

**Powers v Chern**

2011 NY Slip Op 30382(U)

February 16, 2011

Supreme Court, Richmond County

Docket Number: 100003/2008

Judge: Joseph J. Maltese

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

---

**Index No.: 100003/2008  
Motion No.: 1**

**JENNIFER POWERS**

*Plaintiff*

*against*

**OLGA KATIE CHERN, D.D.S., and  
STEVEN H. BRENMAN, D.M.D.**

*Defendants*

---

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**The following items were considered in the review of this motion for partial summary judgment**

<b><u>Papers</u></b>	<b><u>Numbered</u></b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

**Upon the foregoing cited papers, the Decision and Order on the motion for partial summary judgment made by Olga Katie Chern, DDS is to grant the motion in so far as dismissing the action for malpractice pertaining to the treatment of patient's teeth numbered 2, 3, 5, 13, and 14 for being time-barred under CPLR § 214-a.**

Olga Tricot, DDS (sued here as Olga Katie Chern, DDS ["Dr. Chern"]) moves for partial summary judgment pursuant to New York Civil Practice Law and Rules §§ 3211 and 3212 in so far as pertains to treatment rendered to the plaintiff, Jennifer Vales (suing here as Jennifer Powers ["Ms. Powers"]), for Ms. Powers' teeth numbered 2, 3, 5, 13 and 14. The motion for partial summary judgment is granted in its entirety.

**Facts**

Ms. Powers attended the dental practice of Steven Brenman, DMD ("Dr. Brenman") upon advisement that the plaintiff's dental insurance plan was accepted. Dr. Brenman was the sole owner of the dental practice which employed other dentists. On December 4, 2004 the plaintiff was first seen by Lee Smullen, DDS, an employee of Dr. Brenman. During that visit a treatment plan was

developed. On December 6, 2004, the plaintiff had amalgam fillings done to teeth numbered 2, 3, 4, 5, 13 and 14 by Dr. Chern, another employee of the dental practice. Dr. Chern never saw Ms. Powers again and Ms. Powers was thereafter cared for by others in the dental practice, including Dr. Brenman himself. On December 7, 2004, Ms. Powers was seen because she was dissatisfied with her treatment of the day before and was in pain. On that date, the amalgam fillings placed by Dr. Chern were replaced with composite fillings. On December 9, 2004, the plaintiff telephoned to report that she again had pain. She was seen on December 14, 2004 when the fillings of teeth numbered 4 and 5 were smoothed, and a root canal procedure was recommended. On April 28, 2005 root canal procedures were again recommended on teeth numbered 4 and 13. When the plaintiff was next seen on May 16, 2005, Dr. Brenman performed the recommended root canal procedure only on tooth number 4. Because Ms. Powers had no pain in number 13, no work was done on that tooth. The plaintiff was prescribed an antibiotic on May 23, 2005.

On June 13, 2005 Ms. Powers had a filling of tooth number 4 done with amalgam. On June 20, 2005, Ms. Powers was seen for “prophylaxis”. On that date, X-rays of her teeth were taken, and the plaintiff was advised to return in six months. Because of facial pain almost a year later, the plaintiff returned to see Dr. Brenman on June 3, 2006. At that time, tooth number 4 was deemed to be infected and she was prescribed an antibiotic. On February 26, 2007, Ms. Powers was again judged to have infection in tooth number 4, and was again treated with an antibiotic. Thereafter, Ms. Powers received her dental care from other providers.

### **Procedural History**

The summons and complaint was filed on January 2, 2008. Issue was joined when the defendant’s answer was served by mail on May 6, 2008. Notice of issue was made on July 20, 2010. The original motion date for this motion for summary judgment is October 8, 2010.

### **Discussion**

The defendant Dr. Chern moves for summary judgment to dismiss that portion of the plaintiff’s action pertaining to the defendant’s treatment of the teeth numbered 2, 3, 5, 13 and 14 for being

time-barred. Pursuant to the New York Civil Practice Law and Rules (CPLR), “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the cause of action may not be maintained because of ... statute of limitations ...”<sup>1</sup>

Under CPLR § 3212, a motion for summary judgment requires that “the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.”<sup>2</sup> The Court of Appeals states that “summary judgment is a drastic remedy and should not be granted when there is any doubt as to the existence of a triable issue.”<sup>3</sup> Notwithstanding facts presented by any party, “the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.”<sup>4</sup> When the Appellate Division, Second Department evaluates for summary judgment, all evidence must be examined in the light most favorable to the non-moving party;<sup>5</sup> and the non-movant must be given the benefit of every favorable inference.<sup>6</sup>

The proponent of a motion for summary judgment has the burden of tendering sufficient evidence to show the absence of competing material issues of fact.<sup>7</sup> Once a moving party has made a showing of sufficient evidence, the burden shifts to the opposing party to put forth evidence in

---

<sup>1</sup>CPLR § 3211 (a) 5.

