

Petrizzo v Seltzer

2011 NY Slip Op 31447(U)

May 18, 2011

Sup Ct, Nassau County

Docket Number: 3053/1

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

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

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 21**
JAMIE PETRIZZO,

Plaintiff,

- against -

NEAL SELTZER, D.M.D.,

Defendant.

**Index No. 3053/10
Mot. Seq. # 1
Mot. Date 2/23/11
Submit Date 5/11/11**

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The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

Defendant moves by notice of motion for the following relief: a) pursuant to CPLR 214-a and CPLR 3212, for partial summary judgment dismissing any claims of malpractice stemming from treatment occurring more than two and one-half years prior to the commencement of this action.

Plaintiff commenced this dental malpractice action by filing a summons and verified complaint on February 16, 2010. The verified complaint alleges that the plaintiff was treated by the defendant between June 25, 2002 and November 23, 2009. Defendant argues that based on the date plaintiff filed the complaint, any alleged malpractice stemming from the treatment rendered prior to August 16, 2007 (2 ½ years prior) is time barred.

Defendant states that on June 25, 2002, defendant consulted with plaintiff regarding placement of crowns on teeth numbered 4-13. Thereafter, on September 12, 200, defendant began work on placing temporary crowns on plaintiff's teeth. Defendant states he completed the process by placing permanent crowns on December 3, 2003 and that plaintiff did not have any complaints with respect to these crowns, and that she was pleased with the aesthetics. Defendant

avers that between 2003 and February 2007, plaintiff returned to defendant for routine cleaning, root canals, re-cementing of crowns and replacement of posts on certain teeth. It is contended that defendant did not perform any "major dental work."

Thereafter on February 22, 2007, plaintiff and defendant had a consultation with respect to replacing the crowns on teeth numbered 4-13 for aesthetic reasons. On March 6, 2008, defendant began work on replacing the crowns. Defendant completed the work on or about October 13, 2008 and last saw plaintiff on November 3, 2009.

Defendant argues that the continuous treatment doctrine does not apply in the instant case as the treatment rendered prior to August 16, 2007 has no bearing, connection or relation to the treatment rendered after that date. Moreover, plaintiff cannot recover damages with respect to teeth numbers 19, 30 and 31 as treatment did not occur on dates within the limitations period, nor did they happen on any of the dates alleged in the bill of particulars. Additionally, at no point in the history of defendant's treatment of plaintiff did defendant perform work on teeth numbers 2,3, 14, 15, 18 or 32, thereby precluding any recovery by plaintiff. Lastly, defendant argues that plaintiff cannot establish a course of treatment by alleging that defendant failed to diagnose or treat "furcation involvement."

In opposition, plaintiff states that she has satisfied the continuous treatment doctrine exception to the statute of limitations for all dates alleged from June 25, 2002 to her last visit with defendant on November 3, 2009 because defendant was aware of specific dental conditions and performed treatment and monitored her condition in order to manage her dental conditions.

Plaintiff states that defendant's deposition testimony clearly demonstrates that he was treating teeth numbered 4-13 from June 25, 2002 until plaintiff left his office; that plaintiff had routine cleaning and periodontal maintenance in his office during her treatment; that plaintiff was not in his office for a cleaning or periodontal maintenance from June 2006 until April 2009, even though she was in his office for other treatment; that during that time period, defendant failed to make any notes that plaintiff had missed any periodontal maintenance or cleaning appointments.

Plaintiff argues the fact that there are missing entries in the defendant's chart raises a question of fact as to the accuracy of his records. Additionally, there remains a question of fact as to continuous treatment of the plaintiff as the cleaning and periodontal treatments were ongoing as testified to by the plaintiff.

In reply, defendant states that the treatment records do not raise an issue of fact and in no way establish that plaintiff, after August 16, 2007, continued to treat with the defendant for the condition giving rise to the instant action. Defendant asserts that any alleged missing entries in his chart does not suffice to defeat summary judgment. Additionally, other than making conclusory statements, plaintiff fails to establish that defendant treated plaintiff for the same condition from June 25, 2002 to November 3, 2009. To the contrary, during that time period defendant states he saw plaintiff for various discrete and unrelated treatments. Defendant concludes by stating that the new set of treatment involving the placement of new crowns did not

toll the statute of limitations. This treatment, which started in March 2008, had no relation to the placement of crowns that defendant completed in December 2003. Because plaintiff failed to meet her burden of establishing continuous treatment, the allegations of malpractice stemming from treatment rendered prior to August 16, 2007, are time barred.

Based on the foregoing, the decision of the court is as follows:

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 [1986]).

In the case at bar, defendant made a prima facie showing of his entitlement to judgment as a matter of law by demonstrating that the claims based upon dental malpractice referable to treatment rendered prior to August 16, 2007, were time-barred (see *Massie v Crawford*, 78 NY2d at 519; *Kasten v Blaustein*, 214 AD2d 539). The burden then shifted to the plaintiff to raise a triable issue of fact as to whether the continuous treatment doctrine applied (see *Lane v Feinberg*, 293 AD2d 654, 655; *Kasten v Blaustein*, 214 AD2d at 539; *Zito v. Jastremski*, 58 A.D.3d 724).

“Under the continuous treatment doctrine, the two and one-half-year Statute of Limitations for a medical or dental malpractice action (see, CPLR 214-a) is tolled until after a plaintiff's last treatment " "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" " (*Nykorchuck v Henriques*, 78 NY2d 255, 258; *McDermott v Torre*, 56 NY2d 399, 405). Essential to the application of the doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit (see, *Nykorchuck v Henriques*, supra). Neither the mere " 'continuing relation between physician and patient' nor 'the continuing nature of a diagnosis' " is sufficient to satisfy the requirements of the doctrine (*Nykorchuck v Henriques*, supra, at 259; see also, *Ganess v City of New York*, 85 NY2d 733; *Massie v Crawford*, 78 NY2d 516, 520).” *Grippi v. Jankunas*, 230 A.D.2d 826.

On this record, plaintiff failed to establish a triable issue of fact as to whether the continuous treatment doctrine applied to toll the statute of limitations. The court finds that after defendant completed placing crowns on plaintiff's teeth numbered 4-13 in December 2003, plaintiff returned thereafter for routine dental visits. Plaintiff's argument that the chart has omissions of entries is unpersuasive (see, *Melendez v. Parkchester Med. Servs., P.C.*, 76 AD3d 927). Additionally, plaintiff has failed to establish that the treatment rendered prior to August 16, 2007 was for the same condition (see, *Zito v. Jastermski*, 58 A.D.3d 724, 725-726). Subsequent to December 3, 2003, there was no continuous treatment rendered with respect to placement of crowns on teeth numbered 4-13. The only treatment rendered with respect to those

teeth were maintenance or routine cleaning which does not constitute continuous treatment (see *Grippi*, 230 AD2d at 826).

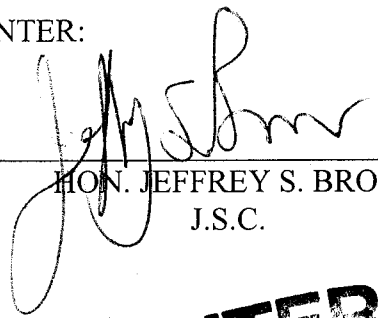
Accordingly, it is

ORDERED, that defendant's application is **GRANTED**. Partial summary judgment is awarded with respect to any claims of dental malpractice stemming from treatment occurring more than two and one-half years prior to the commencement of this action.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 18, 2011

ENTER:



HON. JEFFREY S. BROWN
J.S.C.

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ENTERED
MAY 20 2011
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