

Pozefsky v Aulisi

2009 NY Slip Op 31289(U)

June 9, 2009

Supreme Court, New York County

Docket Number: 112478/07

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 112478/2007
POZEFSKY, FREDA GATES
 VS.
AULISI, RICHARD T., ESQ.
 SEQUENCE NUMBER : 001
 DISMISS ACTION

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

This motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided*

per attached

FILED
 JUN 15 2009
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 6/9/09

[Signature]
 EMILY JANE GOODMAN

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
COUNTY OF NEW YORK: PART 17

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FREDA GATES POZEFSKY

Index No. 112478/07

Plaintiff,

-against-

RICHARD F. AULISI, ESQ., EDWARD F. SKODA,
ESQ., CAPUTO, AULISI and SKODA, and
JOHN DOES, ESQ. 1-10 (fictitious)

Defendants.

-----x

EMILY JANE GOODMAN, J.S.C.:

This is a legal malpractice action by plaintiff Freda Gates Pozefsky against defendants Richard F. Aulisi, Esq. (Aulisi), his former law firm Caputo, Aulisi and Skoda, and his former law firm partner Edward F. Skoda, Esq. (collectively, the Defendants). The complaint against the Defendants alleges three causes of action: (1) professional malpractice; (2) breach of contract; and (3) breach of implied covenant of good faith and fair dealing.

In response, the Defendants move for an order dismissing the complaint (i) as time-barred by the statute of limitations, pursuant to CPLR 3211 (a) (5); (ii) as time-barred by the doctrine of laches; and (iii) for failure to state a cause of action, pursuant to CPLR 3211 (a) (7).

Although the action is not time-barred, Defendants' motion to dismiss is granted based on failure to state a cause of action.

Background

On or about September 4, 2002, Plaintiff commenced a legal malpractice action against the Defendants (the 2002 Action), asserting claims that were virtually identical to those asserted in the instant action. The legal malpractice claim arose from the alleged failure of the Defendants, particularly Aulisi, to schedule the deposition of one of Plaintiff's expert witnesses, Gary Solomon M.D. (Dr. Solomon), in connection with Plaintiff's products liability-breast implant action pending in the United States District Court for the Northern District of New York (the Federal Court), entitled *Pozefsky v Baxter Healthcare Corp., et al.*, 92 Civ 0314 (the Underlying Action). Plaintiff allegedly suffered injuries as a result of exposure to silicone gel from the ruptured breast implants made by Baxter Healthcare. In 1998, Plaintiff retained Defendants, as trial counsel (as opposed to general counsel), to prosecute the Underlying Action.

In the 2002 Action, the Defendants filed a motion to dismiss the complaint and/or for a stay of the proceedings. On or about April 18, 2003, this court (Judge Richard F. Braun) issued an opinion which stated that the complaint filed in the 2002 Action was a nullity, because Plaintiff's then counsel (based in New Jersey) did not have a law office in New York, and was thus not authorized to file the complaint on Plaintiff's behalf. The opinion also stated that the 2002 Action was premature, because

the Underlying Action was still pending in the Federal Court, and Plaintiff had not suffered any damages at that time. A judgment dismissing the complaint filed in the 2002 Action was entered by the Clerk of the Court on or about July 15, 2003.

A settlement was reached by the parties in the Underlying Action on or about September 15, 2004, for an amount Plaintiff believed was inadequate but was compelled to accept, due to the litigation posture of the action. Thereafter, the parties' stipulation dismissing the Underlying Action was "so ordered" by the Federal Court on October 4, 2004. Plaintiff took no action relating to the malpractice claim until the complaint commencing the instant action was filed on or about September 14, 2007.

Discussion

I. Statute of Limitations and Doctrine of Laches

In response to the instant action, the Defendants argue, among other things, that this action should be dismissed because the applicable statute of limitations for the malpractice claim has expired when this action was commenced, or that the instant action is time-barred by the doctrine of laches.

Pursuant to CPLR 214 (6), the limitations period to commence an action to recover on a legal malpractice claim is three years, regardless of whether the theory is based in contract or tort. In this case, the legal malpractice occurred when the Defendants allegedly failed to produce Dr. Solomon, on September 28, 1999,

as an expert witness for deposition in the Underlying Action. Concerned about the statute of limitations, Plaintiff commenced the 2002 Action on September 4, 2002, prior to the expiration of the three year limitations period under CPLR 214 (6). Because the 2002 Action was timely brought, the Defendants did not, and had no legal basis to, assert a statute of limitations defense with respect to that action. Instead, they argued that the 2002 Action should be dismissed because certain documentary evidence purportedly refuted Plaintiff's allegations, or the proceedings should be stayed pending the outcome of the Underlying Action. As noted above, Judge Braun dismissed the 2002 Action on the grounds stated above.

Seeking dismissal of the instant action, the Defendants now contend that because Judge Braun dismissed the 2002 Action as a nullity, such reasoning for the dismissal was paramount, and the alternate basis for dismissal (i.e. prematurity) was mere dicta. Defendants' Reply Brief, at p. 3-4. Defendants' contention is unpersuasive. Dismissal of the 2002 Action as a nullity was a technical defect that could have been readily remedied, either by Plaintiff retaining a New York counsel or by Plaintiff's then counsel seeking *pro hac vice* admission. More importantly, even if such defect were cured or remedied, any continued or renewed prosecution of the malpractice claim against the Defendants would likely be dismissed or stayed, again, due to prematurity, so long

as the Underlying Action was still pending. Further, Defendants do not argue that Judge Braun's dismissal of the 2002 Action based on prematurity was unsupported by legal precedents. See e.g., *Lavanant v General Accident Ins. Co. of America v Witchel*, 212 AD2d 450 (1st Dept 1995) (case cited by Judge Braun as support for the dismissal based on prematurity); *Stettner v Bendet*, 227 AD2d 202 (1st Dept 1996) (court stayed malpractice claim against defendant-attorney pending resolution of plaintiff's rights in an underlying action against a third party); *Lopes v Mangiatordi, Maher & Lemmo, LLC*, 6 Misc 3d 1004 (A) (Sup Ct, Queens County 2004) (dismissed malpractice claim because plaintiff could not show that he had sustained damages caused by defendant-attorney's alleged negligence until after resolution of an underlying personal injury action against a third party); *Pudalov v Brogan*, 103 Misc 2d 887, 892 (Sup Ct, Nassau County 1980) ("[a] necessary element in a cause of action for legal malpractice is damages ... [and] there can be no legal damages until the underlying case is resolved"); *Wright v Diebold*, 28 Misc 2d 978, 979 (Sup Ct, NY County 1961) ("Since damage is an essential ingredient of the [malpractice claim] and plaintiff has not made allegations of ultimate fact establishing any present damage, it would seem that the cause of action sought to be alleged has not yet accrued and is premature"). Cf. *Tal-Spons Corp. v Numberg*, 213 AD2d 395 (2nd Dept 1995) (dismissing malpractice claim because defendant-

attorney's representation of plaintiffs terminated more than seven years before malpractice action was commenced; court also noted plaintiffs' assertion that their malpractice claim only accrued when their damages were adjudicated was unsupportable).

The Court of Appeals has not specifically addressed whether a plaintiff's pending underlying action against a third party (with facts similar to the instant case) would toll the accrual of the limitations period on a legal malpractice claim. However, it is noteworthy that the Court of Appeals has stated that a legal malpractice claim accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court [internal citation omitted.]" *McCoy v Feinman*, 99 NY2d 295, 301 (2002) (case dealt primarily with tolling of the limitations period under the continuous representation doctrine).

As is relevant here, Judge Braun had opined that the 2002 Action was premature, which, in effect, precluded Plaintiff from obtaining judicial relief, at that time, with respect to her malpractice claim against Defendants. In other words, based on Judge Braun's opinion, Plaintiff did not then suffered an "actionable injury," due to the pendency of the Underlying Action. *McCoy*, 99 NY2d at 301 ("[i]n most cases, [the accrual time for a legal malpractice claim] is measured from the day an actionable injury occurs"). Hence, while the law provides that the limitations period for a legal malpractice claim starts to

* 8]

run when the malpractice is committed (this is known as the "occurrence rule") (*Wells Fargo Home Mortgage, Inc. v Zeichner, Ellman & Krauss, LLP*, 5 AD3d 128, 128-129 [1st Dept 2004]) ("[t]he period of limitations in a legal malpractice actions begins to run when the malpractice is committed ... not when the client discovers the injury"), the pendency of plaintiff's underlying action against a third party may stay or toll the accrual or running of the limitations period until plaintiff's damages can be determined (this is known as the "damage rule"), *Stettner v Bendet*, 227 AD2d 202, *supra* (staying legal malpractice action against defendant attorney pending resolution of plaintiff's claim against a third party).¹

Here, because settlement of the Underlying Action was approved by the Federal Court on October 4, 2004 (at which time Plaintiff's damages were determined and became ascertainable), and the complaint against Defendants was filed on or about September 14, 2007, the instant action is not time-barred by the three year limitations period under CPLR 214 (6).

