

Ferraro v Ming Zhu

2008 NY Slip Op 30857(U)

February 7, 2008

Supreme Court, Queens County

Docket Number: 0022493/2005

Judge: Peter O'Donoghue

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Dismiss Complaint
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, PETER J. O'DONOGHUE IAS PART 13
Justice

ROSA FERRARO, Individually and as
Executrix of the Estate of EDWARD
FERRARO, Deceased,

Plaintiffs,

-against-

MING ZHU, M.D., MING ZHU, M.D., P.C.,
LAURENCE R. BUTT, M.D., CALVIN L. CHU,
M.D., MARC D. GOTTLIEB, M.D., MARC D.
GOTTLIEB, M.D., P.C., and QUEENS-LONG
ISLAND MEDICAL GROUP, P.C.,

Defendants.

Index No.: 22493/05

Motion Dates: 11/14/07

Motion Cal. Nos.: 8

Motion Seq. No.: 002

The following papers numbered 1 to 20 read on this motion by
defendants Ming Zhu, M.D. and Ming Zhu, M.D., P.C. ("Dr. Zhu")
for an Order: (1) pursuant to CPLR 3211(a)(5), dismissing the
complaint; or in the alternative, (2) pursuant to 22 NYCRR
§202.21(e) vacating the plaintiff's Note of Issue and Certificate
of Readiness and striking this action from the trial calendar on
the grounds that pre-trial discovery is still outstanding.

PAPERS
NUMBERED

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Upon the foregoing papers it is ordered that the branch of
this motion by defendant Dr. Zhu for an Order pursuant to CPLR
3211(a)(5) dismissing the complaint based on plaintiff's failure
to bring this action within the appropriate time as provided by
the relevant statute of limitations is denied.

In the case at bar, there is a long history of medical diagnostics conducted on decedent Edward Ferraro ("decedent Ferraro"). Defendant Dr. Zhu treated decedent Ferraro from September 10, 1996 to October 8, 2002 at Queens-Long Island Medical Group, P.C. ("QLIMG"), a co-defendant in this case. Decedent Ferraro was a New York City policeman at the time of death. Since his exposure to Ground Zero in September 2001, decedent Ferraro's chief complaint was that he had difficulty breathing. On September 26, 2001, decedent Ferraro complained of a sore throat that he had for three days. Dr. Zhu found nasal congestion on physical examination and prescribed Amoxicillin. On October 4, 2001, decedent Ferraro was still congested. On nose examination by an otoscope, Dr. Zhu found bilateral white thick secretions and thought it was an extension of an upper respiratory infection or allergies. Dr. Zhu prescribed Allegra D. In February of 2002, decedent Ferraro continued to have nose congestion. Once again, Dr. Zhu prescribed Allegra D. On March 15, 2002, decedent Ferraro complained of on and off dyspnea, difficulty in breathing, on exertion. The pulmonary function test was performed. Dr. Zhu diagnosed bronchospams and attributed it to asthma or post nasal drip. On May 22, 2002, decedent Ferraro continued to complain of nose congestion. Dr. Zhu prescribed Rhinocort nasal spray, Allegra D, and a nose wash. On October 8, 2002, decedent Ferraro complained of nose congestion and difficulty of breathing on taking deep breathes on the stairs. Dr. Zhu prescribed Amoxil, Rhinocort spray, and Allegra D. (See Exhibit B annexed to plaintiff's opposition papers.) At this point, Dr. Zhu referred decedent Ferraro to Laurence R. Butt, M.D. ("Dr. Butt"), a pulmonologist. Dr. Butt is affiliated with QLIMG. On October 24, 2002, decedent Ferraro saw Dr. Butt and complained of having occasional episodes of dyspnea. Dr. Butt thought it was possibly attributed to exposure to the World Trade Center or to having a dog at home. Dr. Butt's plan was to have the patient continue to use albuterol. (See Exhibit C annexed to plaintiff's opposition papers.) On December 26, 2002, decedent Ferraro continued his treatment at QLIMG with Marc D. Gottlieb, M.D. ("Dr. Gottlieb"), an ear, nose, and throat specialist affiliated with QLIMG. Dr. Gottlieb used a nasopharyngeal scope to examine decedent Ferraro and found copious yellow mucus bilaterally. Eustachian tube orifices were found to be patent bilaterally. His assessment was chronic rhinitis and sinusitis, for which he prescribed Augmentin and Flonase. (See Exhibit D annexed to plaintiff's opposition papers.) Pursuant to the Progress Notes of Drs. Gottlieb and Calvin L. Chu, M.D. ("Dr. Chu"), on March 20, 2003, decedent Ferraro was seen by both Drs. Gottlieb and Chu at QLIMG and made complaints of congestion, headaches, and post nasal drip. (See Exhibits D and E annexed to plaintiff's opposition papers.) Dr. Gottlieb prescribed Advil Cold and Sinus in the mornings, Clarinex for night time, and Flonase and Medrol, as steroid for

