

Greaves v New York Eye Surgery Assoc. P.C.

2011 NY Slip Op 33710(U)

July 6, 2011

Sup Ct, Bronx County

Docket Number: 300660/09

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

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Neutrice Greaves

Plaintiff

Index No. 300660/09

Decision/Order

-against-

**New York Eye Surgery Associates P.C.,
Anthony Pisicano, M.D., and
Jerome Levy, M.D.**

Howard H. Sherman
Justice

Defendants

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Defendants New York Eye Surgery Associates, P.C., and Drs. Pisicano and Levy move for an order pursuant to CPLR § 3211(a)(5) dismissing as time-barred pursuant to [CPLR § 214-a], the respective claims for malpractice arising out of the care and treatment rendered to plaintiff prior to September 26, 2006.

Facts and Procedural Background

This action was commenced in January 2009, and issue was joined with the service of defendants' respective answers in the month following. Each answer interposes an affirmative defense of the statute of limitations.

Complaint

It is alleged that plaintiff came under the medical and surgical diagnosis, care and treatment of defendants on or about January 26, 2004, and that defendants

performed an operation on June 8, 2004 . It is further alleged that defendants continuously treated plaintiff with regards to this surgery through September 26, 2006, and that as a result of said medical, surgical, diagnosis , care and treatment , which departed from good and accepted standards of care, plaintiff sustained severe injuries and complications therefrom [Verified Complaint ¶ 4]. A second cause of action for informed consent is also interposed [Id. ¶¶ 10-11].

Verified Bills of Particulars

Plaintiff alleges that the left eye corneal implant surgery of 06/08/04 was negligently performed , and that the post-operative treatment rendered was also negligent as defendants failed to recognize and to treat post-surgical complications "as a result of which plaintiff was caused to undergo a second surgery in the nature of a penetrating keratoplasty of the left eye on October 3, 2008." [Verified Bill of Particulars ¶ 1].

By supplemental bill, plaintiff alleges that the defendant physicians negligently performed the surgery "in that the implant was not properly secured, shifted and resulted in significant collapse of the globe of the left eye ", and the stitches left in the left eye from the surgery " became knotted and imbedded in the cornea and which were attempted to be removed and/or corrected during the surgery performed by Dr. Florakis on October 3, 2008." [Supplemental Bill of Particulars ¶ 1].

Motion and Contentions of the Parties

Defendants move for relief pursuant to CPLR 3211 after the time in which to serve the responsive pleadings has expired (CPLR 3211 (e)), and despite the fact that the responsive pleadings have been served.

Defendants maintain that the malpractice claims are time-barred as a matter of law as they arise from the surgery performed on June 8, 2004, and they were not interposed until January 26, 2009, more than four and one-half years after the surgery. It is also argued that plaintiff has the burden of establishing a toll of the two and one-half year statute of limitations [CPLR 214-a] under the "continuous treatment" doctrine. It is maintained that plaintiff cannot make such a showing as the medical records¹, reflect that the treatment rendered after the surgery was not a course of post-operative care, but consisted of routine visits for underlying and pre-existing conditions for which plaintiff had been treated since 1997.

Defendants also maintain that any toll for "foreign objects" is also inapplicable here as the suturing material referenced in the supplemental bill does not qualify as a foreign body negligently left in the patient's body, but is a "fixation device" deliberately introduced to the body to continually secure a surgical closure.

In **opposition**, plaintiff argues that the motion should be denied as premature as neither physician has appeared for deposition, nor has either provided an affirmation to

¹ Exhibit D

support the contentions with respect to the treatment rendered after the surgery.

On the merits, it is plaintiff's contention that the statute of limitations was tolled from the date of the surgery until the last date of treatment on September 26, 2006 by virtue of plaintiff's affirmative and ongoing course of treatment directly related to her 2004 surgery including the prescription of at least eight medications at various frequencies and the scheduling of follow-up appointments to assess and treat the post-operative condition. Plaintiff submits an affidavit attesting to her belief "that [t]he sole purpose of every single visit following my surgery was to treat my left eye and remedy my post-operative complaints including my loss of vision, recessed eye in the socket, left cheekbone higher than the right and the subsequent dusty/sandy sensation I developed." [Affidavit of Neutrice Greaves ¶ 28]

In reply, by affirmation, defendants contend that plaintiff's affidavit contradicts her earlier sworn testimony, and as such, should not be considered in opposition to this "dispositive motion." Also, in reply, defendants argue that plaintiff's last visit, on September 26, 2006 was unequivocally unrelated to the surgery, and as a result, the timeliness of the claims must be measured from the date of the previous visit of October 10, 2005, more than two and one-half years before the commencement of this action.

Applicable Law

CPLR 3211(a)(5)

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the

ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired, and in consideration of the motion, a court is required to take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff (see, Benn v. Benn, 82 A.D.3d 548 [1st Dept. 2011]; Island ADC, Inc. v. Baldassano Architectural Group, P.C., 49 AD3d 815, 816, [1st Dept. 2008]) . In addition, plaintiffs' submissions in response to the motion "must be given their most favorable intendment" (Arrington v New York Times Co., 55 NY2d 433, 442, 434 N.E.2d 1319, 449 N.Y.S.2d 941 [1982], *cert denied* 459 U.S. 1146, 103 S. Ct. 787, 74 L. Ed. 2d 994 [1983]).

In the context of a medical malpractice claim, the initial burden on the health care provider is to establish that the alleged malpractice took place beyond the statutory limitations of time .

Limitations of Time

In pertinent part, the limitation of time for the commencement of an action for medical, dental or podiatric malpractice is set forth in CPLR 214-a , and provides the following.

An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure;

.....
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.

Continuous Treatment

Where applicable, "the time in which to bring a malpractice action is stayed 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" (McDermott v. Torre, 56 NY2d 399, 405 [1982], quoting *Borgia v. City of New York*, 12 NY2d 151, 155 [1962]).

As observed by the Court of Appeals in Williamson v. PricewaterhouseCoopers LLP., 9 N.Y.3d 1 [2007], a case involving an allegation of accountant malpractice, the doctrine of continuous treatment, or as there applicable, continuous representation, was first recognized in medical malpractice cases, having developed "out of concern that a malpractice cause of action might expire while the plaintiff was still a patient receiving care and treatment related to the conditions produced by the earlier wrongful acts and omissions" (*Borgia*, 12 NY2d at 156)." Williamson, at 9

As the Court explained,

[p]ut another way, the toll "enforce[s] the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action" (*Young*, 91 NY2d at 296, citing *Rizk v Cohen*, 73 NY2d 98, 104, 535 NE2d 282, 538 NYS2d 229 [1989]; see *Borgia*, 12 NY2d at 156). Thus, "a patient who is not aware of the need for further treatment of a condition is not faced with the dilemma that the doctrine is designed to prevent" (*Young*, 91 NY2d at 296).

Id.

As such, It is understood that for purposes of the application of the toll as

codified in § 214-a, treatment “does not necessarily terminate upon a patient’s last visit if further care or monitoring of the condition is ‘explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future , agreed upon at the last visit , in conformance with the periodic appointments which characterized the treatment in the past . ‘ ” (Young v. New York City Health & Hosps. Corp., 91 NY2d 291, 296 [1998], quoting Richardson v. Orentreich, 64 NY2d 896, 898-899 [1985]) The application of the toll requires both a nexus between the subsequent treatment and the original condition or complaint , as well as either the “explicit anticipation” (Young, supra) of “ongoing corrective efforts” for that same or a related condition as evidenced by a scheduled future appointment, or in “the absence of physical or personal contact between them in the interim “, a reasonable intention by the physician and patient of the “patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress .” (Richardson v. Orentreich , 64 N.Y.2d 896, 898-899 [1985]).

It is also settled that the “monitoring of an abnormality to ascertain the presence or onset of a disease or condition may constitute treatment for purposes of tolling the Statute of Limitations (Young v New York City Health & Hosps. Corp., 91 NY2d 291, 296; Nykorchuck v Henriques, 78 NY2d 255, 260-261 [Kaye, J., dissenting]). “ Oksman v. City of New York, 271 A.D.2d 213, 215 [1st Dept. 2000] As such, while for example, “sporadic visits or mere discussions of possible treatments may not suffice as ‘monitoring’ [internal citation omitted] an agreement between physician and patient to continue observation of suspicious breast tissue may constitute sufficient monitoring to

support a finding of continuous treatment [internal citation omitted].” *Id.*

It is also clear that the doctrine

does not apply to a continuing general relationship between patient and physician or to situations where the patient initiates routine, periodic examinations to check a condition (see *Massie v Crawford*, 78 NY2d 516, 519, 583 NE2d 935, 577 NYS2d 223 [1991]; *McDermott*, 56 NY2d at 406). Similarly, a physician's failure to take action or provide services in order to protect a patient's interests, does not, standing alone, constitute treatment for purposes of tolling the limitations period (see e.g. *Young*, 91 NY2d at 296-297).

Williamson, *op.cit.* at 9

Discussion and Conclusions

Upon consideration of the moving papers as well as the applicable law, it is the finding of this court that defendants have failed to sustain their burden of proof on this motion.

The complaint to which the court must afford all favorable inferences alleges that plaintiff underwent a course of treatment with the professional corporation's ophthalmologists for the period preceding and subsequent to her RK² surgery on June 8, 2004, and that the treatment afforded subsequent to such surgery related to post-operative complications that remained unresolved.

To prove as a matter of law that the post-operative treatment consisted of a series of “discrete and complete” routine examinations unrelated to any surgical

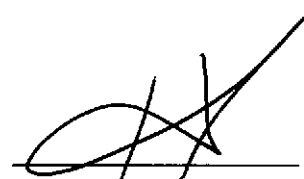
² Radial Keratotomy

complications, defendants rely on copies of the group's records. However, these medical records to the extent discernable are insufficient, without more, to serve as a basis for a reasoned determination of the nature of the post-operative treatment, that is, whether it consisted of corrective efforts or monitoring of surgical complications, or if it consisted of periodic evaluations of pre-existing conditions. Nor can the records alone support a finding of the physicians' "explicit anticipations" with respect to this treatment.

Accordingly, it is ORDERED that the motion of the defendants for an order pursuant to CPLR 3211 (a)(5), be and hereby is denied.

This constitutes the decision and order of this court.

Dated: July 6, 2011



Howard H. Sherman