

Chelli v Nepola

2008 NY Slip Op 33418(U)

December 19, 2008

Supreme Court, New York County

Docket Number: 121630/06

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis
Justice

PART 6

Index Number : 112630/2006
DONO-CHELLI, FRANCES
vs.
NEPOLA, NEIL N. M.D.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/27/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

1-22
23-26
27

FILED

DEC 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

Dated: 12/19/08

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
FRANCES DONO CHELLI, as Executrix of the Estate
of JOYCE DONO,

Plaintiff,

Index No. 121630/06

-against-

NEIL N. NEPOLA, M.D., JEFFRY TAMBOR M.D.,
DOMINIC POMPA, M.D., BEHAVIOR MEDICAL
RESEARCH OF STATEN ISLAND, P.C. and MARK
DIBUONO, M.D.

Defendants.

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

Decision and Order

FILED
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NEW YORK

Defendants Jeffrey Tambor, M.D. (named in the caption of the complaint as Jeffrey Tambor), Mark DiBuono, M.D., and Behavior Management Research of Staten Island ("BMR") move for an order, pursuant to C.P.L.R. Rule 3212, granting summary judgment in their favor. Defendant Neil N. Nepola, M.D. also moves for partial summary judgment in his favor. In response to the motions, plaintiff agreed to dismiss the claims against defendants Tambor, DiBuono, and BMR. The only remaining issue is Dr. Nepola's contention that plaintiff's claim of failure to diagnose lung cancer for "a decade or more" is time-barred with respect to the medical care rendered before March 11, 2004, which is more than two and one-half years prior to commencement of this action. Plaintiff opposes the motion for partial summary judgment by defendant Nepola based on the continuous treatment doctrine.

Plaintiff's decedent, Joyce Dono, died on September 5, 2005 at the age of 65 from lung cancer, with metastasis to the brain. Plaintiff Frances Dono-Chelli, Ms. Dono's daughter, is the executrix of Ms. Dono's estate. Plaintiff alleges that the death was a direct result of a failure to diagnose her mother's condition in a timely manner.

Although plaintiff's bill of particulars seeks to apply the continuous treatment doctrine to treatment which occurred more than a decade prior to the filing of the summons and complaint, plaintiff concedes in her opposition papers that the diagnosis of cancer in July 2005 was considered as a primary differential diagnosis as a result of the same symptoms plaintiff had complained about to Dr. Nepola at least since 2003. Plaintiff's expert opines that the diagnosis of cancer in July 2005 was not an incidental finding, but was considered as a primary differential diagnosis as a result of the same symptoms plaintiff had from 2002 forward. As set forth more fully, *infra*, plaintiff's expert believes that had Dr. Nepola performed routine biannual x-rays beginning in May 2003, he could have detected plaintiff's lung cancer.

Dr. Nepola began treating decedent as her primary care physician in June 1997. During the period prior to March 11, 2004, Dr. Nepola treated her for a variety of ailments. Significant to this application, she was treated for complaints of difficulty in breathing, chest pain, chronic depression, anxiety, panic attacks, and insomnia. On January 6, 1999, decedent had a chest x-ray and Dr. Nepola noted "[e]mphysematous type changes bilaterally." But, he was equivocally saying at one point in his deposition that he did not diagnosis her with emphysema, while later saying he had made the diagnosis. Ms. Dono was a smoker, and Dr. Nepola acknowledged that patients who smoke and get emphysema are at a higher risk of developing lung cancer.

Dr. Nepola next saw decedent on May 17, 2001.¹ She presented with complaints of a cough and earache. He noted, *inter alia*, a positive post-nasal drip and positive decreased breath

¹ During the two-year period, decedent was seen by Dominic Pompa, M.D., who worked on a per diem basis in Dr. Nepola's office on Wednesdays and Fridays. She was seen by Dr. Pompa twice in 1999 and on five occasions in 2000.

sounds bilaterally. She was treated with a nebulizer. Dr. Nepola prescribed Motrin, and asked decedent to get a chest x-ray and a lateral rib series. In addition, Dr. Nepola prescribed cough medicine and Combivent—an inhaler. At this time, his impression was COPD (chronic obstructive pulmonary disease) and chest pain, and he ordered an EKG. He stated during his deposition that his differential diagnosis was exacerbated COPD, pneumonia, and bronchitis. Decedent returned to Dr. Nepola's office three more times in 2001, and one time in 2002, prior to March 19, 2002, when she was again treated by Dr. Nepola. Her complaints were a cough and anxiety with difficulty sleeping. Dr. Nepola found a positive post-nasal drip, positive rhonchi, scattered positive expiratory wheeze, and other findings. He repeated his impression of bronchitis, prescribing Tussionex and Avelox (an antibiotic), as well as Paxil and Xanax. He continued his diagnosis of COPD, but also had a differential diagnosis of lung infection. Dr. Nepola made a note in his record dated March 26, 2002, which reads, "[p]atient hospitalized, lost consciousness secondary to respiratory distress, pulmonary follow-up." He saw decedent again on April 4, 2002. He continued his impression that decedent was suffering from COPD, prescribed Combivent and "Flowvent,"² and noted, "refer to pulmonary." He did not directly schedule an appointment for decedent to see a pulmonologist.

The next visit was July 30, 2002. Decedent's complaints at that visit were palpitations with associated panic attacks. Dr. Nepola's impression was COPD, palpitations, and agitated depression. He ordered an echocardiogram. He prescribed Remeron and, after three weeks, "Clonopin."³ There was no indication that Ms. Dono had been seen by a pulmonologist by that date.

² It is assumed that "Flowvent" in the transcript is "Flovent."

³ It is assumed that "Clonopin" in the transcript is "Klonopin."

The next office visit was August 19, 2002; it was described as a follow-up exam. The doctor's note conveyed that Ms. Dono was doing better. "Clonopin" was prescribed. An echocardiogram was performed during that visit; no significant findings were reported. Dr. Nepola saw decedent again on September 25, 2002. His impression continued to be COPD. He noted decreased breath sounds bilaterally and anxiety. The "Clonopin" and Remeron were continued. After the next visit, November 7, 2002, the office called prescriptions for "Flowvent" and Combivent.

At decedent's next visit on December 10, 2002, it was again noted that Dr. Nepola's impression was COPD as well as agitated depression. Along with other medications, the "Flowvent" and Combivent were continued. There was another visit on December 30, 2002. Her presenting complaint was anxiety. The only mention of lung involvement was a note that the "lungs are clear to auscultation." An anti-anxiety medication, Lorazepam, was prescribed, and an increase in decedent's cholesterol levels was noted. The next visit, on January 21, 2003, was similar. At the next visit, on February 27, 2003, the note indicates "[p]atient complains of shortness of breath secondary to anxiety. . . ." Dr. Nepola's impression was COPD with increased cholesterol levels. A spirometry test was performed with a broncho dilator treatment. She indicated that she felt better. Defendant advised her to use her inhalers and get a nebulizer for home use. She reported that she had quit smoking for three weeks. His finding at this time was emphysema. April 7, 2003, was the next date that Ms. Dono was seen by Dr. Nepola, although prescriptions for Ativan, Combivent, and Remeron were ordered in the interim. The April visit was a follow-up to the February visit, mainly related to anxiety. At her May 15, 2003 visit, she complained of shortness of breath on walking greater than half a block. One factor recorded in the note was decreased breath sounds bilaterally,

although Dr. Nepola testified at the deposition that this was not significant because she had them before; he opined that it would indicate an exacerbation of her emphysema or cardiovascular problems. On June 2, 2003, the Combivent inhaler prescription was renewed. Later that month, on June 23, 2003, she was seen again and it was noted that there were complaints of anxiety and tremulousness, but no shortness of breath. Although Dr. Nepola testified that Ms. Dono had similar complaints in the past, this was the first note of tremulousness. Her medications were continued. There was a follow-up visit on July 19, 2003, with a continuation of her medications. On the next visit, September 9, 2003, similar notes were made with the addition of a different tranquilizer. A refill for a medication for her nebulizer was recorded on October 6, 2003. The next visit was October 13, 2003. In addition to recording previous findings, a pulmonary consult was noted. To this date, Ms. Dono had not been seen by a pulmonary specialist, as had been repeatedly recommended. Another visit occurred on December 22, 2003, with the previously recorded impressions and a continuation of many of the medications. All subsequent examinations by Dr. Nepola occurred within two and one half years of the commencement date.

On July 31, 2005, decedent was admitted to the Community Medical Center (the "Center"). She was diagnosed with metastasized adenocarcinoma, a 3 cm primary cancerous tumor in her left lung, at least two brain tumors, and a liver tumor. She died on September 5, 2005 of the disease.

The issue before the court is whether the continuous treatment doctrine applies under these circumstances so that plaintiff may pursue a claim against Dr. Nepola for any conduct that

occurred prior to March 11, 2004. As set forth above, although plaintiff contends in her bill of particulars that the decedent was under defendant Nepola's care for a decade or more, the opposition papers limit the time period to either 2002 or 2003.

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.

Defendant avers that the statute of limitations bars plaintiff's claims relating to dates of treatment prior to March 11, 2004, two years and six months prior to plaintiff filing the summons and complaint, unless plaintiff can prove continuous treatment.

The continuous treatment doctrine provides that the time to commence a medical 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 (1982), quoting Borgia v. City of New York, 12 N.Y.2d 151, 155 (1962). "The purpose of the continuous treatment doctrine is to avoid the absurdity of requiring a wronged patient to interrupt corrective efforts by serving a summons and complaint upon the treating hospital or physician." Schrank v. Lederman, 52 A.D.3d 494, 495 (2d Dep't 2008).

The party moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician was negligent. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Once the movant satisfies this burden, the burden shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Id. (citation omitted). Specifically as to a claim that a malpractice claim is time barred, defendant needs to assert only that acts complained of occurred prior to two and one half years before commencement of the action. Defendant has shown that this action was commenced in September 2006, and that any claims as to treatment prior to March 11, 2004, more than two years and six months after the alleged acts and omissions took place, are barred. O’Donnell v. Siegel, 49 A.D.3d 415, 420 (1st Dep’t 2008). In addition, in support of his motion, Dr. Nepola submitted affirmations from two experts: Lawrence Scharer, M.D., who is board-certified in internal medicine with a sub-specialty in pulmonary diseases, and Philip Muskin, M.D., a psychiatrist. Dr. Scharer notes that emphysema and COPD are unrelated to lung cancer, and the treatment for these two diseases is different than the treatment for lung cancer. He states that from June 17, 1997 through March 11, 2004, Dr. Nepola treated the decedent for emphysema or COPD, which are both unrelated to lung cancer. He notes that Dr. Nepola also appropriately prescribed medication for the decedent’s psychiatric conditions, and that these psychiatric ailments are unrelated to the classic symptoms of either lung cancer or brain cancer. Dr. Scharer notes that a 2002 brain scan was negative for brain cancer, which refutes the claim that complaints made by the decedent as early as 2002 were symptomatic of a brain lesion.

Dr. Muskin states that there was no evidence in his review of decedent's medical records that she complained of any of the classic symptoms of lung cancer, including, *inter alia*, a new onset of shortness of breath, coughing up blood, chest pain, unabated chronic weight loss, loss of appetite, and hoarseness in her voice. Dr. Muskin points out that decedent's daughter testified at her deposition that in the year before decedent died, she did not recall her mother complaining of any such symptoms. Nor does Dr. Muskin believe that there is any scientific basis to assert that the psychiatric medications that were prescribed to treat decedent's anxiety and depression masked the signs and symptoms of lung cancer. Both experts further state that decedent did not have classic signs and symptoms of brain cancer, including one-sided weakness, one-sided tremors, confusion, aphasia, disorientation, blurry vision, headaches, or seizures.

In opposition to defendant's motion, plaintiff argues that Ms. Dono expressed signs and symptoms which should have triggered diagnostic tests in May 2003, which would have revealed that she was suffering from cancer, not just COPD, emphysema, depression, or anxiety. The symptoms included tremors, weakness, inability to walk half a block, dyspnea, and shortness of breath. Plaintiff offers the affidavit of Dr. Ira Mehlman, a licensed physician, board certified in both internal medicine and emergency medicine. He reviewed the relevant records, depositions of the parties, and defendant's motion papers. He disputes the conclusions of defendant's experts, *i.e.*, that plaintiff did not have classic signs and symptoms of lung cancer or brain cancer, and that the cancer diagnosis was only diagnosed "incidental" to treatment for exacerbation of COPD. He goes on to assert that the symptoms plaintiff presented with on July 31, 2005 were the same symptoms she had presented to Dr. Nepola from 2002 and onward.

Defendant argues that plaintiff misstates facts and disagrees with the opinions expressed by Dr. Mehlman. Defendant argues that Dr. Nepola was not treating plaintiff for cancer and a failure to diagnose does not constitute continuous treatment, citing Nykorchuck v. Henriques, 78 N.Y.2d 255 (1991). But, the decision in Nykorchuck is not such a bright line. The Court of Appeals clearly limited the holding to the facts presented by plaintiff. Defendant was treating plaintiff for infertility issues. On one examination, she brought a lump in her breast to defendant's attention; defendant attributed the lump to a noncancerous condition. The Court of Appeals held that plaintiff failed to establish a connection between the course of treatment she was receiving for infertility and treatment for her breast condition. Here, it is undisputed that Dr. Nepola was treating decedent for complaints involving difficulty breathing as early as January 6, 1999, with a diagnosis of emphysema and COPD by May 17, 2001. He was also treating her for a variety of anxiety-related symptoms which included tremors. It is plaintiff's position that these conditions are sufficiently similar to signs of lung and brain cancer to establish the treatment nexus for application of the continuous treatment doctrine. She cites Melup v. Morrissey, 3 A.D.3d 391 (1st Dep't 2004) for the proposition that a failure to diagnose cancer can invoke the continuous treatment doctrine. See also, Marun v. Coleburn, 291 A.D.2d 340 (1st Dep't 2002). Defendant disputes the similarity between the symptoms plaintiff presented and the symptoms of lung or brain cancer. Since similarity in symptoms is disputed, a factual dispute is presented, making partial summary judgment on C.P.L.R. § 214-a inappropriate.

Defendant's motion is denied. This constitutes the decision and order of the court.

Dated: December 19, 2008

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DEC 22 2008

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JOAN B. LOBIS, J.S.C.