

Vedder-Burton v Columbia Presbyt. Med. Ctr.

2010 NY Slip Op 30313(U)

February 11, 2010

Supreme Court, New York County

Docket Number: 100001/08

Judge: Joan B. Lobis

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

DECENT. **JOAN B. LOBIS**

PART 6

Index Number : 100001/2008
VEDDER-BURTON, MYCHELLE
 VS.
COLUMBIA PRESBYTERIAN
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10/27/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

17

18-35

36-37

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE
NEW YORK

FEB 16 2010

FILED

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

Dated: 2/11/10

JB
J.S.C.

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
NEW YORK COUNTY: IAS PART 6**

-----X
**MYCHELLE VEDDER-BURTON and MICHAEL
PATRICK BURTON,**

Plaintiffs,

Index No. 100001/08

- against -

Decision and Order

**COLUMBIA PRESBYTERIAN MEDICAL
CENTER, NEW YORK PRESBYTERIAN
HOSPITAL and LYNN L. SIMPSON,**

Defendants.

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

In this medical malpractice action, defendants New York and Presbyterian Hospital s/h/a Columbia Presbyterian Medical Center, New York Presbyterian Hospital ("NYPH") and Lynn Simpson, M.D., move for summary judgment pursuant to C.P.L.R. Rule 3212 on the basis that the action is time barred. Plaintiffs Mychelle Vedder-Burton and Michael Burton oppose the motion on substantive and procedural grounds. The procedural basis to oppose the motion is a claim that the motion was not filed within the sixty (60) day period following the filing of the note of issue. In response, defendants claim that the motion is timely and that plaintiffs were given two adjournments to file their opposition papers, so they were not prejudiced. By the court's calculation, the motion was filed on the sixty-first day after the note of issue was filed, but this delay is *de minimis* and I will consider the movant's good faith belief that the motion was timely as satisfying the requirements of good cause to extend the time period. See Brill v. City of New York, 2 N.Y.3d 648 (2004).

This action arises out of the pregnancy and delivery of the parties' son, Caden, on November 15, 2002, at NYPH. From 1998 through 2001, Ms. Vedder-Burton received

gynecological treatment under the care of Eileen DeMarco, M.D., identified by plaintiff as part of the Obstetrics and Gynecology Department, a Division of Columbia Presbyterian Medical Center ("CPMC"). Sometime in December 2001, plaintiff's health insurance changed and Dr. DeMarco no longer accepted her insurance plan. Plaintiff chose to go to defendant Dr. Simpson, who did take her new insurance. In addition, Dr. Simpson's office was close to plaintiff's home. Dr. Simpson is a board certified specialist in obstetrics, gynecology and maternal fetal medicine.

Plaintiff saw Dr. Simpson for the first time on February 26, 2002 for preconception counseling. After a positive home pregnancy test result, she returned to Dr. Simpson's office on March 19, 2002; Dr. Simpson continued to provide plaintiff's obstetrical care throughout the pregnancy. On November 14, 2002, Ms. Vedder-Burton began experiencing contractions. She was admitted to NYPH on November 15, 2002, as a private patient under the care of an attending obstetrician, Dr. Jack Maidmain, who was the on-call physician covering Dr. Simpson's patient. Dr. Maidmain is associated with the Division of Maternal Fetal Medicine of Columbia University College of Physicians and Surgeons. Plaintiff delivered her son at approximately 7:30 a.m. on November 15. Forceps were used in the course of delivery and Ms. Vedder-Burton had an episiotomy and a level four laceration, which was sutured. She remained in the hospital for four days. On discharge, she was told to have a follow-up appointment with Dr. Simpson in six weeks. Because of continued bleeding and pain, plaintiff was seen by Dr. Simpson on December 17, 2002, approximately four weeks after the delivery. Dr. Simpson determined at that appointment that Ms. Vedder-Burton's cervix was still dilated one centimeter and that her coccyx was mobile, indicating a possible fracture a result of the use of forceps. By January 9, 2003, plaintiff's condition had

worsened. She called Dr. Simpson's office and spoke with a nurse practitioner, who told her to come to the eastside office. Plaintiff was seen by Dr. Simpson's associate and the nurse practitioner with whom she had previously spoken. She was told that they suspected that she had not expelled all of the placenta at the time of delivery. This was confirmed by ultrasound. Plaintiff was given certain medications in the hope that the medications would allow Ms. Vedder-Burton to expel the tissue without need for surgery. If that did not occur in three or four days, plaintiff would require a dilation and curettage ("D&C") to remove the retained portion of the placenta. On January 14, 2003, Dr. Simpson determined that a D&C would be necessary.

On January 15, 2003, at 7:00 a.m., plaintiff was admitted to NYPH's Ambulatory Surgery department under Dr. Simpson's service. Dr. Simpson performed the D&C. In the course of the procedure, Dr. Simpson perforated the uterus. Because of the perforation, plaintiff needed a diagnostic laparoscopy and intraoperative consults with a general surgeon and a gynecologic surgeon. The general surgeon, Marc Bessler, M.D., reported that the bowel appeared to be bruised, but not perforated. The gynecologic surgeon, Charles Ascher-Walsh, M.D., repaired the uterine perforation with two sutures. Ms. Vedder-Burton was discharged at 7:00 p.m. the same day.

