

**Robertson v New York City Health & Hosps. Corp.**

2012 NY Slip Op 30579(U)

March 8, 2012

Supreme Court, New York County

Docket Number: 114274/09

Judge: Douglas E. McKeon

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

PRESENT: Douglas E. McKeon  
Justice Supreme Court  
*Justice*

PART 38

Robert Robertson

INDEX NO. 114274/09

- v -

MOTION DATE \_\_\_\_\_

NYCHHC

MOTION SEQ. NO. (004)

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

*This motion is decided in accordance with the annexed Memorandum Decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
MAR - 9 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/8/12

Douglas E. McKeon  
Douglas E. McKeon  
Justice Supreme Court J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER / JUDG.

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

-----X  
ROBERT ROBERTSON,

Plaintiff,

-against-

NEW YORK CITY HEALTH & HOSPITALS CORP.,

Defendant.

-----X  
HON. DOUGLAS E. MCKEON:

MEMORANDUM DECISION

Index No.: 114274/09

**FILED**

**MAR - 9 2012**

**COUNTY CLERK'S OFFICE  
NEW YORK**

Motion, by defendant New York City Health and Hospitals Corporation ("NYCHHC"), for an order dismissing plaintiff's claims pursuant to CPLR § 3211 and the General Municipal Laws as to treatment rendered prior to November 21, 2008 and pursuant to CPLR 3212 granting summary judgment to the defendant for claims as to treatment rendered on and subsequent to November 21, 2008 is granted as follows:

This action involves medical malpractice relating to the delayed diagnosis of plaintiff's prostate cancer beginning with his first visit to Harlem Hospital Center on June 29, 2006 and then at visits to the Sydenham Clinic on September 14, 2006, October 30, 2006, December 1, 2006, February 1, 2007 and October 4, 2007.

It is claimed that NYCHHC failed to appreciate and follow up on the results of routine screening Prostate-Specific Antigen ("PSA") tests done as part of plaintiff's (a 64 year old man) annual physical examinations on September 14, 2006 and October 4, 2007. On November 21, 2008, at another physical examination, the results of the previous PSA were noted and plaintiff was referred to a urologist and subsequently diagnosed with advanced stage prostate cancer. Since then, plaintiff has been continuously treated at Metropolitan Hospital Center and the Sydenham Clinic.

Defendant's motion to dismiss for claims as to treatment rendered prior to November 21, 2008

Defendant sets forth that plaintiff's claims premised on treatment prior to November 21, should be dismissed. It is argued that plaintiff's notice of claim was not timely filed and plaintiff did not commence this action within the one year and 90 day statute of limitations. Further, plaintiff may not rely on the continuous treatment doctrine to render his notice of claim or commencement timely.

Plaintiff served a notice of claim with reference to the instant action on or about March 20, 2009 and commenced the action by the filing of the summons and complaint on or about October 13, 2009. It is claimed that the diagnosis of plaintiff's prostate cancer was delayed despite persistently rising PSA tests, that defendant failed to perform regular digital rectal examinations, and failed to treat the plaintiff relative to prolonged and persistent complaints and indications of prostate cancer. With this court's permission, plaintiff served an amended notice of claim to extend the dates of treatment. Since plaintiff's notice of claim and summons and complaint were served beyond the 90 days after any treatment dates preceding November 21, 2008 and the summons and complaint were filed well beyond the one year and 90 day statute of limitations, defendant seeks to dismiss those portions of plaintiff's claims that were untimely.

Additionally, defendant argues that the focus of plaintiff's care and treatment prior to November 21, 2008 was not related to the same illness giving rise to the alleged malpractice.

In opposition, plaintiff argues that a continuous course of treatment relative to plaintiff's prostate cancer was established. The visits to the defendant facilities were to monitor plaintiff's overall condition, which included being monitored for prostate issues. Thus, plaintiff is entitled to the continuous treatment doctrine, which would toll the statute of limitations and render the claims timely. Plaintiff's opposition is supported by an expert affirmation. Plaintiff's expert,

board certified in internal medicine and oncology, opines that defendant failed to properly address and assess plaintiff's symptoms consistent with prostate cancer and had the screening and follow up for elevated PSA testing been ordered for plaintiff, the cancer would have been detected in the early stages, which would have made treatment more effective and would have increased plaintiff's chances of survival.