¹ See also Ronald E. Mallen, Limitations and the Need for "Damages" in Legal Malpractice Actions, 60 Defense Counsel Journal 234 (April 1993) (collecting cases, discussed issues implicated by the occurrence rule and the damage rule, and concluded that the damage rule is the predominant reason for tolling the accrual of a malpractice claim, because application of the occurrence rule frequently results in illogical outcomes and injustices); Ronald E. Mallen & Jeffrey M. Smith, 3 Legal Malpractice, § 22:5 (2008 edition) (discussing prematurity, abatement and stay issues in malpractice actions).

As to Defendants' other argument that the instant action should be dismissed based on the doctrine of laches, this court finds the argument unpersuasive. Specifically, Defendants argue that because Plaintiff failed to appeal Judge Braun's decision issued in the 2002 Action, the defense of laches applies to bar the instant complaint, since it is filed more than four years after that decision. Defendants' Brief, at p. 8-9. However, the Court finds no basis for applying the doctrine of laches, based on the fact that Plaintiff failed to pursue an appeal of Judge Braun's decision, when based the Judge's decision, Plaintiff could merely file the action in the future. Further, Defendants have not identified or offered any legal basis to support an appeal of that decision. Indeed, as noted, dismissal of the 2002 Action as premature is supported by legal precedents. "The mere lapse of time, without a showing of prejudice, is insufficient to sustain a claim of laches." *In re Linker*, 23 AD3d 186, 189 (1st Dept 2005). Prejudice, as an element of laches, may be demonstrated "by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay." *Id.* (internal quotation marks and citation omitted). Here, Defendants have not demonstrated any prejudice, other than a mere lapse of time. Thus, the defense of laches is inapplicable and without merit.

II. Failure to State a Cause of Action - Proximate Cause

The court now addresses Defendants' alternative argument that the complaint should be dismissed, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. In order to sustain a legal malpractice claim, a plaintiff must allege and prove that the defendant-attorney was negligent (i.e. the attorney failed to exercise the skill, diligence and knowledge commonly possessed by members of the legal community), and such negligence was the proximate cause of plaintiff's loss or injury. *McCoy, supra*, 99 NY2d at 301-302; *Leder v Spiegel*, 31 AD3d 266 (1st Dept), *aff'd* 9 NY3d 836 (2006).

In this case, Plaintiff alleges that because Defendants' failed to produce her medical expert witness, Dr. Solomon, for deposition in the Underlying Action, she was deprived of a just compensation for the damages she suffered in connection with her breast implant litigation. Plaintiff argues that had Dr. Solomon been produced and deposed, his medical testimony and opinion would have been admitted in the Underlying Action. In response, Defendants contend that Dr. Solomon would never have been allowed to testify in the Underlying Action because his testimony would have been precluded on *Daubert* grounds.² In essence, Defendants

² *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993). In *Daubert*, the U.S. Supreme Court established a gate-keeping function for the courts to determine the reliability and relevance of expert testimony, and required the courts to assess, among other things, whether the reasoning or methodology underlying the proposed testimony or opinion is scientifically valid and can be properly applied to the facts in issue, and

contend that, even assuming Plaintiff's complaint pleads an act of legal malpractice by Defendants, she has not established that the alleged malpractice was the "proximate cause" of her loss or damage in respect of the Underlying Action.

In the Underlying Action, the Federal Court conducted a thorough *Daubert* analysis with respect to the issue of causation in the context of injuries purportedly caused by or associated with silicone breast implants. See *Pozefsky v Baxter Healthcare Corp.*, 2001 U.S. Dist. LEXIS 11813 (ND NY August 16, 2001) (the *Pozefsky* Decision). In particular, the Federal Court reviewed the reports of three groups of independent experts, including those published by (1) the Rule 706 National Science Panel (MDL Panel), appointed by Chief Judge Samuel Pointer as part of the Multi-District Breast Implant Litigation; (2) the Institute of Medicine of the National Academy of Sciences (IOM}, commissioned by the United States Department of Health and Human Services; and (3) the Independent Review Group (IRG), organized by United Kingdom's Chief Medical Officer and its Minister of Health. The Federal Court also reviewed the studies published by many well-known national and international, medical and scientific organizations, including, among others, the American Medical Association (AMA), American Cancer Society, American College of

whether the proposed testimony or opinion has been generally accepted by the relevant scientific community.

Rheumatology,³ and College of American Pathologists. These reports and studies concluded that there was insufficient evidence to support the allegation that silicone breast implants are associated with defined or atypical connective tissue diseases, or other autoimmune-rheumatic diseases or conditions in women with such implants. *Pozefsky Decision*, at p. 4-5.

Based on such reports and studies, the Federal Court excluded the testimony of Plaintiff's non-medical experts (i.e. Dr. Pierre Blais, a PhD in organic chemistry, and Dr. Saul Puszkin, a PhD in biochemistry), as to the causation of systemic autoimmune diseases allegedly associated with or caused by silicone breast implants. *Pozefsky Decision*, at p. 5-7. With respect to Dr. Solomon, the Federal Court in an earlier decision had denied Plaintiff's request for a further extension of time to conclude expert disclosure, including the proposed disclosure and deposition of Dr. Solomon, because the final deadline had already passed, and that no further extension should be granted.⁴

Despite the foregoing, Plaintiff argues that Dr. Solomon's report and testimony would have been admitted (if not for the failure of Defendants to produce him for deposition) because,

³ Dr. Solomon is a member of the American Board of Internal Medicine, Rheumatology Sub-specialty.

⁴ See *Pozefsky v Baxter Healthcare Corp.*, 194 FRD 438 (ND NY 2000). The decision noted that Plaintiff attorney's (Aulisi's) campaign for judgeship and his extensive trial practice were insufficient basis to justify an extension of the deadline. *Id.*

unlike other breast implant cases, where Dr. Solomon served as an expert witness and his testimony was precluded by the courts,⁵ Dr. Solomon personally performed treatment and examination of Plaintiff Pozefsky in this case, as part of his record in rendering his report. Plaintiff's Opposition Brief, p. 9-10.

Such argument is not persuasive. First, in Dr. Solomon's report dated December 9, 1997, a copy of which is annexed as Exhibit F to the McKenna Affirmation in Support of Opposition to the Motion to Dismiss, Dr. Solomon stated that, based on the medical history, physical examination and laboratory data of Plaintiff, it was his opinion that "the patient [i.e. plaintiff] is suffering from an undifferentiated connective tissue disease [and that the] patient's constellation of complaints is quite consistent with silicone associated undifferentiated connective tissue disease." Solomon Report, p. 4-5. Also, in Plaintiff's Rule 56 Expert Disclosure dated October 31, 1997, a copy of which is annexed as Exhibit F to the McKenna Affirmation, it was stated that, if Dr. Solomon were to testify, the subject matter and opinions as to which he would testify would be: "Exposure to silicone gel and/or silica causes a systemic disease labeled siliconosis or atypical connective tissue disease." Plaintiff's Expert Disclosure, p. 9. However, Dr. Solomon's opinion or

⁵ See *Havard v Baxter Int'l Inc.*, 2000 Dist. LEXIS 21316 (ND Ohio, July 21, 2000) and *Grant v Bristol-Myers Squibb*, 97 F Supp 2d 986 (D. Ariz 2000).

theory of causation, between silicone implants and Plaintiff's bodily injuries, is neither supported nor generally accepted by the medical and scientific communities, such as the MDL Panel, IOM, IRG or AMA, and Plaintiff has not even alleged or argued otherwise. Indeed, in the *Havard* and *Grant* breast implant cases (*supra*, fn. 5; these cases were analyzed by the Federal Court in the Underlying Action), after conducting the *Daubert* analysis, the *Havard* and *Grant* courts did not permit Dr. Solomon to testify, because they concluded that his theory that silicone implants could cause undifferentiated connective tissue diseases was not based on scientifically valid methodologies. Hence, Plaintiff's attempt to distinguish *Havard* and *Grant* in which no testing or examination of those plaintiffs were performed, as opposed to this case where Dr. Solomon personally tested and examined Plaintiff Pozefsky, is without merit. Significantly, it was due to the fact that Dr. Solomon's causation theory has not been generally accepted by the medical and scientific community, as opposed to his failure to perform examinations or treatment of the plaintiffs, which resulted in the *Havard* and *Grant* courts' exclusion of his testimony. Thus, even if Defendants had not failed to produce Dr. Solomon for deposition, Plaintiff cannot demonstrate that he would have been permitted by the Federal Court to testify as to his theory of causation, because "the overwhelming weight of scientific authority holds that there is

no connection between silicone breast implants and defined or atypical connective tissue disease." *Pozefsky Decision, supra*, at p. 17.

