

Novick v Massapequa Family Care Ctr.

2009 NY Slip Op 32018(U)

August 26, 2009

Supreme Court, Nassau County

Docket Number: 013394/02

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 23

SCOTT NOVICK, as Administrator of the
Estate of Paul Novick,

Plaintiff,

-against-

Index No.: 013394/02
Motion Sequence...06,07
Motion Date...07/15/09

MASSAPEQUA FAMILY CARE CENTER,
NORMAN HAYWOOD, .D.O., ANTHONY
FOTO, D.O., MASSAPEQUA GENERAL
HOSPITAL and JOHN DOES 1 through 5,

Defendants.

Papers Submitted:
Notice of Cross-motion.....X
Notice of Cross-motion.....X
Affirmation in Opposition (2).....X
Reply Affirmation.....X
Affirmation in Reply.....X

Upon the foregoing papers, the respective cross-motions, pursuant to CPLR 3212, by the Defendants, MASSAPEQUA FAMILY CARE CENTER and ANTHONY FOTO, D.O., for partial summary judgment and by the Defendant, NORMAN HAYWOOD, D.O., for summary judgment, seeking to dismiss the complaint and all cross claims asserted against said Defendant, are decided as hereinafter provided.

This medical malpractice action arises out of the medical care and treatment

the decedent, Paul Novick, allegedly received during the period October 13, 1997 through March 1, 2000 at the Defendant, MASSAPEQUA FAMILY CARE CENTER, where he was treated by the Defendants, NORMAN HAYWOOD, .D.O. and ANTHONY FOTO, D.O. on various dates. While Dr. Haywood initially treated the decedent at MASSAPEQUA FAMILY CARE CENTER, in December, 1998, Dr. Haywood established a private practice in Lindenhurst, New York and no longer practiced at the MASSAPEQUA FAMILY CARE CENTER. He continued to treat Paul Novick, however, in his Lindenhurst office from April 21, 1998 until September 18, 1999.

Prior motions brought by the movants herein seeking to dismiss the complaint on statute of limitations grounds were granted by order of the Hon. Kenneth A. Davis entered July 7, 2005, which dismissed the complaint as to the Defendant, NORMAN HAYWOOD, .D.O., and as to the Defendants, MASSAPEQUA FAMILY CARE CENTER and ANTHONY FOTO, D.O., for conduct which occurred prior to February 13, 2000. It appears from the record, however, that, unbeknownst to the court and defense counsel, the motions were submitted and a decision rendered thereon after the death of Paul Novick on February 12, 2005. Although the case remained in limbo for approximately three years, by order of the Hon. Kenneth A. Davis, entered October 27, 2008, a motion by the Defendants, MASSAPEQUA FAMILY CARE CENTER and ANTHONY FOTO, D.O., to dismiss the action for failure to appoint a representative of the estate of the deceased Plaintiff, was denied and the cross-motion to permit substitution of the Estate of Paul Novick as the party

plaintiff, and to amend the caption to reflect such substitution, was granted. The court found that:

“plaintiff has taken numerous steps to substitute an administrator for the decedent. The matter has an extensive history in the Surrogate’s Court * * * [P]laintiff has acted in good faith in trying to complete the appointment but was faced with various obstacles including the inter-family problems as well as the executor being transient.”

The death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR § 1015(a). In such a situation, proceedings in the action are automatically stayed. *Reed v Grossi*, 59 A.D.3d 509, 511 [2nd Dept. 2009]; *Rumola v Maimonides Medical Center*, 37 A.D.3d 696 [2nd Dept. 2007]; *Lugo v GE Capital Auto Lease*, 36 A.D.3d 409, 410 [1st Dept. 2007]. Any order made after the death of a party, and before the substitution of a legal representative for the estate of the deceased, is, therefore, void. *Marte v Graber*, 58 A.D.3d 1, 3 [1st Dept. 2006]; *Faraone v National Academy of Television Arts & Sciences*, 296 A.D.2d 349 [1st Dept. 2002].

Upon a party’s death, an attorney’s authority to act on behalf of the deceased client is terminated and the action is stayed as to the deceased pending the substitution of a legal representative. *CPLR § 1015*; *Meehan v Washington*, 242 A.D.2d 286, 287 [2nd Dept. 1997]. Any determination, therefore, rendered without such substitution is generally deemed a nullity. *Lewis v Kessler*, 12 A.D.3d 421, 422 [2nd Dept. 2004]; *Oberlander v Levi*, 207 A.D.2d 437 [2nd Dept. 1994]. Under the circumstances extant, the Plaintiff’s attorney had no authority to execute the stipulation of discontinuance on April 13, 2005 and the

aforementioned order of Mr. Justice Davis, made after the death of Paul Novick and before the substitution of his son Scott Novick, as his legal representative, are void. *Reed v Grossi, supra* at p. 511; *Cueller v Betanes Food Corp.*, 24 A.D.3d 201 [1st Dept. 2005], *lv to appeal denied* 6 N.Y.3d 708 [2006].

