Hahn v New York Presbyt. Hosp./Weill Cornell Med. Sch.
2015 NY Slip Op 32293(U)
December 3, 2015
Supreme Court, New York County
Docket Number: 805151/2014
Judge: Martin Shulman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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NATALIE HAHN,

Plaintiff, Index No. 805151/2014

-against-

NEW YORK PRESBYTERIAN HOSPITAL/WEILL CORNELL MEDICAL SCHOOL, IRIS CANTOR WOMEN'S HEALTH CENTER, WEILL CORNELL BREAST CENTER, ALEXANDER SWISTEL, M.D., and MIA TALMOR, M.D.,

Defendants.

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Hon. Martin Shulman:

In this medical malpractice action, defendants The New York and Presbyterian Hospital (Hospital), s/h/a New York Presbyterian Hospital/Weill Cornell Medical School, Cornell University (University), s/h/a Weill Cornell Medical School, Iris Cantor Women's Health Center, and Weill Cornell Breast Center, and Alexander Swistel, M.D. (Swistel) move for an order, pursuant to CPLR 3025 (b), granting them leave to amend their answers to assert an affirmative defense that the action was not commenced within the time period prescribed by all applicable statutes of limitations. Presumably, that includes the two-and-one-half-year statute of limitations applicable to medical malpractice actions (CPLR 214-a), given that the only two causes of action set forth in the complaint allege departures from standards of good and accepted medical practice and a lack of informed consent.

Background

Plaintiff, Natalie Hahn (Hahn), sued the Hospital, the University, Swistel and Mia Talmor, M.D. (Talmor), claiming that they failed to appropriately diagnose and treat her breast cancer and perform proper reconstructive surgery. Swistel and Talmor, both general surgeons, are alleged to have been employees and agents of, and/or were affiliated with, and had privileges at, the institutional defendants. Swistel diagnosed and excised a cancerous lesion in Hahn's left breast in July-August 2005. That excision was followed by a course of radiation.

It is claimed that as a result of Swistel's negligence in misdiagnosing the type of breast cancer which was present and in failing to appropriately treat Hahn's cancer, it recurred, requiring a double mastectomy Swistel performed in February 2011, with some immediate reconstruction performed by a plastic surgery team, followed by a course of tissue expansion Talmor performed, Swistel's removal of additional lymph nodes on July 26, 2011, and by second stage reconstructive surgery Talmor performed later that day. Hahn claims that the tissue expansion was negligently performed and was contraindicated because of radiation fibrosis. Hahn also contends that defendants failed to inform her of the risks of, and alternatives to, the tissue expansion and reconstructive surgery. In addition, Hahn asserts that Swistel and Talmor acted as a team.

In November 2011, as a result of continuing pain, Hahn had the implants removed by a nonparty physician. Hahn claims that defendants continued to treat her through August 2012, as reflected in July 23 and August 12, 2012 letters Swistel wrote to a nonparty physician regarding followup visits to Swistel after the implants' removal.

On May 10, 2014, Hahn purchased an index number and filed a summons with notice. On July 12, 2014, Hahn filed her complaint, which set forth (at ¶ 101) the dates the defendants' treatments were performed as "prior and subsequent to July, 2005 through and including August, 2012," but did not specifically plead the dates of the alleged malpractice. In September 2014, defendants, all represented by the same counsel, served answers. Only Talmor's answer asserted a statute of limitations defense. Hahn served her bill of particulars on or about November 10, 2014, in which she advised that the malpractice occurred in July 2005 through August 2012. A preliminary conference order was executed on March 18, 2015.

By motion served on July 15, 2015, movants now seek an order permitting them to add a statute of limitations defense. They assert that such application should not be a surprise to Hahn because more than nine years have passed between the alleged malpractice and the action's commencement. Movants further observe that because no depositions have taken place Hahn cannot demonstrate any prejudice.

Hahn opposes the motion, urging that because defense counsel asserted a statute of limitations defense on behalf of Talmor, counsel consciously determined not to assert one on behalf of each of the other defendants, and thus should not be permitted to assert one now. Hahn maintains that the movants have waived any statute of limitations defense by failing to allege one in their answers and by failing to move pre-answer to dismiss any claim barred by the statute of limitations. Furthermore, Hahn contends that she was misled by the movants' failure to assert a statute of limitations defense, because defendants did not explain why they omitted the statute of limitations defense in their answers. Hahn's counsel also effectively claims that Hahn

will be prejudiced if the amendment is permitted because some of the malpractice stems from treatment rendered in 2005, and Hahn did not become aware of that malpractice until after the statute of limitations had expired. Hahn's counsel adds, without elaboration, that the request to amend the answers should be denied because of the applicability of the continuous treatment doctrine.

Discussion

Before the time to serve an answer, a party may move, pursuant to CPLR 3211 (a) (5), to dismiss any cause of action on the ground that it cannot be maintained because it is barred by the applicable statute of limitations. CPLR 3211(e). Generally, that defense is waived unless such a motion is made or the defense is raised in the defendant's answer. *Id.* Nevertheless, a defendant can be granted leave to amend its answer to assert an unpleaded affirmative defense, including that the action is barred, in whole or in part by the applicable statute of limitations, provided there is no significant prejudice to the plaintiff. *Arellano v HSBC Bank USA*, 67 AD3d 554 (1st Dept 2009); *Seda v New York City Hous. Auth.*, 181 AD2d 469, 469-470 (1st Dept), *lv denied* 80 NY2d 759 (1992). On a motion to amend pleadings, the burden of establishing prejudice is on the party opposing the amendment. *Hickey v Hutton*, 182 AD2d 801, 802 (2d Dept 1992).

In the exercise of this court's discretion, defendants' motion is granted. Defendants' delay in moving was not excessively long given that no depositions have been held and that Hahn only apprised defendants of the alleged malpractice's time frame in her bill of particulars. *Seda v New York City Hous. Auth.*, 181 AD2d at 470; *see also A.L. Eastmond & Sons, Inc. v Keevily, Spero-Whitelaw, Inc.*, 107 AD3d 503

(1st Dept 2013) (three-and-a-half-month delay after completion of depositions in moving to amend the pleadings is not too long). Moreover, Hahn alleges only bald and conclusory assertions, thus failing to meet her burden of demonstrating either surprise or prejudice. *Williams v Tompkins*, 132 AD3d 532 (1st Dept 2015) (a valid showing of prejudice must be attributable to the fact that the new matter "is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add" [internal quotation marks and citation omitted]); *Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420 (1st Dept 2014) (the nature of the prejudice that justifies the denial of an application for leave to amend pleadings is the type that impedes a party's preparation of its case or stops a party from taking some step to bolster its position); *Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 (1st Dept 2009) (that a party may need to engage in discovery, spend more time preparing its case, or face greater liability, does not constitute the type of prejudice that will result in denial of a motion to amend pleadings); *contrast Cseh v New York City Tr. Auth.*, 240 AD2d 270, 271 (1st Dept 1997) (defendant's motion for leave to amend answer to assert statute of limitations defense, 10 years after action's commencement, denied where no excuse offered for the delay, and plaintiff produced a great deal of evidence and engaged in lengthy discovery, including 10 depositions).

Here, that the statute of limitations on certain of Hahn's claims may have expired before she commenced this action, in that New York does not have a statute of limitations based on when a plaintiff can reasonably discover the claimed malpractice. Therefore, this does not constitute a ground upon which this court may deny

defendants' motion. Hahn's claim, that the defendants' motion should be denied because of the continuous treatment doctrine, is also unavailing. The statute of limitations in a medical malpractice action is two-and-one-half years, and runs from "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." CPLR 214-a. That limitations period usually starts to run when the doctor believes the patient's treatment is finished and does not ask the patient to come back for additional treatment. *McDermott v Torre*, 56 NY2d 399, 405 (1982). The burden of prima facie demonstrating that a malpractice claim is barred by the two-and-one-half-year statute of limitations is on the defendant. *Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405 (2d Dept 2007). Where that burden is met, the burden then shifts to the plaintiff to establish an exception to the usual accrual rule (*Valenti v Trunfio,* 118 AD2d 480, 483 [1st Dept 1986]), including the applicability of the continuous treatment doctrine. *Massie v Crawford,* 78 NY2d 516, 519 (1991); *Texeria,* 43 AD3d at 405.

