

Ostad v Memorial Sloan-Kettering Cancer Ctr.
2010 NY Slip Op 33888(U)
June 11, 2010
Sup Ct, NY County
Docket Number: 111198/09
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN E. LOEBS, Justice

OSYAD, ABRAHAM

MEMORIAL SEAN KETTERING

The following papers, numbered to _____	motion _____
Notice of Motion / Order to Show Cause / Notice to Appear	_____
Exhibits	_____
Respon. Affidavits	_____

Order Motion: [X] Yes [] No

Motion decided in accordance with proposed motion/affidavits/objections

FILED JUN 16 2010

THIS COURT HAS ORDERED THE STENOGRAPHER TO TAKE THE FOLLOWING MESSAGES FROM THE COURT:

[Signature]

Final Disposition: [] Final Disposition

[Signature]
JOAN E. LOEBS, Justice
Final Disposition: [X] Final Disposition

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ABRAHAM OSTAD and SORAYA OSTAD,

Plaintiffs,

Index No. 111198/09

-against-

Decision and Order

**MEMORIAL SLOAN-KETTERING CANCER
CENTER, BERTRAND GUILLONNEAU, M.D.,
MARK WEIBMAN, M.D., JOSEPH PETTUS,
M.D., BEATRICE TARA HUSTE, P.A., PETER
SCARDINO, M.D. and JOHN DOE, M.D.,**

Defendants.

FILED
JUN 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Defendants Mark Weibman, M.D., and Joseph Pettus, M.D., move for an order dismissing the claim against Dr. Weibman for lack of personal jurisdiction, and for an order dismissing the claim against both defendants for failure to timely commence the action within the statute of limitations period. The action sounds in medical malpractice and lack of informed consent related to defendants' treatment of plaintiff Abraham Ostad's prostate cancer. Plaintiffs allege that defendants were negligent and caused permanent injury to Mr. Ostad's bladder. The motion is decided as follows.

That branch of the motion seeking dismissal of the complaint as to Dr. Weibman, pursuant to C.P.L.R. Rule 3211(a)(8), for plaintiffs' failure to properly serve him with process, is granted. Dr. Weibman has shown, and plaintiffs do not dispute, that he was not served in any manner authorized under C.P.L.R. § 308 for service upon a natural person. The court therefore lacks personal jurisdiction over Dr. Weibman and the complaint must be dismissed as against him.

Plaintiffs' argument that the relation-back doctrine should somehow serve to cure lack of personal jurisdiction is unavailing.

That branch of the motion seeking dismissal of the complaint pursuant to C.P.L.R. Rule 3211(a)(5) on behalf of Dr. Pettus is denied.¹ Dr. Pettus avers that during the time of the alleged medical malpractice, he was a fellow on the urology service at Memorial Hospital for Cancer and Allied Diseases (the "Hospital"). He asserts that he assisted on a surgical procedure performed by defendant Bertrand Guilloneau, M.D., on December 18, 2006. Mr. Ostad was readmitted on December 28, 2006 through January 4, 2007, and Dr. Pettus again "attended"² to him. Mr. Ostad was admitted for a third time on January 10, 2007 through January 23, 2007, and Dr. Pettus "attended" to him then as well. Dr. Pettus states that his last contact with Mr. Ostad was on January 23, 2007, when he authored a note reflecting that Mr. Ostad be discharged. He maintains that his last act on behalf of Mr. Ostad was an order he authored on January 29, 2007. The medical records attached to defendants' moving papers support these facts. This action was not filed until August 6, 2009.

In opposition to Dr. Pettus' motion to dismiss, plaintiffs' counsel mistakenly bases his argument on the standard for summary judgment; however, the court shall nevertheless consider

¹ Due to lack of personal jurisdiction over Dr. Weibman, the court will consider the statute of limitations defense as to Dr. Pettus only.

² Dr. Pettus' use of the word "attended" in his affidavit, in describing his contact with or treatment of Abraham Ostad, does not amount to a determination that he was an attending physician as opposed to a urology fellow, as he earlier asserts.

the factual issues he raises. Plaintiffs argue that the relationship between Dr. Pettus and his co-defendants, and their treatment of Mr. Ostad for the same condition, invokes the continuous treatment doctrine, thus making the action timely. Plaintiffs maintain that Mr. Ostad treated with Dr. Pettus' co-defendants through August 2007, which is within the two and one-half year time period prior to the commencement of the action. Plaintiffs' counsel sets forth that Mr. Ostad sought treatment from defendant Hospital for prostate cancer. He maintains that there is "no question" that Mr. Ostad was a patient of the Hospital, not Dr. Guillonneau individually, and that continuous treatment should be imputed to Dr. Pettus on that basis.

On a Rule 3211 motion to dismiss, the court shall liberally construe the pleadings. Leon v. Martinez, 84 N.Y.2d 83, 87 (1994); C.P.L.R. § 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon, 84 N.Y.2d at 87-88 (citations omitted). On seeking dismissal under Rule 3211(a)(5) on the ground that the suit is barred by the statute of limitations, the defendant bears the initial burden of proving that the time in which to bring the suit has expired. Gravel v. Cicola, 297 A.D.2d 620, 620-21 (2d Dep't 2002). If the defendant achieves his initial burden, the burden shifts to the plaintiff to demonstrate, at the very least, that a material issue of fact exists as to whether an exception to the statute of limitations applies. Id. at 621. For medical malpractice actions, the applicable statute of limitations is two and one-half years 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.

Dr. Pettus satisfied his initial burden as to plaintiffs' claims prior to February 6, 2007, or two and one-half years prior to the filing of the action, by annexing the pleadings and the medical records to the motion. Since this action was commenced by the filing of a summons and complaint on August 6, 2009, the issue is whether the continuous treatment doctrine applies under these circumstances so that plaintiffs may pursue a claim against Dr. Pettus for any conduct prior to February 6, 2007. Plaintiffs allege that Mr. Ostad was under the continuous treatment and care of the Hospital through August 2007, and that the relationship between the Hospital employees and the Hospital serves to toll the statute of limitations as to Dr. Pettus. Plaintiffs' papers raise an issue of fact as to whether the continuous treatment doctrine would serve to toll the statute of limitations. On a Rule 3211 motion to dismiss, the court must credit the plaintiff's papers asserting that certain factual grounds may defeat the statute of limitations defense. Cf. Held v. Kaufman, 91 N.Y.2d 425, 433 (1998). In affording plaintiffs the "benefit of all favorable inferences to which they are entitled," (Shrank v. Lederman, 52 A.D.3d 494, 496 [2d Dep't 2008]), it cannot be determined that there was no continuous treatment as a matter of law at this early phase of the litigation. Discovery should serve to clarify this issue.

Accordingly, it is hereby

ORDERED that defendant Mark Weibman, M.D.'s motion to dismiss is granted and the complaint is severed and dismissed as to Mark Weibman, M.D., only, based on lack of personal jurisdiction; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

All other relief requested is denied. The partes are advised that this matter shall appear on the court's calendar for a preliminary conference on Tuesday, July 20, at 10:00 a.m., in Part 6, Courtroom 345, at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: June 11, 2010



JOAN B. LOBIS, J.S.C.

FILED
JUN 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

PRESENT: James B. ...
Justice

PART: 1

Index Number : 108162/2006
PEREZ, EBERT
vs.
MOUNT SINAI HOSPITAL
SEQUENCE NUMBER : 002
ENFORCE/EXEC JUDGMENT OR ORDER

INDEX NO. _____
MOTION DATE: 9/10/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
In this motion to/for _____

PAPERS NUMBERED
1-5
6-7

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 is granted
An order to show cause is brought on
the motion of parties seeking relief that

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S)

FILED
SEP 16 2010
COUNTY CLERK OFFICE

Dated: 9/10/10

[Signature]

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE