

Kaufmann v Fulop

2006 NY Slip Op 30456(U)

October 17, 2006

Supreme Court, Richmond County

Docket Number: 12814/02

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

06-M-036B

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TARA KAUFMANN, as Limited Administratrix
of the Estate of SUSAN KAUFMANN, deceased,

Plaintiffs,
Present:

Part: DCM PART 6

Hon. Philip J. Minardo

-against-

ROBERT FULOP, M.D., VALERIA ASIMENIOS,
M.D., ELIZABETH MADDELA, M.D. and CESAR
SEGURITAN, M.D.,

Defendant(s).

Decision and Order
Index No. 12814/02
Motion No. 593-004
690-005

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The following papers numbered 1 to 5 were submitted on this motion this 19th day of June, 2006:

Notice of Motion to Dismiss and Exhibits (dated February 28, 2006).....	1
Notice of Cross Motion and Exhibits (dated March 2, 2006).....	2
Affirmation in Opposition to Motion and Cross Motion to Dismiss and Exhibits (dated April 16, 2006)...	3
Reply Affirmation of Defendant (dated May 9, 2006).....	4
Reply Affirmation of Defendant (dated May 30, 2006).....	5

Upon the foregoing papers, the motion (No. 593) is granted, and the cross motion (No. 690) is decided as hereinafter provided.

This is an action to recover compensatory damages for the pain and suffering and wrongful death allegedly incurred by plaintiff's decedent due to defendants' negligence and medical malpractice.

In Motion No. 593, defendant Seguritan moves for dismissal of all claims asserted against him for any acts or omissions alleged to have occurred prior to June 1, 2001, on the basis that they are time-barred and not part of a continuous course of medical treatment. In Motion No. 690, defendants Fulop and Asimenios cross-move pursuant to CPLR 3211(a)(5) and 3212 to

dismiss the claims asserted against each of them on the basis that this action is barred by the applicable Statute of Limitations.

The complaint is grounded in defendants' alleged failure to timely diagnose and treat lung cancer in plaintiff's decedent during the period August 1998 through October 2001. This action was commenced on August 28, 2002.¹

Plaintiff alleges that the decedent was a patient of Robert Fulop, M.D., P.C. (not a party to this action) commencing on or about August 12, 1998. Defendants Fulop, Asimenios and Maddela are employees of the medical office known as Robert Fulop, M.D., P.C. (hereinafter "the P.C."). Defendant Seguritan is a radiologist, an independent contractor, who reads x-rays for the P.C. on an *ad hoc* basis.

Plaintiff's decedent (hereinafter "Mrs. Kaufman" or "decedent") first seen at the non party P.C. on August 12, 1998. According to office records, she presented with no lung-related complaints. She returned on August 31, 1998 to have her blood pressure checked and a cyst on her foot examined. Dr. Asimenios diagnosed hypertension. At both examinations, Dr. Asimenios advised her to stop smoking.

She next returned on October 9, 1998, presenting with a sore throat, chills and cough. Dr. Asimenios examined her, determined that her lungs were clear, and prescribed an antibiotic. She was again advised to stop smoking.

Mrs. Kaufman also saw Dr. Asimenios three times in the first half of 1999, on March 23rd April 8th, and April 27th, to have her blood pressure checked. She made no complaint related to her lungs. On the first and third of these visits, Dr. Asimenios again advised her to stop smoking.

On November 8, 1999, Mrs. Kaufman returned to see Dr. Asimenios complaining of

fever, fatigue, weakness and difficulty breathing. Following a physical examination that showed decreased air entry in both lungs, an x-ray was taken that revealed “increased vascular marking bilaterally,” Dr. Asimenios diagnosed bronchitis and prescribed medication. She again advised Mrs. Kaufman to stop smoking.