On January 21, 2003, Ms. Vedder Burton was seen for a follow-up. She had her stitches removed. It is plaintiff's recollection that the topic of future pregnancies was discussed. There is a dispute about whether she attended an additional follow-up appointment on February 11, 2003. But, Ms. Vedder-Burton admits that as of February 11, 2003, Dr. Simpson told her that she was no longer practicing straight (general) gynecologic medicine. It is plaintiff's position that she

had additional contacts with Dr. Simpson for breast-feeding information, but no dates are provided for these contacts and the requests were not related to treatment for the retained placental tissue or the fistula created by the uterine perforation. The only contact with Dr. Simpson after February 11, 2003 occurred on June 1, 2006, after plaintiff learned that a perforation still existed.

In December 2003, plaintiff returned to the care of Dr. DeMarco for her gynecological needs. They discussed a pre-existing fibroid condition and the perforation. She saw Dr. DeMarco two additional times in 2004. Plaintiff was very concerned about whether the perforation would affect her ability to bear more children. On January 21, 2004, she had an ultrasound at CPMC Eastside, which was read by Dr. Lerner, a doctor who read the ultrasound performed in 2003 after the birth of Caden. On March 4, 2004, she met with Dr. DeMarco, Dr. Lerner, and a third physician, Dr. Chrisomalis. According to plaintiff's affidavit, she was told at this meeting that they had conferred with defendant Dr. Simpson. The meeting centered on her concern about possible problems with future pregnancies and the advice that all future deliveries should be by cesarean sections.

Her next gynecologic examination occurred on November 22, 2005. Her doctor was Dr. Yeh. On December 15, 2005, he performed a sonohistogram which revealed that the perforation site was open. She had follow-up testing by Dr. Yeh. Sometime in January or February 2006, plaintiff had a telephone conversation with Dr. Simpson about Dr. Yeh's findings. The last contact plaintiff had with Dr. Simpson was an office visit on June 1, 2006. The consequences of the perforation on future pregnancies was discussed. No treatment was rendered at that time.

Section 214-a of the C.P.L.R. establishes the statute of limitations for medical malpractice actions. It reads as follows:

[a]n action for medical, dental or podiatric malpractice 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; provided, however, that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. For the purpose of this section the term "continuous treatment" shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition. For the purpose of this section the term "foreign object" shall not include a chemical compound, fixation device or prosthetic aid or device.

Defendants assert that because this action commenced on January 2, 2008—approximately five years after the last post-operative visit by Ms. Vedder-Burton to Dr. Simpson—the action is time-barred and must be dismissed. While defendants also argue that NYPH cannot be held liable for the acts of a private attending physician, this issue need not be reached if Ms. Vedder-Burton's action is time-barred. Mr. Burton's claim would also fail if Ms. Vedder-Burton's action is dismissed.

"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). A medical malpractice action accrues on the date of the incident causing the plaintiff's alleged harm. Massie v. Crawford, 78 N.Y.2d 516, 519 (1991). Two elements must be met for a treatment to toll the statute: the treatment must relate to the original condition or

complaint, and the 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 14, 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. Unfortunately, plaintiffs have not met their burden. Between February 11, 2003, and June 1, 2006, plaintiff did not receive treatment from Dr. Simpson. Plaintiff admitted that the June 1, 2006 visit with Dr. Simpson was for the purpose of discussing the finding that the perforation caused by Dr. Simpson was not repaired. No treatment was rendered on that date. The visits to other physicians in 2004 and 2005 established that Ms. Vedder-Burton was not relying on Dr. Simpson for any continuation of her care. Plaintiffs did not commence their lawsuit until January 2008, which was well beyond the statutory period for bringing a medical malpractice action against Dr. Simpson. The fact that plaintiffs did not discover the alleged malpractice until on or about December 15, 2005, is unavailing, because this jurisdiction has no generally applicable rule allowing a statute of limitation calculation based on the date of discovery, which may have allowed a later commenced date of this lawsuit. See Rodriguez v. Manhattan Medical Group, 77 N.Y.2d 217 (1990).

Neither did plaintiffs establish that Dr. DeMarco, Dr. Simpson, Dr. Yeh, and all of the other medical practitioners who provided plaintiff with obstetric and gynecological care are professionally related for the purposes of applying the doctrines of continuous treatment or vicarious liability. Throughout their papers, plaintiffs refer to the CPMC as if they are a single practice group. But, plaintiffs have not established a legal relationship amongst the individual doctors, the faculty practice, Columbia University, and NYPH. It was clear that the physicians were not taking the same insurance and that there was no link between them financially. The only link between the physicians is that they are all listed as affiliates with the Department of Obstetrics and Gynecology at CPMC, but there are no other earmarks of a relationship for the purposes of establishing continuous treatment or vicarious liability. The fact that they take different insurance is sufficiently determinative of a lack of a relationship. No evidence offered by plaintiff established a legal basis to extend the statute of limitations by application of the doctrine of continuous treatment on the basis of treatment by Drs. DeMarco, Lerner, Chrisomalis, and Yeh. In any event, even if they were all part of a group practice, there was no continuation of treatment for the condition that gives rise to this lawsuit.

The action is time barred. Defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety as against all defendants. The Court is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of the court.

Dated: February 11, 2010

NEW YORK COUNTY CLERK'S OFFICE
 FEB 16 2010
FILED

 JOAN B. LOBIS, J.S.C.