

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA PART 5
Justice

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VINCENT COSSENTINO	Index Number <u>10879</u> 2004
- against -	Motion Date <u>September 22,</u> 2004
VICTOR WEINSTEIN, et al.	Motion Cal. Number <u>8</u>

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The following papers numbered 1 to 6 read on this motion by defendants Victor Weinstein and Victor Weinstein, P.C. to dismiss plaintiff's complaint pursuant to CPLR §§ 3211 and 3016(a).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-6

Upon the foregoing papers it is ordered that the motion is determined as set forth herein.

Plaintiff Vincent Cossentino commenced this action in which he alleges that defendants failed to disclose plaintiff's HIV status to plaintiff, that defendants' employees informed plaintiff's relatives that plaintiff was HIV positive, and that defendants' employees defamed plaintiff by falsely and maliciously informing third parties that plaintiff was HIV positive.

At the outset, the court notes that defendants' motion to dismiss plaintiff's complaint was served four days after the time to answer had elapsed. CPLR 2004 vests the trial court with discretion to extend the time to perform any act "upon such terms as may be just and upon good cause shown." In considering the motion, the court may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the

delay, the reason given for the delay, whether the moving party was in default before seeking the extension and, if so, the presence or absence of an affidavit of merit (see Tewari v. Tsoutsouras, 75 NY2d 1 [1989]). It is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see Cleary v East Syracuse-Minoa Cent. School Dist., 248 AD2d 1005 [1998]; Lichtman v Sears, Roebuck & Co., 236 AD2d 373 [1997]).

Herein, defendants' counsel affirms that during a telephone conversation, plaintiff's counsel agreed to extend defendants' time to answer the complaint. Plaintiff's counsel affirms that he told defendants' counsel he would agree to an extension of time to answer but that defendants' counsel assured him that she did not need an extension of time. It is not alleged that the default was wilful or that prejudice resulted therefrom. In light of plaintiff's counsel's concession that he offered to extend defendants' time to answer, and taking into consideration that defendants' counsel moved to dismiss only four days after the time to answer elapsed, this court in its discretion will consider defendants' motion to dismiss (see Specialized Risk Mgmt. v Cri-Bet Realty, Ltd., 307 AD2d 309 [2003]; Goldman v. City of New York, 287 AD2d 482 [2001]).

On a motion to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]), the court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated (see Santos v City of New York, 269 AD2d 585 [2000]).

Defendants seek to dismiss plaintiff's first cause of action on statute of limitations grounds (CPLR 3211[a][5]). The gravamen of plaintiff's first cause of action is that defendants failed to inform plaintiff that he was HIV positive.

To determine which statute of limitations governs plaintiff's claim, the court must decide whether the first cause of action sounds in medical malpractice or negligence. It has been held that the failure to communicate significant medical findings to a patient or his treating physician is not medical malpractice but ordinary negligence (see Yaniv v Taub, 256 AD2d 273 [1998]; McKinney v Bellevue Hosp., 183 AD2d 563 [1992]; Matter of Caracci v State of New York, 178 AD2d 876 [1991]). In the instant case, however, where plaintiff is clearly the defendants' patient,

expecting diagnosis and treatment of any medical conditions, the failure to communicate significant medical findings constitutes malpractice (see Bleiler v Bodnar, 65 NY2d 65 [1985]; Doe v Lai-Yet Lam, 268 AD2d 206 [2000]; Harvey v Cramer, 235 AD2d 315 [1997]) and is governed by the 2 1/2-year limitations period of CPLR 214-a (see Weiner v Lenox Hill Hosp., 88 NY2d 784 [1996]). The defendants met their initial burden of demonstrating that CPLR 214-a bars this medical malpractice action relating to the alleged act of malpractice in 1998. The burden then shifts to the plaintiff to establish that the continuous treatment doctrine tolls the statute of limitations (see Massie v Crawford, 78 NY2d 516 [1991]). It is well established that "[a] patient's continuing general relationship with a physician, or routine, periodic health examinations will not satisfy the doctrine's requirement of 'continuous treatment' of the condition upon which the allegations of medical malpractice are predicated" (Young v New York City Health & Hosps. Corp., 91 NY2d 291, 296 [1998]; Shiffman v Harris, 280 AD2d 752 [2001]). Here, the plaintiff fails to allege that the plaintiff contemplated or received continuous treatment from defendants for HIV (see Young v New York City Health & Hosps. Corp., *supra*; Nykorchuck v Henriques, 78 NY2d 255 [1991]; Doyaga v Columbia-Presbyterian Med. Ctr., 307 AD2d 333 [2003]; McInnis v Block, 268 AD2d 509 [2000]), thus the continuous treatment exception, which would toll the statute of limitations, does not apply to the instant case.

Plaintiff's second cause of action alleges that defendants' alleged disclosure of plaintiff's HIV status to his relatives constituted a violation of Public Health Law § 2782, which states, in relevant part, as follows:

"1. No person who obtains confidential HIV related information in the course of providing any health...service or pursuant to a release of confidential HIV related information may disclose or be compelled to disclose such information..."

As a "liability ... created or imposed by statute," plaintiff's statutory cause of action is governed by the three-year period of limitations of CPLR 214(2) (Zeides v Hebrew Home for the Aged at Riverdale, Inc., 300 AD2d 178 [2002]). Thus, the disclosures alleged to have occurred in 1998 are time barred.

Plaintiff's third cause of action asserts that defendants' employees defamed plaintiff by falsely and maliciously informing third parties that plaintiff was HIV positive. The statute of limitations for an action for defamation is one year (CPLR 213[3]),

thus, those statements which were allegedly made in 1998 are time barred. However, the statements allegedly made in 2003 meet the specificity requirement of CPLR 3016(a) (Chime v Sicuranza, 221 AD2d 401 [1995]).

Accordingly, defendants' motion to dismiss plaintiff's complaint is granted to the extent that plaintiff's first cause of action is dismissed, plaintiff's second cause of action is dismissed as to those disclosures made in 1998, and plaintiff's third cause of action is dismissed as to those statements made in 1998.

Dated: December 21, 2004

J.S.C.