At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of June, 2007.

P R E S E N T:

HON. GERARD H. ROSENBERG,
Justice.

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ROBERTO TORRES,

Plaintiff,

Index No. 10508/01

Motion Seq. No. 004

- against -

NEW YORK CITY HEALTH & HOSPITALS CORPORATION, INDIVIDUALLY AND DOING BUSINESS AS WOODHULL MEDICAL & MENTAL HOSPITAL CENTER, et al.,

Defendants.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this action to recover damages for dental malpractice, plaintiff Roberto Torres (plaintiff) moves, pursuant to CPLR 2221, for renewal and/or reargument of his opposition to the prior motion by defendants New York City Health & Hospitals Corporation (HHC), individually and doing business as Woodhull Medical & Mental Hospital Center (Woodhull) (collectively, defendants), to dismiss plaintiff's action

pursuant to CPLR 3211 or for summary judgment dismissing plaintiff's action based upon plaintiff's alleged failure to timely serve a notice of claim pursuant to General Municipal Law § 50-e. Plaintiff seeks, upon such renewal and/or reargument, an order denying defendants' motion.

This action arises out of an alleged nerve injury, which plaintiff allegedly sustained as a result of treatment he received at Woodhull (which is owned and operated by HHC). Such treatment involved tooth extractions and the insertion and adjustment of dental implants. Plaintiff served a notice of claim on HHC on August 24, 2000, and he commenced this dental malpractice action against defendants on March 22, 2001.

Defendants previously brought a motion to dismiss pursuant to CPLR 3211 or for summary judgment, contending that plaintiff failed to timely serve his notice of claim within 90 days after his claim arose pursuant to General Municipal Law § 50-e (1)(a). Defendants argued that plaintiff's cause of action accrued on February 24, 1999, which, they claimed, was the last dental appointment plaintiff had at Woodhull that was for treatment with respect to the subject dental implants.

While defendants acknowledged that plaintiff returned to Woodhull for treatment on March 22, 2000, and, again, on April 5, 2000, they contended that the continuous treatment doctrine was inapplicable to toll the 90-day period within which plaintiff was required to serve his notice of claim. They claimed that this was because plaintiff's visit on March 22, 2000 was not a continuation of his treatment, but, rather, a resumption of

treatment. Plaintiff, on the other hand, contended that these visits were a continuation of his care and treatment for his nerve injury, which allegedly arose as a result of the placement of the dental implants, making the continuous treatment doctrine applicable to toll the 90-day period within which he was required to serve his notice of claim.

By decision and order dated October 17, 2006, the court granted defendants' motion to dismiss plaintiff's complaint pursuant to General Municipal Law § 50-e for failure to timely serve a notice of claim. The court predicated its decision on its finding that regardless of whether plaintiff's cause of action accrued on February 24, 1999, as HHC contended, or on April 5, 2000, as plaintiff contended, plaintiff's notice of claim, which was served on August 24, 2000 (more than 90 days from April 5, 2000) was not timely pursuant to General Municipal Law § 50-e. The court further based its decision on the lack of a showing that plaintiff had scheduled any follow-up visits or otherwise returned to Woodhull to seek corrective treatment from Woodhull during the ensuing 13-month interval from February 24, 1999 to March 22, 2000. It found that this resulted in a break in treatment sufficient to conclude that no continuous course of treatment existed between plaintiff and defendants after February 24, 1999.

In support of his instant motion, plaintiff has now submitted a statement of treatment, which shows that he, in fact, was treated at Woodhull on June 14, 2000, which (unlike the April 5, 2000 date), if found to be plaintiff's last treatment date, would render plaintiff's August 24, 2000 notice of claim timely served within 90 days of the accrual of plaintiff's

claim. Plaintiff admits that he did not raise the issue of the June 14, 2000 treatment date in opposition to defendants' earlier motion, but states that he did not do so because defendants had not raised the issue of what date was his last actual visit to Woodhull, but, instead, only argued that continuous treatment for the condition at issue in this action had ended on February 24, 1999. The last chart entry produced by Woodhull was an entry for April 5, 2000, and there was no evidence before the court as to defendants' later treatment of plaintiff.

Plaintiff, to additionally support his instant motion, has also now submitted a further affirmation from his dental expert, a board certified oral surgeon. Plaintiff's dental expert explains that the overall treatment plan for plaintiff at Woodhull, as initially delineated on an "implant worksheet" was never completed even as of the last date of treatment which, according to plaintiff's testimony, was actually in July 2000. In fact, plaintiff's dental expert explains that Woodhull and its dentists had not yet placed a "clip" to prevent movement of one of the prosthetics, and there remained an incomplete treatment of a root canal therapy on tooth #29 which had begun on February 24, 1999. Plaintiff's dental expert also references the fact that Dr. Frederick M. Lifshey, the oral surgeon at Woodhull principally in charge of supervising the overall implantation of the treatment plan and the doctor who was caring for plaintiff regarding his inferior nerve injury, had concluded and noted in his April 5, 2000 examination and entry that he "will follow" that nerve condition, reflecting the continued care and treatment of plaintiff's nerve condition. Additionally, plaintiff's expert further

points to plaintiff's deposition testimony that Dr. Rodriguez of Woodhull told him in July 2000 that he should see a neurologist at Woodhull regarding his nerve condition (Plaintiff's Dep. Tr. at 80-84).

The requirement that a motion for leave to renew a prior motion be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion (*see Mi Ja Lee v Glicksman,* 14 AD3d 669, 670 [2005]; *Meighan v Rodriguez*, 287 AD2d 442, 443 [2001]; *J.D. Structures v Waldbaum*, 282 AD2d 434, 436 [2001]; *Daniel Perla Assocs. v Ginsberg*, 256 AD2d 303, 303 [1998]; *Cronwall Equities v International Links Dev. Corp.*, 255 AD2d 354, 355 [1998]; *U.S. Reinsurance Corp. v Humphreys*, 205 AD2d 187, 192 [1994]). Here, since plaintiff has offered a reasonable excuse for his failure to adduce omitted information prior to the time of the motion to renew and, in any event, since it is in the interests of justice and there is an absence of any prejudice to defendants, plaintiff's motion to renew must be granted (*see* CPLR 2221 [e] [3]; *Kennedy v Coughlin*, 172 AD2d 666, 666 [1991]).

Upon such renewal, the court notes that under the continuous treatment doctrine, "a notice of claim period does not begin to run until 'the course of treatment which includes the wrongful acts or omissions has run *continuously* and is *related* to the same original condition or complaint'" (*Matter of McCoy v City of New York*, 10 AD3d 724, 725 [2004], quoting *Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *see also Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]; *McDermott v Torre*, 56 NY2d 399, 405

[1982]; *Lemmerman v Delmar Dental, P.C.*, 3 AD3d 771, 772 [2004]). The continuous treatment doctrine includes "a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment" (*McDermott*, 56 NY2d at 406; *see also Stahl v Smud*, 210 AD2d 770, 771 [1994]). The mere fact that there was a gap in treatment does not preclude a finding that there was a continuous course of treatment where the plaintiff did not evince an intention to abandon his or her reliance on the care provided by the defendant, and the treatment sought continued to relate to the original condition (*see Rudolph v Jerry Lynn, D.D.S, P.C.*, 16 AD3d 261, 262 [2005]; *Marun v Coleburn*, 291 AD2d 340, 341 [2002]).

In the case at bar, plaintiff alleges that defendants departed from the standard of care in the improper placement of an implant into the inferior alveolar canal, which caused a permanent nerve injury in the lower left inferior alveolar nerve. Based on the Woodhull record and the testimony of Dr. Lifshey of Woodhull, the placement of the implants was part of the original treatment plan developed for plaintiff on August 9, 1996. On September 13, 1996, the implants were inserted. Plaintiff asserts that at that time, there was nerve injury to his left inferior alveolar nerve and that he experienced numbness to his lower left lip. A November 14, 1996 chart entry reflects that plaintiff expressed concern with "numbness to the lower left lip," and was assured by Woodhull's dentists that "it [wa]s normal after placement of implants to experience numbness." The dental progress notes reflect that on January 24, 1997, there was profound V III paresthesia in the lower left

quadrant. A March 29, 1998 entry by Dr. D'Abundo of Woodhull, who placed the subject implants, recognizes the presence of paresthesia and reflects that plaintiff's case was discussed with Dr. Lifshey.

