

Schrank v Lederman

2008 NY Slip Op 30952(U)

March 25, 2008

Supreme Court, Nassau County

Docket Number: 0903-06/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

LINDA SCHRANK and PHIL WEITZ,

Plaintiff,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 20903/06

- against -

Motion Sequence No. 004

GILBERT SEYMOUR LEDERMAN, M.D.,
RADIO SURGERY NEW YORK, LLC, GILBERT
LEDERMAN, D.D., P.C., STATEN ISLAND
UNIVERSITY HOSPITAL, JOHN R.
MANGIARDI M.D., JOHN R. MANGIARDI,
M.D., JOHN R. MANGIARDI, M.D., F.A.C.S.,
P.C. and CABRINI MEDICAL CENTER,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC,
and Gilbert Lederman, M.D., P.C. move for an order pursuant to CPLR 3211 (a) (5)
partially dismissing the plaintiffs' complaint with prejudice on the grounds it has set forth
causes of action against the moving defendants that are time barred by the application
statute of limitations. The plaintiffs oppose the motion on the grounds the complaint is
not time barred and the doctrine of continuous treatment is applicable to the plaintiff

wife's acoustic neuroma after the completion of radiology in September 2002. The plaintiffs contend the Court did not previously find, as a matter of law, any initial care and treatment rendered by the defendants at Staten Island University Hospital does not constitute continuous treatment. The defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. reply the plaintiffs fail to controvert the defense showing, under collateral estoppel and the law of the case, the plaintiffs are barred from alleging or litigating Dr. Lederman committed malpractice during any treatment rendered prior to November 2004. The defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. contend the Court found there is no nexus between the treatment rendered by Dr. Lederman at Staten Island University Hospital, and the subsequent treatment that Dr. Lederman may have rendered at Cabrini Medical Center. The underlying medical malpractice action seeks damages against the defendant. On June 28, 2007, this Court dismissed the plaintiffs' complaint against the defendant Staten Island University Hospital.

The attorney for defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. states, in a supporting affirmation dated September 10, 2007, the plaintiff presented to Dr. Lederman, then the Director of Radiation Oncology at Staten Island University Hospital with complaints and a medical history consistent with impaired neurological functioning, and elected to undergo

stereotactic brain surgery. The attorney for defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. states the plaintiff underwent radiation therapy at Staten Island University Hospital on August 27, 30, September 4, 6, 10, 2002, and the plaintiff did not present to Dr. Lederman for any additional treatment following the course of radiation therapy that ended on September 10, 2002. The attorney for defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. notes, in approximately November 2004, over two years after the completion of treatment, the plaintiff consulted with Dr. Lederman, who was then, and is now affiliated with Cabrini Medical Center. The attorney for defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. argues the June 28, 2007 court order found the treatment rendered by Dr. Lederman at Staten Island University Hospital was not continuous with any treatment rendered at Cabrini Medical Center, so the plaintiffs' claims arising from the treatment provided at Staten Island University Hospital were time barred under the applicable statute of limitations, and dismissed by the Court.

The plaintiffs' attorney states, in an opposing affirmation dated November 28, 2007, the Court found only with respect to Staten Island University Hospital in the June 28, 2007 court order. The plaintiffs' attorney asserts, while the plaintiffs disagree with that court order, the issue presented by the instant motion solely focuses on the ongoing care and treatment rendered by the defendants Gilbert Seymour Lederman, M.D., Radio

surgery New York, LLC, and Gilbert Lederman, M.D., P.C. during the period between September 10, 2002 and December 12, 2006, which shown in the plaintiff Linda Shrank' affidavit dated October 25, 2007, and Dr. Lederman's records. The plaintiffs' attorney points out the defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. do not state what took place during the subject interval, to wit the period between September 10, 2002 and December 12, 2006. The plaintiffs' attorney counters with a detailed statement of the ongoing care and treatment rendered by the defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. to the plaintiff from September 10, 2002.

The attorney for defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. reiterates, in a reply affirmation dated December 19, 2007, the Court's June 28, 2007 order establishes there was no continuous treatment with respect to the defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. The attorney for defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. states there was no continuous treatment by Dr. Lederman between September 2002 and November 2004. The attorney for defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. contends the plaintiffs have not shown whether further treatment was explicitly anticipated by both the physician and patient as manifested in the form of a regularly scheduled appointment for the near

future, and agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past. The attorney for defendants Gilbert Seymour Lederman, M.D., Radio surgery New York, LLC, and Gilbert Lederman, M.D., P.C. asserts the Courts have distinguished between continuous treatment and resumption of treatment, to wit the latter is separate treatment, and does not allow for the tolling of the statute of limitations.

This Court has reviewed and considered all of the papers submitted by the parties on this motion. CPLR 3211 (a) (5) provides: [a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the cause of action may not be maintained because of...statute of limitations. CPLR 214- a provides:

An action for medical...malpractice must be commenced within two years and six months of 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...For the purpose of this section the term "continuous treatment" shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition.

The Second Department has held:

A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, *prima facie*, that the time in which to commence an action has expired (*see LaRocca v. DeRicco*, 39 A.D.3d 486, 486-487, 833 N.Y.S.2d 213; *Gravel v. Cicola*, 297 A.D.2d 620, 747 N.Y.S.2d 33). The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies (*see LaRocca v. DeRicco, supra; Gravel v. Cicola, supra* at 621, 747 N.Y.S.2d 33)

Texeria v. BAB Nuclear Radiology, P.C., 43 A.D.3d 403, 405, 840 N.Y.S.2d 417 [2nd Dept., 2007].

This Court determines these defendants met the initial burden of proving, *prima facie*, that the time in which to commence this action had expired, however the plaintiffs have supplied evidentiary facts establishing their causes of action fall within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies.

Accordingly, the motion is denied.

So ordered.

Dated: **March 25, 2008**

ENTER:



J. S. C.

HON ANTONIO I. BRANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION

ENTERED

APR 01 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**