Gala v Martz
2008 NY Slip Op 32456(U)
September 2, 2008
Supreme Court, New York County
Docket Number: 0114641/2004
Judge: Emily Jane Goodman
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SCANNED ON 9/9/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 114641/2004

GALA, SUSAN

vs

MARTZ, EDWARD J.

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided per attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

SEP 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/2/08

EJG

EMILY JANE GOODMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☑ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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SUSAN GALA,

Plaintiff,

-against-

Index No. 114641/04

EDWARD J. MARTZ,
SABLE & GOLD, a partnership,
and SABLE & GOLD, P.C.,

Defendants.

FILED
SEP 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

EMILY JANE GOODMAN, J.S.C.:

This is a legal malpractice action arising in connection with a medical malpractice claim where defendant Edward J. Martz (Martz) and co-defendant, being sued herein as Sable & Gold and Sable & Gold, P.C. (S&G), were legal counsel for plaintiff Susan Gala (Gala). In her complaint filed in this action, plaintiff alleges that defendants committed legal malpractice by failing to timely commence a medical malpractice claim on her behalf against Dr. Mark E. Pruzansky (Prusansky), an orthopedic surgeon, prior to the expiration of the statute of limitations, and that due to defendants' negligence, plaintiff has suffered actual damages.

After the completion of discovery, Martz filed the instant motion seeking entry of a summary judgment, pursuant to CPLR 3212, dismissing the complaint. In its cross motion, S&G also

seeks a summary judgment dismissing the complaint.[1] For the reasons set forth herein, the motion and cross motion are denied.

Background

Plaintiff, a physical fitness instructor, visited Dr. Arthur Cohen, a podiatrist, in late 1997 because she experienced pain in the ball of her right foot after running. Gala Affidavit, ¶ 7-8. Dr. Cohen diagnosed her with a Morton's neuroma, *Id.* ¶ 8, a non-cancerous growth of nerve tissue around one of the digital nerves leading to the toes that can cause sharp pain in the ball of the affected foot. Plaintiff then consulted with Dr. Steven Sheskier (Sheskier), an orthopedic surgeon, who concluded, after a physical examination of plaintiff on January 28, 1998, that her medical condition was consistent with a second MTP synovitis and a Morton's neuroma between the 2nd and 3rd toes of her right foot. *Id.* ¶ 10; Sheskier Affirmation, ¶ 5-6. Sheskier treated plaintiff with cortisone injections and a Budin splint, which provided temporary relief. Gala Affidavit, ¶ 10.

On June 29, 1998, plaintiff sought a second opinion from Pruzansky regarding her medical condition. *Id.* ¶ 11. Plaintiff alleges that during the June 29th visit, which was the first time she met with Pruzanksy, she told him about the neuroma diagnosis, and that he confirmed such diagnosis and recommended surgery to

[1] Though the cross motion does not address a cross claim, in S&G's answer to the complaint, S&G asserts a cross claim against Martz for contribution and/or indemnification.

remove it. *Id.* While defendants do not deny such allegation, they contend, instead, that Pruzansky diagnosed plaintiff with a recurrent bunion and a hammer toe. Robb Affirmation, Exh. H (Pruzansky Deposition, p. 26); Exh. J (miscellaneous medical records). On July 14, 1998, Pruzansky performed a bunionectomy and a hammer toe correction on plaintiff's right foot, where part of the bone of her foot was removed, and a pin and screw was installed. Gala Affidavit, ¶ 13. After the surgery, plaintiff continued to visit Pruzansky for about 15 months for her right foot and other medical problems.[2] During these visits, Pruzansky examined plaintiff, prescribed physical therapy, orthotics and cortisone injections, among other things. *Id.* ¶ 14. On December 30, 1998, Pruzansky diagnosed plaintiff with a Morton's neuroma between the 3rd and 4th toes of her right foot. Gala Affidavit, ¶ 15; Robb Affirmation, Exh. J. Plaintiff states that her last visit to Pruzansky for her foot was on October 5, 1999, at which time she continued to complain about pain and limitation in her right foot. *Id.* ¶ 16. Plaintiff also states that she visited Pruzansky on October 14, 1999, but that visit was only for her wrist. *Id.*

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[2] On July 25, 1998, plaintiff was struck by a car, and she visited Pruzansky on July 27, 1998 for numbness in her hand and arm due to the car accident. Plaintiff states that the only significant injury she sustained was to her wrist, and that Pruzansky performed a carpal tunnel surgery on July 31, 1998. The car accident law suit was settled for $10,000. *Id.* ¶ 20.

On October 9, 2001, plaintiff returned to Sheskier, the doctor who previously diagnosed her as having symptoms consistent with a Morton's neuroma, to complain about pain and numbness on her right leg from the hip down, as well as the surgery performed by Pruzansky in July 1998. *Id.* ¶ 17. On November 19, 2001, Sheskier removed the neuroma, and the surgical records confirmed that it was between the 2nd and 3rd toes of her right foot. *Id.* ¶ 19. Even though the neuroma was removed, plaintiff asserts that, as a direct consequence of the bunionectomy and hammer toe surgery performed by Pruzansky, "my [right] foot is completely deformed and I am very limited and restricted in my activities and have constant pain." *Id.* ¶ 30.

In the fall of 2001, plaintiff visited Martz, who was then associated with S&G and had previously represented plaintiff in a landlord-tenant matter, to discuss a potential malpractice claim against Pruzansky. *Id.* ¶ 21-22; Robb Affirmation, Exh. F (Martz Deposition, p. 74-75). On February 7, 2002, plaintiff signed a retainer agreement with S&G and certain medical authorization forms. Gala Affidavit, ¶ 23; Young Affirmation, ¶ 6 and Exh. 2 (S&G retainer agreement). After signing up plaintiff, Martz told her "to continue to marshal medical evidence that would help the firm [S&G] prove her case." Young Affirmation, ¶ 10, quoting Martz Deposition, p. 117. Consequently, plaintiff provided Martz with information of her medical malpractice claim and believed

that her claim against Pruzansky was being properly handled. Gala Affidavit, ¶ 24; Young Affirmation, ¶ 12, and Exh. 11 and 12 (various information regarding plaintiff's medical condition and treatment). The record reflects that Martz and S&G might have had a "contentious parting-of-the-ways" in November 2002, where S&G accused Martz of "stealing" and locked him out of the office. Young Affirmation, ¶ 11; Martz Deposition, p. 174-175; Fred Gold Deposition, p. 25. The record also reflects that in April 2003, Martz asked plaintiff to sign a new retainer agreement, whereby he would be her counsel for the medical malpractice claim. Young Affirmation, ¶ 13, and Exh. 13 (new retainer agreement); Martz Deposition, p. 123-124, where Martz testified that he believed plaintiff "still had rights to protect (i.e. a viable medical malpractice claim) and that he needed a new retainer but would be "unable to do that if Sable & Gold was still representing her". Plaintiff did not sign the new retainer agreement, but she did give Martz $3,000 (by check and cash) he needed to draft and file the necessary paperwork. Gala Affidavit, ¶ 26.

On or about March 3, 2004, plaintiff wrote a letter to Martz requesting copies of the paperwork for her medical malpractice claim. *Id.* ¶ 26; Young Affirmation, Exh. 14 (copy of March 3rd letter). When she did not get a response, plaintiff went to court in May 2004 to find out information about her claim against Pruzansky. Gala Affidavit, ¶ 27. The court docket indicates

that a summons with notice was filed on June 19, 2003 with respect to plaintiff's claim against Pruzansky (index number 111249/2003), and an affirmation of service was filed on May 18, 2004. Young Affirmation, ¶ 14; Exh. 17 (relevant court docket). However, there is no indication that a complaint had ever been filed or served, or that Pruzansky had ever answered or otherwise responded to the purported lawsuit. Young Affirmation, ¶ 14. In light of the foregoing, in October 2004, plaintiff commenced this legal malpractice action against defendants Martz and S&G.

In his motion seeking summary judgment dismissing the complaint, Martz argues that (1) the statute of limitations to bring the underlying medical malpractice action against Pruzansky had already expired when defendants were retained by plaintiff to prosecute such action; and (2) plaintiff has not established that the medical malpractice action would have been successful even if it had been timely commenced. S&G fully adopts Martz's arguments in its cross motion for summary judgment.

Applicable Legal Standards

In stating the standards for granting or denying a summary judgment motion pursuant to CPLR 3212, the Court of Appeals noted in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]}:

> As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such ... showing requires a denial

> of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the Court of Appeals' guidance, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief should be granted or denied. *Giandana v Providence Rest Nursing Home*, 32 AD3d 126, 148 (1st Dept 2006)(because summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues")(citations omitted); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997)(in considering a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion")(citations omitted). However, general allegations of a conclusory nature unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 324-325. Further, documentary evidence must establish conclusively a defense to a claim as a matter of law, before a court may dismiss the claim pursuant to CPLR 3211 (a) (1). *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300 (2001); *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 (1st Dept 2004).

Discussions

To properly plead a legal malpractice claim, a plaintiff must allege: (1) the attorney's negligence; (2) the negligence was the proximate cause of plaintiff's loss; and (3) actual damages sustained by plaintiff. *Leder v Spiegel*, 31 AD3d 266 (1st Dept 2006), affd 9 NY3d 836 (2007); *Pellegrino v File*, 291 AD2d 60 (1st Dept 2002).

In the instant case, defendants argue that (A) plaintiff's medical malpractice claim was already time-barred when she retained defendants as counsel; and (B) plaintiff cannot establish that the underlying medical malpractice claim would have been successful, but for the negligence of defendants.

A. Statute of Limitations

CPLR 214-a provides, in relevant part, that: "[a]n action for medical ... malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." Under the continuous treatment doctrine, the limitations period is tolled until after the plaintiff's last 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.'" *Hein v Cornwall Hospital*, 302 AD2d 170, 173 (1st Dept 2003), *quoting McDermott v*

Torres, 56 NY2d 399, 405 (1982).

In this case, defendants argue that, because the surgery performed by Pruzansky occurred on July 14, 1998, the two and one-half year limitations period to bring a medical malpractice action relating to such surgery ended on January 14, 2001. Defendants further argue that, even if the limitations period was tolled by the continuous treatment doctrine, since the last treatment plaintiff received from Pruzansky in connection with the surgery was on June 2, 1999, when she was provided with a new orthotic for her right foot, this would "extend the statute of limitations for a potential claim against Dr. Pruzansky to January 2, 2002, more than a month prior to the date [February 7, 2002] on which the plaintiff retained the defendants." Defendant Brief, p. 17-18. Therefore, defendants argue that the statute of limitations to commence a malpractice action against Pruzansky had already expired when they were retained by plaintiff pursuant to the retainer agreement of February 7, 2002.

This argument is without merit for many reasons. First, based on Pruzansky's medical records, he continued to treat and provided post-surgery follow-up services to plaintiff, beginning on or about July 20, 1998 through and including October 5, 1999, for a total of not less than ten office visits by plaintiff. Robb Affirmation, Exh. J (various medical records). Secondly, according to Pruzansky's deposition testimony based on such

medical records, a part of the October 5, 1999 office visit was a follow-up examination of plaintiff relating to the July 14, 1998 surgery. *Id.* Exh. G (Pruzansky Deposition, p. 103). Even more importantly, the office notes maintained by Martz, as well as his own deposition testimony, reflected that when the S&G retainer agreement was signed on February 7, 2002, he was aware of the statute of limitations issue, and that a summons and/or notice should be filed promptly so as to protect plaintiff's potential claim against Pruzansky. Young Affirmation, ¶ 7-9 and Exh. 7-10; Martz Deposition, p. 104-111, 115-116.

