

Torres v Birns

2010 NY Slip Op 33094(U)

October 29, 2010

Supreme Court, New York County

Docket Number: 103067/08

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

IA PART 16

PRESENT: _____
Justice

Index Number : 103067/2008

TORRES, RAUL

VS.

BIRNS, DOUGLAS DR.

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

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

*by defendant
Dr. Birns is granted in accordance
with the accompanying memorandum
decision.*

FILED

NOV 04 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

OCT 29 2010

Alice Schlesinger
ALICE SCHLESINGER 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):

FILED

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

NOV 04 2010

**NEW YORK
COUNTY CLERKS OFFICE**

-----X
RAUL TORRES,

Plaintiff,

-against-

Index No. 103067/08
Motion Seq. No. 001

DR. DOUGLAS BIRNS and DR. DANIEL KLEIN,

Defendants.
-----X

SCHLESINGER, J.:

On February 28, 2008, plaintiff Raul Torres commenced this medical malpractice action against Drs. Douglas Birns and Daniel Klein. The claim against Dr. Birns, a urologist, was that in the face of symptoms displayed by Mr. Torres on June 4, 2004 when their professional relationship began (and after), and in the face of radiological evidence in the form of x-rays and CT scans, Dr. Birns should have either diagnosed Mr. Torres' lung cancer in June 2004 or at the very least referred him to a pulmonologist who would have made such a diagnosis.

The plaintiff last saw Dr. Birns on September 14, 2005. Because of a chest x-ray and CT scan that month ordered by Dr. Birns showing an "opacification of the medial aspect of the right middle lobe," Torres was referred to co-defendant Dr. Klein¹, an internist, who ordered another CT scan on October 7, 2005. This scan showed an obstructing mass and led to a bronchoscopy on November 2, 2005, which confirmed a positive finding of a malignancy. This then led to a PET scan on November 18, 2005, which characterized the lesion in the lung as likely representing a stage III B Cancer. Since

¹Dr. Birns had earlier referred Mr. Torres to Dr. Klein for the first time in June 2004 to do a pre-surgical medical clearance

the actual diagnosis of advanced lung cancer was not made until November 2005, the plaintiff argues that the delay from June 2004 to November 2005 likely resulted in a prognosis that was significantly reduced. This argument is based on the opinion given by his expert that in June 2004 the cancer was probably a stage I.

The motion now before me by counsel for Dr. Birns has two parts. The first and more controversial assertion urges a dismissal of all allegations of malpractice relating to this doctor's care and treatment rendered before August 28, 2005, as barred by the statute of limitations. As stated above, the action was commenced on February 28, 2008. The statute of limitations for actions sounding in medical malpractice is two and a half years. Therefore, based on the February 28, 2008 commencement date of the action, defendant argues that all actions by Dr. Birns before August 28, 2005, a date two and a half years before the action was commenced, are time barred.

The applicable CPLR §214 -a states in relevant part that:

An action for medical ... 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

From these latter words, an extensive body of law has developed regarding "continuous treatment". The rationale for tolling the statute of limitations when there is continuous treatment by the doctor for the same illness is that the patient should not be forced to terminate his professional relationship with his doctor by commencing a lawsuit (which would surely put a damper on the relationship) while the patient is still receiving treatment from the doctor. *Nykorchuk v Henriques*, 78 NY2d 255, 258 (1991).

Here, there is no question that Mr. Torres and Dr. Birns did have a doctor-patient relationship from early June 2004 until mid-September 2005. However, such a relationship is not itself sufficient to toll the statute. As the words themselves state, "continuous treatment for the same illness, injury or condition which gave rise to the said act," and as multiple cases discuss, the alleged malpractice must be associated with the actual treatment the doctor was providing the patient.

Therefore, here the moving defendant relies on the following facts. First, he notes that Dr. Birns was a urologist to whom Mr. Torres was specifically referred for treatment of a suspected renal mass in his left kidney. At their first meeting on June 4, 2004, Dr. Birns, after viewing a June 2, 2004 MRI, made plans to do a left radical nephrectomy (excision of his left kidney). The surgery was scheduled for and performed on June 21, wherein that kidney and the adjacent adrenal gland were removed without complications. The later pathology report confirmed cancer. Thereafter, on a daily basis until June 26 when Mr. Torres was discharged from Beth Israel Hospital, Dr. Birns saw him to make sure that he was recovering from the surgery.

After the discharge, Dr. Birns saw Mr. Torres on June 30 and then on the following dates for after-care: August 2, 2004, November 1, 2004, and November 10, 2004 for a cystoscopy; March 16, 2005; and finally on September 14, 2005 for a routine follow-up, where an "interval CT-scan and chest x-ray" were ordered which showed positive findings in the lung prompting Dr. Birns to make a referral for further tests. The cancer was ultimately diagnosed and staged in November.

From these facts, counsel argues that despite the fact that during the course of Dr. Birns' treatment, his patient Torres made complaints of coughing up blood, and despite

the fact that various chest x-rays and CT-scans from March 2004 through June of that year had positive findings, these were routine studies done pre- and post-surgery merely to make sure his patient was ready for surgery and then properly recovering from it. Counsel urges that at all times Dr. Birns treated Mr. Torres exclusively for his cancerous kidney, which was unrelated to questionable findings in his lungs.

There is strenuous opposition to this aspect of the motion, which includes an affirmation from an unnamed physician (Exhibit B) who is board certified in surgery with a specialty in Adult and Pediatric Urology. He maintains an office in Pennsylvania but states that he completed his surgical residency in New York and remains "knowledgeable and familiar with the standards of practice and care in New York and Metropolitan areas as they were in 2004 and 2005 and at the present time."²

The Pennsylvania surgeon, in a lengthy affirmation, reviews Mr. Torres' symptoms, which included coughing and spitting up blood in June 2004, and diagnostic studies in great detail. By way of a summary, he charts the significant findings on the scans and chest x-rays from March 29, 2004 through November 18, 2005. By doing this, one can see that "focal atelectasis [an incomplete filling of the lungs] of the medial segment of the right

²The defendant's moving papers contain an affirmation from Dr. Michael Stifelman, a board certified urologist associated with NYU Langone Medical Center. His position, after reviewing the applicable medical records, is that Dr. Birns, "at all times acted appropriately and in accordance with good and accepted medical practices as they existed in September of 2005." He then merely reviews the significant dates when Mr. Torres saw Dr. Birns (and on June 14, 2004 saw Dr. Klein) and what occurred, just as moving counsel had done. Finally, he opines that the allegations in the bill of particulars as they pertain to Dr. Birns are without merit and that no action or inaction by him was a substantial contributing factor to the plaintiff's claim that he failed to diagnose lung cancer. He, however, provides no insight into the issues relevant to continuous treatment.

middle lobe" is observed for the first time on March 29, 2004 (by another doctor but the report is seen by Dr. Birns in early June 2004), then again on a May 10, 2004 CT-scan, then again on a June 21, 2004 chest x-ray (right after surgery), this time with the word "significant" added, then again on June 25, 2004 on a chest x-ray where the report states:

[no] resolution of atelectasis of the right lower lung field. Follow up to resolution to rule out underlying obstructing lesion is recommended. The possibility of superimposed infiltrate (pneumonia) in the right lower medial lung cannot be excluded and clinical correlation is advised. Additionally, underlying neoplastic disease in this area cannot be ruled out.

Impression: small pleural effusions and atelectasis in the lower lobes. Follow-up CT-scan could be obtained as clinically warranted. The case was discussed Dr. Birns.

Finally, the expert points to a June 25, 2004 chest CT-scan where atelectasis is seen in the lower lobes and right middle lobe.

He then opines that since renal cancer can metastasize more frequently into the lungs than other organs, a fact that Dr. Birns acknowledged at his deposition, Dr. Birns should have addressed the abnormal chest imaging studies to make sure it was not metastatic disease. He states (at p 6) that while Dr. Birns was treating Torres for renal cancer, it was "part and parcel of that treatment, that Dr. Birns first became aware of abnormal chest imaging studies that showed atelectasis" and therefore "that as part of the course of treatment Dr. Birns provided to Mr. Torres when treating his renal cancer, Dr. Birns should have addressed the abnormal chest imaging studies to make sure it was not metastatic disease."

According to this doctor, the moving defendant's treatment of Mr. Torres did not occur in a vacuum, and because renal cancer can metastasize more frequently than not to the lungs, Dr. Birns in the course of treating the renal cancer had to consider the implications of the other symptoms.

It should be noted that while the plaintiff was recovering from the kidney surgery under the exclusive care of Dr. Birns, the doctor ordered the June 25 scans because Torres was unstable and dizzy while walking. Dr. Birns wanted to rule out pneumonia or a pulmonary embolism, which he did, to an extent. But the report put him on notice that there were other unsettling possibilities, specifically stating that :“Additionally underlying neoplastic disease in this area cannot be ruled out.” So Dr. Birns as the treating physician properly brought in a consultant, Dr. Weinberg, a pulmonologist at Beth Israel where Torres was a patient. Whatever Weinberg advised, he was obligated to report back to Dr. Birns, the treating physician, who then was arguably obligated to explore these other possibilities. Dr. Weinberg's status as a pulmonologist or as a consult did not diminish Dr. Birns' role as Mr. Torres' prime medical provider at that time.

In reply (as in the initial papers), defense counsel relies on *Nykorchuck*, cited above, and other cases for the principle that a failure to diagnosis a condition unrelated to the condition for which the patient is being treated does not toll the statute of limitations. In *Nykorchuck*, there was an alleged failure to diagnose breast cancer, but the plaintiff was being treated for endometriosis, a condition in no way related to breast cancer.

But that is not the situation here. Dr. Birns ordered certain scans after earlier ones had been brought to his attention. He also was told directly by Mr. Torres that he was spitting up blood. The scans showed lung abnormality, as did the symptoms, suggestive

of cancer. Dr. Birns was treating Mr. Torres for cancer, not of the lungs but of the kidney. But Dr. Birns acknowledges that lung cancer can result from kidney cancer and that the lungs in fact are the organ most likely to be adversely affected.

The plaintiff's expert opined that a patient cannot be treated in a vacuum. In other words, a physician cannot close his eyes to relevant information that could affect the illness he was providing treatment for. Dr. Birns apparently believed that he lacked the expertise to clinically correlate this information. That may well be true, but as Mr. Torres' primary physician for the treatment of cancer, it was arguably his obligation to make sure that someone who did have the expertise be brought into the picture so as to make a diagnosis. Treating a condition does not mean that the doctor does not treat the whole person, particularly here where cancer was the known cause of the condition and a possible, but yet unknown, cause for the other condition.

Therefore, for all of the above reasons, I find that, at the very least, there is a triable question of fact as to whether Dr. Birns was Mr. Torres' treating physician from June 2004 through August 2005 as to the undiagnosed condition in his lungs. Therefore, the first part of defendant's motion to dismiss events before August 28, 2005 is denied.

As to the second part of the motion, seeking summary judgment for the remaining allegations of malpractice following August 28, 2005, that motion is granted. First, counsel for the plaintiff does not oppose that aspect of the motion. Second, there is a good reason for it. It is clear that in September 2005, Dr. Birns did properly refer the plaintiff to other physicians, who within a reasonable amount of time diagnosed the stage III B lung cancer. Thus, no malpractice could be shown under these circumstances.

Accordingly, it is hereby

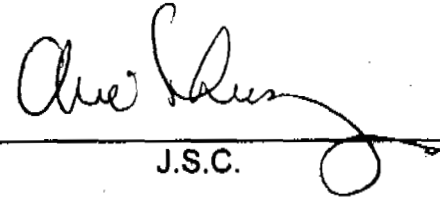
ORDERED that the motion by defendant Dr. Douglas Birns to dismiss is denied insofar as it seeks to dismiss all allegations of malpractice for care and treatment rendered prior to August 28, 2005; and it is further

ORDERED that the motion by defendant Dr. Douglas Birns for summary judgment is granted insofar as it seeks to dismiss all allegations of malpractice for care and treatment rendered after August 28, 2005.

Counsel shall appear in Room 222 on January 12, 2011 at 11:00 a.m. for a pre-trial conference as previously scheduled.

Dated: October 29, 2010

OCT 29 2010


J.S.C.

ALICE SCHLESINGER

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