<sup>2</sup>CPLR § 3212 (b).

<sup>3</sup>*Rotuba Extruders, Inc. v. Ceppos*, 46 NY 2d 223, 231 [1978], quoting *Moskowitz v. Garlock*, 23 AD 2d 943, 944 [1965]; *Herrin v. Airborne Freight Corp.*, 301 AD 2d 500, 500-501 [2d Dept 2003]; and *American Home Assurance Co. v. Amerford International Corp.*, 200 AD 2d 472 [1st Dept 1994].

<sup>4</sup>*Id.*

<sup>5</sup>*Nicklas v. Tedlen Realty Corp.*, 305 AD 2d 385, 386 [2d Dept 2003].

<sup>6</sup>*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]; *Perez v. Exel Logistics, Inc.*, 278 AD 2d 213, 214 [2d Dept 2000]

<sup>7</sup>*Wasserman v. Carella*, 307 AD 2d 225, 226 [1st Dept 2003].

admissible form to establish a triable issue for the fact finder.<sup>8</sup> Mere assertions do not rise to meet the burden of evidentiary form.

An action for dental malpractice must be commenced within two years and six months of the time of alleged malpractice unless “there is continuous treatment for the same illness ... or condition which gave rise to the said act, omission or failure ...”<sup>9</sup> “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.”<sup>10</sup> “Under the continuous treatment doctrine, the limitations period is tolled only if the defendants continuously rendered an ‘actual course of treatment’ during the relevant period ‘for the same conditions or complaints underlying the plaintiff’s medical malpractice claim.’”<sup>11</sup> Here, the only and last date of treatment rendered individually by Dr. Chern to Ms. Powers was December 6, 2004. On that date, treatment was rendered for teeth numbered 2, 3, 4, 5, 13 and 14.

The treatment for individual teeth and specific dental care may be distinguished within overall dental care provided.<sup>12</sup> From December 7, 2004 onwards, Dr. Brenman or his employees provided treatment to Ms. Powers. As a general principle, a dental provider or that provider’s agent may toll the statute of limitations by delivering a continuous course of treatment.<sup>13</sup> The last date of treatment for teeth numbered 2, 3 and 14 was on December 7, 2004. On that date, treatment was provided by Dr. Brenman, and consisted in the substitution of amalgam fillings with composite fillings in teeth

---

<sup>8</sup>*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980]; *see also Judith M. v Sisters of Charity Hosp.*, 93 NY 2d 932, 933 - 934 [1999].

<sup>9</sup>CPLR § 214-a.

<sup>10</sup>*Id.*

<sup>11</sup>*Chambers v Mirkinson*, 68 AD 3d 702, 705 [2d Dept 2009]; *quoting Gomez v Katz*, 61 AD 3d 108, 111-112 [2009].

<sup>12</sup>*Zito v Jastremski*, 58 AD 3d 724, 725 - 726 [2d Dept 2009].

<sup>13</sup>*Coyne v Bersani*, 61 NY 2d 939 [1984].

previously having been filled with amalgam by Dr. Chern. The last treatment rendered for tooth number 5 was provided on December 14, 2004 when that tooth's filling was smoothed because of pain. The last treatment for tooth numbered 13 was provided on May 16, 2005 when that tooth was evaluated because of previous pain that had resolved. Subsequent visits made by Ms. Powers were for prophylaxis on June 20, 2005, or for dental infections in tooth number 4 on June 8, 2006 and February 26, 2007.

Succinctly put, the doctrine of a continuous course of treatment consists of three main elements.<sup>14</sup> First the plaintiff must continue to both seek and obtain a course of treatment from a defendant dentist, during the period claimed to comprise the continuous course of treatment.<sup>15</sup> Next, the course of treatment must be for the same conditions or complaints underlying the malpractice claim.<sup>16</sup> Finally, the course of treatment must be explicitly anticipated by both the dentist and patient, as characterized by past treatments.<sup>17</sup>

The plaintiff seeks to toll the statute of limitations by defining all the visits to Dr. Brenman's practice for dental care as being one single and continuous course of therapy. Even if this proposition were correct, this would fulfill only the first criterion for a continuous course of treatment. However, the plaintiff did not seek treatment specifically for teeth numbered 2,3,5,13 or 14 within the time span between July 3, 2005 and two years and six months later, on January 2, 2008, the time this action commenced. The plaintiff does state that every time she returned for a visit, the visit concerned infection. The record confirms that the infection was in tooth number 4.

“A patient is not entitled to the benefit of a tolling of the statute of limitations in the absence of

---

<sup>14</sup>*Gomez v Katz*, 61 AD 3d 108, 111-113 [2d Dept 2009].

<sup>15</sup>*Id.* at 111 - 112.

<sup>16</sup>*Id.* at 112.

<sup>17</sup>*Id.* at 112 - 113.

continuing efforts by a doctor to treat a particular condition.”<sup>18</sup> Returning to see a dentist for other reasons does not constitute a continuous course of treatment unless the visit includes evaluation of the condition that is the subject of the action.<sup>19</sup> “The rule of ‘continuous course of treatment’ does not apply to a continuing general relationship between patient and dentist or to situations where the patient initiates routine, periodic examinations to check a condition.”<sup>20</sup> Here, the purpose of the visit of June 20, 2005 was manifestly described as “prophylaxis”. Even if the plaintiff had complained of pain and infection on June 20, 2005 and thereafter, that complaint related to the infected tooth number 4 on the right side of her mouth, and not to the other teeth designated in the cause of this action.

The plaintiff wishes the court to construe a general monitoring of a patient as constituting a continuous course of treatment for a particularized process. The plaintiff asserts subsequent examinations and x-rays confirm a continuous course of treatment.<sup>21</sup> The plaintiff further cites an example of continuous monitoring of fibrocystic breast changes as an example.<sup>22</sup> However, the monitoring of the patient must be for the condition constituting the basis for the cause of action, and not for general or routine examinations such as prophylaxis.<sup>23</sup> Therefore, even if Ms. Powers inquired of pain on the right side of her mouth resulting from the infection in tooth number 4 at the time of her visit for prophylaxis, this would not be continuous treatment for the particular teeth numbered 2, 3, or 5, and certainly not for the left sided teeth numbered 13 or 14. Here, the

---

<sup>18</sup>*Massie v Crawford*, 78 NY 2d 516, 519 [1991]; and see also *Nykorchuck v Henriques*, 78 NY 2d 255, 259 [1991].

<sup>19</sup>*McDermott v Torre*, 56 NY 2d 399, 406 [1982].

<sup>20</sup>*Williamson v PriceWaterhouseCooper, LLP*, 9 NY 3d 1, 9 [2009].

<sup>21</sup>*The plaintiff cites Ganess v City of New York*, 85 NY 2d 733 [1995], in which no continuous course of treatment was clearly demonstrated.

<sup>22</sup>*Pace v Caron*, 232 AD 2d 617 [2d Dept 1996], where the monitoring was specifically of the patient’s fibrocystic breast disease in order to determine if cancer was present.

<sup>23</sup>*Massie v Crawford*, 78 NY 2d at 520; and *Borgia v City of New York*, 12 NY 2d 151, 157 [1986].

examinations subsequent to July 3, 2005 were for tooth number 4 only and the x-rays were associated with a visit identified as being for prophylaxis. Therefore, the second element of a *prima facie* continuous course of treatment is not present.

Further, the treating dentist anticipated that the plaintiff should return in six months from the treatment date of June 20, 2005. When the plaintiff sought care next in February 26, 2007, this was not explicitly anticipated by the treating dentist because the dentist anticipated the next visit before that date. Consequently only one element of the three that together comprise the doctrine of a continuous course of therapy is fulfilled for teeth numbered 2, 3, 5, 13 and 14. A *prima facie* showing of a continuous course of treatment has failed.

As a result, the statute of limitations of two years and six months was not adequately tolled by a continuous course of treatment for the plaintiff's teeth numbered 2, 3, 5, 13 and 14. The motion to grant summary judgment and to dismiss the cause of action for the teeth numbered 2, 3, 5, 13 and 14 is granted.

Accordingly, it is hereby

ORDERED, that summary judgment is found for the defendant Olga Tricot, DDS (Olga Katie Chern, DDS) and the action brought by Jennifer Vale (Jennifer Powers) is dismissed in so far as pertains to teeth numbered 2, 3, 5, 13 and 14; and it is further

ORDERED, that the parties shall return to **DCM Part 3, 130 Stuyvesant Place, Third Floor, on Monday, March 28, 2011.**

ENTER,

DATED: February 16, 2011

\_\_\_\_\_  
Joseph J. Maltese

Justice of the Supreme Court