The continuous treatment doctrine is based on the policy which "seeks to maintain the physician-patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure [internal citation omitted]." *McDermott v Torre*, 56 NY2d at 408. The doctrine's toll "was created to enforce the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action ... ." *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 (1998).

The doctrine requires that a course of treatment has been established regarding the condition giving rise to the lawsuit. *Nykorchuck v Henriques,* 78 NY2d 255, 258-259 (1991).

Therefore, the failure to diagnose a condition and the consequent failure to establish a course of treatment does not constitute continuous treatment. *Trebach v Brown*, 250 AD2d 449, 449-450 (1st Dept 1998); *Chesrow v Galiani,* 234 AD2d 9, 11 (1st Dept 1996). Neither the patient's general continuing relationship with the doctor (*id.* at 11), periodic routine examinations of a patient who seems to be in good health (*Massie v Crawford,* 78 NY2d at 520), nor complete, discrete and isolated treatment constitutes continuous treatment. *Nykorchuck v Henriques*, 78 NY2d at 259. However, "a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment," constitutes continuous treatment. *McDermott v Torre,* 56 NY2d at 406. Also, monitoring "for a specific medical condition to ensure that it improves or at least does not deteriorate (as opposed to a general physical examination)" can constitute continuous treatment. *Ganess v City of New York*, 85 NY2d 733, 736 (1995); *Ramirez v Friedman*, 287 AD2d 376, 377 (1st Dept 2001).

In the instant case, the movants have prima facie demonstrated that any claim accruing in 2005 is barred by the two-and-one-half-year statute of limitations applicable to medical malpractice actions. They have demonstrated that their proposed statute of limitations defense is neither devoid of merit nor palpably insufficient (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]), and that the defense in fact

has merit at least as to the claims which accrued in 2005. Hahn, on the other hand, at this point in the litigation does not appear to have demonstrated any course of continuous treatment between 2005 and 2011, and her counsel's bare reliance on the continuous treatment doctrine does not raise any factual issue on this score. Further, the medical records Hahn submits fail to show any continuous treatment the movants rendered between 2005 and 2011. Hahn's counsel does not specifically urge that Hahn's 2011 treatment constituted a timely return visit to complain about and seek treatment for a matter related to her 2005 treatment. Further, given the approximately five-and-one-half-year gap in treatment, defendants' claimed failure to properly diagnose Hahn's condition in 2005, and the fact that the cancer returned, the applicability of the continuous treatment doctrine is questionable. However, the ultimate determination of that issue presently is not before this court. In light of all of the foregoing, the movants' motion for an order permitting them to amend their answers to assert a statute of limitations defense is granted, and the movants' answers are deemed amended in the form set forth in the proposed amended answers, appended to the moving affirmation as exhibit E, upon service of a copy of this order with notice of entry. In conclusion, it is

ORDERED that the motion of The New York and Presbyterian Hospital, s/h/a New York Presbyterian Hospital/Weill Cornell Medical School, Cornell University, s/h/a Weill Cornell Medical School, Iris Cantor Women's Health Center, and Weill Cornell Breast Center, and Alexander Swistel, M.D. for an order permitting them to amend their

answers to add the affirmative defense that the plaintiff's causes of action are barred by all applicable statutes of limitations is granted; and it is further

ORDERED that upon service of a copy of this order with notice of entry, the moving defendants' answers are deemed amended in the form appended to the moving affirmation as exhibit E.

Counsel for the parties shall appear for a status conference at Part 1, 60 Centre Street, Room 325, New York, New York, on January 13, 2016 at 9:30 a.m.

The foregoing constitutes the order of this court.

Dated: New York, New York
December 3, 2015

Hon. Martin Shulman, J.S.C.