

Fulton v Bobb-McKoy
2011 NY Slip Op 34066(U)
March 14, 2011
Supreme Court, Bronx County
Docket Number: 302997/08
Judge: Stanley B. Green
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NEW YORK SUPREME COURT - COUNTY OF BRONX

MAR 17 2011

IA-6

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

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DORIS FULTON,

INDEX NO.: 302997/08

Plaintiffs,

-against-

MARION BOBB-McKOY, M.D., FORDHAM FAMILY
PRACTICE, MONTEFIORE MEDICAL GROUP, and
MONTEFIORE MEDICAL CENTER,

Present:

HON. STANLEY GREEN

J.S.C.

Defendant(s).

----- X

The following papers numbered 1 to 3 read on this motion
No. on the Calendar of January 13, 2011

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1
Answering Affidavit and Exhibits.....	2
Replying Affidavit and Exhibits.....	3
Sur-reply Affidavits and Exhibits.....	
Stipulation(s) - Referee's Report - Minutes.....	
Memoranda of Law.....	

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: March 14, 2011


STANLEY GREEN, J.S.C.

UPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

-----X
DORIS FULTON,

INDEX NO.: 302997/08

Plaintiffs,

-against-

MARION BOBB-McKOY, M.D., FORDHAM FAMILY
PRACTICE, MONTEFIORE MEDICAL GROUP, and
MONTEFIORE MEDICAL CENTER,

Defendants

DECISION

-----X

HON. STANLEY GREEN

The motion by Marion Bobb-McKoy, M.D., Fordham Family Practice, Montefiore Medical Group and Montefiore Medical Center for an order dismissing the allegations of malpractice for all treatment prior to October 11, 2005 with prejudice on the ground that the treatment is barred by the statute of limitations is granted.

Plaintiff commenced this medical malpractice action to recover damages for defendants' failure to appreciate the signs and symptoms of non-small cell carcinoma and failure to diagnose non-small cell carcinoma during the period from May 2002 through August 2006.

Defendants seek dismissal of all claims of malpractice arising out of treatment prior to October 11, 2005 on the ground that they are barred by the applicable 2 ½ year statute of limitations. In support of the motion, defendants submit copies of plaintiff's treatment records and the report of Dr. Weinberg, dated August 28, 2006.

The medical records show that plaintiff was treated at Fordham Family Practice (FFP) on ten occasions during the period from May 28, 2002 through August 8, 2006: May 28, 2002, July

1, 2002, January 2004, August 16, 2004, May 17, 2005, July 6, 2005, August 9, 2005, April 11, 2006, July 10, 2006 and August 6, 2006. She was treated by Dr. Bobb-McKoy on each visit, except the August 15, 2004 visit, when she was treated by Dr. McLeod, and the July 10, 2006 visit, when she was treated by Dr. Dahan.

The records also show that on May 28, 2002, plaintiff presented with complaints of gas, post-nasal drip, sinus congestion and a hoarse throat. Her physical examination was normal, except for a lipoma on the back and thick, lichenified (thickening of the skin) toenails and thumbnails. Dr. Bobb-McKoy prescribed Flonase for the post nasal drip and Sporanox, an anti-fungal medication, for the toenails. She also ordered lab work, which revealed an elevated alkaline phosphatase and a positive Tuberculosis test. Due to the positive Tuberculosis test, plaintiff was referred for a chest x-ray. The chest x-ray, which was taken on May 31, 2002, was normal.

Plaintiff was next seen at FFP on July 1, 2002. She was scheduled for a mammogram, colonoscopy and lipoma surgery on the back. She was given a prescription for elevated blood pressure. She was told to return in six months for a hepatitis B shot and to recheck the liver function tests because Sporanox can elevate liver function tests. However, plaintiff did not return to FFP until January 2004, for an annual examination.

On January 7, 2004, plaintiff complained of a sore throat for four days and reported that she had used a pump for asthma once in the past 4-5 months and that she had quit smoking. She had also run out of her blood pressure medication. Her physical examination was normal, except she still had the thickened skin around her toenails. Dr. Bobb-McKoy referred her to a podiatrist and ordered blood work. Plaintiff was diagnosed with laryngitis and advised to gargle with salt

water and to return in 6 months. However, when the lab tests showed that plaintiff's thyroid value was low, she was sent a letter advising her to follow-up on the thyroid results.

