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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 112408/2009

BRAUN, REFAEL

VS

LEWIS, M.D. BLAIR S.

Sequence Number : 001

AMEND CAPTION/PARTIES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read 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 plaintiff to amend is granted, and the cross-motion by defendants to dismiss is denied, in accordance with the accompanying memorandum decision.

FILED

JUL 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 26, 2011 JUL 26 2011

ALICE SCHLESINGER J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

----------X

RAFAEL BRAUN, as Proposed Executor of the Estate of BOZENA BRAUN, and Rafael BRAUN, Individually,

Plaintiffs,

-against-

BLAIR S. LEWIS, M.D., and BLAIR S. LEWIS, M.D., P.C.,

Defendants.

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Index No. 112408/09
Motion Seq. No. 001

SCHLESINGER, J.:

On June 15, 2009, Bozena Brown, at that time age 57, died of colon cancer. She had first been diagnosed with this disease in August of the preceding year, 2008. Her husband, Rafael Braun, in late August 2009 commenced this lawsuit sounding in the main in medical malpractice against Dr. Blair S. Lewis (and his professional corporation).

When the suit was begun, it was in the name of Rafael Braun as the "Proposed Executor of the Estate of Bozena Braun". Thereafter, in April 2011, plaintiff moved pursuant to CPLR §3025(b) to amend the caption of the action substituting Rafael Braun, as Executor of his late wife's estate, in place of merely the Proposed Executor. Letters Testamentary had been issued to Mr. Braun on April 5, 2010 by the Surrogate's Court of Queens County, New York.

The motion now before the Court is a relatively simple, straightforward one, one not expected to meet with opposition. And in fact, it was not. Rather, it was met

with a cross-motion by the defense requesting dismissal of the action pursuant to CPLR §3211(a)(5) and EPTL §5-4.1 based on their Affirmative Defense. Counsel made the argument that the action here had not been commenced within the applicable periods for medical malpractice actions or for ones sounding in wrongful death.

The facts put forth by the defense as the predicate for the cross-motion were the following: the decedent Bozena Braun only saw and received treatment from Dr. Lewis on two occasions, both times for a colonoscopy, performed in part to remove known polyps. Those two visits occurred on February 10, 2006 and August 28, 2006. As stated above, the action here was commenced on August 31, 2009. Since that date is more than two and one-half years later than the last visit of August 28, 2006, the defense argues that the action is time-barred pursuant to CPLR §214-a.

Anticipating an argument that plaintiff's counsel was expected to make in opposition, moving counsel in her cross-motion brought to the Court's attention an exchange of letters between defendant and Mrs. Braun on March 5, 2007, and the second on March 11, 2007 from Mr. Braun to Dr. Lewis on behalf of his wife, Bozena Braun. The March 5 letter, signed by Dr. Lewis, told Mrs. Braun that his office records showed that "it is time for your surveillance examination". She was therefore instructed to call the office at her convenience to arrange for it. In the March 11 letter, in a response signed by "Rafael Braun (husband)", plaintiff wrote the following in its entirety:

To Whom It May Concern,

This is in reference to your letter dated March 5th, copy attached.

Please be advised that your records are incorrect. My wife, Bozena Braun, is not due for "surveillance examination", as stated in your letter, since she had a colonoscopy on August 28, 2006, after which she ended up in the emergency room in L.I.J.

In fact, to date we did not get a written report of the result of this test. We respectfully request that you send us a copy of the test results to the address below.

Sincerely

Moving counsel asserts that despite the above exchange of letters, August 28, 2006 was the last date on which Dr. Lewis rendered treatment to Mrs. Braun. In furtherance of her position, she argues that the continuous treatment doctrine does not operate here. In citing to well-known and lesser-known cases, defendant argues that continuous treatment, specifically referred to in CPLR §214-a, applies only when further treatment for the same condition is explicitly anticipated by both physician and patient and is shown, for example, in the form of a regularly scheduled appointment in the near future.

In this regard, counsel points out that after the procedure of August 28, 2006 was concluded, no further appointments were made. While the March 5, 2007 letter by the doctor to the decedent may be characterized as a "continuing relationship", it did not constitute "continuous treatment". She sums up her argument in this way (at ¶ 29, p. 8):

> Mr. Braun's response is clear evidence that there was no "mutual contemplation of further treatment" (citing *Zelig v. Dr. Mark Urken*, 28 AD3d 318, 1st Dept, 2006), and the fact that Mrs. Braun never again presented to Dr. Lewis only provides further evidence of that fact.

Of course the plaintiff opposes, in fact in counsel's words "vigorously opposes". Essentially three arguments are made. First, counsel argues that the motion is premature and procedurally defective because the case is in such an early phase with no Bills of Particulars having been served and no discovery having taken place. Counsel points out in that regard that defendants really have not been fully apprised here of precisely what the plaintiff is claiming.

The next argument is that the action is in fact timely based upon the continuous treatment doctrine. Finally, were the Court to find that the continuous doctrine does not operate, then the plaintiff is also claiming that a major portion of his action sounds in general negligence, which has a longer period to bring a suit than malpractice, or three years.

Plaintiff agrees with defendant's reliance on *Gomez v Katz*, 61 AD3d 108 (2nd Dept 2009) in which that court speaks of the three principal elements contained in the continuous treatment doctrine. They are first, that the plaintiff continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period. The second element is that the course of treatment provided by the physician must be for the same conditions or complaints underlying

the plaintiff's medical malpractice claim. The third element is that the physician's treatment must be deemed continuous, which is often found to exist when further treatment is explicitly anticipated by both the physician and the patient. This could be shown in the form of a regularly scheduled appointment for the near future in conformance with the periodic appointments that characterized the past treatment. *Gomez*, 61 AD2d at 112.

Plaintiff claims here that the March 2007 letters indicate by their content that further treatment was explicitly or implicitly anticipated by both the doctor and his patient. Specifically, counsel urges that Mr. Braun's request for the test results on behalf of his wife is an indication of an ongoing relationship for the same treatment, which meets the third element. As to the first and second elements, counsel asserts that it is clear that Mrs. Braun was always being treated by Dr. Lewis for the prevention and detection of colon cancer, which is illustrated by the two visits wherein he performed colonoscopies and removed polyps and related material on each occasion.

As to the alternate claim of general or common law negligence which allows for the longer statute of limitations, counsel for the plaintiff relies on the fact that Dr. Lewis failed to communicate significant medical findings to Mrs. Braun, specifically the results of the biopsies that followed the colonoscopies, the earlier one, for example, showing "A. Fragments of colonic mucosa with tubulovillous adenoma containing areas of high grade dysplasia (carcinoma in situ)" in the

February 10, 2006 pathology report. Here she cites *Bennett v Long Island Jewish Medical Center*, 51 AD3d 959 (2nd Dept, 2008) for legal support. That case is very similar to the instant action in that in *Bennett* (*supra*) the plaintiff, who had undergone a CT scan of his lungs as part of a clinical trial conducted by the defendant doctor at the defendant facility, was not given certain information found in the report, namely, the existence of a "2 cm cyst in the right lobe of the thyroid". There, also similar to the instant case, the defendant moved to dismiss the medical malpractice cause of action as time-barred. The court granted that motion but also gave plaintiff permission to assert a cause of action sounding in negligence based on his allegation that the defendants were negligent, under common law principles, for failing to review the CT scan report and apprise the plaintiff of the results.

I find that there should be the same result here as to the alternative claim. However, unlike the *Bennett* court, I am not prepared to find at this very early date that the cause of action sounding in medical malpractice is barred by the applicable Statute of Limitations. In other words, while I do not agree with counsel for plaintiff that the cross-motion is procedurally defective, I do agree that it is premature and, in accord with *Gomez* (*supra*), I also find that factual issues exist vis-a-vis the March 2007 letter exchanges that preclude this Court from dismissing the malpractice claims as barred by the Statute of Limitations.

The factual history of the professional relationship between the decedent and Dr. Lewis, while short, still had significant events. When Mrs. Braun was first

referred to the defendant, it was by her, up to that time, sole treating gastroenterologist, Dr. Mark Friedman. Also, the referral was for a specific purpose or treatment, the removal of a cecal polyp. The first visit was on February 7, 2006. The procedure occurred on February 10, 2006. Two days later, on February 12, 2006, Dr. Lewis wrote to Dr. Friedman. He began by telling the latter that this was a report of the colonoscopic evaluation of Mrs. Bozena who "as you know, the patient is a 54-year old woman with a known large cecal polyp."

In the body of the report, Dr. Lewis described the actual procedure he had performed and pointed out that he had also identified and removed a "second smaller polyp". Also, he mentioned that there was no diverticular disease. He ended the letter by saying that he was enclosing several endoscopic photographs and would forward a copy of the pathology report when it was available. He concluded with the following: "I believe repeat surveillance examination should be performed in one year." The pathology report of February 10, 2006, referred to earlier, also diagnosed "a crushed area containing atypical changes" without definitive infiltration and "B. hyperplastic polyp."

Both sides have submitted, as part of their papers, what purports to be Dr. Lewis' entire file for Mrs. Braun. From these records, it is hard to discern why or how or even by whom a decision was made that the decedent should return for another colonoscopy evaluation in six months, rather than the one year that Dr. Lewis had first recommended. But it was six months, and that is when, on August 28, 2008, the second and last visit between the two occurred. That

colonoscopic evaluation also was followed up with a letter to Dr. Friedman and a pathology report, the latter following a microscopic examination.

The procedure by Dr. Lewis this time found and removed a small amount of residual adenomatous tissue. No other tumors or polyps were discovered. However, now severe diverticular disease of the sigmoid colon was seen. The pathology report clinically identified the specimen as "residual polyp". The microscopic description showed "fragments of a sessile polyploid adenomatous lesion composed of low grade dysplastic colonic glands arranged in a tubular and villous architecture." The February specimen had shown "high grade dysplasia."

Dr. Lewis sent Dr. Friedman a letter the same day as the procedure, August 28, 2006. There he recommended that a repeat surveillance examination be performed in 3 years. But when writing this letter, while he had observed the severe diverticulitis, he had not as yet seen the pathology report. Clearly the latter showed a less dangerous diagnosis with an analysis of low grade dysplastic colonic grades. But there were still findings of concern with fragments of a "sessile polyploid adenomatous lesion" arranged in a "tubular and villous architecture".

Therefore, the event that occurred on March 5, 2007, the letter sent out by Dr. Lewis to his patient Bozena Braun, may not necessarily have been a mistake after all, as defense counsel suggests. And as Mr. Braun said in his March 11, 2007 letter, Mr. and Mrs. Braun had not received a written report of the result of this test. In fact, the plaintiff states in an affidavit of June 3, 2011, that neither he nor his wife had been advised of the result of either colonoscopy. He goes on to say

that if they had known that Mrs. Braun had "carcinoma in situ" in February 2006, they would have sought an immediate consultation.

The above assertion, of course, is self-serving and not particularly relevant to an analysis of the third element of the continuous treatment doctrine, when further treatment is explicitly anticipated by both partners. However, what we do know is that Dr. Lewis did have the reports when he directed Mrs. Braun to come in for another examination, and arguably the only reason the Brauns believed that direction was a mistake and that the examination should take place in three years, was because they did not have the reports.

Clearly, discovery via depositions of Dr. Lewis and perhaps non-party Dr. Friedman, who also had the reports and presumably was conferring with the defendant, would shed needed light on this point. Therefore, there is no real dispute here that the first two elements of *Gomez* have been met. However, there is a real dispute as to the third element; that is, a recognition of the continuation of the relationship for treatment for the same condition, the health of Mrs. Braun's colon with particular attention to the polyps found therein. As I believe further discovery is necessary to explore this issue, the cross-motion to dismiss the complaint as time-barred is, at this time, denied. The motion to dismiss is also denied as to the alternative cause of action sounding in common law negligence, on the authority of *Bennett*. Finally, without opposition, plaintiff's motion to amend the caption to read that Rafael Braun is the Executor of the Estate of Bozena Braun is granted.

Accordingly, it is hereby

ORDERED that the plaintiff's motion is granted, and Rafael Braun, as executor of the estate of Bozena Braun, deceased, shall be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, Rafael Braun as Proposed Executor, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Rafael Braun, as executor of the estate of Bozena Braun, deceased, as indicated herein; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that defendants' cross-motion to dismiss is denied; and it is further

ORDERED that counsel shall appear in Room 222 for a preliminary conference on Wednesday, September 28, 2011 at 9:30 a.m.

Dated: July 26, 2011

JUL 26 2011

FILED

JUL 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.

ALICE SCHLESINGER