

Keenan v Silverstein

2009 NY Slip Op 32289(U)

September 24, 2009

Supreme Court, Richmond County

Docket Number: 100010/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 100010/08
Motion No.: 1**

THOMAS KEENAN

Plaintiff

against

HARVEY A. SILVERSTEIN, D.D.S.

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion for Partial Summary Judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers
Letters to the Court	4,5

Upon the foregoing cited papers, the Decision and Order on this Motion for Partial Summary Judgment, dismissing all treatment dates outside the scope of time permitted by CPLR § 214-a, is granted to the extent of dismissing those dates of treatment specified by the plaintiff's Verified Bill of Particulars that occurred prior to the accrual date of alleged malpractice related to the defendant's treatment of plaintiff's dental prosthetic device; and is granted in so far as any other dates of treatment that are time barred by not falling within the doctrine of continuous treatment.

The defendant, Harvey A. Silverstein, D.D.S. ("Dr. Silverstein"), moves for Partial Summary Judgment pursuant to New York Civil Practice Law and Rules ("CPLR") § 3212 (e)¹ established upon supporting proofs². Specifically, Dr. Silverstein moves to exclude from consideration in this action dates of treatment that fall outside the time specified by the Statute of Limitations as set forth in CPLR § 214-a.³ The motion for partial summary judgment is denied in its entirety.

¹CPLR § 3212 (e).

²CPLR § 3212 (b).

³CPLR § 214-a.

Facts

Some time in the past, Mr. Keenan began dental treatment with Dr. Silverstein. Initially, Dr. Silverstein provided only root canal therapy while Mr. Keenan was still under the care of another dentist, Dr. Lieb. Dr. Lieb was a former associate of Dr. Silverstein. By 2000 or 2001, Mr. Keenan grew to regard Dr. Silverstein as his regular dentist and saw Dr. Silverstein for his general dental care. Mr. Keenan had numerous visits with Dr. Silverstein for his general dental care over the years between 2001 and 2007.⁴ Whether treatment dates are interrelated or particularized individual therapeutic interventions are not stated.

The record shows that on June 2, 2003, Dr. Silverstein first began planning a permanent bridge spanning the second to eleventh teeth. The record is inconsistent as to whether a temporary bridge was installed on that date.⁵ During testimony, Dr. Silverstein first stated a temporary bridge was placed on June 2, 2003, while the new permanent bridge was being prepared.⁶ Shortly thereafter, Dr. Silverstein contradicted that assertion by saying no treatment was performed on June 2, 2003.⁷ In any event, the permanent bridge was cemented into place with temporary cement on August 25, 2003.⁸ Within one day, Mr. Keenan experienced a problem with this prosthesis, presumably pain.⁹

⁴Plaintiff's Affirmation in Opposition, Exhibit 1, Records of Dental Treatment.

⁵Plaintiff's Affirmation in Opposition, Exhibit 2, Examination Before Trial of Dr. Silverstein, page 47, line 14 through page 51, line 12.

⁶*Id.* at page 47, lines 17 through 20.

⁷*Id.* at page 48 lines 19 through 24.

⁸*Id.* at page 59, line 23.

⁹Plaintiff's Affirmation in Opposition, Exhibit 4, Examination Before Trial of Mr. Keenan, page 33, line 23 to page 34, line 7.

Mr. Keenan continued to have pain resulting from the prosthesis through November 18, 2003 when Dr. Silverstein modified the bridge, and thereby decreasing the amount of pain.¹⁰ On November 29, 2003, Mr. Keenan's bridge was again checked and seemed tight. The bridge was cemented into place again with a stronger, but still only temporary cement.¹¹ On October 6, 2004, the upper bridge was removed and re-cemented with temporary cement.¹² Dr. Silverstein asserted this was done because the bridge was loose, and possibly because it was a poor fit.¹³ The bridge was re-cemented on October 19, 2004 and again on November 16, 2004.¹⁴ On May 30, 2006, a tooth that was the distal abutment of the bridge was noted to be painful and had surrounding swollen gum tissue.¹⁵ This distal portion of the bridge continued to be a source of problems, and was treated through January 25, 2007 by Dr. Silverstein.¹⁶ Throughout this time, Dr. Silverstein rendered care on numerous occasions for a variety of problems, the relationships or lack thereof among discrete treatments is not specified.

Mr. Keenan commenced this action by alleging that Dr. Silverstein committed malpractice by providing both inadequate general dental care and also inadequate care for a specific dental prosthetic device, or bridgework ("the bridge"). Among the complaints, it is alleged that Dr. Silverstein failed to diagnose the dental condition of Mr. Keenan; failed to take adequate tests and X-rays; and failed to adequately perform dental reconstructions with a resulting loss of a crown and multiple teeth. It is further alleged that Dr. Silverstein failed to properly maintain the bridge. As a result Mr. Keenan claims to have suffered injuries. Dr.

¹⁰*Id.* at page 66, lines 19-22.

¹¹*Id.* at page 67, lines 2 through 5.

¹²*Id.* at page 77 lines 9 through line 18.

¹³*Id.* at page 77, lines 14 through 18.

¹⁴*Id.* at page 78 lines 6 through 19.

¹⁵*Id.* at page 85, lines 7 through 15.

¹⁶*Id.* at page 92, lines 11 through 14.

Silverstein now moves for summary judgment dismissing several dates on which alleged malpractice occurred, asserting those dates are time barred.

Discussion

Two categories of treatment dates are considered in Mr. Keenan's action against Dr. Silverstein. One category of dates would include continuous therapy for a dental problem such as the specific dental prosthesis, the dental bridge ("the bridge"), spanning the second and the eleventh teeth of Mr. Keenan for which planning and services may have begun on June 2, 2003. This category of treatments would also include other courses of distinctive therapies and perhaps unify some of Mr. Keenan's distinctive dental conditions into cognizable courses of continuous treatments.

For the doctrine of continuous treatment to apply, three elements must be met.¹⁷ Firstly, the patient must seek and must also obtain a course of treatment for the specific condition giving rise to the lawsuit.¹⁸ Secondly, the physician must render treatment for the same specific condition giving rise to the lawsuit.¹⁹ Thirdly, treatment must be continuous in that "further treatment 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 immediate past."²⁰ It has been said that the continuous treatment doctrine is further based upon the patient's continuing trust and confidence in the treating medical provider.²¹ Whether continuing trust and

¹⁷*Gomez v. Katz*, 61 AD 3d 108, 111 [2d Dept 2009]; *Kaufmann v. Fulop*, 47 AD 3d 682, 684 [2d Dept 2008].

¹⁸*Id.* at 112; *Nykorchuck v. Henriques*, 78 NY 2d 255, 259 [1991].

¹⁹*Gomez v. Katz* at 112; *Nykorchuck v. Henriques* at 259.

²⁰*Gomez v. Katz* at 112; *Richardson v. Orentreich*, 64 NY 2d 896, 898-899 [1985].

²¹*Coyne v. Bersani*, 61 NY 2d 939 [1984].

confidence reposed in a treating medical provider by a patient is a matter of fact for a fact finder to determine.²²

A second category of treatments dates would include discrete, individual treatments for which no continuous therapy was rendered. The statute of limitation tolls from the date upon which a specified, single, particularized treatment was rendered.

This action began with service of the summons upon the defendant.²³ Service was made on January 4, 2008, and is the one common date included in all calculations for tolling the statute of limitations.

I. Standard of Review

Under CPLR § 3212 (b), a motion for summary judgment requires that “the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.”²⁴ Notwithstanding facts presented by any party, “the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.”²⁵ The Appellate Division, Second Department evaluates for summary judgment by examining all evidence in the “light most favorable to the party opposing the motion”;²⁶ and the non-movant must be given the benefit of every favorable inference.²⁷ The Court of Appeals

²²*Gomez v. Katz* at 115; citing *Colodner v. Columbia Presbyterian Medical Ctr.*, 223 AD 2d 429 [1st Dept 1996].

²³CPLR § 203 (b) 1.

²⁴CPLR § 3212 (b).

²⁵*Id.*

²⁶*Nicklas v. Tedlen Realty Corp.*, 305 AD 2d 385, 386 [2d Dept 2003].

²⁷*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]; *Perez v. Exel Logistics, Inc.*, 278 AD 2d 213, 214 [2d Dept 2000]; *Marine Midland Bank, N.A. v. Dino*, 168 AD 2d 610 [2d Dept 1990], quoting *Lakeside Constr. Co. v. Depew & Shetter Agency, Inc.*, 154

states that “summary judgment is a drastic remedy and should not be granted when there is any doubt as to the existence of a triable issue.”²⁸ The Court of Appeals further declines to grant summary judgment where the existence of an issue is arguable.²⁹

II. Failure to meet the burden.

Each motion for summary judgment must be supported by affidavit, and include a copy of the pleadings.³⁰ Defendant’s Notice of Motion includes an affirmation (in lieu of an affidavit) by an attorney “fully familiar with the facts and circumstances.”³¹ A Verified Complaint and Bill of Particulars by the plaintiff support the motion.³² The proponent of a motion for summary judgment also has the burden of presenting “other available proof, such as depositions and written admissions.”³³ “Bare conclusory denials of liability without any factual relationship to the alleged injuries and the submission of the affidavit of a medical expert which fails to address the essential factual allegations set forth in the complaint, are insufficient to establish that the defendant is entitled to summary judgment.”³⁴ Once a moving party has met the requirements, including a showing of sufficient evidence, the burden shifts to the opposing party to put forth

AD 2d 513 [2d Dept 1989]. .

²⁸*Rotuba Extruders, Inc. v. Ceppos*, 46 NY 2d 223, 231 [1978]; *quoting Moskowitz v. Garlock*, 23 AD 2d 943, 944 [1965]; *Herrin v. Airborne Freight Corp.*, 301 AD 2d 500, 500-501 [2d Dept 2003]; *American Home Assurance Co. v. Amerford International Corp.*, 200 AD 2d 472 [1st Dept 1994].

