

Feinstein v Norwegian Christian Home & Health Ctr., Inc.
2011 NY Slip Op 34220(U)
February 3, 2011
Supreme Court, Kings County
Docket Number: 157/09
Judge: Sylvia O. Hinds-Radix
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of February, 2011.

P R E S E N T:

HON. SYLVIA O. HINDS-RADIX,
Justice.

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ANDREW FEINSTEIN AND LINDA COHEN, AS CO
ADMINISTRATORS OF THE ESTATE OF FRANCES
FEINSTEIN AND ANDREW FEINSTEIN AND LINDA
COHEN, INDIVIDUALLY,

Plaintiffs,

- against -

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NORWEGIAN CHRISTIAN HOME & HEALTH CENTER,
INC., IRA HOLLENDER, M.D., ELLEN DREXLER, M.D.,
LEV KUCHER, M.D., AND OLENA KSOVRELL, M.D.,

Defendants.

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The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1 - 4
Opposing Affidavits (Affirmations)_____	5
Reply Affidavits (Affirmations)_____	6
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant Lev Kucher, M.D., (Dr. Kucher) moves for an order, pursuant to CPLR 3211 (a) (5), dismissing the complaint of plaintiffs Andrew

Feinstein and Linda Cohen, as co-administrators of the estate of Francis Feinstein, in its entirety, with prejudice, as against Dr. Kucher.

Background

On February 6, 2006, plaintiffs' decedent 74 year-old Francis Feinstein was admitted to the Assisted Living Facility at the Norwegian Christian Home (Norwegian) located in Brooklyn, New York. Shortly after Ms. Feinstein's admission, Dr. Kucher was requested to provide a psychiatric consultation. The record reveals that he saw Ms. Feinstein on several occasions from February 15, 2006 through June 28, 2006 and prescribed various medication during that time, with the last medication order occurring on June 14, 2006.

On June 16, 2006, plaintiff's decedent was taken out of Norwegian for an outside consultation with Dr. Ellen Drexler, a neurologist. Following this consultation, Dr. Drexler issued orders changing Mrs. Feinstein's medications. These medication orders were implemented by the staff at Norwegian. On July 8, 2006, Mrs. Feinstein was found lying on the floor next to her bed and was taken to Lutheran Medical Center with a head injury. She never returned to Norwegian. She died on September 14, 2007 of causes unrelated to the fall. Thereafter, plaintiffs commenced the instant action alleging negligence and medical malpractice as against Dr. Kucher.

Dr. Kucher's Motion

Dr. Kucher moves for an order, pursuant to CPLR 3211 (a) (5), dismissing the complaint in its entirety, with prejudice, as asserted against him. Dr. Kucher argues that he

last treated Ms. Feinstein on June 28, 2006 and that the summons and complaint was not filed until January 5, 2009, which he contends, is after the statute of limitations had expired as against him on December 28, 2008. He further argues that the last time that he issued any medication orders for Ms. Feinstein was on June 14, 2006, after which, on June 16, 2006, Dr. Drexler began treating her.

CPLR § 214-a requires that an action for medical practice 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 . . .” An action for medical malpractice must be commenced within 2½ years of the date of accrual (CPLR 214-a). A claim generally accrues on the date of the alleged wrongful act or omission (*Nykorchuck v Henriques*, 78 NY2d 255).

A defendant who seeks dismissal of a complaint pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired (*see LaRocca v DeRicco*, 39 AD3d 486, 486-487 [2007]; *Gravel v Cicola*, 297 AD2d 620 [2002]). The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies (*see LaRocca*, supra; *Gravel v Cicola*, supra at 621).

In support of his motion, Dr. Kucher submits an affidavit in which he states:

“ I treated Ms. Feinstein as a consultant at Norwegian . . . I am not employed by Norwegian. . . When I treat residents at

Norwegian . . . I bill the residents' insurance carriers or Medicare/Medicaid. I do not receive any payment directly from Norwegian . . . I last treated Ms. Feinstein on June 28, 2006.”

Dr. Kucher's affidavit also recounts that he last issued a medication order for Ms. Feinstein on June 14, 2006. He further states that Dr. Drexler had begun treating Ms. Feinstein on June 16, 2006 and had issued orders changing her medications up to, and including on July 3, 2006. With this affidavit, Dr. Kucher has established that his treatment of Ms. Feinstein ceased on June 28, 2006, and, thus, that the time in which to bring a claim against him sounding in medical malpractice ceased on December 28, 2008. Thus, he has demonstrated that the claims asserted against him were time barred. The burden now shifts to plaintiffs to establish that the cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such an exception applies (*see LaRocca v DeRicco, supra; Gravel v Cicola, supra* at 621).

In opposition, plaintiffs contend that the testimony of Denise Fazio, RN, who was produced as a witness on behalf of Norwegian, reveals that Dr. Kucher was a member of Norwegian's staff and was the psychiatrist assigned to Ms. Feinstein on the date of her admission to the facility. They also point to Ms. Fazio's testimony that Ms. Feinstein remained under Dr. Kucher's care until her date of discharge from Norwegian on July 26, 2006. In making this claim they note that Ms. Fazio testified that, although Ms. Feinstein was transferred to Lutheran Medical Center on July 9, 2006, and never returned to

Norwegian, her file and bed remained open pursuant to regulations until her discharge on July 26, 2006. Accordingly, plaintiffs contend that this action, was timely filed on January 5, 2009. Additionally, they point to Fazio's testimony that Dr. Drexler did not take over Ms. Feinstein's care because Dr. Drexler was a neurologist, while Dr. Kucher was a psychiatrist.

The court disagrees. Dr. Kucher has demonstrated, through his affidavit, that he last treated Ms. Feinstein on June 28, 2006 thus the statute of limitations to assert any claims sounding in medical malpractice as against him expired on December 28, 2008. Moreover, a careful reading of Ms. Fazio's testimony at pages 573- 575 reveals that she testified as follows:

Q: So would Dr. Kucher have been at the facility checking on patients that needed his assistance some time between the 28th and the 9th of July?

A: No.

Q: So would Dr. Kucher have been on the premises on any kind of regular basis to visit with patients and I don't mean just Ms. Feinstein; he is on staff, correct?

A: That's correct.

Q: He would come every two weeks or as needed to check in on patients, correct?

A: That's correct.

Q: And one of the patients he would check in on is Ms. Feinstein, is that correct?

A: That's correct but I didn't understand you I wasn't sure what you mean.

Q: One of the patients he would check in on was Ms. Feinstein, correct?

A: The 28th was the last time he saw her.

Q: Subsequent to the 28th, did he visit the hospital again, not for Ms. Feinstein in particular, did he make his way back into the hospital on a two week basis?

A. Do you mean the assisted living?

Q: Yes, I said hospital, I'm sorry. So he would have made another visit to the assisted living facility?

A: Yes.

Q: And at that time he would run through and see who he had to see that day, correct?

A: That's correct.

Q: And if Ms. Feinstein wasn't on the litigation [list], he wouldn't see her that day, is that correct?

A: That's correct.

Q: Otherwise, he was there to see her if her name was put on the list, is that correct?

A: That's correct.

Moreover, Ms. Fazio testified that it was Dr. Drexler who had issued medication orders for Ms. Feinstein on June 16th and up until July 3, 2006 and that these orders were being implemented by Norwegian staff. Accordingly, plaintiffs' assertion that Fazio testified

that Kucher did not stop treating Ms. Feinstein in his role as her assigned staff psychiatrist until the "time of discharge on July 26, 2006 is belied by the testimony cited above.

Accordingly as Dr. Kucher has made a prima facie showing, that so much of the complaint insofar as asserted against him concerning alleged malpractice committed by him was time barred (see CPLR 214-a) and plaintiffs have failed to establish that the cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such an exception applies. Based upon the foregoing, Dr. Kucher's motion seeking an order dismissing the complain insofar as asserted against him with prejudice is granted. This action is severed accordingly, and it is further

ORDERED, that the caption is amended to read as follows:

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Andrew Feinstein and Linda Cohen, as Co-
Administrators of the Estate of Frances
Feinstein and Andrew Feinstein and Linda
Cohen, Individually,
Plaintiffs,

- against -

Norwegian Christian Home & Health Center,
Inc. and Olena Ksovreli, M.D.,
Defendants.

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ENTER,

J. S. C.

7 HON. SYLVIA O. HINDS-RADIX