The court notes, however, that a proper substitution having been accomplished, the Defendants are not precluded from moving once again for the relief previously sought. *Turner v Milligan*, 37 A.D.2d 896 [3rd Dept. 1971].

A medical malpractice cause of action accrues on the date of the alleged act, omission or failure complained of, and is subject to a two-and-one-half year statute of limitations. *CPLR § 214-a; Nespola v Strang Cancer Prevention Center*, 36 A.D.3d 774 [2nd Dept. 2007]; *Gaspard v Herard*, 20 A.D.3d 504, 505 [2nd Dept. 2005]. Under the continuous treatment doctrine, however, the statute of limitations is tolled when the course of treatment, i.e., affirmative and ongoing conduct¹, which includes the wrongful acts or omissions, has run continuously and is related to the same original condition or complaint. *Mule v Peloro*, 60 A.D.3d 649, 650 [2nd Dept. 2009]. The doctrine contains three principal elements: 1) the plaintiff continued to seek and, in fact, obtained an actual course of treatment from the defendant physician during the relevant period; 2) the course of treatment provided by the physician was for the same conditions or complaints underlying the malpractice claim; and 3) the physician's treatment is deemed "continuous" i.e., further treatment is explicitly

¹Mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll. *Nykorchuck v Henriques*, 78 N.Y.2d 255, 259 [1991].

anticipated by both physician and patient as manifested by 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 immediate past. The law recognizes, however, that a discharge by a physician does not preclude application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for conditions related to earlier treatment. *Gomez v Katz*, 61 A.D.3d 108, 112 [2nd Dept. 2009].

Neither a general physician/patient relationship, routine examinations nor visits concerning matters unrelated to the condition giving rise to the malpractice claim are sufficient to invoke the benefit of the doctrine. *Boyle v Fox*, 51 A.D.3d 1243, 1244 [3rd Dept. 2008], *lv to appeal denied* 11 N.Y.3d 701 [2008].

It appears from the record, that the Defendant, NORMAN HAYWOOD, .D.O., last treated Paul Novick on September 18, 1999, as evidence by Dr. Haywood's affidavit of July 1, 2009 and Paul Novick's own deposition testimony, wherein he states that he stopped treating with Dr. Haywood at his Lindenhurst office at or about that time because Dr. Haywood no longer accepted Medicaid patients after October 1, 1999, after which date Paul Novick had no further contact with Dr. Haywood. As such, this action, commenced on August 13, 2002, is time barred as to the Defendant, NORMAN HAYWOOD, .D.O.

The Plaintiff has failed to raise a triable issue of fact *vis a vis* whether the statute of limitations was tolled by the continuous treatment doctrine. The allegation that

Paul Novick considered Dr. Haywood to be his primary care physician until April 3, 2000, as evidenced by the fact that a subsequent medical provider [Good Samaritan Chronic Dialysis Center] requested a copy of Paul Novick's medical records from Dr. Haywood's office, pursuant to an authorization signed by Paul Novick on April 3, 2000, is unavailing as is the claim that Paul Novick continued to refill prescriptions written by Dr. Haywood after he acknowledges he ceased to be treated by Dr. Haywood.

The court agrees that the complaint must be dismissed as to the Defendants, ANTHONY FOTO, D.O. and MASSAPEQUA FAMILY CARE CENTER, with respect to any treatment by said Defendants rendered prior to February 13, 2000. Between March 3, 1998 and February, 2000, Paul Novick was under the exclusive care of Dr. Haywood and the Defendants, ANTHONY FOTO, D.O. and MASSAPEQUA FAMILY CARE CENTER were not involved in his care.

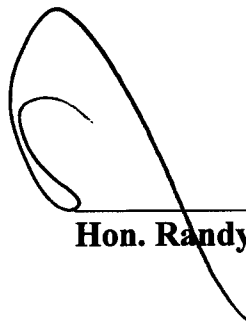
Accordingly, it is hereby

ORDERED, that the Defendants, ANTHONY FOTO, D.O. and MASSAPEQUA FAMILY CARE CENTER's cross-motion seeking partial summary judgment with respect to any treatment alleged to have been rendered by said Defendants to the decedent, Paul Novick, prior to February 13, 2000, is **GRANTED** and any claims in the Plaintiff's complaint, as they pertain to any treatment alleged to have been rendered by said Defendants to the decedent, Paul Novick, prior to February 13, 2000, are dismissed; and it is further

ORDERED, that the Defendant, Norman Haywood, D.O.'s motion for summary judgment, seeking to dismiss the complaint and all cross claims asserted against said Defendant, is **GRANTED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
August 26, 2009



Hon. Randy Sue Marber, J.S.C.

ENTERED

AUG 28 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE