

**Clavin v Maquine**

2008 NY Slip Op 30883(U)

March 20, 2008

Supreme Court, Nassau County

Docket Number: 2277-06/

Judge: Daniel Martin

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## SHORT FORM ORDER

## SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN  
Acting Supreme Court Justice

TRIAL/IAS, PART 31  
NASSAU COUNTY

\_\_\_\_\_  
JENNIFER CLAVIN and JOHN CLAVIN.

Plaintiffs.

Sequence No.: 001  
Index No.: 002277/06

- against -

MELANIE MAQUINE and BETHPAGE  
PRIMARY MEDICAL CARE, P.C.

Defendants.

\_\_\_\_\_  
The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendants' motion for summary judgment dismissing the complaint herein or alternatively, for an order pursuant to CPLR 3211(a)(5) dismissing all claims asserted by plaintiff that pre-date the applicable statute of limitations is denied.

The following facts are undisputed. Plaintiff first presented to defendant Melanie Maquine, M.D. and her group, defendant Bethpage Primary Medical Care, P.C. as a patient on October 15, 1997 and continued receiving medical care from defendants until November 15, 2004. Plaintiff makes no claims of malpractice against defendants for the period of October 15, 1997 until April 3, 2004. On April 4, 2000 plaintiff presented to Dr. Maquine with complaints of tingling in her arms and hands. Dr. Maquine performed an examination and ordered x-rays. On June 6, 2000 plaintiff again presented to Dr. Maquine with complaints of pain in her hands and fingers and as a result of this examination plaintiff was referred to a hand specialist who diagnosed carpal tunnel syndrome. Plaintiff continued to be examined and treated by defendant Maquine in connection with several complaints and ailments between January 18, 2001 and February 18, 2002. On October 14, 2004 plaintiff presented to defendant Maquine with complaints of a rash on her arms, knees and elbows as well as pain in her fingers. Plaintiff was referred by Dr. Maquine to a dermatologist. Plaintiff last appeared for examination in Dr.

Maquine's office on November 15, 2004 the result of which she was referred to an ear, nose and throat specialist.

On March 18, 2005 plaintiff saw a rheumatologist upon referral by her new primary care physician. That rheumatologist, Stuart Kaplan, M.D., diagnosed plaintiff with psoriatic arthritis, synovitis and deformities and bony erosions in multiple joints, especially the IP joints of her toes and the DIP joints of her fingers. Plaintiff commenced the instant action asserting medical malpractice against defendants herein for the period of treatment rendered by Dr. Maquine from April 4, 2000 until October 14, 2004 based upon Dr. Maquine's failure to diagnose the psoriatic arthritis. Defendants have answered and now move for summary judgment dismissing the complaint in its entirety upon the ground that Dr. Maquine did not deviate from the norms of good and accepted medical practice in her treatment of plaintiff and alternatively, for an order pursuant to CPLR 3211(a)(5) dismissing all claims of malpractice made by plaintiff for alleged departures which occurred prior to August 7, 2003.

### Summary Judgment

In moving for summary judgment defendants must demonstrate that there are no issue of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In opposing the motion plaintiffs must demonstrate a triable issue of fact through admissible evidence. *Id.*

In support of this branch of their motion defendants annex the affirmation of Melvin Holden, M.D., a specialist in the field of internal medicine who has been board certified in said field since 1966. In his affirmation Dr. Holden affirms that based upon his review of the relevant records herein, including Dr. Maquine's records, the deposition transcripts and the report from Ms. Clavin's independent medical examination that:

- 1) psoriatic arthritis has no cure and even if detected immediately the chronic and degenerative nature of the condition can only be treated symptomatically;
- 2) even had Ms. Clavin been immediately referred to a specialist for treatment of the condition it would have not changed the progression of plaintiff's condition;
- 3) for the period of 2000 through 2004 Dr. Maquine appropriately treated Ms. Clavin by referring her to specialists including a hand surgeon and dermatologist;
- 4) Dr. Maquine performed all required diagnostic testing during plaintiff's examinations during this time period;
- 5) in his opinion, the fact that in June, 2000 Dr. Maquine referred the patient to a hand specialist who diagnosed the tingling and numbness as being caused by carpal tunnel syndrome leads Dr. Holden to conclude that Ms. Clavin was not complaining of psoriatic arthritis at that time;
- 6) Dr. Maquine consistently documented her findings at examinations of Ms. Clavin over the next several years "including the lack of any clubbing, cyanosis or edema on the extremities" and x-rays and blood tests were appropriately ordered for further complaints of pain in the patient's hands;
- 7) In October, 2004 Dr. Maquine properly referred Ms. Clavin to a dermatologist based

upon the appearance of skin lesions who, in turn, referred Ms. Clavin to rheumatologist who diagnosed the psoriatic arthritis (it should be noted that this assertion is in conflict with the rest of the record herein);

8) In his opinion with a reasonable degree of medical certainty that at all times that Ms. Clavin received medical treatment from Dr. Maquine between 2000 and 2004 which was “entirely within the standard of care that existed” in that time period “and in fact as they exist today”.

Where a defendant demonstrates through an expert’s affidavit that the defendant doctor did not deviate from good and accepted norms of medical care or that any departure was not the proximate cause of the patient’s injuries, that defendant has made a *prima facie* demonstration of entitlement to summary judgment in its favor. See, e.g., Anderson v. Lamaute, 306 A.D.2d 232 (2<sup>nd</sup> Dep’t 2003). Where, as here, the moving defendants have made a *prima facie* demonstration of entitlement to summary judgment, the burden shifts to plaintiffs to demonstrate an issue of fact which precludes summary judgment. Zuckerman v. City of New York, *supra*.

In opposition plaintiffs annex the affirmation of a physician who is board certified in the fields of internal medicine and rheumatology. In his/her affirmation plaintiff’s expert concludes with a reasonable degree of medical certainty that Dr. Maquine deviated from good and accepted medical practice because:

1) In June, 2000 Dr. Facibene sent Dr. Maquine a letter which noted psoriasis with occasional joint pain and notes bilateral arthritis of the hands, “possibly psoriatic”;

2) In July, 2000 Dr. Maquine noted psoriasis-sporadic joint pain;

3) In February, 2001 Dr. Maquine noted swelling of the hand and fatigue which are two of the symptoms of psoriatic arthritis;

4) Dr. Maquine noted swollen fingers and stiffness in the hands and right wrist and incorrectly ordered blood tests and x-rays to check for ANA and Rheumatoid factor despite the fact that her notes considered the possibility of psoriatic arthritis;

5) a January 2, 2002 prescription of Advil for finger pain is insufficient to treat psoriatic arthritis;

6) between January 2, 2002 and October 14, 2004 Dr. Maquine and covering physicians saw Ms. Clavin on nineteen occasions and none of them referred to complaints about Ms. Clavin’s joints or psoriasis although plaintiff still complained about same;

7) on October 14, 2004 Ms. Clavin presented to Dr. Maquine with complaints of pain in her fingers and psoriatic lesions;

8) despite all of the symptoms over the years and which continued up until the end of the relationship, Dr. Maquine failed to refer Ms. Clavin to a rheumatologist, which was the appropriate course of treatment; and

9) he/she disputes Dr. Holden’s position that there are no medications or treatment for psoriatic arthritis and, in fact, states that early detection and treatment have been shown “to retard the progression of bony and soft tissue destruction.”

Where, as here, the parties to a medical malpractice action have submitted conflicting experts’ affidavits on the issue of whether there was a departure from good and accepted

[\* 4 ]  
standards of medical practice, an issue of fact exists which precludes summary judgment. See, Shields v. Baktidy, 11 A.D.3d 671 (2<sup>nd</sup> Department 2004).

Accordingly, the court denies that branch of defendants' motion which seeks summary judgment dismissing the complaint.

#### Statute of Limitations

Defendants assert that in the event the court denies their motion for summary judgment dismissing the complaint in its entirety, as has happened here, that all claims asserted by plaintiffs for treatment rendered to Ms. Clavin prior to August 7, 2003 should be dismissed as commenced untimely.

In his affidavit Dr. Holden, defendants' expert, avers that in his opinion Ms. Clavin was not continuously treated by Dr. Maquine from 2000 to 2004 in connection with a particular condition from which plaintiffs claim malpractice on Dr. Maquine's part. He notes that Ms. Clavin presented for a multitude of complaints and reasons including her annual physical, sore throats, coughing, sinus problems, nasal congestion, laryngitis, headaches, difficulty breathing, allergies, bronchitis, asthma, runny nose, ear ache, pregnancy related pains and fever.

It is well established that: "A medical malpractice action must be commenced within two years and six months of the act, omission, or failure complained of (*see* CPLR 214-a), but may be tolled until the end of treatment if the plaintiff establishes that the defendant provided continuous treatment, which is defined as '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' [quoting, *Borgia v City of New York*, 12 NY2d 151, 155]." Elkin v. Goodman, 24 A.D.3d 717, (2<sup>nd</sup> Dep't 2005). Compare, Williams v. Health Insurance Plan of Greater New York, 220 A.D.2d 343 (1<sup>st</sup> Dep't 1995). Where, however, the doctor patient relationship extends back past the limitations period, the continuous treatment doctrine will not serve to toll the statute of limitations where the treatment pertained to other conditions than that upon which the claim for malpractice is based. See, Chulla v. DiStefano, 242 AD2d 657 (2d Dep't, Sept. 29, 1997); Fisher v Felix, 201 A.D.2d 453 (2<sup>nd</sup> Dep't 1994).

In opposition, Ms. Clavin avers that Dr. Maquine would examine plaintiff's elbows, knees and hands on virtually every visit and advise her on using creams and Eucerin for flare-ups. Ms. Clavin further avers that she frequently complained about these conditions when she had her visits with Dr. Maquine during the relevant time period. She even goes so far as to assert that "we would discuss my hands on each visit and she would examine my hands and fingers which had become visibly swollen and by the end of our treatment had become visibly deformed with knots in the finger joint". Further, avers Ms. Clavin, Dr. Maquine "continued to advise me to take over-the-counter anti-inflammatory medications and painkillers...which provided little or no relief."

Where, as here, plaintiff demonstrates that even where the physician's notes do not reflect treatment for the condition upon which the medical malpractice claims are based, she may raise a

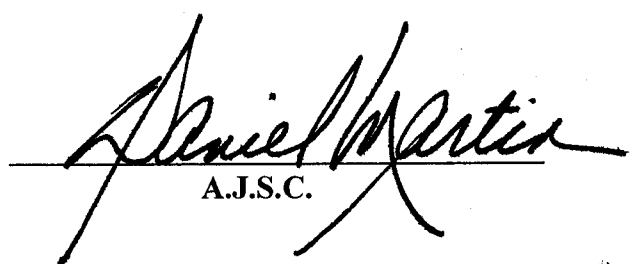
triable issue of fact as to whether there was a continuous course of treatment that tolls the statute of limitations where she avers that when visiting the doctor, she complained about the symptoms of the underlying condition at those visits. See, Labshere v. Petroski, 32 A.D.3d 645 (3<sup>rd</sup> Dep't 2006).

Accordingly, the court finds that plaintiffs have raised a triable issue of fact as to whether there was continuous treatment of Ms. Clavin for the condition which is the subject of this action.

This branch of defendants' motion is likewise denied.

So Ordered.

**Dated:** March 20, 2008

  
A.J.S.C.

**ENTERED**

MAR 26 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**