

Strong v Cosmetic Restoration Mktg., Inc.

2009 NY Slip Op 31910(U)

August 24, 2009

Supreme Court, New York County

Docket Number: 100511/09

Judge: Joan B. Lobis

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

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

STRONG, JANE

Plaintiff(s),

- v -

COSMETIC RESTORATION MARKETING
Defendant(s)

INDEX NO. 100511/09
MOTION DATE 7/22/09
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8, were read on this motion to dismiss

Notice of Motion / Order to Show Cause - Affidavits - Exhibits
Answering Affidavits - Exhibits
Replying Affidavits

PAPERS NUMBERED
1-5
6-7
8

Cross-Motion: Yes No

FILED
AUG 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER**

Dated: 8/24/09

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

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

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JANE A. STRONG,

Plaintiff,

Index No.: 100511/09

- against -

COSMETIC RESTORATION MARKETING, INC.,
MHR, INC., MEDICAL HAIR RESTORATION, INC.,
CRAIG ZIERING, M.D., and "JOHN DOE NO. 1" TO
"JANE DOE NO. 7",

Defendants.

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

Motion Sequence Numbers 001 and 002 are hereby consolidated for disposition. In Motion Sequence Number 001, defendants MHR, Inc., and Medical Hair Restoration s/h/a Medical Hair Restoration, Inc. ("MHR") move, pursuant to C.P.L.R. Rule 3211(a)(5), for an order dismissing plaintiff's claims as time-barred. In Motion Sequence Number 002, defendant Craig Ziering, M.D., moves for the same relief.

This is an action for medical malpractice and breach of contract related to defendants' performance of hair restoration surgery on plaintiff Jane Strong. On December 21, 2004, after consulting with Dr. Ziering at MHR's offices, Ms. Strong signed a contract with MHR for hair restoration surgery. On January 4, 2002, Dr. Ziering performed hair restoration surgery on Ms. Strong at the Manhattan offices of MHR. The procedure involved cutting a piece of scalp from the back of Ms. Strong's head, removing the hair, and transplanting the hair to her forehead. Ms. Strong returned to MHR's offices on January 16, January 30, February 21, and March 29, 2002; at each visit Dr. Ziering determined that the wound on the back of plaintiff's head had not healed properly. Ms. Strong again returned to MHR on September 16, 2002, and claims to have met with Dr. Ziering,

which he disputes. On March 21, 2003, Dr. Ziering left MHR's practice and ceased practicing medicine on MHR's behalf. Although there were some telephone calls between Ms. Strong and MHR through May 2003, Ms. Strong did not receive treatment at MHR in 2003, 2004, or 2005. In early 2006, there were four canceled or "no-show" appointments. Ms. Strong returned to MHR for the last time in October 2006. This action was not commenced until January 14, 2009.

"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). Medical malpractice actions "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." C.P.L.R. § 214-a. A medical malpractice action accrues on the date of the incident causing the plaintiff's alleged harm. See McDermott v. Torre, 56 N.Y.2d 399, 410 (1982). However, the statute of limitations is tolled as long as the plaintiff remains under the continuous care or treatment of the physician. See Cox v. Kingsboro Medical Group, 88 N.Y.2d 904 (1996). Two elements must be met for treatment to toll the statute: the treatment must relate to the original condition or complaint, and further treatment must be "explicitly anticipated by both physician and patient." Richardson v. Orentreich, 64 N.Y.2d 896, 898-99 (1985). The second element can be manifested by "a regularly scheduled appointment for the near future, agreed upon during [the] last visit," or "where 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." Id.

Defendants have demonstrated that the time within which to bring an action for the alleged malpractice that occurred on January 4, 2002—over seven years prior to the commencement of this action—has expired. The burden shifts to plaintiff to demonstrate that the continuous treatment doctrine applies to toll the statute of limitations.