Based on the foregoing, any argument that the limitations period to commence a malpractice claim against Pruzansky had already expired when defendants were retained by plaintiff lacks merit and must be dismissed.

B. Success Of The Medical Malpractice Action

In support of their argument that plaintiff cannot prevail in the medical malpractice action against Pruzansky, defendants attached the affirmation of Dr. Stuart Katchis, an orthopedic surgeon, who examined plaintiff on September 25, 2006, a date that was more than eight years after the July 14, 1998 surgery performed by Pruzansky (the Katchis Affirmation). Based on his personal examination of plaintiff and his review of the pleadings of the parties, Katchis opines that "Pruzansky did not depart from the accepted standards of medical practice in connection

with the care and treatment that he rendered to Susan Gala." Katchis Affirmation, ¶ 4. With respect to Pruzansky's diagnosis on December 30, 1998 that plaintiff's neuroma was between her 3rd and 4th toes, in contrast with Sheskier's 1998 diagnosis that it was between her 2nd and 3rd toes, Katchis states that Pruzansky's diagnosis occurred "nearly seven months from the surgery in question" and that "the Morton's neuroma was a separate and distinct condition from the bunion and claw toe that were the basis for the July 14, 1998 surgery." *Id.* ¶ 38.

In opposition, plaintiffs submitted the affirmations of (1) Dr. Gary Saphire, a doctor of podiatry medicine, who examined plaintiff on November 6, 2006 and reviewed the parties' pleadings (the Saphire Affirmation); and (2) Dr. Sheskier, the orthopedic surgeon who diagnosed plaintiff as having symptoms of a Morton's neuroma in the 2-3 web space in January 1998 and then surgically excised the same on November 19, 2001 (the Sheskier Affirmation). It is Saphire's opinion that (a) the neuroma between plaintiff's 2nd and 3rd toes was continuously present until it was surgically removed; (b) Pruzansky erred in attributing plaintiff's medical conditions and complaints to a hammer toe and a bunion, and performed unnecessary surgery to alleviate such conditions and complaints; (c) Pruzansky misdiagnosed the neuroma as between plaintiff's 3rd and 4th toes; and (d) plaintiff suffered a permanent injury to her right foot as a direct result of

Pruzanksy's surgery that was improperly performed. In addition, it is Sheskier's opinion, among other things, that when he examined plaintiff in January 1998, she did not have a hammer toe or a bunion on her right foot, and that in 1998 and 2001, she did not have a symptomatic Morton's neuroma of the 3-4 web space.

From the foregoing, it is clear that the opinions and conclusions stated in the Saphire Affirmation and the Sheskier Affirmation are in conflict with those stated in the Katchis Affirmation. Because these conflicts raise material issues of disputed facts regarding the propriety of Pruzansky's diagnosis and treatment of plaintiff's medical conditions, and thus the success of the medical malpractice claim against Pruzansky, summary judgment must be denied as to defendants' motion and cross motion for dismissal of the instant action. *Dellert v Kramer*, 280 AD2d 438 (1st Dept 2001)(affirming the denial of defendant's motion for summary judgment where plaintiff's expert sufficiently raised triable issues as to whether defendant was negligent in his treatment of plaintiff's medical condition).

Accordingly, it is

ORDERED that the motion for summary judgment dismissing the complaint by defendant Edward Martz is denied; and it is further

ORDERED that the cross motion for summary judgment dismissing the complaint by defendant Sable & Gold, a partnership, and Sable & Gold, P.C., is also denied; and it is

further

ORDERED that a settlement conference with the Court will take place on November 2, 2008 at 10:00 am. All counsel must have settlement authority or have clients present (including insurance adjusters); and it is further

ORDERED that in the event the settlement conference does not resolve this action, jury selection shall commence at 12:00 noon, with trial commencing immediately thereafter.

This constitutes the Decision and Order of the court.

Dated: September 2, 2008

ENTER:

J.S.C.

FILED
SEP 2008
COUNTY CLERK'S OFFICE
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