician did not mutually agree upon or anticipate future

appointments (*see Anderson v Central Brooklyn Med. Group*, 56 AD3d 500, 501), nor could the plaintiff's return on her own initiative a year and a half after breaking a follow-up appointment be deemed "timely" (*McDermott v Torre*, 56 NY2d at 406; *cf. Ramos v Rakhmanchik*, 48 AD3d 657, 658). Accordingly, the Supreme Court properly granted that branch of the motion of Eye Guys which was for summary judgment dismissing those causes of action which were to recover damages for medical malpractice committed prior to September 1, 2004, insofar as asserted against it, and properly denied the plaintiffs' motion pursuant to CPLR 3211(b) to dismiss Eye Guys' first affirmative defense.

In opposition to Hillside's motion, the plaintiff failed to raise a triable issue of fact as to whether she sought and obtained an actual course of treatment for her symptoms related to MS during the four appointments on August 9, 2000, September 3, 2002, May 8, 2003, and August 26, 2003. On each of those dates, the plaintiff complained of discrete symptoms and received testing which failed to show any abnormalities except, on one occasion, the unrelated condition of strep throat. After each appointment, future treatment was not anticipated except for a scheduled follow-up visit after the consultation on September 3, 2002, which the plaintiff failed to keep. Under the circumstances, these four office visits manifest the "mere continuation of a general doctor-patient relationship" (*Gomez v Katz*, 61 AD3d at 112), or "return visits on the patient's initiative, merely for the purpose of having [her] condition checked" (*Norum v Landau*, 22 AD3d at 652). By contrast, the plaintiff submitted evidence that she complained of symptoms related to MS during the appointments on April 27, 2004, and July 14, 2004, and continued to complain of such symptoms on March 7, 2005, a date falling within the limitations period. The plaintiff also submitted evidence that, on these dates, Hillside addressed the symptoms by administering therapy, ordering testing, or making referrals to specialists. Accordingly, the plaintiff raised a triable issue of fact as to whether Hillside actually rendered a continuous course of treatment related to her MS symptoms commencing on April 27, 2004, and the Supreme Court should have denied that branch of Hillside's motion seeking to dismiss those claims as time-barred (*see Gomez v Katz*, 61 AD3d at 114).

Finally, the continuous treatment toll is personal to the patient and not available to extend the husband's loss of consortium claim (*see Schrank v Lederman*, 52 AD3d 494, 496-497). The husband's claim, however, is governed by the three-year statute of limitations (*see CPLR 214; Schrank v Lederman*, 52 AD3d at 497). Since the summons and complaint were filed on March 1, 2007, the plaintiff's April and July 2004 consultations at Hillside fall within the three-year limitations period, and the husband's loss of services claim is not time-barred with respect to those dates.

MASTRO, J.P., BELEN, HALL and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court