²⁹*Sillman v. Twentieth Century-Fox Film Corp.*, 2 NY 2d 395, 404 [1957]; *American Home Assurance Co. v. Amerford International Corp.*, 200 AD 2d 472 [1st Dept 1994].

³⁰CPLR 3212 (b).

³¹Defendant’s Notice of Motion, Affirmation, ¶ 1.

³²*Id.*, Exhibits A and B.

³³CPLR 3212 (b).

³⁴*Wasserman v. Carella*, 307 AD 2d 225, 226 - 227 [1st Dept 2003].

evidence in admissible form to establish a triable issue for the fact finder.³⁵ As an example, in a motion for summary judgment involving a case of libel, the Court of Appeals required proof in evidentiary form to sustain the defendant's motion for summary judgment.³⁶ The same principal applies when the movant is the plaintiff.³⁷

Here, the moving party, the defendant Dr. Silverstein, failed to present evidence specifically refuting any course of continuous treatment for any condition and neglected to specify dates considered by Dr. Silverstein to be outside of the limits set by CPLR § 214-a.. No proof is made available to the Court that would exclude from consideration any specific date of alleged malpractice claimed by the plaintiff, Mr. Keenan, in the Bill of Particulars. The defendant, Dr. Silverstein, does include an affidavit from Richard L. Rausch, D.D.S. ("Dr. Rausch") in a Reply Affirmation.³⁸ Dr. Rausch provides generalized opinions that "many of the claims asserted by the plaintiff are outside of the scope ... of the Statute of Limitations."³⁹ Dr. Rausch alleges that the plaintiff's expert failed to argue there was any treatment "constituting a continuous course of care."⁴⁰ Dr. Rausch does not relate any given specific dates with concrete unfulfilled elements of continuous care that would exclude a date from the complaint. This court rejects conclusory opinions.

As the moving party it is the defendant, Dr. Silverstein who bears the initial burden to show acceptable proof. The non-moving plaintiff does not have any burden unless the moving

³⁵*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980]; *In the Matter of Javon T. v. Ashton T.*, 2009 NY Slip Op *1 [2d Dept 2009].

³⁶*Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY 2d 1065, 1067 (1979).

³⁷*Kosson v. "Algaze"*, 84 NY 2d 1019, 1020 (1995).

³⁸Defendant's Reply Affirmation, Exhibit A, Affidavit of Dr. Rausch.

³⁹*Id.*, ¶ 4.

⁴⁰*Id.*, ¶ 5.

party makes an adequate showing to the Court. The motion by the defendant concludes without acceptable proof that treatment dates prior to July 2, 2005 are time-barred. More specificity is necessary to show absence of continuing treatment, or some other reason to exclude a given date of alleged malpractice. In this instance, the plaintiff, as non-moving party has the advantage of being awarded every reasonable inference that may be made on the behalf of Mr. Keenan.

In the Verified Bill of Particulars, Dr. Silverstein is alleged to have negligently treated Mr. Keenan on the dates of: 6/_/00, 7/23/00, 1/09/01, 2/15/01, 3/17/01, 6/29/01, 7/2/01, 12/11/01, 3/4/02, 6/25/02, 7/11/02, 7/19/02, 12/_/02, 12/30/02, 1/12/03, 1/14/03, 1/21/03, 3/10/03, 4/21/03, 4/30/03, 5/10/03, 6/21/03, 7/3/03, 7/21/03, 7/24/03, 8/5/03, 8/6/03, 8/13/03, 8/25/03, 9/3/03,10/16/03, 11/3/03,11/18/03, 11/25/03,12/8/03, 1/14/04, 1/21/04, 4/5/04, 4/12/04, 4/19/04, 5/10/04, 9/22/04,10/19/04 11/16/04, 6/13/05, 11/9/05, 11/14/05, 11/28/05, 12/05/05, 6/5/06, 12/14/06, 1/25/07 and 6/25/07.⁴¹ .

It is the moving party's obligation to provide facts in evidence to the court to support a motion. Evidence includes "available proof, such as depositions and written admissions."⁴² The defendant, Dr. Silverstein's motion fails to meet the burden of presenting evidence that refutes any element of the doctrine of continuous treatment for any one of the days asserted by the plaintiff. Hence, Dr. Silverstein fails to address with specificity any date of alleged malpractice and relate the absence of one or more elements of continuous treatment to that date.

⁴¹Plaintiff's Notice of Motion, Exhibit C, Verified Bill of Particulars, ¶ 1.

⁴²CPLR 3212 (b).

Conclusion

Dr. Silverstein has failed to meet the burden of presenting supporting proof to the court as required by CPLR 3212 (b). Dr. Silverstein's motion for partial summary judgment is dismissed in its entirety.

Accordingly, it is hereby

ORDERED, that partial summary judgment is denied in its entirety; and it is further

ORDERED, that the parties shall return to DCM Part 3 for a pre-trial conference on Monday, **October 21, 2009 at 9:30 AM.**

ENTER,

DATED: September 24, 2009

Joseph J. Maltese
Justice of the Supreme Court