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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS Justice PART 6

SMITH, PHILLIP ROSS, ET AL.

-v-

ANTHONY D. GALICO, M.D.

INDEX NO. 105167/07

MOTION DATE 10/28/08

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-6
Answering Affidavits — Exhibits	7-8
Replying Affidavits	9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/8/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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PHILLIP ROSS SMITH and MARJORIE SCHULMAN,

Plaintiff,

-against-

ANTHONY J. GREICO, M.D.,

Defendant.

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Index No. 105167/07

Decision and Order

JOAN B. LOBIS, J.S.C.:

Defendant Anthony J. Greico, M.D. moves by order to show cause, pursuant to C.P.L.R. § 214-a and Rule 3211(a)(5), for an order dismissing as time barred all claims arising from treatment provided by Dr. Greico prior to October 17, 2004, two-and-one-half years prior to the date on which plaintiff, Phillip Ross Smith, filed his summons and complaint.

This is an action for medical malpractice arising out of defendant's treatment of plaintiff's prostate health issues as plaintiff's primary care physician. Plaintiff, who is now 63 years old, began treating with defendant in or about March 1989 and continued seeing him through July 2006. During that period, plaintiff saw defendant approximately once every one to two years for comprehensive examinations, and as needed if medical issues arose between comprehensive examinations. It appears that defendant treated plaintiff for various conditions over the years, including high blood pressure, heartburn, hypertension, high cholesterol, erectile dysfunction, and benign prostate disease. Plaintiff alleges that defendant failed to timely diagnose plaintiff's condition of prostate cancer, leading to the progression and metastasis of the cancer and the lost opportunity to cure the cancer.

Annexed to plaintiff's papers are portions of a transcript from defendant's deposition. Although no medical records are annexed, defendant's history of treating plaintiff during the relevant time period is briefly described below, as best can be gleaned from the transcript excerpts. At each comprehensive exam, a physical examination of plaintiff was conducted, and a battery of tests—including blood pressure, pulse, blood analysis, urinalysis, and EKG—was given. Defendant began performing PSA (Prostate-Specific Antigen) screenings as part of plaintiff's comprehensive health examinations in 1993.[1] Defendant's early PSA readings were 1.0 in 1993; 1.0 in 1997; and, 1.2 in 1998. Regarding plaintiff's urological health, defendant remembered that plaintiff complained of erectile dysfunction in the early 1990's. Plaintiff also telephoned defendant in September 1999 to report erectile dysfunction; at that time, plaintiff asked for Viagra, which defendant prescribed.

In September 2001, at plaintiff's comprehensive exam, plaintiff complained of heartburn that he treated with Zantac, and occasional nocturia (the need to get up during the night to urinate). His genital examination was normal and a rectal examination indicated that the prostate was 2+, or "moderately enlarged," but also normal in consistency, and symmetrical. His PSA level was 2.1,which was an increase from 1.2 in 1998. Defendant believed at this point that the increase in plaintiff's PSA level was consistent with benign prostate disease. Defendant testified that when an individual has benign prostate disease, it is his practice to "reobtain the history, reexamine and do the PSA at the next annual comprehensive visit."

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[1] According to defendant's testimony, a PSA screening is an indicator of prostatic disease.

Plaintiff saw defendant for two brief visits limited to pulse and blood pressure check-ups in October and November, 2001. Plaintiff again saw defendant in February 2002, at which time plaintiff complained of a cyst on his left genital area. Upon examination, plaintiff's testes were normal. A prostate examination was not performed on this date.

Plaintiff's next comprehensive examination was in November 2002. Plaintiff complained of bad breath and dry mouth, nocturia no more than once per night, and stated that he was still taking Viagra when needed. A genital examination was normal, and a rectal examination showed a 1+ prostate, or mildly enlarged. Defendant testified that he attributed the previous prostate size of 2+ to possible swelling due to prostatitis, which would have reduced post-prostatitis, as opposed to prostatic enlargement or tumor growth. Plaintiff's PSA in November 2002 was 2.8. Defendant testified that an increase from 2.1 in September 2001 to 2.8 in November 2002 was within the range of normal growth. Defendant testified that at plaintiff's November 2002 visit, he was primarily concerned with plaintiff's hypertension and his significantly elevated lipid levels.

Plaintiff's next comprehensive examination was in April 2004. Plaintiff had undergone a colonoscopy in November 2003; he had lost some weight on the Atkins diet; his heartburn had improved; and, he was worried about his blood pressure. He complained of nocturia one to three times per night. A genital exam was negative; a rectal exam revealed no masses, and the prostate was 1+, or mildly enlarged. Defendant testified that he attributed plaintiff's nocturia to benign prostatic disease. Plaintiff's PSA in April 2004 was 3.4; defendant testified that his plan was to continue monitoring plaintiff's prostate at his annual comprehensive exams, not more frequently.

Plaintiff had a brief examination in December 2005, where he complained of a narrowing urine stream over the prior six months. At that exam, defendant performed a prostate examination, but he did not perform a PSA screening.

Plaintiff's next comprehensive exam was sixteen months later, on July 31, 2006. Plaintiff was complaining of nocturia three times per night, occurring more frequently, and a sense of an incomplete bladder emptying and a narrowing urine stream. A genital exam was normal, and a rectal exam showed that the prostate was 2+, moderately enlarged; however, plaintiff's PSA reading was 10.6, so defendant told plaintiff that he must see a urologist for a prompt consultation. When he saw the urologist, plaintiff learned that he had a "seriously advanced and incurable level of prostate cancer, which, by that time, had spread throughout and beyond all quadrants of his prostate."

C.P.L.R. § 214-a provides that:

> [a]n 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 . . . . 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.

Plaintiff commenced his action by the filing of a summons and complaint on April 17, 2007. His bill of particulars claims that defendant was negligent in rendering medical care to plaintiff "from on or about February, 2001 and subsequent thereto, including: November 2002; April 1, 2004; October 22, 2004; December 5, 2005; and July 31, 2006."

Defendant avers that the statute of limitations bars plaintiff's claims relating to dates of treatment prior to October 17, 2004, two years and six months prior to plaintiff filing the summons and complaint, unless plaintiff can prove continuous treatment. Defendant's motion is limited to an attorney's affirmation in support and copies of the pleadings. Plaintiff argues that defendant's motion must fail because it is "palpably improper, tendering no evidentiary proof in admissible form." However, "[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 sue has expired." Gravel v. Cicola, 297 A.D.2d 620, 620-21 (2d Dep't 2002) (citations omitted). Defendant satisfied this burden as to plaintiff's claims regarding treatment prior to October 17, 2004, by annexing plaintiff's summons and complaint and bill of particulars to the motion.

In anticipation of plaintiff's opposition, defendant also argues that plaintiff cannot benefit from the continuous treatment doctrine because no course of treatment for prostate cancer was ever established, and because the rationale underlying the continuous treatment doctrine—that a patient should not be made to interrupt medical treatment in order to bring a lawsuit (see Young v. N.Y.C. Health and Hosps. Corp., 91 N.Y.2d 291, 296 [1998])—is not present in this case. Plaintiff, in opposition, argues that the continuous treatment doctrine should be applied to toll the statute of limitations as to claims relating to treatment rendered prior to October 17, 2004. He argues that defendant's own testimony demonstrates that plaintiff "continuously sought treatment from the defendant for complaints regarding his prostate since 1993, when defendant had [plaintiff] undergo his first PSA and in 1997, when, according to defendant, [plaintiff] began complaining to defendant of excessive nighttime urination, or nocturia." Plaintiff asserts that defendant testified that it is his practice to conduct PSA tests annually for male patients over age 50 and to monitor their prostate as part of a

comprehensive evaluation. As such, plaintiff argues that plaintiff's visits to defendant constitute a continuous course of treatment.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." Leon v. Martinez, 84 N.Y.2d 83, 87 (1994), citing C.P.L.R. § 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Id., at 87-88 (citations omitted). A court may also consider extrinsic evidence submitted by the parties. See Schrank v. Lederman, 52 A.D.3d 494, 496 (2d Dep't 2008), citing Leon, supra, at 88.

Monitoring of a condition may constitute continuous treatment, if the monitoring 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 the last visit, in conformance with the periodic appointments which characterized the treatment in the past.'" Young, supra, at 296, quoting Richardson v. Orentreich, 64 N.Y.2d 896, 898-99 (1985). But, "[r]outine examinations of a patient who appears to be in good health or diagnostic examinations, even when conducted repeatedly over a period of time, are not 'a course of treatment.'" Massie, supra, 78 N.Y.2d at 520 (internal citations omitted); see also Sinclair v. Cahan, 240 A.D.2d 152, 154 (1st Dep't 1997).

Plaintiff has alleged that there may have existed monitoring at a level that would constitute continuous treatment. Defendant had diagnosed plaintiff with benign prostate disease at least as early as September 2001. Defendant testified that the generally accepted principle is for adults to have their PSA levels checked every two years, but for someone who has been diagnosed with benign prostate

disease, he would check the PSA levels at the patient's annual comprehensive visit, or every year. Defendant also stated that "[p]rostate cancer is always a possibility to develop in an adult male." Further, plaintiff made repeated complaints of symptoms which may be "ultimately traceable to the cancerous condition whose alleged misdiagnosis and alleged mistreatment have given rise to this action." Dellert v. Kramer, 280 A.D.2d 438 (1st Dep't 2001). The fact that defendant may have attributed plaintiff's condition to benign prostate disease, as opposed to prostate cancer, "is not a basis to find that [defendant was] not treating [plaintiff for prostate cancer] if his symptoms were such as to indicate its existence and [defendant] nevertheless failed to properly diagnose it." Hill v. Manhattan West Med. Group, 242 A.D.2d 255 (1st Dep't 1997).

Based on plaintiff's pleadings and defendant's deposition testimony, "in affording [plaintiff] the benefit of all favorable inferences to which [he is] entitled," (Schrank v. Lederman, supra, at 296) it cannot be said, as a matter of law, that the treatment provided by Dr. Greico prior to October 17, 2004 did not constitute continuous treatment for the purpose of tolling the statute. As such, it is premature at this juncture to dismiss plaintiff's claims related to treatment that occurred prior to October 17, 2004. This issue is best left to the trier of fact. Accordingly, it is

ORDERED that defendant's motion to dismiss is denied.

This constitutes the decision and order of the court.

Dated: December 5, 2008

JOAN B. LOBIS, J.S.C.