

Bayuk v Gilbert

2007 NY Slip Op 30803(U)

April 5, 2007

Supreme Court, New York County

Docket Number: 0116975/2006

Judge: Stanley L. Sklar

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

PRESENT: Hon. Stanley L. Sklar
Justice

PART 29

Index Number : 116975/2006

BAYUK, MARY JUNE

vs

GILBERT, MARVIN M.D.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered _____, are submitted in support of 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

MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

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

Dated: 7/5/07

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

-----X

MARY JUNE BAYUK,

Plaintiff,

Index No.: 116975/06

-against-

MARVIN GILBERT, M.D.,

Defendant.

-----X

SKLAR, J.:

Defendant Dr. Marvin Gilbert moves to dismiss this medical malpractice action pursuant to CPLR § 3211 (a)(5) as barred by the two and one half year medical malpractice Statute of Limitations. Plaintiff cross moves for an accelerated preliminary conference and discovery. The motion is granted and the cross motion is accordingly denied as moot.

Plaintiff, who lived in Arizona, was referred to Dr. Gilbert in New York for hip replacement surgery. Dr. Gilbert, who first examined plaintiff on November 4, 2002, previously ordered presurgical testing including a chest x-ray of the plaintiff, Mary June Bayuk, to clear her for the surgery at Mt. Sinai hospital to be performed on November 5, 2002. The chest x- ray was performed in Arizona. The radiologist’s preliminary report of that x-ray dated October 24, 2002 which was faxed to Dr. Gilbert indicated that there was a “2 cm nonspecific LUL [left upper lobe] nodule”, and recommended “comparison ĉ prior”. The final radiologist’s report, which according to the complaint was received by Dr. Gilbert in October 2004, indicated the “presence of a 2.2 cm. left upper lobe noncalcified pulmonary parenchymal nodule and that comparison [should] be made if prior examination is available, and if not, that a CT scan [was] recommended as further evaluation” (complaint, ¶7). The complaint, which was not personally verified by

plaintiff, alleges that “The defendant failed to accurately disclose the contents of the report, and deliberately concealed the information from the plaintiff” in “October 2002, and thereafter” (Id ¶¶ 9, 13). Plaintiff’s counsel, who lacks personal knowledge, claims that Dr. Gilbert told plaintiff that the x-ray was normal. Dr. Gilbert last saw plaintiff for post-surgical followup on December 12, 2002 (Ex D, motion).

In June and July 2003 plaintiff phoned Dr. Gilbert’s office from out of state to discuss the dislocation of her hip prosthesis, and on July 14, 2003 asked that he speak to a Dr. Yamanaka, who was evidently attending to her dislocation. See Gilbert aff ¶ 7 Plaintiff’s counsel claims that Dr. Gilbert during those discussions “concealed, and failed to disclose the 2.2 cm nodule and x-ray report in his office chart”. Reingold aff. in opp. In the summer of 2003 the dislocation was reduced at Salem Hospital in Oregon, and a copy of a radiology report from that June 2003 admission showing a reduction of the dislocation was faxed to Dr. Gilbert.

Dr. Gilbert’s last contact with plaintiff was in August 2006 when her counsel sought the release of her records. Plaintiff’s counsel asserts that plaintiff had no symptoms until an unusual cough developed in October 2005, and that plaintiff within a short time thereafter was diagnosed with lung cancer that had metastasized.

This action was instituted by the filing of a summons and complaint on November 14, 2006. The complaint, which purports to assert one cause of action, alleges that this “deception and malpractice” prevented plaintiff from discovering that she had cancer and receiving treatment which could have cured it and avoided metastasis of the disease.

Defendant moves to dismiss the complaint since the action was instituted more than two and one half years after the last day that defendant treated plaintiff. Plaintiff’s cross

motion indicates in effect that the continuous treatment doctrine applies but concedes that the Statute of Limitations, "strictly applied" expired in January, 2006, i.e. 2 ½ years after the summer of 2003 phone conversations. Defense counsel does not concede that the continuous treatment doctrine applies but notes that even assuming arguendo it did, the action was still not timely commenced within 2 ½ years of the summer of 2003. Plaintiff's counsel urges however that Dr. Gilbert should be equitably estopped from asserting the Statute of Limitations as a bar to the action, relying on *Simcuski v Sacli*, 44 NY2d 442 (1978), and its progeny. Plaintiff's counsel's estoppel argument seems to be predicated on a failure of Dr. Gilbert during his conversations in the summer of 2003 with plaintiff and/or her subsequent treating doctor about plaintiff's dislocated hip, to inform them of the contents of some of results of routine presurgical medical clearance testing, namely the results of the chest x-ray (See Reingold aff, p 2). Plaintiff's counsel evidently surmises that during those conversations Dr. Gilbert either remembered that he never sent plaintiff for followup with respect to her x-ray or reviewed his entire chart, including those irrelevant to the dislocation, and intentionally failed to reveal that the chest x-ray report revealed a "nonspecific LUL nodule" and recommended further testing. There is no claim by plaintiff's counsel or plaintiff herself that any affirmative misrepresentation was made by Dr. Gilbert at that time.

The motion is granted and the action is dismissed. Initially I note that the complaint does not purport to assert a cause of action sounding in fraud, and plaintiff's counsel does not claim that it does on this motion. In any event any such cause of action would fail because among other things the complaint fails to allege damages separate and apart from those

arising from the alleged malpractice. *Atton v Bier*, 12 AD3d 240 (1st Dept, 2004); *Bellera v Handler*, 284 AD2d 488 (2nd Dept, 2001)

Plaintiff's counsel's estoppel argument is without merit because plaintiff's complaint while replete with vague, bald and conclusory statements does not allege "facts apart from those giving rise to the malpractice claim". *Rizk v Cohen*, 73 NY2d 98, 102, 105-106 (1989); *Roswick v Mt. Sinai Medical Center*, 22 AD3d 409 (1st Dept, 2005); *Kermen v Brower*, 16 AD3d 156 (1st Dept, 2005); *Kaufman v Cohen*, 307 AD2d 113, 122 (1st Dept, 2003); *Chesrow v Galiani*, 234 AD2d 9 (1st Dept, 1996); *Dmoch v Iolab Corp.*, 203 AD2d 59 (1st Dept, 1994)

The complaint fails to allege any specific fraudulent misrepresentation following the alleged malpractice made in an attempt to conceal the malpractice and prevent the timely institution of the instant action (See *Rizk supra* at 105-106; *Simcuski supra* at 448-449), and no affidavit is provided by plaintiff herself on this motion. In view of all the foregoing plaintiff's counsel's assertion in his reply affirmation that the basis of Dr. Gilbert's deception will be discovered during discovery [See CPLR 3211(d)] is unavailing.

In conclusion the motion is granted and the action is dismissed as time-barred.

The cross motion is denied as moot.

Settle order.

Dated: April 5, 2007
60 Centre Street
New York, NY



J.S.C.