

**Rodriguez v Mount Sinai Hosp.**

2011 NY Slip Op 31865(U)

July 7, 2011

Supreme Court, New York County

Docket Number: 108217/05

Judge: Joan B. Lobis

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

PRESENT: LOBIS  
Justice

PART 6

RODRIGUEZ, DIANA

INDEX NO. 108217/05

MOTION DATE 3/1/11

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

- v -

THE MOUNT SINAI HOSPITAL

The following papers, numbered 1 to 46 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

1-11

12-40

41-46

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the following decision and order.

**FILED**

JUL 11 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/7/11

JBL  
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: 1AS PART 6

-----X  
DIANA RODRIGUEZ,

Plaintiff,

Index No. 108217/05

-against-

Decision and Order

THE MOUNT SINAI HOSPITAL,

**FILED**

Defendant.

JUL 11 2011

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

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant The Mount Sinai Hospital ("Mt. Sinai") moves, pursuant to C.P.L.R. Rule

3211(a)(5), to dismiss plaintiff's claims as time-barred. Since discovery is completed, I notified the parties via conference call that, pursuant to C.P.L.R. Rule 3211(c), I would convert Mt. Sinai's motion to dismiss to a motion for summary judgment on the issue of the timeliness of plaintiff's claims. Counsel for both parties agreed to waive their right to submit additional papers with respect to the conversion of the motion. Defendant's motion is granted in part, to the extent set forth below.

This action sounding in medical malpractice and lack of informed consent concerns a mastectomy and breast reconstruction surgery performed at Mt. Sinai. Plaintiff is fifty-six years old with a history of anxiety and depression and a longstanding fear of dying from cancer. She is receiving Supplemental Security Income disability benefits. In or about 1999, plaintiff reported to a doctor that she had an extensive family history of breast cancer and she was referred for genetic testing. Her report of her family history was not accurate. According to records from Memorial Sloan-Kettering Hospital ("Memorial"), the results from the genetic testing indicated that plaintiff did not have a "known deleterious [genetic] mutation" and that her risk for cancer was unknown. At her examination before trial ("EBT"), plaintiff testified that she was initially informed that she

had breast cancer, but was later told that she neither had cancer nor had any increased risk of getting cancer.

Despite receiving results from the genetic testing that established that she was not at an increased risk for breast cancer and being told that she did not have cancer, plaintiff believed that she had breast cancer or was destined to get cancer due to her family history. Plaintiff sought a prophylactic mastectomy of both breasts. She consulted with doctors at Memorial about the surgery in 1999, and again in May 2001, but because plaintiff refused to release her psychological information, the surgery was never scheduled. Thereafter, plaintiff consulted with physicians at Mt. Sinai, who agreed to perform the mastectomy. Prior to undergoing the mastectomy, plaintiff met with a plastic surgeon to discuss the option of having reconstructive surgery immediately after the mastectomy. According to her EBT testimony, plaintiff chose not to have the reconstruction immediately after the mastectomy because she was afraid to undergo both surgeries at the same time. On November 20, 2001, plaintiff underwent a prophylactic double mastectomy at Mt. Sinai.

After the surgery and through September 2002, Mt. Sinai staff continued to monitor and evaluate plaintiff and consult with her about the breast reconstruction. Plaintiff did not experience any physical complications from the mastectomy and received no further treatment related to the mastectomy. Plaintiff discussed reconstructive surgery with her physicians at two follow-up appointments in December 2001 and January 2002. On September 26, 2002, plaintiff had breast reconstruction surgery at Mt. Sinai. According to the medical records, at several follow-up visits from October 8, 2002 through April 22, 2003, plaintiff complained that she was experiencing pain in her breasts and that she was dissatisfied with the surgery.

Plaintiff commenced this action with the filing of a summons and verified complaint on or about June 13, 2005. In her bill of particulars, plaintiff alleged that Mt. Sinai, *inter alia*, performed an unnecessary prophylactic mastectomy; negligently performed breast reconstruction surgery; and failed to obtain her informed consent for both procedures given her lack of mental capacity. Mt. Sinai answered and asserted an affirmative defense based on the statute of limitations.

In this motion, Mt. Sinai asserts that both the prophylactic mastectomy and the breast reconstruction surgery occurred more than two and one-half years prior to the commencement of the action and, therefore, any claims of medical malpractice arising out of these procedures are time barred. Mt. Sinai further argues that plaintiff cannot establish any exceptions to the statute of limitations. Mt. Sinai asserts that the procedures were not part of a related course of treatment and that plaintiff cannot rely on the insanity toll because she was not "unable to function in society or to protect [her] own legal rights." Zumpano v. Quinn, 6 N.Y.3d 666, 672 (2006).

In opposition, plaintiff argues that the bilateral prophylactic mastectomy performed on November 20, 2001 and the breast reconstruction surgery performed on September 26, 2002, are part of a course of treatment that extended through April 22, 2003, the date that she last reported complaints of pain and dissatisfaction with the surgery to Mt. Sinai. Therefore, plaintiff asserts, the continuous treatment doctrine applies and the claims are timely. Plaintiff also argues that she is entitled to a tolling of the statute of limitations under C.P.L.R. § 208 due to her mental status.

In reply, defendant asserts that the two surgical procedures are distinct, pointing to the fact that once plaintiff indicated that she did not want the mastectomy and reconstruction at the

same time, the reconstructive surgery was put off for an indeterminate amount of time. In fact, defendants contend, plaintiff never showed any interest in undergoing the reconstruction until January 2002 and did not decide to have the surgery until sometime thereafter. As to any toll due to plaintiff's mental illness, defendants argue that plaintiff's mental condition is not significant enough to trigger the insanity toll.

Generally, a medical malpractice action must be commenced within two and one-half years of the date of the alleged "act, omission, or failure complained of." C.P.L.R. § 214-a. However, the time in which to bring a medical malpractice action is stayed if there is a continuous course of treatment that "includes the wrongful acts or omissions . . . 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. This exception, known as the continuous treatment doctrine, "rests upon the belief that the best interests of a patient warrant continued treatment with an existing provider, rather than stopping treatment, as 'the [existing provider] not only is in a position to identify and correct his or her malpractice, but is best placed to do so.'" Rudolph v. Jerry Lynn, D.D.S., P.C., 16 A.D.3d 261, 262 (1st Dep't 2005) (brackets in original), quoting McDermott, 56 N.Y.2d at 408. Further, if the plaintiff is disabled by reason of insanity at the time a claim for medical malpractice accrues, her time to bring the claim is extended to two and one-half years after the period of disability ends but not by more than ten years from the date the claim accrues. C.P.L.R. §§ 208 and 214-a.

On a motion to dismiss a cause of action as time barred, the defendant bears the initial burden of showing that the alleged malpractice took place more than two and one-half years prior

to the commencement of the action. Texeria v. BAB Nuclear Radiology, P.C., 43 A.D.3d 403, 405 (2d Dep't 2007). Once that burden is met, the plaintiff must establish the applicability of the continuous treatment doctrine or other exceptions to the statute of limitations. Massie v. Crawford, 78 N.Y.2d 516, 519 (1991); Texeria, 43 A.D.3d at 405. "In order to establish that the [continuous treatment] doctrine applies, the plaintiff is required to demonstrate that there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice." Stewart v. Cohen, 82 A.D.3d 874, 876 (2d Dep't 2011) (citations omitted). Further, in order to establish that a statute of limitations should be tolled due to insanity, the plaintiff must "aver sufficient evidentiary facts to support a finding of his [or her] insanity which, for the purposes of CPLR 208, requires a showing that he [or she] was unable to protect his [or her] legal rights because of an overall inability to function in society." Santo B. v. Roman Catholic Archdiocese of New York, 51 A.D.3d 956 (2d Dep't 2008), citing McCarthy v. Volkswagen of America, Inc., 55 N.Y.2d 543, 548 (1982); see also Zumpano v. Quinn, 6 N.Y.3d at 677.

Since Mt. Sinai has shown that both of the procedures that form the basis of the malpractice action occurred outside of the statute of limitations, the burden shifts to plaintiff to demonstrate the applicability of the continuous treatment doctrine. The statute of limitations as to the claims related to the reconstruction surgery is stayed until the last day of treatment related the reconstruction, April 22, 2003, which is within two and one-half years from the date this action was commenced; accordingly, the claims related to the reconstruction surgery are timely. However, upon the undisputed facts of this case, plaintiff has failed to establish that the mastectomy was sufficiently related to the reconstruction procedure as to render the two procedures part of a continuous course

[\* 7]  
of treatment. Plaintiff has failed to offer any medical proof in support of her proposition that the two surgeries were connected; the court notes that each surgery required a different medical speciality. Furthermore, plaintiff herself refused to have both procedures on the same day, suggesting that the two procedures are not necessarily related. The claims related to the mastectomy are, therefore, time barred.

With respect to the issue of whether the extension provisions of C.P.L.R. § 208 apply, while it is undisputed that plaintiff has a mental disability, which is characterized as an anxiety disorder, she is able to carry out the tasks of daily living, manage her finances, and protect her legal rights. She has not shown that her disability arises to the level of preventing her from protecting her rights or being able to function in society. Accordingly, plaintiff is not entitled to rely on the extension provisions of C.P.L.R. § 208.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent of dismissing all claims arising from the November 20, 2001 mastectomy; and it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 6 on July 26, 2011 at 9:30 a.m.

Dated: July 7, 2011

**FILED**

JUL 11 2011

NEW YORK  
COUNTY CLERK'S OFFICE

  
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JOAN B. LOBIS, J.S.C.