

Diaz v New York-Presbyt. Hosp.

2010 NY Slip Op 32642(U)

September 22, 2010

Supreme Court, New York County

Docket Number: 101325/09

Judge: Joan B. Lobis

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

PRESENT: COBLS
Justice

PART 6

Jorge Luis Diaz
-v-
NY-Presbyterian Hospital

INDEX NO. 101325/09
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to 30 were read on this motion to/for summary judgment

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

PAPERS NUMBERED
<u>1-16</u>
<u>17-26</u>
<u>27-30</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 24 2010
COUNTY CLERK'S OFFICE
NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 9/22/10

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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
JORGE LUIS DIAZ,

Plaintiff,

Index No. 101325/09

- against -

Decision and Order

NEW YORK-PRESBYTERIAN HOSPITAL, ANITA
DARMANIAN, M.D., DAVID J. MCCONNELL, M.D.,
and CLAIRE KEETING, M.D.,

Defendants.

FILED
SEP 24 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Defendant New York-Presbyterian Hospital ("NYPH") moves, by order to show cause, pursuant to C.P.L.R. §§ 214(a) and 3211(a)(5), for an order dismissing this action. For the reasons set forth below, the motion is granted to the extent of dismissing all claims that arise out of the conduct of NYPH prior to July 30, 2006.¹

In this medical malpractice action, plaintiff alleges that NYPH improperly prescribed Prednisone, a steroid drug. He alleges that overuse of Prednisone caused causing avascular necrosis of his hips leading to a need for bilateral hip replacements and pain in his hips and lower back.

According to the medical records, plaintiff first visited NYPH on September 24, 2003, complaining of a cough and chest pain. He returned the next day and was admitted until October 7, 2003. Plaintiff was diagnosed with asthma, pneumonia, and a non-specific skin rash.

¹ Dr. McConnell and Dr. Darmanian have not appeared. NYPH asserts that neither doctor has been served. Plaintiff does not dispute this assertion. The case against Dr. Keeting has been voluntarily discontinued.

Staff at NYPH administered Prednisone and discharged him with a Prednisone taper, which is used to decrease the dosage over time. Plaintiff returned to NYPH's emergency room by ambulance on February 7, 2004, because he was having trouble breathing. He was treated and released the same day with instructions to continue to take two 20 milligram Prednisone tablets a day for four additional days in addition to other medications. He was also told to follow up at NYPH's Asthma Center. Plaintiff presented to the Asthma Center on February 11, 2004 and was given an additional Prednisone prescription, which he was to taper over two weeks. Plaintiff was advised to return on February 25, 2004. On that date, he was told to continue with Advair and Albuterol to ease his breathing. Prednisone was not prescribed on that date. He was advised to return in three months. NYPH alleges that plaintiff did not return to the Asthma Center until September 28, 2005; however, a note in the medical records indicates that plaintiff was referred to an allergy clinic on June 15, 2005. On the September 28 visit, there is no indication that Prednisone was prescribed. He was told to continue with Advair, Albuterol, and Spiriva as needed.² Plaintiff admits that this was his last day of treatment for asthma and other chronic lung ailments.

During 2005 and 2006, plaintiff was also treated by NYPH for chronic joint, lower back, and hip pain. He was admitted to NYPH on July 27, 2006, for what plaintiff describes as psychiatric and orthopedic complaints. On admission, staff at NYPH believed that plaintiff was taking a Prednisone regiment so they continued to administer the drug to plaintiff. NYPH maintains that its physicians had to continue any medications they had reason to believe that plaintiff was taking at the time of his admission so as not to abruptly discontinue medication. On July 31, NYPH

² It is unclear from the papers whether these medications are steroids.

staff contacted plaintiff's primary care physician and she informed them that plaintiff was not a Prednisone regiment. As a result, Prednisone was discontinued that day. Plaintiff was discharged on August 11, 2006 to his private physician's care. He continued periodic visits to NYPH for lower back and hip pain later throughout the rest of the year. In June 2007, he underwent hip surgery. Plaintiff commenced this action by the filing of a summons and verified complaint on January 30, 2009.

The statute of limitations in a medical malpractice action is two and one half years, and runs from "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. The initial burden is on the defendant to show that the alleged malpractice took place more than two and one half-years beyond the statute of limitations. Texeria v. BAB Nuclear Radiology, P.C., 43 A.D.3d 403, 405 (2d Dep't 2007). When that burden is met, the burden then shifts to the plaintiff to establish the applicability of what is known as the continuous treatment doctrine. Massie v. Crawford, 78 N.Y.2d 516, 519 (1991); Texeria, 43 A.D.3d at 405. The doctrine provides that "the time in which to bring a malpractice action is stayed 'when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint'." McDermott v. Torre, 56 N.Y.2d 399, 405 (1982) (citation omitted); see also C.P.L.R. § 214-a. The continuous treatment doctrine arose out of the theory "that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure . . . [and] that [such] doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so." McDermott, 56 N.Y.2d at 408 citing

Borgia v. City of New York, 12 N.Y.2d 151, 156 (1962). But, the mere fact that the same treater was visited several times after the alleged malpractice is not sufficient for the doctrine of continuous treatment to apply. There must be proof that the visits involved "ongoing corrective efforts for the same or a related condition" that was allegedly negligently treated. Richardson v. Orentreich, 64 N.Y.2d 896, 899 (1985). In the instant case, all claims of medical malpractice accruing before July 28, 2006 are barred by the two and one half-year statute of limitations unless plaintiff can raise an issue as to the applicability of the continuous treatment doctrine. Plaintiff has not established such a link to treatment prior to July 2006. Plaintiff sought treatment from NYPH for asthma and was prescribed Prednisone beginning in October of 2003. It is undisputed that NYPH stopped treating his asthma in 2005. Plaintiff's subsequent visits to NYPH were for unrelated conditions, namely orthopedic and psychiatric care. Therefore, allegations that plaintiff's asthmatic condition was negligently treated are time-barred. Accordingly, it is

ORDERED that the motion for summary judgement is granted to the extent that all claims for medical malpractice that may have occurred prior to July 28, 2006 are dismissed; and it is further

ORDERED that the parties shall appear for a status conference on October 26, 2010 at 10 a.m.

Dated: September 22, 2010

FILED

SEP 24 2010

COUNTY CLERK'S OFFICE
NEW YORK



JOAN B. LOBIS, J.S.C.