Decedent’s chest x-ray was subsequently reviewed by Dr. Seguritan at the request of the P.C. He documented the presence of “infiltrate” in the right base of the lung, reported his findings to the P.C. and recommended a repeat x-ray in six weeks. Mrs. Kaufman was so advised, and she returned for the follow-up x-ray on January 24, 2000. At this time, she was seen by Dr. Fulop. His office notes indicate that she told him that she had been suffering from a cough, belching and stomach pain for the past week and had a 102° fever two days prior to her visit. Dr. Fulop examined her and found that her lungs clear, leading to an impression of gastritis. He also took the follow-up x-ray, and compared it with the prior x-ray. The second x-ray purportedly showed “no change.” However, Dr. Fulop noted the presence of a “questionable fat pad,” and held the second x-ray aside for review with Dr. Seguritan. While Dr. Seguritan does not recall discussing this particular x-ray with Dr. Fulop, Dr. Fulop indicates that he spoke directly with the radiologist, who reported no change in the x-rays. Dr. Seguritan’s written report indicated that he saw “no change from [the] previous [x-ray],” but that he did observe a “little increase” of the hilar marking on the second x-ray—what he described at his subsequent deposition as an “unusual finding.” He did not recommend any follow-up.

Dr. Fulop testified at his deposition that he “followed the radiologist’s advice” and took no further action. He stated that he relied on the radiologist’s interpretation of the x-rays in deciding that no further visit and/or x-rays were required of Mrs. Kaufman.

Dr Fulop had no contact with Mrs. Kaufman after January 24, 2000.²

During the remainder of 2000, Mrs. Kaufman visited the P.C. twice, and was treated by Dr. Asimenios on both occasions. On April 22, 2000, Dr. Asimenios diagnosed Mrs. Kaufman with a urinary tract infection based on her complaints and a physical examination, and on the second visit, added an upper respiratory infection to her diagnosis. Dr. Asimenios testified at her deposition that she did not consider chest x-rays to be necessary on either occasion because the patient's lungs were clear and because Dr. Seguritan had not recommended any further treatment.

In January, 2001, Mrs Kaufman was involved in an automobile accident and came to the office complaining of head and neck pain. Dr. Asimenios diagnosed a concussion and recommended a CT scan to rule out a subdural hematoma. There is no record of whether the CT scan was performed.

Dr. Asimenios did not treat Mrs. Kaufman after January 22, 2001.

On June 1, 2001 (approximately 17 months after the previous chest x-ray), Mrs. Kaufman presented at the P.C. office complaining of symptoms consistent with bronchitis. She was seen by Dr. Maddela, who diagnosed bronchitis and ordered a chest x-ray. Dr. Maddela may have discussed the x-ray with Dr. Fulop at that time, but she does not recall. Dr. Seguritan subsequently reviewed the film and noted increased density in the right base and a questionable prominence in the left hilum. He recommended a follow-up x-ray in six weeks.

Mrs. Kaufman returned for the follow-up x-ray on July 31, 2001 and was again seen by Dr. Maddela. Dr. Seguritan reviewed the follow-up x-ray and noted: "reidentification of the infiltrate Rt base & slight prominence of the left hilum"; since there is no change or improvement, CT scan [is] advised."

Mrs. Kaufman returned on September, 2001 and was advised that a CT scan was necessary. That CT scan was performed on September 25, 2001, at an independent radiology

unit, and purportedly revealed a right lower mass with spread to the right hilum. On October 31, 2001, Dr. Forlenza (not a party to this action) diagnosed lung cancer.

As noted, this action was commenced on August 28, 2002. Mrs Kaufman died on December 16, 2003.

A medical malpractice action must be commenced within two years and six months of the act, omission or failure complained of (CPLR 214-a). However, the limitations period may be tolled until the end of treatment if the plaintiff establishes that the defendant doctor provided him or her with continuous treatment. Continuous treatment exists “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 (*Borgia v. City of New York*, 12 NY2d 151 [1962]).

Here, defendant Seguritan argues that he never examined the decedent and that his sole connection with her condition was as an independent contractor reading individual x-rays for the professional corporation. He states that when Dr. Fulop would call him concerning an x-ray, he would pick up the films and review them at home. He kept no records and did not bill for the service. He does not recall discussing the matter with Dr. Fulop. In addition, he alleges that any discrete acts he performed prior to his reading of the x-ray on June 1, 2001, occurred more than two years and six months prior to commencement of this action in August 2003.

It is undisputed that Dr. Seguritan never personally saw or examined the decedent. In general, “where a diagnostician, such as a radiologist, performs a ‘discrete and complete’ service, this will not be considered continuous treatment . . . unless the diagnostician ‘has a continuing or other relevant relationship with the patient’ or act[s] as an agent for the doctor or otherwise act[s] in relevant association with the physician” (*Elkin v. Goodman*, 24 AD3d 717 [2nd Dept 2005], citations omitted).

The *Elkin* decision (hereinafter "*Elkin II*") was the second in that case by the Appellate Division, and was rendered after trial. It followed a prior appeal (*Elkin v. Goodman*, 285 AD2d 282 [2nd Dept 2001], hereinafter "*Elkin I*") in which the same court had determined that summary judgment was improper because a question of fact existed as to whether the plaintiff's medical malpractice claims against the defendants--his treating physician and an independent radiologist who read and interpreted certain MRI scans for that physician--were tolled by the continuous treatment doctrine. In making that determination, the court in *Elkin I* noted that a prescribed series of radiological reports to the treating physician indicated plaintiff's tumor, but that it had not significantly changed in size and appearance during the monitoring period. The treating physician read the reports, but also reviewed the films on his own. The *Elkin I* court found questions of fact concerning (1) whether the radiologist's failure to detect the increase in the tumor size was the proximate cause of plaintiff's injuries; (2) the extent of the relationship implicit in the records between the radiologist and the treating physician; and (3) the degree to which the treating physician's concurrence with the radiologist's conclusions was influenced by the reports.

At trial, it was determined that (1) neither the plaintiff nor the radiologist anticipated that the latter would provide plaintiff with ongoing treatment; (2) although the radiologist sent the referring physician a copy of each scan and a radiologist report, the referring physician made his own independent analysis of the scans and drew his own conclusions; (3) based on that independent analysis, the referring physician decided on the appropriate course of treatment; and (4) the radiologist made no decisions regarding plaintiff's treatment. Based on these findings of fact, the court in *Elkin II* found that the treating physician's continuing treatment of the plaintiff could not be imputed to the radiologist, and dismissed the complaint as against him pursuant to

the Statute of Limitations.

Here, as in *Elkin I*, the role of the court is not to find facts, but to identify triable issues, and “the applicability of the continuous treatment toll for the services of the [radiologist at bar] cannot be determined as a matter of law” (285 AD2d at 486). As in *Elkin I*, there are factual questions in this case concerning (1) whether Dr. Seguritan’s failure to detect the change between the November 1999 and January 2000 x-rays was a proximate cause of decedent’s injuries; (2) the extent of the relationship between the radiologist and the treating physicians;³ and (3) the degree to which the latter’s concurrence with the radiologist’s conclusions was influenced by his reports.

Moreover, given the deposition testimony as to the working relationship between Dr. Seguritan and Drs. Fulop, Asimenios and Maddela, a jury could properly determine that the aforesaid acted in “relevant association” with each other in treating of plaintiff’s deceased (*see and compare McDermott v. Torre*, 56 NY2d 399 [1982], in which the relationship was found to be insufficient). Under such circumstances, the doctrine of continuous treatment may be applicable to Dr. Seguritan.

As for the allegations of malpractice against the remaining doctors for the acts or omissions occurring prior to February 2000, the doctrine of “continuous treatment” may also be applicable to bring these alleged errors within the Statute of Limitations. As is relevant to this issue, it is undisputed that Dr. Fulop examined the decedent only once, on January 24, 2000, and failed to schedule follow-up treatments following consultation with Dr. Seguritan. Accordingly, there is no reasonable view of the facts from which “continuous treatment” by Dr. Fulop can be inferred. Contrariwise, Dr. Asimenios testified at her deposition that she treated the decedent both before and after February 2000, and that during each period she fielded complains about

Mrs. Kaufman's breathing. Her further testimony indicates that the doctor never considered chest x-rays because the patient's lungs were clear and because Dr. Seguritan had not recommended any further treatment. In fact, she specifically stated that it was based on the recommendation of Dr. Seguritan that she refrained from scheduling further treatment regarding the x-ray findings of November 8, 1999 and January 24, 2000. Dr. Maddela only treated the decedent on and after June 1, 2001, i.e., within the statutory period.

While neither a continuing relationship between a physician and patient, nor the continuing nature of a diagnosis is alone sufficient to satisfy the requirements of the continuous treatment exception to the Statute of Limitations in medical malpractice actions (*see e.g. Waring v. Kingston Diagnostic Radiology Ctr*, 13 AD3d 1024 [3rd Dept 2004]), where, as herein alleged, the failure to schedule follow-up visits is attributed to malpractice and the patient presents soon afterward with symptoms that are consistent with his or her earlier health concerns, a trier of fact reasonably could determine that there has been a course of continuous treatment rather than a resumption of treatment when the patient re-presents with a related illness.

Accordingly, it is

ORDERED that the motion to dismiss (No. 593) is denied; and it is further

ORDERED that the cross motion (No. 690) for like relief is denied except as to defendant Robert Fulop, M.D.; and it is further

ORDERED that the complaint and any cross claims against the aforementioned defendant are severed and dismissed; and it is further

ORDERED that the action continue as to the remaining defendants; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

Dated: Oct. 17, 2006

J.S.C.

BACKGROUND MATERIAL

Accordingly, the mere existence of a misdiagnosis upon which other physicians rely is not sufficient to warrant the imputation of continuous treatment, since "the continuing nature of a diagnosis or misdiagnosis does not itself constitute continuous treatment" (Swift v. Colman, 196 A.D.2d 150, 153, 608 N.Y.S.2d 717). Applying these principles to **142(Cite as: 214 A.D.2d 150, *154, 632 N.Y.S.2d 139, **142) the instant case, it was incumbent upon the plaintiffs to establish either a continuing relationship between Dr. Levowitz and Mr. Cox, or an agency or other relevant relationship between Dr. Levowitz and Kingsboro (see generally, Kavanaugh v. Nussbaum, 71 N.Y.2d 535, 547, 528 N.Y.S.2d 8, 523 N.E.2d 284; Reeck v. Huntington Hosp., 215 A.D.2d 464, 626 N.Y.S.2d 516). The plaintiffs failed to demonstrate either.

As to the defendants Dr. Adachi and Kingsbrook, no continued or continuing relationship (see, Swartz v. Karlan, 107 A.D.2d 801, 803, 484 N.Y.S.2d 635; Manno v. Levi, 94 A.D.2d 556, 563, 465 N.Y.S.2d 219, affd 62 N.Y.2d 888, 478 N.Y.S.2d 853, 467 N.E.2d 517) or agency, or other relevant relationship (see, McDermott v. Torre, supra; Evra v. Hillcrest Gen. Hosp., 111 A.D.2d 740, 490 N.Y.S.2d 234) between Dr. Pomina, the primary physician, and Dr. Adachi and

Kingsbrook, the misdiagnosing defendants, was shown, that would warrant imputing continuous treatment by Dr. Pomina to Dr. Adachi and Kingsbrook. Neither was there any continuing relationship between Mrs. Modzelewski and Dr. Adachi and Kingsbrook following Mrs. Modzelewski's discharge on December 10, 1977 (see, *McDermott v. Torre*, supra, 56 N.Y.2d at p. 403, 452 N.Y.S.2d 351, 437 N.E.2d 1108). The plaintiffs cannot show even an indirect relationship between Dr. Adachi and Dr. Pomina through their connections with Kingsbrook. Dr. Pomina was an independent doctor affiliated with, but not employed by, *500(Cite as: 120 A.D.2d 498, *500, 501 N.Y.S.2d 699, **701)

Kingsbrook. This is insufficient to impute Dr. Pomina's conduct to Kingsbrook (*Ruane v. Niagra Falls Mem. Med. Center*, 60 N.Y.2d 908, 470 N.Y.S.2d 576, 458 N.E.2d 1253; *Evra v. Hillcrest Gen. Hosp.*, supra).

Modzelewski v. Kingsbrook Jewish Medical Center, 120 AD2d 498 [2ND Dept 1986], *app denied*

¹ The original plaintiff passed away on December 16, 2003. A cause of action for wrongful death subsequently was added to the complaint by the Administratrix of decedent's estate, who was also substituted as plaintiff in the causes of action for conscious pain and suffering.

² It is uncontroverted that all of the above occurred more than two and one-half years prior to the commencement of this action on August 28, 2002.

³ Compare *Cox v. Kingsboro Medical Group* (214 AD2d 150 [2nd Dept 1995], *affd* 88 NY2d 904) in which plaintiff failed to establish a relevant relationship between the reviewing physician--an independent contractor--and the treating physician.