McNulty v Winthrop-University Hosp.

2008 NY Slip Op 32486(U)

September 3, 2008

Supreme Court, Nassau County

Docket Number: 8252-04/

Judge: Michele M. Woodard

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

---x

THOMAS McNULTY,

Plaintiff,

-against-

WINTHROP-UNIVERSITY HOSPITAL, WINTHROP CARDIOVASCULAR AND THORACIC SURGERY, P.C., WILLIAM A. PURTILL, M.D., TIMOTHY MANONI, M.D., MEHRAN KHAJAVI, M.D., RICHARD N. ASHLEY, M.D., and RICHARD N. ASHLEY, M.D., FACS, P.C.,

Defendants.

---x

MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No.: 18252/04
Motion Seq. Nos.: 02, 03 & 04
DECISION AND ORDER

Papers Read on this Decision

Defendant Timothy Manoni, M.D.'s Notice of Motion	02
Plaintiff's Affirmation in Opposition	xx
Defendant Timothy Manoni, M.D.'s Reply In Support of Motion to Vacate Note of Issue	xx
Plaintiff's Reply Affirmation	xx
Defendant Timothy Manoni, M.D.'s Sur-Reply	xx
Plaintiff's Notice of Cross-Motion	03
Defendant Manoni's Affirmation in Opposition	xx
Defendants William Purtill, M.D. and Winthrop Cardiovascular's Affirmation in Opposition	xx
Plaintiff's Reply Affirmation	xx
Plaintiff's Affirmation in Opposition	xx
Defendants Ashley and Richard N. Ashley, M.D., FACS, P.C.'s Notice of Motion	04
Defendants Ashley and Richard N. Ashley, M.D., FACS, P.C.'s Reply Affirmation	xx

In motion sequence number two, Defendant Timothy Manoni, M.D., moves for an order pursuant to 22 NYCRR 202.21(e) vacating the Note of Issue and Certificate of Readiness; an order pursuant to CPLR§§ §3101, 3124 and 3126 directing Plaintiff to provide outstanding authorizations and to respond to various demands; and, an order preserving Dr. Manoni's right to further depose

Plaintiff.

The Plaintiff cross-moves in motion sequence number three for an order pursuant to CPLR §3103 granting him a protective order "denying, limiting, conditioning or regulating" Defendants' procurement of 40 HIPPA compliant authorizations permitting defense counsel to conduct ex-party interviews with his doctors and/or other medical providers and an order directing Defendants to re-prepare said HIPPA authorizations.

Defendants Richard N. Ashley, M.D. and Richard N. Ashley, M.D., FACS, P.C., move in motion sequence number four for an order pursuant to CPLR §3211(a)(5) dismissing the complaint against him as barred by the Statute of Limitations.

The Ashleys' Motion

The genesis of this action is alleged negligent surgery performed by Defendant Dr. Ashley along with other doctors, including Defendant Dr. Purtill. The Plaintiff presented to Dr. Ashley on October 18, 2002 for an evaluation of his kidney stone condition. Dr. Ashley ultimately concluded that the Plaintiff's right kidney had to be removed. During that surgery which was performed on January 20, 2003, the Plaintiff's vena cava was dissected, which lead to numerous complications.

The Ashley Defendants seek summary judgment dismissing the complaint against them as barred by the Statute of Limitations.

"On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such

prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept 1990).

The Statute of Limitations for medical malpractice is two years and six months (CPLR §214-a). A claim for medical malpractice accrues on the date that the alleged malpractice takes place. Massie v Crawford, 78 NY2d 516, 519 (1991), rearg den. 79 NY2d 978 (1992) citing Nykorchuck v Henriques, 78 NY2d 255, 258 (1991); Matter of Daniel J. v New York City Health & Hosps. Corp., 77 NY2d 630, 634-635 (1991). However, the statute is tolled "until a Plaintiff's last treatment 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 (internal quotations omitted)." Massie v Crawford, supra, at p. 519, citing McDermott v Torre, 56 NY2d 399, 405 (1982), quoting Borgia v City of New York, 12 NY2d 151, 155 (1962).

The Summons and Complaint in this action were first served on the Ashley Defendants on January 8, 2007. Thus, absent the application of the continuous treatment doctrine, the Statute of Limitations bars claims for acts of medical malpractice which occurred prior to July 8, 2004. CPLR §214-a. However, here, the Statute of Limitations was tolled for a period of three months and twenty-four days, from September 12, 2006, on which date the Plaintiff moved for leave to file and serve an

Amended Summons and Complaint naming the Ashley Defendants, until January 5, 2007, when the order granting that motion was entered. Perez v Paramount Communications, Inc., 92 NY2d 749 (1999). Therefore, any claims for acts of medical malpractice which occurred more than two years, nine months and twenty-four days prior to January 8, 2007, i.e., prior to March 14, 2004, are barred by the Statute of Limitations absent the application of the continuous treatment doctrine.

"Pursuant to CPLR §214-a '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, the "accrual" comes only at the end of the treatment.' " Roca v Perel, 51 AD3d 757 (2d Dept 2008), quoting Borgia v City of New York, supra, at p. 155. Needless to say, "the term 'continuous treatment' includes treatment of a secondary condition in the same area of the body, which condition allegedly arose because the Defendant doctor failed to follow good and accepted medical practice with respect to the condition for which he was first consulted." The Plaintiff bears the burden of establishing that the continuous treatment doctrine applies. Weber v Bay Ridge Medical Group, 220 AD2d 408 (2d Dept 1995); see also, Boyle v Fox, 51 AD3d 1243 (3d Dept 2008); Lane v Feinberg, 293 AD2d 654 (2d Dept 2002).

It is well established that the doctrine of continuous treatment applies only to those cases in which "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 periodic appointments which characterized the treatment in the immediate past." Richardson v Orentreich, 64 NY2d 896, 898-899 (1985); see also, Cox v Kingsboro, 88 NY2d 904 (1996); Allende v N.Y.C.H.H.C., 90 NY2d 333 (1997); Roca v Perel, supra; Monello v Sottile, Megna, M.D., P.C., 281 AD2d 463 (2d Dept 2001); McInnis v Block, 268 AD2d 509 (2d Dept 2000).

Visits for treatment of unrelated health conditions do not establish a course of treatment nor does a failure to timely diagnose. Young v New York City Health & Hospitals Corp., 91 NY2d 291, 297 (1998). The failure to establish a course of treatment is not a course of treatment for purposes of applying this doctrine, either. Nykorchuck v Henriques, supra, at p. 259.

The mere existence and continuity of a doctor-patient relationship as well as the continuing nature of a diagnosis do not satisfy the requirements of the continuous treatment doctrine, nor does it apply to routine examinations or diagnostic examinations even when conducted repeatedly over a period of time, or if Plaintiff initiated on his own return visits to monitor his ongoing condition, as these acts are not a "course of treatment." Massie v Crawford, supra at p. 519-520; McDermott v Torre, supra; Sinclair v Cohen, 240 AD2d 152 (1st Dept 1997); Fauci v Wolan, 238 AD2d 305 (2d Dept 1997); Cassara v Larchmont, 194 AD2d 708 (2d Dept 1993). Since the purpose of the continuous treatment doctrine is to avoid placing a patient in a position of questioning a doctor's judgment and instituting suit while being treated by him, "[a] patient is not entitled to the benefit of the toll in the absence of continuing efforts by a doctor to treat a particular condition because the policy reasons underlying the continuous treatment doctrine do not justify the patient's delay in bringing suit in such circumstances." Massie v Crawford, supra, at p. 519, citing Nykorchuck v Henriques, supra, at p. 259; see also, Borgia v City of New York, supra, at p. 157. Nevertheless, "[i]ncluded within the scope of 'continuous treatment' is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment." McDermott v Torre, supra, at p. 406; see also, Curcio v Ippolito, 63 NY2d 967 (1984); compare, Parisi v DeVita, __ AD2d __, 2008 WL 3062481 (2d Dept 2008).

In evaluating whether an issue of fact exists as to whether there has been continuous

treatment, the court must accept the facts as alleged by Plaintiff. Young v New York City Health & Hospitals Corp., supra, at p. 296, citing Rizk v Cohen, 73 NY2d 98, 103 (1989).

In support of his motion, Defendant Ashley has chronicled in detail his contact with the Plaintiff as follows:

Plaintiff, a then 45-year-old male in kidney failure, was referred to the Defendant, Dr. Ashley, a board-certified urologist, to evaluate a finding of bilateral kidney stones. He first presented on October 18, 2002. Studies showed no blood flow to the right kidney, which was infected, and minimal function and blood flow to the left. Dr. Ashley concluded that Plaintiff's right kidney needed to be removed because it was massively infected and no longer functioned. That surgery was performed at Winthrop University Hospital on January 20, 2003, by Dr. Ashley, Defendant Dr. Purtill, a vascular surgeon, and others who are not Defendants here. During that surgery, the vena cava was injured as the kidney was being dissected from it. Again, it is that injury that forms the basis of this lawsuit. The Plaintiff was hospitalized at Winthrop from January 20, 2003 to February 14, 2003. During that hospitalization, Dr. Ashley assisted the general surgeon, Gregory Zito, M.D., in surgery to repair an incarcerated ventral hernia on February 5, 2003. While the Plaintiff developed pulmonary emboli requiring the insertion of filters into the vena cava to prevent further blood clots to the lungs, Dr. Ashley did not participate in that procedure. However, Dr. Ashley did follow the Plaintiff throughout that hospitalization. Dr. Ashley also continued to follow the Plaintiff for a while after his discharge from the hospital. In February, shortly after discharge, Dr. Ashley made a house call. In March, he saw the Plaintiff in his office on several occasions. The last scheduled visit was on March 21, 2003. Shortly thereafter, the Plaintiff came under the care of a nephrologist, Dr. Edward Kowalski, who was the Medical Director of the Outpatient Dialysis Services at Winthrop.

On August 6, 2003, the Plaintiff presented to Ashley's office to have his urine tested. Several days thereafter, the doctor reviewed a report of a CT scan taken on August 7, 2003 which showed that the filters that had been placed in the vena cava at Winthrop had migrated out of position. Dr. Ashley spoke with both the Plaintiff and the head of cardiothoracic surgery at Winthrop University Hospital to discuss what could be done about that finding. On August 15, 2003, at the Plaintiff's insistence, he was seen at Ashley's office where he spoke with Dr. Ashley for approximately one hour concerning the various opinions he had received over the past months from other physicians regarding the viability of a kidney transplant, as well as recurrent kidney stones and urinary tract infections, which Dr. Ashley was not treating.

The Plaintiff was admitted to Winthrop University Hospital for blood in his urine from September 23, 2003 to September 25, 2003. The Defendant was called in for consultation for that problem on September 25, 2003. The Plaintiff was next seen in Dr. Ashley's office on October 2, 2003 for a urinary tract infection and possible prostatitis. The Defendant placed him on an antibiotic. On October 8, 2003, the Plaintiff called to report that the antibiotic apparently was not working. He was next seen in Dr. Ashley's office on October 15, 2003 complaining about the dialysis catheter that had been inserted by the physicians at Winthrop. Throughout this period of time, Dr. Ashley continued to receive periodic telephone calls from the Plaintiff to update him on the care being rendered by other physicians. The doctor did not always document those telephone calls in his record as they did not relate to his care and treatment.

On December 4, 2003, the Plaintiff had a CT scan of the abdomen and pelvis to investigate pain he was experiencing from a bulge in the right flank. That CAT scan may have been ordered by Dr. Ashley. He received the report, which showed a muscle weakness in the area of his surgery. The

Plaintiff was referred to the general surgeon, Dr. Zito, to discuss possible treatment options.

Dr. Ashley next treated the Plaintiff on January 7, 2004, when he was asked to consult during an admission to Winthrop University Hospital. As that consult makes clear, Dr. Ashley's services were no longer needed because, although the Plaintiff was having recurrent urinary tract infections which is why Dr. Ashley was called in, they were not being caused by any urologic obstruction, but rather by his kidney failure. Other than managing the infections, which could be done by his nephrologist, there was nothing from a urological standpoint that could be done by Dr. Ashley.

Dr. Ashley received a copy of a study that was performed on the patient's vena cava performed on March 17, 2004 at Roosevelt Hospital at the request of his vascular surgeon, Dr. Lantis. That report was faxed to the doctor on March 19, 2004. Although aware of the problems the Plaintiff was having with blood flow to his lower extremities, Dr. Ashley was not treating for that condition, which was outside his area of expertise. Thereafter, Dr. Ashley received laboratory studies from the dialysis unit at Winthrop University Hospital, all ordered by the Plaintiff's treating physician nephrologist Dr. Kowalski for March, April, May, June, September and October 2004. There are handwriting on these slips presumably made by the dialysis center but not by Dr. Ashley. He simply initialed each one as he reviewed it. Dr. Ashley did not treat the Plaintiff during this time frame, although he may have received telephone calls from him, as the Plaintiff frequently called him to provide him with information regarding the treatment rendered by others. During this time period, the Plaintiff also informed Dr. Ashley that he had initiated a lawsuit against the vascular surgeon, Dr. Purtill, over the injury to the vena cava. In fact, the next time the Plaintiff was seen in Dr. Ashley's office was on October 25, 2004, when he came in at the request of his attorneys to ask Dr. Ashley to write a letter to his counsel regarding the events during surgery and who was responsible for the

injury to the vena cava. Dr. Ashley agreed to do so and dictated that letter in front of him.

The last time that the Plaintiff presented to Dr. Ashley's office was when he showed up without an appointment insisting that he place a suture in his dialysis catheter because it was loose and he refused to go to the emergency room and wait. Dr. Ashley accommodated that demand and did not bill for his services. He was not sure when this occurred.

The last report received by Dr. Ashley was a CT scan of the abdomen and pelvis dated 3/21/05 from Mercy Medical Center. Although his name appears as the ordering physician, Dr. Ashley testified that he did not order that test. He believes his name was placed on the report by Plaintiff's cousin, Thomas, who was a supervisor in radiology at Mercy. Dr. Ashley did not speak with anyone regarding the results of that test, nor did he have any role in the Plaintiff's treatment.

The Ashley Defendants have established that they ceased **treating** the Plaintiff for his kidney condition and the ensuing complications before March 14, 2004, as the Plaintiff's care had been taken over by others. While there was further contact between the Plaintiff and Dr. Ashley, under the circumstances, it did not constitute "continuous treatment." That is, while Dr. Ashley made referrals, received copies of reports, spoke with the Plaintiff and may have rendered advice, under the circumstances extant, this contact did not constitute "continuous treatment."

Dr. Ashley's **motion sequence number four** is **granted** and the complaint against him is **dismissed**.

The Plaintiff's Motion

The Defendant Winthrop Cardiovascular and Thoracic Surgery, P.C. and William A. Urtill seek HIPPA compliant authorizations to enable them to interview 40 of the Plaintiff's doctors and medical providers. The Plaintiff objects on several grounds: That one doctor is an employee of

Winthrop; that four other doctors "may be" employees of a party; and, that not all of the people from whom Defendants seek HIPPA authorizations treated him for the condition at issue in this lawsuit.

"The proponent of a motion for a protective order must make an appropriate factual showing to be entitled to such relief." Pierno v Mobil Oil Corp., 7 Misc3d 162, 169 (Supreme Court Richmond Co. 2005), citing Willis v Cassia, 225 AD2d 800 (3d Dept 1998). "[A] litigant is 'deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue.' " Arons v Jutkowitz, 9 NY3d 393, 409 (2007), quoting Dillenbeck v Hess, 73 NY2d 278, 287 (1989); citing Koump v Smith, 25 NY2d 287, 294 (1969); see also, Hoenig v Westphal, 52 NY2d 605 (1981).

There is no across-the-board ban on *ex parte* communications with an adversary's employees–even current ones. Arons v Jutkowitz, supra, at p. 408, citing Niesig v Team I, 76 NY2d 363 (1990). In fact, in Arons v Jutkowitz (supra), the Court of Appeals allowed the Defendants to conduct off-the-record interviews with non-party treating physicians who were employees of the Defendant "so long as measures were taken to steer clear of privileged or confidential information (quotations omitted) . . . ." Arons v Jutkowitz, supra, at p. 409.

The Plaintiff has made only sweeping allegations and has failed to identify which doctors or medical personnel from whom HIPPA authorizations are sought are not possessed of medical information that is relevant to this lawsuit. The Plaintiff has accordingly failed to meet his burden and his request in **motion sequence number three** for a protective order must be **denied**.

Defendant Manoni's Motion

It appears from the Defendant Dr. Manoni's Sur-Reply dated July 16, 2003 and the Plaintiff's Reply dated July 23, 2008 that the authorizations sought by Dr. Manoni have belatedly but ultimately

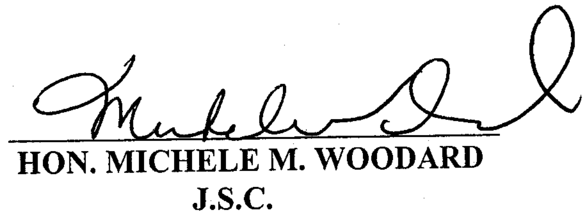
been supplied. And, no reason for a further deposition of the Plaintiff has been shown. Defendant Manoni's **motion sequence number two** is **denied as moot**.

The parties are directed to appear for trial on September 22, 2008 in DCM.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: September 3, 2008
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED
SEP 04 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

H:\McNulty v Winthrop Mot Seq 2-3-4.wpd