

Petito v Roberts

2012 NY Slip Op 30223(U)

January 26, 2012

Sup Ct, Richmond County

Docket Number: 101126/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 101126/08
Motion No.: 5**

**ROCCO PETITO and
CHRISTINE PETITO**

Plaintiffs

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**STEPHEN ROBERTS, MD and
JOSEPH MOTTA, MD, PC**

Defendants

The following items were considered in the review of the following motion for dismissal or summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion for Dismissal and Summary Judgment is as follows:

The defendant, Stephen Roberts, MD (“Dr. Roberts”) moves for dismissal or summary judgment against the plaintiffs, Rocco Petito and Christine Petito, asserting lack of timeliness and lack of merit. The action brought by the plaintiffs against the defendant Dr. Roberts is dismissed.

Facts

The plaintiff, Mr. Petito, first saw Dr. Roberts for medical care on April 26, 2005. At that time Dr. Roberts was an employee of Prime Care Urgi Center (“Prime Care”), an out-patient medical care provider. Mr. Petito complained of urinary frequency lasting several days and a urine analysis was abnormal. It was presumed Mr. Petito had a urinary tract infection. Mr. Petito was prescribed oral antibiotics at that first visit and advised to return for confirmation of a cure.

Over subsequent weeks and visits, the urine analysis failed to revert to normal and Mr. Petito was prescribed further antibiotics. May 17, 2005, Dr. Roberts referred Mr. Petito to a urologist, Dr. David J. Lehr. Dr. Roberts never saw Mr. Petito again.

Dr. Lehr ordered a computerized tomography scan (“CT”) scan and forwarded his written consultation to a different doctor who shared Dr. Roberts’ last name. The CT scan showed a questionable lesion in the rectum and Dr. Lehr again forwarded the results to the wrong physician. Dr. Lehr advised that Mr. Petito return to the defendant for further care with regard to the CT scan. Dr. Lehr saw Mr. Petito again on June 20, 2005. However, Mr. Petito elected not to see Dr. Lehr again on the next scheduled visit.

Dr. Roberts ceased his employ with the Prime Care in September 2006. Mr. Petito asserts that he attempted to contact Dr. Roberts several times in order to obtain the results of his urologic visit within the week after the CT Scan. Mr. Petito states he was never told the results of his urologic consultation. On April 30, 2007, Mr. Petito returned to Prime Care complaining of testicular pain. He was seen at Prime Care by Jeffrey Tambor, MD, whom he saw on May 10, May 21, and June 25 of 2007. On October 7, 2007, Mr. Petito saw Dr. Tambor for frequent, loose bowel movements. He returned on October 11, 2007 and was referred to a gastroenterologist. Ultimately, Mr. Petito was diagnosed as having metastatic colon carcinoma. The plaintiffs assert that the cancer was originally seen on the CT scan performed in 2005.

A verified complaint was filed against Dr. Roberts on March 14, 2008. Issue was joined by service of a verified answer on June 12, 2008. An amended verified answer was later served on June 17, 2008. In both the answer and verified answer an affirmative defense was raised invoking the statute of limitations. Dr. Roberts’ motion for dismissal or summary judgment was filed on August 26, 2011.

Discussion

This is an action based upon alleged malpractice in failing to timely diagnose colon cancer. The statute of limitations for medical malpractice actions in adults that is not based upon a foreign body is two years and six months from the date of the last treatment within a course of continuous treatment for the same illness or condition giving rise to the malpractice.¹ The time tolls from the last treatment of a “continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure.”² A motion to dismiss may be based on the statute of limitations.³ To preserve this affirmative defense, it must be brought forth within the defendant’s answer.⁴ Here, an affirmative defense invoking the statute of limitations was stated within both Dr. Roberts’ answer and his amended answer. Therefore, Dr. Roberts may assert this defense against an untimely summons and complaint in this action.

The doctrine of relation back is not germane to this action. “As codified in New York’s Civil Practice Law and Rules, what is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are ‘united in interest,’” and where the new party knew or should have known that he was not identified as a defendant by mistake.⁵ The criteria to apply the doctrine of relation back are completely incongruent to the specifics of this action. In the instant action there is no claim previously asserted against a different codefendant united in interest to Dr. Roberts, but not originally asserted against Dr. Roberts. Moreover, the ex-employee Dr. Roberts cannot be said to

¹CPLR § 214-a.

²*Id.*

³CPLR § 3211 (a) (5).

⁴CPLR § 3211 (e).

⁵*Buran v. Coupal*, 87 NY 2d 173, 177 and 183 [1995].

be united in interest with his employer Prime Care following his departure from employment with them in Sept 2006. Nor do the circumstances fulfill the last criterion because Dr. Roberts was a named defendant from the state of this action. Therefore, the care rendered later by Prime Care and Dr. Tambor to Mr. Petito after September 2006 does not allow the statute of limitations to relate back and pertain to Dr. Roberts under the doctrine of relation back.

The statute of limitations for medical malpractice may be tolled while there is continuing course of treatment with follow-up that is for the same condition and is explicitly agreed upon by both the patient and to physician.⁶ Dr. Roberts last saw Mr. Petito on May 17, 2005 for the condition that brought Mr. Petito to Dr. Roberts' care. There is no testimony or other admissible evidence that Dr. Roberts and Mr. Petito had a mutual expectation that Mr. Petito would see or even speak with Dr. Roberts again after that last consultation together. Despite Mr. Petito's calls to Prime Care, in the absence of an mutually agreed upon interaction between Mr. Petito and Dr. Roberts after May 17, 2005, there was no continuing course of treatment with Dr. Roberts after May 17, 2005. Therefore, the two years and six month statute of limitations began to run from the last date of treatment on May 17, 2005, which expired on October 17, 2007. Since the complaint was not filed until March 14, 2008, the action against Stephen Roberts, M.D. is dismissed because it was time barred by the statute of limitations.

The branch of the motion requesting summary judgment on the merits has not been reached because it is mooted by dismissal of the action.

⁶*Plummer v. New York City Health and Hosps. Corp.*, 98 NY 2d 263, 267-268 [2002].

Accordingly, it is hereby:

ORDERED, that the motion for dismissal made by the defendant Stephen Roberts, MD against the plaintiffs Rocco Petito and Christine Petito is granted with prejudice; and it is further

ORDERED, that the name of Stephen Roberts, MD shall be stricken from the caption by the Clerk of the Court.

ENTER,

DATED: January 26, 2012

Joseph J. Maltese
Justice of the Supreme Court