On August 16, 2004, plaintiff returned to FFP and was seen by Dr. McLeod. She complained of sinus pressure for one day over the left eye and post-nasal drip. She had also run out of her blood pressure medication. Dr. McLeod's impression was "post nasal drip/rhinitis." He gave plaintiff a prescription for her blood pressure medication and Flonase and told her to follow up with Dr. Bobb-McKoy.

On May 17, 2005, plaintiff returned to the FFP and was seen by Dr. Bobb-McKoy. She complained of knee pains occasionally and indicated that she bangs her knees on her desk at work. She also complained of bilateral leg swelling that is worse when she is on her feet for 12 hours a day for her job. The toe fungus was still present as the pills she was given by the podiatrist did not work. The physical examination of plaintiff was normal, except that edema was noted in the lower extremities. Dr. Bobb-McKoy's impression was dependent edema. She advised plaintiff to elevate her feet and to cover the desk at work. She referred plaintiff for x-rays of her knees, which were normal.

Plaintiff returned to FFP on July 6, 2005 for an annual examination. At that time she complained of knee pain going down stairs and that she banged her knees on the board. There were no physical findings upon examination of the knees. The diagnosis was knee pain. The rest of the examination was normal except that an itchy area under the breasts and clubbing of the fingernails were noted. Blood tests and a knee x-ray were ordered.

Plaintiff returned to FFP on August 9, 2005 for the results of the x-rays and blood work. The lab results showed an elevated blood sugar level, elevated alkaline phosphatase and the

thyroid was abnormal. The knee x-ray was normal. Plaintiff reported that she "occasionally" had knee pain, but she had none that day and that Tylenol helped. Dr. Bobb-McKoy referred plaintiff to an orthopedic surgeon for the knee pain and re-ordered the blood work to check the abnormal findings.

When the blood work was returned, it showed a normal blood sugar level, an elevated alkaline phosphatase and a low thyroid value. The record indicates that a letter was sent to plaintiff on August 18, 2005 advising her to follow up on the labs, but plaintiff did not return to FFP until April 11, 2006.

On April 11, 2006, plaintiff complained of feeling light-headed for two months and bilateral knee pain. She also indicated that she was under stress because her son was sent to prison. There were no physical findings regarding plaintiff's knees that day. Dr. Bobb-McKoy referred her for a neurological examination and prescribed Naprosyn for "arthritis." Dr. Bobb-McKoy also noted that plaintiff was to return in July 2006 for a physical examination.

Plaintiff returned to FFP on July 10, 2006 and was seen by Dr. Dahan. However, the only record regarding Dr. Dahan's treatment of plaintiff that is submitted is a note regarding the lab results, which indicates that a letter was written to plaintiff to make an appointment to follow up on the lab results with her doctor. Therefore, the description of his treatment that is provided by counsel is not considered.

On August 8, 2006, plaintiff returned to FFP to follow up on the results of a chest x-ray that had been ordered by Dr. Dahan. The x-ray showed a large mass in her lung. Dr. Bobb-McKoy referred plaintiff for a CT scan and to a pulmonologist.

On August 28, 2006, plaintiff saw Dr. Weinberg, a pulmonologist for evaluation of the

mass on the right lower lobe of her lung. His report shows that plaintiff complained of dyspnea on exertion associated with wheezing and nonproductive cough that began approximately 2-3 days earlier. She denied hemoptysis, chest pain, otalgia, nasal congestion, rhinorrhea, postnasal drip, weight loss, fever, rigors or night sweats. Dr. Weinstein discussed the diagnostic possibilities with plaintiff, including carcinoma and he recommended fiberoptic bronchoscopy as a means of making the diagnosis.

Dr. Weinberg's report shows that on August 28, 2006, he evaluated plaintiff for a mass on the right lower lobe of the lung. He noted that she had complaints of dyspnea on exertion associated with wheezing and non-productive cough. She reported that her complaints began approximately 203 days earlier and the severity was mild.

Plaintiff opposed the motion on the ground that it was premature because the motion to amend the caption and substitute Sheila Chestnut as executrix was still pending at the time the motion was filed. Plaintiff also opposed the motion on the ground that defendant failed to submit sufficient evidence in support of their claim and triable issues of fact exist as to whether the defendants continuously failed to properly diagnose and treat plaintiff from May 2002 through August 8, 2006.

In opposition to the motion, plaintiff submits the redacted affidavit of an expert, who opines, inter alia, that: (1) the defendants continuously rendered negligent care and treatment to Ms. Fulton from May 30, 2002 through August 8, 2006; (2) there were no gaps in treatment; and (3) that plaintiff "continually presented with signs and symptoms of non-small cell lung cancer at early stages such that with a timely diagnosis, the non-small lung cancer, which ultimately caused her death on May 9, 2009, could have been treated and cured."

He also opines that based upon plaintiff's history of smoking one pack of cigarettes per day, her exposure to second hand smoke, history of asthma and the findings of elevated alkaline phosphatase in May 2002 and July 2002, her symptoms in January 2004 and August 2004, her complaints of bilateral knee pain and bilateral leg swelling on May 17, 2005 and the finding of hypertrophic ostoarthopathy (finger clubbing) on July 6, 2005, defendants had should have, but failed to, order a chest x-ray, CT scan of the chest and sputum test and establish a differential diagnosis, ruling out lung disease, including lung cancer, as a cause of the elevated alkaline phosphatase and her other symptoms. He concludes that as a direct and proximate result of the defendants' continuous acts, there was "at least a 16th month delay," beginning in May of 2005 through September of 2006, in a diagnosis of non-small cell lung cancer and that the delay in diagnosis cause tumor to become inoperable, un-treatable and incurable.

In reply to plaintiff's opposition, defendants submitted the affidavit of Dr. Michael Grossbard, who opines that plaintiff was treated for routine annual examinations and separate distinct visits for refills of medications and for separate visits for knee pain, post nasal drip and fungal infection of the nails, but she was not treated continuously from May 2002 through August 2006 for symptoms suggestive of lung cancer.

Despite plaintiff's contention to the contrary, defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiffs' claims to the extent they are based upon acts and omissions that occurred before October 11, 2005 because plaintiff commenced this action on April 11, 2008, more than two years and six months after those acts and omissions took place (O'Donnell v. Siegel, 49 AD3d 415). Thus, the burden shifted to plaintiffs to raise a triable issue of fact with respect to whether the continuous treatment doctrine

tolled the statute of limitations for those claims. She has failed to meet this burden.

The continuous treatment toll was created to enforce the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in a physician-patient relationship in order to ensure the timeliness of a medical malpractice action (Rizk v. Cohen 73 NY2d 98; Borgia v. City of New York, 12 NY2d 151). Because a patient who is not aware of the need for further treatment of a condition is not faced with the dilemma the doctrine is designed to prevent, the primary focus in determining whether the doctrine applies in a given case must remain with the patient (Allende v. NYCHHC 90 NY2d 333). A patient's continuing general relationship with a physician or a routine, periodic health exam will not satisfy the doctrine's requirement because the continuous treatment doctrine is not applicable when the consultations are not part of "continuing efforts by a physician to treat a particular condition (Massie v. Crawford, 78 NY2d 516).

Plaintiff's medical records show that prior to October 11, 2005, she received treatment for discrete complaints related to her sinus, toenails, throat, knees and legs and there was no continuous treatment for a lung condition. Even accepting as true the facts as alleged by plaintiff on this motion and disregarding the affidavit of defendants' expert submitted in reply, plaintiff has failed to raise a material issue of fact as to whether the continuous treatment doctrine applies to the treatment provided to her by FFP and Dr. McKoy prior to October 11, 2005.

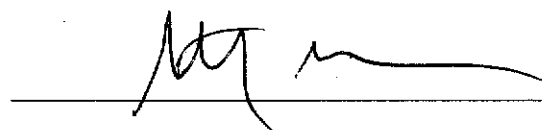
The cases cited by plaintiff as authority for her contention that there was continuous treatment in this case are factually distinguishable from the instant case. For example, in Marun v. Coleburn (291 AD2d 194), where the court decided there was an issue of fact as to whether there was continuous treatment, the plaintiff had been treated for urinary tract complaints prior to

and subsequent to, a two year lapse in treatment. That is not the case here, where plaintiff's records show that she was treated for complaints related to her throat, sinus, toenails, knees and legs on the visits prior to October 11, 2005 and there is no evidence of continuous treatment for any complaints other than toenail fungus and high blood pressure.

Accordingly, defendants' motion to dismiss plaintiff's claims for treatment prior to October 11, 2005 is granted.

This constitutes the decision and order of the court.

Dated: March 14, 2011

A handwritten signature in black ink, appearing to read 'St Stanley Green', is written over a horizontal line.

STANLEY GREEN, J.S.C.