Alternatively, Plaintiff argues that several federal courts have permitted medical testimony on the issue of causation, and that if Dr. Solomon were likewise permitted to testify in the Underlying Action, Plaintiff could have obtained a more favorable settlement. Plaintiff's Opposition Brief, p. 10-11. However, Plaintiff's reliance on *Toole v McClintock* (999 F2d 1430 [11th Cir 1993]) and *Hopkins v Dow Corning Corp.* (33 F3d 1116 [9th Cir 1994]) as support for such argument is misplaced. Notably, those two breast implant cases predated the reports and studies of the MDL Panel, IOM, IRG, AMA, and other medical or scientific institutions. Thus, the rulings in those cases are inapplicable to the Underlying Action, inasmuch as they did not take into consideration such relevant reports and studies.

Plaintiff further argues that federal courts in selected cases have "permitted testimony via a medical differential diagnosis for the disease causation by a medical expert," and such permitted testimony "would have enabled Dr. Solomon to successfully testify in the [Underlying Action.]" Plaintiff's Opposition Brief, at p. 11. The cases relied on by Plaintiff for such proposition are *Zuchowicz v United States* (140 F3d 381 [2d Cir 1998]) (patient suffered pulmonary hypertension disease due to

defendant's agent prescribing drugs in overdose amounts); *Kennedy v Collagen Corp.* (161 F3d 1126 [9th Cir 1998]) (patient alleged that collagen injections manufactured by defendant caused her atypical systemic lupus erythematosus); and *Heller v Shaw Industries* (167 F3d 146 [3rd Cir 1999]) (plaintiff sued carpet maker whose product allegedly caused her respiratory illness). However, none of the cited cases are silicone implant cases, and they do not discuss the relevant medical and scientific reports and studies which were relied upon in the Underlying Action. Moreover, the courts in such cases, before ruling on the admissibility of the experts' opinions or theories of causation, carefully evaluated the methodologies and scientific validity of reasoning underlying the experts' testimonies and their applicability to the facts in issue, and found that the experts' opinions and theories were based upon methods reasonably relied on by peers in their particular fields.

In the instant case, however, Plaintiff failed to show that Dr. Solomon's opinion or theory was accepted or supported by his peers. In fact, the relevant reports and studies refuted his theory. Accordingly, even if Defendants were negligent in failing to produce Dr. Solomon for deposition in the Underlying Action, such negligence did not proximately caused Plaintiff's loss, because Dr. Solomon's proposed testimony would not have been admissible under the *Daubert* standards. In such regard, the

legal malpractice claim against Defendants should be dismissed.

III. Breach of Contract and Implied Covenant of Good Faith Claims

As noted above, Plaintiff's complaint also asserts a breach of contract claim (Second Count) and a breach of the implied covenant of good faith and fair dealing claim (Third Count).

Plaintiff has failed to respond to Defendants' argument that such claims should be dismissed as duplicative of the legal malpractice claim. *See Sonnenshcine v Giacomo*, 295 AD2d 287 (1st Dept 2002) (court ruled that breach of contract and breach of fiduciary claims alleged same operative facts as malpractice claim, and all claims were dismissed for failure to state a cause of action); *Mecca v Shang*, 258 AD2d 569 (2nd Dept 1999) (same). Hence, these claims should be dismissed as a matter of law.

Accordingly, it is

ORDERED that the Defendants' motion to dismiss Plaintiff's complaint is hereby granted; and it is further

ORDERED that the Clerk of the Court is hereby directed to enter judgment dismissing all claims against the Defendants.

This constitutes the Decision and Order of the court.

Dated: June 9, 2009

FILED
 JUN 15 2009
 NEW YORK
 COUNTY CLERK'S OFFICE

ENTER:


 J.S.C.
EMILY JANE GOODMAN