

Giglio v Billera

2007 NY Slip Op 30129(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0011131

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/12/06
ADJ. DATE 12/11/06
Mot. Seq. # 001 - MotD

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	:	Attorneys for Plaintiff	
Plaintiff,	:	361 Atlantic Avenue	
	:	East Rockaway, New York 11518	
- against -	:		
	:	CHESNEY & MURPHY, LLP	
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	:	2305 Grand Avenue	
Defendant.	:	Baldwin, New York 11510	
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Upon the following papers numbered 1 to 18 read on this motion for partial summary judgment; Notice of Motion; Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10 - 14; Replying Affidavits and supporting papers 15 - 18; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 214-a and 3212 granting him partial summary judgment dismissing so much of plaintiff's complaint which alleges acts of dental malpractice occurring before November 4, 2002, is granted only to the extent of dismissing claims relating to defendant's alleged failure to properly treat plaintiff's periodontal disease, and is otherwise denied.

In this dental malpractice action, plaintiff alleges that defendant departed from accepted standards of dental care from May 14, 2002 through February 9, 2005. Defendant now moves for partial summary judgment dismissing plaintiff's claims as to any alleged acts occurring more than 2½ years prior to the commencement of this action on May 4, 2005, pursuant to CPLR 214-a.

As a general rule, dental malpractice accrues on the date the alleged wrongful act or omission occurred and is governed by a 2 ½ year statute of limitations (CPLR 214-a). However, under the continuous treatment doctrine the two-and-one-half-year period does not begin to run until the end of the course of 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" (*Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 670 NYS2d 169 [1998]; *Nykorchuck v Henriques*, 78 NY2d 255, 258, 573 NYS2d 434 [1991]; *McDermott v Torre*, 56 NY2d 399, 452 NYS2d 351 [1982]).

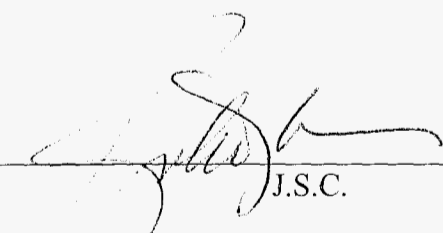
“Essential to the application of the [continuous treatment] doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit” (*Nykorchuck v Henriques*, *supra* at 259; *Grippi v Jankunas*, 230 AD2d 826, 646 NYS2d 829 [1996], *lv dismissed* 89 NY2d 938 [1997]).

Here, plaintiff’s bill of particulars alleges defendant’s malpractice, *inter alia*, in failing to properly treat her periodontal condition and negligently preparing and installing bridgework during the period from May 14, 2002 through February 9, 2005. Defendant’s deposition testimony established that he began treating plaintiff on May 14, 2002, when he saw her for emergency treatment relative to a failed “Maryland” bridge. Defendant testified that he performed a complete exam, took a full mouth series of x-rays, and discussed options for replacing the failed bridge. Among these was a fixed bridge which would span six teeth, from tooth #22 to tooth #27. Two teeth, #24 and #25, were missing and would be replaced by pontics, and the remaining four natural teeth, #22, #23, #26 and #27 would be capped. In addition, tooth #22 required root canal therapy. Plaintiff returned for the root canal on tooth #22 on August 21, 2002, and for preparation of the natural teeth and placement of a temporary bridge on August 28, 2002. The permanent bridge was cemented on October 10, 2002.

Defendant also testified that plaintiff was seen on November 4, 2002, for a “focal” exam, or an emergency visit. Plaintiff complained of pain on tooth #27, one of the abutments for the bridge, and defendant adjusted her bite and applied a desensitizing agent. The pain did not subside and on November 5th defendant called in prescriptions for pain relief and an antibiotic to plaintiff’s pharmacy. On November 6th defendant saw plaintiff again and concluded that tooth #27 had developed irreversible pulpitis and performed a root canal on that tooth. Plaintiff was treated by defendant on an emergency basis on June 23, 2003, August 10, 2004, and January 18, 2005. These emergency visits were all related to pain and discomfort for teeth within the fixed bridge. Therefore, there remain questions of fact as to whether these emergency treatments constitute continuous treatment as to the bridge, thereby tolling the statute of limitations, and summary judgment as to these claims is denied (*Ragusa v Winter*, 28 AD3d 313, 813 NYS2d 410 [2006]; *Denlea v Hanswirth*, 303 AD2d 711, 758 NYS2d 85 [2003]).

However, as to defendant’s alleged failure to properly treat plaintiff’s periodontal condition, the only treatment consisted of routine prophylaxis (and x-rays) performed on February 5th, May 12th, and November 4th of 2003. Since defendant never did more than routine scaling and polishing, there was no continuous treatment as to her alleged periodontal condition (*Grippi v Jankunas*, *supra* at 827; *see also*, *Couch v County of Suffolk*, 296 AD2d 194, 196, 746 NYS2d 187 [2002]). Accordingly, any claims which accrued prior to November 4, 2002, relating to defendant’s failure to treat plaintiff’s periodontal disease, are not tolled by the continuous treatment doctrine and summary judgment dismissing these claims is granted.

Dated: MAR 05 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION