

Guifre v County of Nassau

2008 NY Slip Op 32544(U)

September 9, 2008

Supreme Court, Nassau County

Docket Number: 8139-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

DAVID N. GUIFFRE,

Plaintiff,

- against -

COUNTY OF NASSAU,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 8139/07

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2, 3, 4</u>
Replying Affidavits	<u>5</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant County of Nassau moves for an order pursuant to CPLR 3211 (a) (5) dismissing the plaintiff's complaint as time barred by the statute of limitations. The *pro se* plaintiff David N. Guiffre opposes this motion.

A Deputy County Attorney states, in a supporting affirmation dated May 7, 2008, the basis for this motion is the plaintiff failed to serve a summons and complaint upon the County of Nassau within one year and 90 days of the accrual of the cause of action. The defense attorney points out the circumstances involve an allegation of dental malpractice in August 2005, while the plaintiff was an inmate at the Nassau County Correctional Center, East Meadow, New York. The defense attorney notes the plaintiff served a purported notice of claim by regular mail upon the Office of the Nassau County Attorney which was received on April 13, 2006, but no hearing was held as required under General Municipal Law § 50-h on

this claim. The defense attorney states this Court on April 9, 2008, granted the plaintiff's motion seeking permission to serve the summons and complaint by regular mail, and the plaintiff served those papers which were received by the Office of the Nassau County Attorney on April 23, 2008. The defense attorney asserts the summons and complaint should also be dismissed because the plaintiff used the same index number for the motion and the summons and complaint, and the date the plaintiff affixed to the front of the summons for the purchase of the index number is May 16, 2007, more than 120 days the plaintiff had to serve the summons and complaint. The defense attorney avers the plaintiff filled in the date of the summons as March 4, 2008.

The plaintiff states, in an opposing affidavit dated May 19, 2008, the summons and complaint are not barred by the statute of limitations. The plaintiff states the notice of claim was served by certified mail, return receipt requested on April 13, 2006, and the defendant does not dispute it. The plaintiff responds, in detail, about the circumstances of the dental malpractice incident, and points out the infections and tooth loss come under the continuous treatment rule, so September 5, 2007, would be when the one year and 90 days limit would expire. The plaintiff asserts the court received the plaintiff's papers four months prior, to wit April 14, 2007, well within the statute of limitations. The plaintiff points to the separate malpractice allegation concerning disfigurement and permanent injury, and states the defendant fails to mention it in this motion, so it should not be dismissed even if the first part of the complaint is dismissed. The plaintiff counters the defense assertion regarding the index number and the date by stating this contention is untrue because the court or clerk filled in that information, and there was delay caused by processing the poor person relief request.

The Deputy County Attorney states, in a reply affirmation dated May 29, 2008, while the plaintiff is correct there does exist a doctrine of continuous treatment it is inapplicable here. The Deputy County Attorney points out the plaintiff alleges the dental malpractice occurred in August 2005, yet the plaintiff was sentenced to an indeterminate period of incarceration with the New York State Department of Corrections, and transferred from the Nassau County Correctional Center to a prison designated by the New York State Department of Corrections. The defense attorney asserts the plaintiff was then under the custody and control of the State, and not the County, and the next treatment for the same problem was done by a medical provider supplied by the State in Dannemora Correctional Facility which is borne out by dental records. The defense attorney avers that State treatment started on April 3, 2006, and continued in the State facility. The defense attorney submits there is no relevant relationship between the local detention facility and the state correctional facility, so the accrual date of the cause of action is August 2005, and the present action is time barred, and should be dismissed. The defense attorney reiterates the one year and 90 days limitation period expired on November 29, 2006, but the plaintiff commenced the instant action in May 2007, and whether it was commenced on that occasion, or when the plaintiff filed the poor person motion, or on when another Justice of the Supreme Court in Nassau County signed the inmate reduced fee order, is of no consequence. The defense attorney notes those incidences are beyond the statute of limitations period. The defense attorney avers the plaintiff's claim for disfigurement and permanent injury is based upon the same August 5, 2005 act of dental malpractice, and is subject to the same time limitations.

The plaintiff counters, in an unsworn reply statement dated June 2, 2008, the defense

theory the continuous treatment rule is inapplicable. The plaintiff differs with the defendant concerning whether the plaintiff was in local or state jurisdiction when the treatment commenced. The plaintiff reiterates the defendant fails to mention the separate malpractice allegation concerning disfigurement and permanent injury.

This Court has carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. CPLR 3211 (a) (5) provides:

Motion to dismiss cause of action. 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 arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds

General Municipal Law § 50-i provides:

(1) No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death. (2) This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter. (3) Nothing contained herein or in section fifty-h of this chapter shall operate to extend the period limited by subdivision one of this section for the commencement of an action or special proceeding.

