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

PRESENT: EILEEN BRANSTEN PART 6
Justice

CRESSON,

Plaintiff,

- v -

NYU COLLEGE OF DENTISTRY et al.,

Defendants.

INDEX NO. 113633/05
MOTION DATE 9/12/06
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 were read on this motion for SUMMARY JUDGMENT.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 10-13-06

EILEEN BRANSTEN, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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LISA CRESSON,

Plaintiff,

-against-

Index No. 113633/05
Motion Date: 9/12/06
Motion Seq. No.: 001

NEW YORK UNIVERSITY COLLEGE OF DENTISTRY, DR. TRAVIS HARSHMAN, and DR. MARK VAN DUSEN,

Defendants.

----------X

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 214-a and 3212, defendants Dr. Travis Harshman ("Dr. Harshman") and Dr. Mark VanDusen ("Dr. VanDusen") move for summary judgment dismissal of the action commenced by Lisa Cresson ("Ms. Cresson") as barred by the statute of limitations. Ms. Cresson opposes the motion.

Background

On December 19, 1999, Ms. Cresson first presented to New York University College of Dentistry ("NYU") for orthodontic treatment. Affirmation in Support of Motion ("Aff."), at ¶ 4; Affirmation in Opposition ("Opp."), at 2. Her case was assigned to Dr. Harshman, a graduate student at NYU, who treated her from 1999 until June 2001, when he completed his studies at NYU and returned to Michigan to practice. Opp., at 2. In particular, Dr. Harshman last treated Ms. Cresson on June 13, 2001. Aff., at ¶ 11.

After Dr. Harshman left NYU, Dr. VanDusen – another student – took over treatment of Ms. Cresson, and provided orthodontic care until June 22, 2002, at which time he graduated from NYU and returned to Oregon to practice. Aff., at ¶ 12. According to her chart, at her last appointment with Dr. VanDusen, he introduced her to Dr. Florman for transition. Aff., Ex. C, at 9 ("Pt introduced to Dr. Florman for trans. - - initial conversation turned into argument and pt. stormed out of clinic"). Four days later, on June 26, 2002, Ms. Cresson called NYU to request her radiographs so she could take them to a different orthodontist. *Id.* She stated that she wanted "to excuse herself from this circus." *Id.* Nonetheless, Ms. Cresson continued to receive treatment from other students and faculty at NYU through 2003. Opp., at 2.

In this dental malpractice action commenced on September 28, 2005, Ms. Cresson claims that defendants negligently provided orthodontic treatment to her. Aff., at ¶ 3.

Drs. Harshman and VanDusen now move for dismissal of Ms. Cresson's case, arguing that they completed caring for her before March 27, 2003 – two and one-half years before the filing of the complaint – and her claims against them are thus barred by the statute of limitations. Aff., at ¶ 10. In support of their motion, defendants submit the affidavit of Dr. VanDusen, who states that he treated Ms. Cresson from July 2, 2001 to June 26, 2002, but thereafter did not see her. Aff., Ex. D, at 1-2. Dr. VanDusen further opines that he treated Ms. Cresson in accordance with accepted standards of dental care. Aff., Ex. D, at

¶ 2. The doctors also rely on the affidavit of Dr. Harshman, who avers that he treated Ms. Cresson from December 13, 1999 to June 13, 2001 and did not provide treatment to Ms. Cresson after June 2001. Aff., Ex. D, at 3-4. Dr. Harshman concludes, moreover, that he treated Ms. Cresson in accordance with accepted standards of dental practice. Aff., Ex. D, at 3.

Relying on the doctrine of continuous treatment, Ms. Cresson opposes the motion and argues that her ongoing treatment at NYU should be imputed to Drs. Harshman and VanDusen because they were employees of NYU. Opp., at 3.

Analysis

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dept. 1991).

Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made

on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see also*, *Waring v. Kingston Diagnostic Radiology Ctr.*, 13 A.D.3d 1024, 1025 (3d Dept. 2004) (defendants have initial burden of proving that plaintiff commenced action more than two and one-half years after occurrence of allegedly negligent acts).

Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324; *see also, Waring v. Kingston Diagnostic Radiology Ctr.*, 13 A.D.3d, at 1025 (burden shifts to plaintiff to demonstrate triable issues of fact with respect to application of continuous treatment doctrine).

An action for medical malpractice must be commenced within two years and six months from the date of the alleged malpractice. CPLR 214-a; *Hein v. Cornwall Hosp.*, 302 A.D.2d 170, 173 (1st Dept. 2003). The statute of limitations is tolled, however, when the course of treatment that includes the allegedly negligent conduct runs continuously and relates to the original condition, illness, injury, complaint, or "failure." *Hein v. Cornwall*

Hosp., 302 A.D.2d, at 173. "A patient remains under the 'continuous treatment or care' of a physician between the time of the last visit and the next scheduled one where the latter's purpose is to administer ongoing corrective efforts for the same or a related condition." *See*, *Richardson v. Orentreich*, 64 N.Y.2d 896, 899 (1985); *see also*, *Cox v. Kingsboro Med. Group*, 88 N.Y.2d 904, 906 (1996).

The mere continuing physician-patient relationship is insufficient to toll the statute of limitations. *Massie v. Crawford*, 78 N.Y.2d 516 (1991), *rearg. denied* 79 N.Y.2d 978 (1992); *Nykorchuck v. Henriques*, 78 N.Y.2d 255, 259 (1991). Neither is the statute tolled in circumstances in which the patient initiates return visits merely to have her condition checked or for routine examinations. *Massie v. Crawford*, 78 N.Y.2d, at 520; *McDermott v. Torre*, 56 N.Y.2d 399, 405 (1982); *Sinclair v. Cahan*, 240 A.D.2d 152, 154 (1st Dept. 1997).

If the plaintiff demonstrates a triable issue of fact as to whether the continuous treatment doctrine applies, summary judgment must be denied. *Dansby v. Trumpatori*, 298 A.D.2d 265, 266 (1st Dept. 2002); *Irizarry v. New York City Health and Hosp. Corp.*, 268 A.D.2d 321, 323 (1st Dept. 2000).

Here, Drs. Harshman and VanDusen have established their *prima facie* right to summary judgment dismissal by demonstrating that the summons and complaint were filed on September 28, 2005 and that they last treated Ms. Cresson on June 13, 2001 and June 22,

2002, respectively – more than two and one-half years earlier. The burden then shifted to Ms. Cresson to demonstrate that there is a question of fact as to whether the doctrine of continuous treatment applies. She argues that her claim is not time-barred because the doctors were employees of NYU and she last received treatment at NYU in May 2003, less than two-and-one-half years before filing the complaint.

Plaintiff has not met her burden. The statute of limitations as to Drs. Harshman and VanDusen does not run from the date of Ms. Cresson's last visit to NYU in 2003; it runs from the time she and each defendant no longer contemplated continuous treatment for her orthodontia. *Oksman v. City of New York*, 271 A.D.2d 213, 215 (1st Dept. 2000) (treatment is continuous as long as both patient and physician explicitly anticipate further treatment).

It is clear from the record that Drs. Harshman and VanDusen did not contemplate further treatment with Ms. Cresson because, in both cases, the doctors graduated from NYU and left the state shortly after their last appointments with Ms. Cresson. Furthermore, the chart reflects that Ms. Cresson was informed, at the very least, that Dr. VanDusen was leaving and was introduced to Dr. Florman "for transition." Aff., Ex. C, at 9. At the time of her introduction to a her new orthodontist, any expectation of continuing care from Dr. VanDusen was terminated and Ms. Cresson had no reason not to institute suit against him if she believed his treatment of her was below the standard of care. *Keith v. Schulman*, 265 A.D.2d 380 (2d Dept. 1999) (essential to the application of the continuous treatment

doctrine is a finding that the physician and patient had a relationship of continuing trust and confidence). Indeed, Ms. Cresson does not even argue that she continued to treat or intended a continuation of treatment with either of these doctors. To be sure, just four days after Ms. Cresson last saw Dr. VanDusen she requested her radiographs so that she could transfer to another orthodontist, exclaiming that she wanted "to excuse herself from this circus." Aff., Ex. C, at 9.

That Ms. Cresson continued treatment with NYU, Dr. Harshman's and Dr. VanDusen's employer, is inapposite. It does not change the fact that all care and treatment with Dr. Harshman and Dr. VanDusen terminated on June 13, 2001 and June 22, 2002, respectively. *See, Keith v. Schulman*, 265 A.D.2d, at 380; *Adams v. Frankel*, 242 A.D.2d 595 (2d Dept. 1997); *Champagnie v. State of New York*, 224 A.D.2d 476, 477 (2d Dept. 1996). Certainly, she cannot argue that her trust and confidence in her continuing care at NYU was such that she could not be expected to institute suit against it; at the time of her last appointment with Dr. VanDusen, she threatened to terminate treatment with NYU, stormed out of the office and fiercely argued with NYU doctors about her treatment.

Moreover, the Court of Appeals has stated that the fact that a physician is a "shareholder, officer or employee of a professional service corporation does not make him vicariously liable for the malpractice of another doctor who is an officer, director and employee of the corporation." *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 79 (1986). The

Appellate Division, Fourth Department, has applied this principle to the continuous treatment doctrine and determined that continuous treatment by one officer of a professional service corporation will not be imputed to toll the statute against another officer. *Pellegrino v. Millard Fillmore Hosp.*, 140 A.D.2d 954, 955 (4th Dept. 1988); *see also*, *McDermott v. Torre*, 56 N.Y.2d, at 408 (continuous treatment by hospital will not be imputed to independent laboratory); *Janisch v. Howland*, 163 A.D.2d 821, 822 (4th Dept. 1990) (continuous treatment by one shareholder of a medical group will not be imputed to another), *lv. denied*, 76 N.Y.2d 713; *Bradt v. Hamel*, 144 A.D.2d 921, 922 (4th Dept. 1988) (continuous treatment by one member of a professional corporation will not be imputed to another); *Damsker v. Berger*, 123 A.D.2d 343 (2d Dept. 1986) (continuous treatment by one doctor will not be imputed to another when first doctor refers patient to second). Thus, NYU's treatment of Ms. Cresson after March 27, 2003 cannot be imputed to Drs. Harshman and VanDusen to toll the statute.

In the end, Ms. Cresson has not proven that there is a question of fact with respect to continuing treatment that warrants a trial and summary judgment must be granted.

Accordingly, it is

ORDERED that Dr. Harshman and Dr. VanDusen's motion to dismiss is granted and the complaint is hereby severed and dismissed as against defendants Dr. Harshman and Dr.

VanDusen. The Clerk is respectfully directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 13, 2006

ENTER

Hon. Eileen Bransten