

Balaban v Bachrach

2011 NY Slip Op 32734(U)

October 7, 2011

Supreme Court, New York County

Docket Number: 119011/2006

Judge: Alice Schlesinger

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

PRESENT. **ALICE SCHLESINGER**

PART **IA** PART 16

Index Number : 119011/2006

BALABAN, AMY

vs
BACHRACH, RICHARD D.O.

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

by defendant is denied and the cross-motion by plaintiff is granted in accordance with the accompanying memorandum decision.

FILED

OCT 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

OCT 05 2011

Dated: October 5, 2011

Alice Schlesinger

Check one: FINAL DISPOSITION

ALICE SCHLESINGER^{S.C.}
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
COUNTY OF NEW YORK

-----X
AMY BALABAN,

Plaintiff,

Index No. 119011/06
Motion Seq. No. 004

-against-

LESLIE BACHRACH, as the EXECUTOR OF THE
ESTATE OF RICHARD BACHRACH, D.O., and
CENTER FOR SPORTS AND OSTEOPATHIC
MEDICINE,

Defendants.

-----X
SCHLESINGER, J.:

FILED

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This medical malpractice action has a trial date of November 7, 2011. However, what first must be decided are competing motions by the parties, all having to do with the timeliness of the action. In the first instance, defendant has moved for summary judgment pursuant to §3211(a)5 of the CPLR, claiming a violation of the applicable two and one-half year statute of limitations. The plaintiff opposes this motion and has cross-moved to dismiss the applicable affirmative defenses; namely, the Third and Seventh in the Verified Answer, with the Third relating exclusively to the Informed Consent cause of action.

The relevant dates are as follows. All parties agree that Ms. Amy Balaban began her treatment with Dr. Richard Bachrach, a D.O., at his Center for Sports and Osteopathic Medicine on July 9, 2003.¹ The parties also agree that the action was commenced on December 22, 2006. The date in controversy is when the treatment for the condition being treated ended. In the moving papers, counsel for the defense states this date is

¹The Center is still a defendant, but because Dr. Bachrach died after the commencement of this action, the Executor of his Estate, Leslie Bachrach, has been substituted as the first named defendant. Significantly, Dr. Bachrach was deposed before his death.

December 8, 2003, the acknowledged last date of in-office administration of therapy. Plaintiff acknowledges this date as the last time she received actual treatment, although it was in November 2003, that she received her last prolotherapy injection.² However, her position is the doctor/patient relationship with Dr. Bachrach continued until August 24, 2004. This date was the last time the doctor prescribed medication for Ms. Balaban, specifically duragesic patches, which she says was an "essential component of her treatment."

If the defendants are correct using the December 2003 date, then the time to commence an action expired in June 2006. However, if the plaintiff is right on this issue, then she would have had until late February 2007 to commence the action. Since the action was commenced in December 2006, plaintiff argues it was timely brought.

After reviewing the copious records produced by counsel, including the parties' depositions, as well as the arguments put forth, I believe that the law supports the plaintiff's position. Specifically, I find that a medical relationship between Ms. Balaban and Dr. Bachrach for the condition for which she was seeking treatment — pain in her lower back and in her sacroiliac joint for which she was given a diagnosis by the defendant of instability of the lumbrosacral spine and sacroiliac joint, somatic dysfunction of the sacroiliac, muscle spasm and weakness — did continue until the last time the doctor prescribed a duragesic patch for Ms. Balaban's continuing pain.

What is important here is that Ms. Balaban sought out the defendant after seeing a number of other physicians because she had serious unrelenting pain in the areas described. The plan Dr. Bachrach devised at the start of his treatment, according to his

² This treatment involves ligamentous attachment to the bones and is used to tighten lax ligaments in the back, neck and upper and lower extremities.

records, was threefold. It consisted of prolotherapy, physical therapy and pain medication by prescription. As stated earlier, the last prolotherapy was administered by Dr. Bachrach on November 20, 2003. But the doctor did provide other in-office treatment to Ms. Balaban on December 3, 2003, which was a prescription for physical therapy and one for neurontin.

At the defendant's deposition was taken on August 14, 2009, he clarified an entry he had made in his records. The entry said "deferred prolotherapy". But on pages 248-49 of the examination the doctor said: "I should say 'defer' prolotherapy. I just decided not to do it then because I thought I would like to see how she was being affected by the prior injections."

In this regard, I believe defense counsel mischaracterizes Ms. Balaban's deposition testimony on the same subject matter, the termination of treatment. On page 177 of her examination taken on May 8, 2009, Ms. Balaban does agree that the last time she saw the defendant in his office was in late December 2003, but she does not acknowledge that this was the end of treatment. There, she attempted to add that Dr. Bachrach was still prescribing medication for her.

I find that is the critical evidence. As documented in the voluminous records, on December 9, 2003, January 14, February 9 and March 4, 2004, Dr. Bachrach prescribed duragesic patches. There were additional prescriptions for pain medication including ultracet and bextra on March 29, April 27, May 27 and June 16, 2004. Finally, after receiving a report from Dr. Richman (a doctor plaintiff was referred to by Dr. Bachrach) of May 26, 2004, Dr. Bachrach prescribed duragesic patches and ultracet on May 27, May 29, June 16, July 7, August 2 and August 24, 2004.

As part of the defense argument, counsel points to the January 2004 referral by Dr. Bachrach to Dr. Daniel Richman, a pain management specialist at the Hospital for

Special Surgery. Ms. Balaban first saw Dr. Richman on January 9, 2004. He sent his report of that visit to Dr. Bachrach. Defendants argue that this is evidence that the plaintiff had discontinued her treatment with the defendant and was seeing Dr. Richman in his place.

However, neither Ms. Balaban nor importantly Dr. Richman seemed to view it in this way. Dr. Richman regularly sent reports to Dr. Bachrach both as to his findings and treatment of Ms. Balaban each time he saw her, and Dr. Bachrach responded. Further, Ms. Balaban continued to communicate with the defendant and specifically in an e-mail of May 2004 Ms. Balaban inquired of Dr. Bachrach as to medication. She described feeling inflamed and asked him whether he felt an anti-inflammatory medication might help. Dr. Bachrach responded to this e-mail by saying that there was no evidence of an inflammatory process to him or to Dr. Richman, "however I have no aversion to giving you anti-inflammatory medicine and certainly will proscribe (*sic*) same after conferring again with Dr. Richman."

Discussion

The dispute between the parties here is whether, pursuant to §214-a of the CPLR, there was continuous treatment between Dr. Bachrach and Amy Balaban for the same illness and condition after Ms. Balaban's final office visit in December 2003.

Despite defense counsel's interpretation of "condition" here as applying only to those instances where Ms. Balaban was receiving prolotherapy injections, it is clear from the defendant's own records and testimony that the treatment was much broader than the injections and included physical therapy and significantly medication for pain. Further, it is clear that Dr. Bachrach's treatment both before and after December 2003, was for the same spinal and related conditions.

In *Stilloe v. Contini*, 190 AD2d 419, 422 (3rd Dep't 1993), cited favorably by the First Department in 1995 in *Forte v. Weiner*, 214 AD2d 397, *lv denied* 86 NY2d 885, the Court cited to *Richardson v Orentreich*, 64 NY2d 896, 899 and said in circumstances similar to these as follows:

Regardless of any physical or personal contact between a doctor and his patient, where they intend the relationship to continue and the patient continues to rely on the doctor for care and treatment, the requirement for continuous care and treatment for the purpose of the Statute of Limitations is satisfied."

In *Stilloe*, the doctor had continued prescribing prednisone for the patient for a skin condition for a five-year period without seeing her, although he had directed her to see him once a year. But she did not and the doctor continued the prescriptions despite this fact. Here, we are only talking about a period of about eight months, a period of time when Dr. Bachrach continued to prescribe the same medications and even added new ones after consultations with a specialist to whom he had referred Ms. Balaban.

Therefore, it seems clear that, despite the lack of personal contact between the two and/or a designated later appointment, these continuing and multiple prescriptions between them indicate the continuance of the physician/patient relationship, a relationship that sought to relieve continuing pain in Ms. Balaban's spine and joints.

Additionally, the communications between the parties directly and with Dr. Richman, who was seeing the patient and talking to both Ms. Balaban and Dr. Bachrach, is further evidence that the parties and Dr. Richman considered a doctor/patient relationship to be ongoing. It was not until after August 24, when Ms. Balaban decided to look elsewhere for relief and stopped calling Dr. Bachrach for help, that the relationship ceased.

Finally, some mention should be made of a Second Department case, *Parrott v. Rand* 126 AD2d 621 (1987), *app denied* 69 NY2d 611, cited by defense counsel. That action also involved the issue of continuous treatment and the prescribing of medication. However, there the patient relied solely upon his use of a medication long after the last contact with the physician/defendant who had prescribed it. There was nothing else in that case to illustrate the reciprocity needed for a relationship to continue, which conversely is evident here. More importantly, however, what makes that case materially distinguishable is that the patient merely continued to use an old prescription given to her by the doctor "long after the last contact." Here the physician continued, even more frequently than on a monthly basis, to prescribe medication for pain, an active part of the treatment. Additionally, he altered the medications with additional drugs after Ms. Balaban's last office visit.

It is clear here that the characterization by Ms. Balaban of her December 2003 visit as being her "last one", was because it was the last personal contact Ms. Balaban had with Dr. Bachrach before her decision to go elsewhere. It is certainly not apparent, much to the contrary, that in December, either or both parties believed their relationship had ended. In other words, it became her "last visit" in hindsight, looking back at events at the time of the deposition in May of 2009. In sum, the action was and is timely.

FILED

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Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment is denied and the
 further

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ORDERED that the plaintiff's cross-motion is granted and the Third and Seventh affirmative defenses in defendants' Answer are stricken.

Dated: October 5, 2011

OCT 05 2011

Alice Schlesinger

ALICE SCHLESINGER