Ms. Strong is not entitled to toll the statute of limitations to pursue a medical malpractice claim against Dr. Ziering. All parties agree that the date of the last meeting between Ms. Strong and Dr. Ziering was in 2002. Dr. Ziering left MHR and stopped performing work in the New York office on March 21, 2003. The continuous treatment doctrine exists to allow a patient to maintain her relationship with her treating physician without jeopardizing a potential malpractice claim, in the belief that “the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure.” McDermott, supra, at 408, citing Borgia v. City of New York, 12 N.Y.2d 151 (1962). The physician-patient relationship between Dr. Ziering and Ms. Strong ended, at the very latest, in March 2003, when Dr. Ziering left MRH, even though Ms. Strong alleges that she maintained a relationship with MHR. As Dr. Ziering no longer had a relationship with MHR after March 2003, Ms. Strong cannot maintain her claim against Dr. Ziering by claiming that MHR or any of its doctors were Dr. Ziering’s agents. Allende v. New York City Health & Hosps. Corp., 90 N.Y.2d 333, 339 (1997) (“Where 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.”), citing Meath v. Mishrick, 68 N.Y.2d 992, 994 (1986), quoting McDermott, supra, at 403.

Nor is Ms. Strong entitled to toll her claims against MHR. Ms. Strong claims that she is entitled to a tolling of the statute because she never indicated any intent *not* to return to MHR. But mutual intent to continue treatment is not sufficient to toll the statute unless it is accompanied by the patient's "uninterrupted reliance" on the physician's treatment. Richardson, supra, at 899. Ms. Strong has not demonstrated "uninterrupted reliance" on MHR, and any attempt would be belied by her failure to show up to numerous scheduled appointments in early 2006. Without a showing of reliance, her return visit in October 2006 constitutes either a patient-initiated return visit or a renewal of contact, neither of which tolls the statute of limitations. See McDermott, supra, at 405 ("Continuous treatment does not contemplate circumstances where a patient initiates return visits."); Clayton v. Mem. Hosp. for Cancer & Allied Diseases, 58 A.D.3d 548, 549 (1st Dep't 2009) ("Renewal of contact" not entitled to tolling of statute); see also, O'Donnell v. Siegel, 49 A.D.3d 415 (1st Dep't 2008). In addition, MHR's efforts to follow up with Ms. Strong in 2003 demonstrate mutual intent to continue the physician-patient relationship, but do not demonstrate reliance. Therefore, MHR's efforts do not establish continuous treatment. See Rizk v. Cohen, 73 N.Y.2d 98, 104-05 (1989) (explaining "sound policy reasons" to encourage doctors to follow up on patients without fear of tolling statute of limitations).

Plaintiff's complaint also includes a claim for breach of contract. Generally, if an action sounds in medical malpractice, a plaintiff cannot also pursue a breach of contract cause of action unless "plaintiff can prove that, within the context of medical treatment, defendant expressed a specific promise to effect a cure or to accomplish some definite result." Scalisi v. NYU Medical Center, 24 A.D.3d 145, 147 (1st Dep't 2005) (citation omitted). Included in the medical records

annexed to defendants' papers is a consent form signed by Ms. Strong which states that she "understand[s] that Dr. Ziering will do his best to produce satisfactory results, but that he cannot promise the quality of the result or freedom from complications." It does not appear that there was any promise to cure or for a certain result. The breach of contract claim is essentially a claim for medical malpractice and, as stated above, is time barred as to both Dr. Ziering and MHR.

Although the parties did not raise this issue in their papers, there is one remaining defendant, Cosmetic Restoration Marketing, Inc. ("CRM"). According to the affidavit of service filed in the county clerk's office, CRM was served pursuant to B.C.L. § 306. CRM did not appear at the preliminary conference on June 23, 2009, and there is no evidence that CRM has appeared in the action. Plaintiff's complaint refers to defendant MHR as including or doing business with the entity CRM. A review of the New York State Department of State Division of Corporations database indicates that "Cosmetic Restoration Marketing, Inc." is an inactive entity that was dissolved on May 31, 2002. Accordingly, the court deems that the claims against CRM, if any, are time barred.

For all of these reasons, the motions to dismiss are granted and the complaint is dismissed as to all defendants. The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: August 24, 2009

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AUG 26 2009
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JOAN B. LOBIS, J.S.C.