

Reilly v Savino

2009 NY Slip Op 33094(U)

December 23, 2009

Supreme Court, Richmond County

Docket Number: 103182/05

Judge: Joseph J. Maltese

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

**Index. 103182/05
Motion No.:001**

**WILLIAM J. REILLY, Surviving spouse of
BARBARA REILLY, and
SEAN REILLY, Son of
BARBARA REILLY,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**BARTHOLOMEW SAVINO, M.D.,
SISTERS OF CHARITY HEALTHCARE,
SISTERS OF CHARITY MEDICAL CENTER- a/k/a
ST. VINCENT'S CAMPUS, a/k/a ST. VINCENT'S HOSPITAL,
JOHN DOES 1 THROUGH 5, and
JOHN DOES 6 THROUGH 10,**

Defendants

The following items were considered in the review of the following motion for 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

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants move for an order granting them summary judgment dismissing the plaintiffs complaint pursuant to CPLR § 3212. The defendants' motion is granted in its entirety.

Facts

This is an action for medical malpractice alleging that the defendant Bartholomew Savino, M.D. ("Dr. Savino") did not properly screen and treat the decedent Barbara Reilly for coronary artery disease which is claimed to have been the proximate cause of her acute

myocardial infarction that led to her death on May 3, 2003. The decedent began treating with Dr. Savino on August 1, 2001 after being diagnosed with elevated blood pressure. According to Dr. Savino's records the decedent treated with him on five additional occasions, August 8, 2001, September 18, 2001, December 13, 2001, July 25, 2002 and December 27, 2002. Dr. Savino's records for the decedent indicate that she was to return to his office in approximately two to three months. The decedent never returned to Dr. Savino's office.

On July 5, 2005 Sisters of Charity Healthcare, Sisters of Charity Medical Center a/k/a St. Vincent's Campus, a/k/a St. Vincent's Hospital ("St. Vincent's") filed for bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York. Subsequently, on November 2, 2005 the plaintiffs original counsel filed a summons and complaint with the Richmond County Clerk's office. The defendants Dr. Savino and St. Vincent's were not served until February 23, 2006. The defendant, Dr. Savino served an answer on March 15, 2006 and St. Vincent's advised the plaintiff that all litigation involving St. Vincent's was subject to the automatic bankruptcy stay. Subsequently, Dr. Savino amended his answer on August 29, 2008 and St. Vincent's served its answer.

By stipulation dated September 30, 2009, the parties agreed to change the caption of this action, substituting William J. Reilly as Administrator of the Estate of Barbara Reilly. The plaintiff does not oppose St. Vincent's motion dismissing all claims against it, but contests Savino's motion.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable

to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

In this case the defendant has met his prima facie burden indicating that the this action was commenced after the expiration of the 2 years and six months statute of limitations articulated in CPLR § 214-a. Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.⁶

The two years and six months statute of limitations may be tolled pursuant to the continuous treatment doctrine. A plaintiff seeking to employ the continuous treatment doctrine must satisfy three 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 condition or complaints underlying the

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁶ *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

plaintiff's medical malpractice claim; and 3) the physician's treatment is deemed to be "continuous".⁷

In this case, it is clear that the plaintiff regularly received treatment from Dr. Savino for hypertension. However, the medical records kept by Dr. Savino demonstrate that he wanted the decedent to appear for an additional office visit within two to three months from her December 27, 2002 visit. Taking the most generous view of the facts, the decedent should have seen Dr. Savino by March 27, 2003. The medical records reveal that the decedent failed to schedule an additional appointment with Dr. Savino by March 27, 2003, nor is there any allegation that decedent scheduled an appointment at a later date. As such, the plaintiff fails to satisfy the first prong of the continuous treatment in that the decedent did not seek or obtain additional treatment subsequent to her December 27, 2002 office visit.

Conclusion

It is uncontested that the decedent failed to return to Dr. Savino's office pursuant to his direction at the decedent's December 27, 2002 office visit. Barbara Reilly failed to seek continuous treatment from Dr. Savino. Therefore, the plaintiffs are not entitled to a tolling of the statute of limitations pursuant to the continuous treatment doctrine.

Accordingly, it is hereby:

ORDERED, that the defendants motion for summary judgment dismissing the complaint is granted in its entirety; and it is further

⁷ *Gomez v. Katz*, 61 AD3d 108, [2d Dept 2009].

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER,

DATED: December 23, 2009

Joseph J. Maltese
Justice of the Supreme Court