“An action in medical malpractice "accrues" at the date of the original negligent act or

omission, however; subsequent continuous treatment does not change or extend the accrual date but serves only to toll the running of the applicable Statute of Limitations (*McDermott v Torre*, 56 NY2d 399, 407; *see also, Rizk v Cohen*, 73 NY2d 98, 103; *Suria v Shiffman*, 67 NY2d 87, 95)” (*Daniel J. by Ann Mary J. v. New York City Health and Hospitals Corp.*, 77 N.Y.2d 630, 634, 569 N.Y.S.2d 396 [1991]).

Here, the plaintiff opposes to the defense argument pursuant to General Municipal Law § 50-i, the plaintiff, and raises an assertion that the continuous treatment doctrine be invoked against the defendant. However, the plaintiff has failed to counter the defense contention as to whether the treatment received by the plaintiff from the State of New York constituted continuous treatment sufficient to toll the statute of limitations (*see Capece v. Nash*, 52 A.D.3d 760, 861 N.Y.S.2d 119 [2nd Dept., 2008]).

CPLR 214-a provides:

An action for medical, dental or podiatric 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; provided, however, that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. 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. For the purpose of this section the term “foreign object” shall not include a chemical compound, fixation device or prosthetic aid or device.

The Court of Appeals has determined:

Under the continuous treatment doctrine, “the time in which to bring a malpractice action is stayed ‘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' ” (*McDermott v. Torre*, 56 N.Y.2d 399, 405, 452 N.Y.S.2d 351, 437 N.E.2d 1108, *quoting Borgia v. City of New York, supra*, 12 N.Y.2d, at 155, 237 N.Y.S.2d 319, 187 N.E.2d 777). As we have recognized, it “would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital” (*Borgia v. City of New York, supra*, 12 N.Y.2d, at 156, 237 N.Y.S.2d 319, 187 N.E.2d 777). Further, we have noted that the doctor committing the alleged malpractice is not only in a position to identify and correct any mistakes but also best placed to do so (*Ganess v. City of New York*, 85 N.Y.2d 733, 735, 628 N.Y.S.2d 242, 651 N.E.2d 1261; *Cooper v. Kaplan*, 78 N.Y.2d 1103, 578 N.Y.S.2d 124, 585 N.E.2d 373). One of the elements of continuous treatment is 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. * * * [W]here the physician and patient reasonably intend the patient’s uninterrupted reliance upon the physician’s observation, directions, concern, and responsibility for overseeing the patient’s progress, the requirement for continuous * * * treatment * * * [is] satisfied.” (*Richardson v. Orentreich*, 64 N.Y.2d 896, 898-899, 487 N.Y.S.2d 731, 477 N.E.2d 210 [emphasis added]; *see also, Cox v. Kingsboro Med. Group*, 88 N.Y.2d 904, 646 N.Y.S.2d 659, 669 N.E.2d 817.)

Allende v. New York City Health and Hospitals Corp., 90 N.Y.2d 333, 338, 683 N.E.2d 317 [1997].

The defendant has shown the statute of limitations was not tolled by the continuous treatment doctrine as asserted by the plaintiff. The plaintiff rather presents having a patient-dentist relationship during the plaintiff’s detention at the defendant’s facility prior to his transfer to the State to serve out the sentence where the plaintiff received additional dental treatment. This circumstance did not constitute a course of treatment with respect to the condition that gave rise to this action (*see Schreiber v. Zimmer*, 17 A.D.3d 342, 793 N.Y.S.2d 104 [2nd Dept., 2005]). Moreover, “[w]here the continuing treatment is provided by someone other than the allegedly negligent practitioner, there must be “ ‘an agency or other relevant relationship’ ” between the health care providers [citations omitted] *Allende v. New York City Health and Hospitals Corp., supra*, at 339). The plaintiff has not shown that agency or other relevant

relationship.

The Court finds more than one year and 90 days have elapsed since the date the plaintiff's cause of action accrued. The Court is constrained to determine, since this action was not commenced within the requisite statutory period, the complaint may not be maintained (*see Antoine v. New York City Health and Hospitals Corp.*, 46 A.D.3d 726, 847 N.Y.S.2d 482 [2nd Dept., 2007]); *Bacalokostas v. Nichols*, 141 A.D.2d 482, 529 N.Y.S.2d 111 [2nd Dept., 1988]).

Accordingly, the motion is granted.

So ordered.

Dated: September 9, 2008

ENTERED
ENTERED
 SEP 15 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE

J. S. C.
HON ANTONIO I. BRANDVEEN

FINAL DISPOSITION xxx

NON FINAL DISPOSITION