

Gosse v Saint Peter's Hosp. of City of Albany

2008 NY Slip Op 32067(U)

July 23, 2008

Supreme Court, Albany County

Docket Number: 0037682/0081

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

RONALD GOSSE and
SHANNON GOSSE, his wife,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 3768-08
RJI NO. 01-08-093150

SAINT PETER'S HOSPITAL OF THE CITY OF ALBANY
d/b/a ST. PETER'S HOSPITAL, PAUL FORREST, M.D., LEE
STETZER, M.D., MICHAEL J. ESPOSITO, M.D., ERIC S.
KORENMAN, M.D., LEE RATNER, M.D., THE ENDOCRINE
GROUP, LLP, MARK L. FRUITERMAN, M.D., GREGG G.
GERTY, M.D., ALBANY GASTROENTEROLOGY
CONSULTANTS, P.C., and RICHARD CLIFT, M.D.,

Defendants.

Supreme Court Greene County All Purpose Term, June 13, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Between the third and sixth of September 2005, Mr. Gosse was hospitalized, at Saint

Peter's Hospital. During that hospitalization, on September 4, 2005, Dr. Korenman performed an ultrasound on Mr. Gosse that found a "liver mass" and recommended a CT scan be performed. The CT scan was performed two days later and Dr. Ratner found that Mr. Gosse had a potential tumor on his liver, which specifically stated that the finding was "worrisome for a focal liver lesion." The record shows that Mr. Gosse was not informed of these findings at the time, and despite such finding, no immediate follow up diagnosis or care was provided. Mr. Gosse learned of these findings in March 2008, when he was diagnosed with stage 4 liver cancer.

Relevant to the instant motion, defendant Clift, as an employee of Albany Gastroenterology Consultants, PC, treated Mr. Gosse during his September 3-6, 2005 hospitalization. On or before September 6, 2005, Dr. Clift had reviewed the ultrasound that found a "liver mass". On September 6, 2005, he noted the "liver lesion?" and was "awaiting CT scan." Although the CT scan was performed on September 6, 2005, the report was not transcribed until September 9, 2005, after Mr. Gosse had been discharged from the hospital. There is no indication in this record that Dr. Clift took any further action to treat Mr. Gosse relevant to his September 6, 2005 discharge and it does not appear that Mr. Gosse expected any further treatment. Similarly, neither Dr. Korenman nor Dr. Ratner conducted any further followup care for Mr. Gosse, and no expectation of followup care was demonstrated.

On May 9, 2008 Mr. Gosse, and his wife derivatively, commenced this action. Plaintiffs seek damages due to the defendants' failures to diagnose, treat or inform him of the September 2005 findings, along with Ms. Gosse's derivative claims. Issue has been joined, and discovery is ongoing. Four defendants, Richard Clift, M.D., Albany Gastroenterology Consultants, P.C., Erick S. Korenman, M.D. and Lee Ratner, M.D., now bring motions to dismiss, claiming that the

statute of limitations has run on Mr. Gosse's malpractice claim against them under CPL §214-a.

“When a party moves pursuant to CPLR §3211(a)(5) for a judgment dismissing a claim on the ground that it is barred by the Statute of Limitations, it is that party's burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations had elapsed.” Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc., 168 A.D.2d 822, 823 (3d Dept. 1990), Gravel v. Cicola, 297 A.D.2d 620 (2d Dept. 2002). The moving party need not negate all exceptions to the statute of limitations and once the movant makes their prima facie showing, the burden “shifts to the party opposing the motion to aver evidentiary facts establishing that the case at hand falls within such exceptions.” Hoosac Valley Farmers Exchange, Inc., supra, Doyon v. Bascom, 38 A.D.2d 645 (3d Dept. 1971).

The defendants' motions before the court all move to dismiss the plaintiffs' complaint against them, pursuant to §3211(a)(5), as untimely filed under CPLR §214-a. All of these defendants' initial moving papers allege that plaintiffs' medical malpractice claims against them are based upon the treatment and care Mr. Gosse received while he was hospitalized between September 3-6, 2005. The defendants each alleged that this malpractice action was required to be “commenced within two years and six months of the act, omission or failure complained of...”. CPLR §214-a. They specifically allege that the plaintiffs were required to commence this malpractice action prior to March 4, 5 or 6, 2008. The defendants' maintain that because plaintiffs did not commence this action until May 9, 2008, after the statute of limitations had run, it is time barred. The above showing sufficiently demonstrated that the Statute of Limitations had elapsed on plaintiffs' medical malpractice claim, which shifted the burden to plaintiffs.

In opposition, plaintiffs argue that the “continuous treatment” doctrine applies to toll the

statute of limitations. Plaintiffs' reliance on the "continuous treatment" doctrine, however, is misplaced. Plaintiffs' medical malpractice claim is based upon defendants' delay and failure to "diagnose, evaluate, treat and care". The Court of Appeals, in Young v. New York City Health & Hospitals Corp. (91 N.Y.2d 291 [1998]), when faced with a plaintiff alleging a factually similar failure to diagnose action, held that the "continuous treatment" doctrine did not apply. The Court premised its holding on the purpose underlying the continuous treatment doctrine, which is "to enforce the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action." Id. at 296. Applying such principal here, Mr. Gosse was not faced with the operative choice of continuing treatment with any one of these doctors or pursuing a claim against them, because he never knew of the diagnosis. As such, the "continuous treatment" doctrine is inapplicable. In Young the Court of Appeals stated: "given plaintiff's lack of awareness of a condition warranting further treatment, the purpose of the continuous treatment doctrine would not be served by its application here." The Young Court's reasoning is equally applicable, and accordingly the court finds that the "continuous treatment" doctrine did not toll the statute of limitations for plaintiffs.

Plaintiffs further argue that because Dr. Clift's hospital note left open a question about the CT scan, and Dr. Ratner's interpretation of the CT scan was not transcribed until after Mr. Gosse was discharged from the hospital, their treatment was "continuous" and tolled the statute of limitations. However, plaintiffs failed to establish that these doctors, or Mr. Gosse, anticipated future treatment. In Richardson v. Orentreich, (64 N.Y.2d 896, 898-99 [1985]), the Court of Appeals held that for a "continuous treatment" finding it must be shown that "further

treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past.” (emphasis added) Plaintiffs have made no such explicit showing here, and the “continuous treatment” doctrine’s tolling provision is inapplicable.

Dr. Clift, Albany Gastroenterology Consultants, PC’s, Erick S. Korenman, M.D. and Lee Ratner, M.D. all made a prima facie showing that plaintiffs’ medical malpractice claim is time barred by CPLR §214-a. As plaintiffs have failed to establish that an exception or tolling applies, plaintiffs’ medical malpractice claims against these defendants are dismissed.

Additionally, plaintiffs’ responding papers also argue that their action against defendants Dr. Clift, Albany Gastroenterology Consultants, PC’s, Erick S. Korenman, M.D. and Lee Ratner, M.D. must not be dismissed because they state a claim of ordinary negligence, which was timely commenced. While plaintiffs are correct that their amended complaint states a cause of action sounding in ordinary negligence, such argument misses the mark on this motion. The plaintiffs’ verified amended complaint states a cause of action against these defendants sounding in both malpractice (first cause of action) and ordinary negligence (fourth cause of action). The defendants’ initial moving papers did not seek dismissal of the ordinary negligence cause of action. As such, no motion is pending before the Court seeking dismissal of plaintiffs’ ordinary negligence cause of action and the Court declines to address such argument. Inasmuch as defendants’ reply papers argue for dismissal of plaintiffs’ ordinary negligence cause of action, same are disregarded as not properly before the court. Dannasch v. Bifulco, 184 A.D.2d 415, 417 (2d Dept 1992) (stating “[t]he function of reply papers is to address arguments made in

opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion”).

Accordingly, plaintiffs complaint sounding in malpractice against Dr. Clift, Albany Gastroenterology Consultants, PC’s, Erick S. Korenman, M.D. and Lee Ratner, M.D. is dismissed and plaintiffs’ complaint sounding in ordinary negligence against these defendants is not dismissed.

All papers, including this Decision and Order are being returned to the attorneys for the defendants Dr. Clift and Albany Gastroenterology Consultants, PC. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: July 23, 2008
Albany, New York



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated June 9, 2008, Affirmation of Lia Mitchell, dated June 9, 2008, with attached Exhibits “A” - “E”, and accompanying Memorandum of Law of Lia Mitchell, dated June 9, 2008.
2. Affirmation in Opposition of Bruce A. Sutphin, dated June 20, 2008, with Attached Exhibits “A” - “F” and Memorandum of Law of Bruce A. Sutphin, dated June 20, 2008.
3. Attorney Affirmation of Lia Mitchell, dated June 27, 2008, with attached Exhibit “A” and Reply Memorandum of Law of Lia Mitchell, dated June 27, 2008.
4. Notice of Motion, dated May 22, 2008, Affidavit of Adam H. Cooper, dated May 22, 2008, with attached Exhibits “A” - “C”, and accompanying Memorandum of Law of Adam H. Cooper, dated May 22, 2008.
5. Affirmation in Opposition of Bruce A. Sutphin, dated June 20, 2008, with Attached Exhibits “A” - “B” and Memorandum of Law of Bruce A. Sutphin, dated June 20, 2008.
6. Reply Affidavit of Adam H. Cooper, dated June 26, 2008, with attached Exhibits “A(1-5)” - “C(6)” and Reply Memorandum of Law of Adam H. Cooper, dated June 26, 2008.