the polyps. Dr. Chu prescribed Flonase and Clarinex for a possible bacterial superinfection. On May 1, 2003, decedent Ferraro continued his treatment at QLIMG with Dr. Gottlieb again. He still had the nasal polyp and now presented with anosmia, which is a loss of the ability to smell. Dr. Gottlieb's assessment and plan was polyposis, Flonase, and CT scan. (See Exhibit F annexed to plaintiff's opposition papers.) On May 22, 2003, according to the CT scan, Dr. Gottlieb diagnosed a mass in the left sinuses with lamina pap and cribiform involvement. Dr. Gottlieb referred decedent Ferraro to a head and neck surgeon and recommended decedent Ferraro to obtain a MRI of the brain and sinuses. (See Exhibit F annexed to plaintiff's opposition papers.) On June 2, 2003, the MRI was performed and revealed a paranasal sinus mass lesion. Mark Perksy, M.D., a head and neck surgeon from Beth Israel Medical Center, performed a biopsy of the mass on June 13, 2003. Plaintiff alleged that the biopsy results were reported on June 17, 2003 as "sino nasal 'intestinal type' adenocarcinoma, mixed papillary and colonic types" and the cause of decedent Ferraro's death was sino-nasal cancer. Plaintiff Ferraro alleged that therefore, decedent Ferraro's symptoms of congestion started in September 2001 and only worsened over time, with new related symptoms appearing as the cancer progressed undiagnosed.

Defendant Dr. Zhu argues that this action is untimely as against him. October 8, 2002 was the last date on which he participated in the treatment of decedent Ferraro, and March 2003 was the last date on which he was associated with the medical group. Defendant Dr. Zhu argues that both dates were more than two years and six months prior to October 24, 2005, the date when he was served with plaintiff Ferraro's summons and complaint in this action. (See CPLR 214-a.)

Plaintiff Ferraro, on the other hand, contends that this action was instituted in a timely fashion because the continuous treatment doctrine tolls the statute of limitations. Plaintiff Ferraro further contends that decedent Ferraro received treatment from the medical group through May 22, 2003 for the same condition from which he was suffering when he first consulted with Dr. Zhu in September 2001 and that he considered himself a patient of the medical group.

An action for medical malpractice must be commenced within two years and six months from the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure. (See CPLR 214-a.)

In the case at bar, for all relevant periods up until the time of his death, the decedent was under the care and treatment

of the defendant QLIMG until May 22, 2003. (See Cardenales v Queens-Long Island Med. Group, P.C., 18 AD3d 689 [2nd Dept 2005].) There existed a relationship among QLIMG, Drs. Zhu, Butt, Gottlieb, and Chu, "such that the continuous treatment of the decedent by QLIMG serves as a basis for tolling the statute of limitations." (See id. at 690; See also McDermott v Torre, 56 NY2d 399 [1982]; Kimiatek v Post, 240 AD2d 372 [2nd Dept 1997]; Watkins v Fromm, 108 AD2d 233 [2nd Dept 1985].) Therefore, the two years and six months statute of limitations period is computed from May 22, 2003, the last date of treatment by the medical group. Using this date, the statute of limitations expired on November 22, 2005. Since the action was commenced with the service of the summons and complaint upon Dr. Zhu on October 24, 2005, the action is timely as to Dr. Zhu.

The branch of this motion by defendant Dr. Zhu for an Order vacating the plaintiff's Note of Issue and Certificate of Readiness and striking this action from the trial calendar on the grounds that pre-trial discovery is still outstanding is denied.

Dated: February 7, 2008

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 J.S.C.