Dr. Lifshey stated that "in [his] periodic evaluations" (which began either on January 24, 1997 or March 9, 1998 and during which, on April 5, 2000, he made an entry that he "will follow" plaintiff's condition), "there was no need to refer [plaintiff] to a neurologist (Dr. Lifshey's Dep. Tr. at 70), "that removal of the implant puts the nerve at even greater risk," and that "over time [plaintiff's] symptoms seemed to improve" (Dr. Lifshey's Dep. Tr. at 75). Dr. Lifshey also had noted as late as his April 5, 2000 entry that plaintiff's condition could "proceed to hypersensation," and his "will follow" note reflects a "wait and see" approach with respect to the continued restorative treatment plan.

In addition, as noted above, the "clip" was never placed on the subject denture to address the "movement of dental laterally" as intended in the treatment plan, and a root canal therapy on a tooth, which had been started, was not given a prosthetic restoration. It is also now undisputed that plaintiff returned to Woodhull on June 14, 2000 for treatment, and that he was treated on that day. As discussed above, plaintiff has testified that he visited Woodhull in July 2000, and that Dr. Rodriguez, at that time, recommended that he see a neurologist at Woodhull for his nerve condition (Plaintiff's Dep. Tr. at 80-84).

Thus, the record establishes that plaintiff's March and April 2000 visits to Woodhull were directly related to the initial treatment plan and that the dentists at Woodhull were

monitoring plaintiff's progress (*see Ramirez v Friedman*, 287 AD2d 376, 377 [2001]). While defendants have not produced the treatment records for June 14, 2000, the statement of treatment reflects the treatment of plaintiff on that date, indicating a further continued course of treatment.

Defendants have not established, as a matter of law, that the dental care provided to plaintiff on the dates subsequent to February 24, 1999 was for treatment of a condition separate and distinct from the condition allegedly negligently treated (*see Yelin v American Dental Center*, 184 AD2d 693, 695 [1992]). Rather, plaintiff has raised questions of fact as to his anticipated future treatment by the Woodhull dentists for the same condition that gave rise to his cause of action (*see Dansby v Tumpatori*, 298 AD2d 265, 266 [2002]). Indeed, defendants concede that "the dental work done when plaintiff returned [in March 2000 was] related to work that was done previously."

Defendants, in opposition to plaintiff's motion, contend, however, that the continuous treatment doctrine cannot be applied because plaintiff did not intend to continue treatment after the February 24, 1999 visit. Defendants assert that plaintiff's lack of an intention to continue treatment is shown by the gap between plaintiff's February 24, 1999 visit and his March 22, 2000 visit, and his failure to return for follow-up care during this time and his disregard of instructions to come back in three months for a routine hygiene appointment. Defendants argue that because plaintiff did not believe he needed to return for further care, there could be no intent on his part to continue treatment.

Defendants' argument must be rejected. When considering that the record reflects that the treatment of plaintiff consisted of a decision to wait and evaluate and not remove the subject implant or refer plaintiff to a neurosurgeon for neurosurgical repair, in conjunction with plaintiff's deposition testimony that he was told that his nerve problem would "go away" (Plaintiff's Dep. Tr. at 59) and the opinion of Dr. Lifshey that he had believed "the paresthesia was resolving" (Dr. Lifshey's Dep. Tr. at 73), it cannot be said that the gap in treatment resulted from plaintiff's election to discontinue treatment, as opposed to from plaintiff's continued reliance on defendants' care and treatment and his belief that his dental problem would resolve itself (*see Rudolph*, 16 AD3d at 262; *Edmonds v Getchonis*, 150 AD2d 879, 880-881 [1989]).

While defendants fault plaintiff for failing to seek corrective treatment during the 13-month period from February 24, 1999 to March 22, 2000, it is true, as plaintiff contends, that a patient who was told that his or her symptoms are normal would not be expected to seek corrective treatment. It is undisputed here that plaintiff was not directed by anyone at Woodhull to seek corrective treatment, but, instead, he was only directed, in a November 24, 1999 entry, to see a hygienist for routine maintenance. Such a direction to seek routine maintenance by a hygienist is not tantamount to being directed to get corrective treatment by a dentist or oral surgeon. The Woodhull dentists' failure to diagnose plaintiff's problem does not mandate the conclusion that they made no attempt to provide treatment for plaintiff's condition (*see Marun,* 291 AD2d at 341).

Thus, plaintiff did not, by his gap in treatment, evince an intention to abandon his reliance on the care the Woodhull dentists were providing to him (*see Rudolph*, 16 AD3d at 263; *Melup v Morrissey*, 3 AD3d 391, 391 [2004]; *Getchonis*, 150 AD2d at 881). Consequently, the gap in treatment does not preclude application of the continuous treatment doctrine (*see Rudolph*, 16 AD3d at 262; *Gehbauer v Baker*, 292 AD2d 255, 255-256 [2002]; *Marun*, 291 AD2d at 341; *Getchonis*, 150 AD2d at 880; *Levy v Schnader*, 96 AD2d 854, 854 [1983]).

Plaintiff's return visits on March 22, 2000 and April 5, 2000 indicate that plaintiff sought treatment for complaints related to his original treatment and condition and that the Woodhull dentists addressed these complaints, monitored plaintiff's condition, and rendered professional opinions upon which plaintiff relied (*see Raminez*, 287 AD2d at 377). Such evidence sufficiently implicates the continuous treatment doctrine to avoid summary dismissal of plaintiff's complaint (*see Lemmerman*, 3 AD3d at 773; *Denlea v Hanswirth*, 303 AD2d 711, 712 [2003]; *Easton v Kellerman*, 248 AD2d 913, 914-915 [1998]).

Defendants additionally attempt to argue that plaintiff's lack of an intent to continue treatment with the Woodhull dentists is established by plaintiff's testimony at his General Municipal Law § 50-h hearing that he did not want to "take a chance with [the dentists at Woodhull to perform work on him] anymore." Such argument is unavailing. The context of plaintiff's testimony at his General Municipal Law § 50-h hearing indicates that

it referred to his visit to Dr. Rodriguez in July 2000, which was subsequent to (and has no bearing upon his intent at) his March, April, and June 2000 treatment visits.

Thus, plaintiff has raised a triable issue of fact as to whether there was a course of continuous treatment by defendants, which, if established, would render plaintiff's service of his notice of claim timely (*see* General Municipal Law § 50-e [1][a]; CPLR 214-a; *LaRocca v DeRicco*, 39 AD3d 486, 486 [2007]; *Krzesniak v New York Univ.*, 22 AD3d 378, 379 [2005]; *Chinosi v Kringstein*, 7 AD3d 558, 558 [2004]; *Lemmerman*, 3 AD3d at 772; *Yelin*, 184 AD2d at 695). Therefore, dismissal of plaintiff's complaint must be denied.

Conclusion

Accordingly, plaintiff's motion for renewal of his opposition to defendants' prior motion to dismiss is granted, and, upon such renewal, the court's decision and order dated October 17, 2006 is vacated and defendants' motion to dismiss plaintiff's complaint as against them is denied.

This action is restored to the Trial Calendar. Counsel are directed to appear for a Pre-Trial Conference on June 29, 2007 in the Medical Malpractice Trial Readiness Part, in Room 724, at 9:30 a.m.

This constitutes the decision and order of the court.

E N T E R,

HON. GERARD H. ROSENBERG
J. S. C.