Under CPLR 214, the statute of limitations for medical malpractice does not begin to run until the continuous course of care or treatment has terminated. Essential to the application of the doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit. *See Nykorchuck v. Henriques*, 78 NY2d 255 (1991). The mere continuing relation between physician and patient nor the continuing nature of a diagnosis is sufficient to satisfy the requirements of the doctrine. *Id.* Here, in essence, plaintiff alleges nothing more than defendant's failure to timely diagnose his prostate cancer, omissions that do not amount to a course of treatment. *Id.* Nor has plaintiff shown that he and his physician explicitly contemplated further treatment for his prostate issues prior to November 21, 2008. *See Young v. New York City Health & Hospitals Corp.*, 91 NY2d 291 (1998). A patient remains under the continuous treatment or care of a physician between the time of the last visit and the next scheduled one where the latter's purpose is to administer ongoing corrective efforts for the same or a related condition. *See Richardson v. Orentreich*, 64 NY2d 896 (1985). The continuous treatment may be found only when further treatment is explicitly anticipated by both the physician and the patient as manifested in the form of a regularly scheduled appointment for the future and agreed upon during the last visit. *Id.*

Plaintiff was treated at Harlem Hospital on June 29, 2006 for an upper respiratory infection. Plaintiff's visits to the Sydenham Clinic on September 14, 2006 and October 3, 2007

were for annual physical examinations. As part of the annual physical exam for males of a certain age, among other lab work, a PSA was ordered. It is uncontested that the PSA tests were not ordered in response to any urinary complaints. The visits that took place between these annual physical examinations were for follow-up visits for conditions unrelated to prostate cancer. Plaintiff's testimony that he made urinary complaints during these visits is belied by the plaintiff's own medical records. Additionally, plaintiff was not aware of the need for further treatment of a condition as he admitted that he did not consider his urination complaints to be a problem—he attributed them to age. Though plaintiff's PSA levels were slightly elevated during this time period, plaintiff was unaware of same and a course of treatment was not established such that he may be entitled to the continuous treatment doctrine's toll.

Accordingly, defendant's motion to dismiss plaintiff's complaint as to treatment rendered prior to November 21, 2008 is granted.

Summary Judgment in favor of the defendant as to claims for treatment rendered on and subsequent to November 21, 2008

Defendant concedes that the action is timely with respect to care beginning on November 21, 2008 and continuing up to and beyond the time plaintiff filed a notice of claim and an amended notice of claim. Thus, defendant moves for summary judgment as to claims for treatment rendered on and subsequent to November 21, 2008.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged. *See Roques v. Nobel*, 73 AD3d 204, 206 (1st Dep't 2010). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential

allegations in the bill of particulars. *Id.* If the movant makes a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require trial of the action. *Id.* Specifically, in a medical malpractice action, a plaintiff opposing summary judgment must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of plaintiff's injuries. *See Roques*, 73 AD3d at 207.

Here, movant has made a prima facie showing of its entitlement to summary judgment, which has gone unrebutted. Defendant's position is supported by the affirmation of Barry Rubin, M.D., a board-certified urologist. He opines, to a reasonable degree of medical certainty, that the care rendered to plaintiff on and subsequent to November 21, 2008 was in accordance with accepted standards of medical practice that were in effect at the time in question. Notably, plaintiff does not oppose defendant's part of the motion seeking partial summary judgment.

Accordingly, defendant's application for an order granting partial summary judgment in favor of the defendant relating to claims for treatment rendered on and subsequent to November 21, 2008 is granted without opposition.

The Clerk of this Court is respectfully directed to enter judgment in favor of the defendant New York City Health and Hospitals Corporation.

This constitutes the decision and order of the court.

DATED: New York, New York  
March 8, 2012

**FILED**  
MAR - 9 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

*Douglas E. McKeon*  
Douglas E. McKeon, J.S.C.  
Douglas E. McKeon  
Justice Supreme Court