

Pitkow v Lautin

2012 NY Slip Op 30758(U)

March 22, 2012

Sup Ct, New York County

Docket Number: 800047/11

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16
PART

Index Number : 800047/2011
PITKOW, LISA
vs.
LAUTIN, EVERETT M.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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 and the two cross-motions are determined in accordance with the accompanying memorandum decision.

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

FILED
MAR 26 2012
NEW YORK COUNTY CLERK'S OFFICE

Dated: MAR 22 2012

Alice Schlesinger
ALICE SCHLESINGER 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
LISA PITKOW,

Plaintiffs,

Index No. 800047/11
Motion Seq. No. 001

-against-

EVERETT LAUTIN, M.D., INSTITUTE BEAUTE
AVENTIS PHARMACEUTICALS, INC., and
SANOFIAVENTIS U.S., INC.,

Defendants.
-----X

SCHLESINGER, J.:

In this medical malpractice action the defendant Dr. Everett Lautin is moving to dismiss pursuant to CPLR §3211(a)(5) and CPLR §214-a. His counsel argues that the action is time-barred because the allegations of negligence vis-a-vis Sculptra being injected into the plaintiff's face occurred on only two days, February 13, 2008 and March 12, 2008. The complaint was filed on February 14, 2011 and the statute of limitations for medical malpractice is 2½ years. Therefore, counsel argues that the action is time-barred since it was begun long after the 2½ years had elapsed from March 12, 2008. The last permissible date for filing, according to counsel, would have been in September 2010.

It should be noted that plaintiff served the defendant with a Bill of Particulars on August 19, 2011. In item 3(b) of that document, plaintiff gave other dates of treatment after March 12, 2008. These were May 7, 2008 and August 5, 2009. However, consistent with the defendant's position that this case only involves the Sculptra injections, counsel rejected this Bill of Particulars as not being responsive to their inquiry and further, that the dates were not in agreement with the dates in the Verified Complaint.

The motion is supported by an affidavit from Dr. Lautin. He maintains in the affidavit that he only injected Sculptra into Ms. Pitkow's face on the two dates previously mentioned. He also states that while he did provide other treatment for the plaintiff, on other days, these involve other modalities and not Sculptra. Specifically, the other days of treatment are January 10, 2008, February 13, 2008, March 12, 2008, May 8, 2008 and finally, the last one August 5, 2009. According to Dr. Lautin, these other modalities, "The IR Deep, Lux G and 1540 fractional laser treatments are all non-ablative and are used to rejuvenate the skin superficially helping even out skin tone, color, and fine lines and wrinkles" (¶7 of November 21, 2011 Affidavit, Exh. H to Motion). Dr. Lautin also acknowledges speaking to the plaintiff on April 21, 2009, when she was at her home in Los Angeles and also speaking to her doctor Dr. Rebecca Fitzgerald in California on several occasions.

Defense counsel maintains that the August 5, 2009 pulsed light treatment is not part of the treatment which involved the Sculptra injections and is not claimed to be part of any malpractice. In this regard, counsel points out that another modality was used and it was superficial to the skin, as opposed to being an injection into the skin.

Finally, counsel also argues that not only was there no continuous treatment after March 12, 2008, but that Sculptra could not in any way be considered a fixation device. Rather, it must be considered a chemical compound. Therefore, there would not be any tolling of the statute of limitations pursuant to a foreign object exception.

In response, the plaintiff opposes Dr. Lautin's motion and also cross-moves to strike defendant's Affirmative Defense which relies on a violation of the Statute of Limitations. She also wishes to amend her complaint pursuant to CPLR §3025(b) to add "further dates of malpractice".

Her counsel argues that the doctrine of continuous treatment renders all of the defendant's treatments timely. She urges that all the visits and all of the modalities used emanated from an overall treatment plan to enhance Ms. Pitkow's facial appearance. She further asserts that this was a course of treatment that was established at an initial consultation and it was to be performed at different stages over time.

Plaintiff's counsel also argues that this motion is premature pursuant to CPLR §3212(f). She claims that more facts and discovery are needed before the matter is ripe for decision. Depositions have not been taken, and she adds that she has not yet received the entire medical file from Dr. Lautin, not even when the Court ordered it. She points out that defendant's motion papers contain dozens of pages of this record which have never before been exchanged.

As part of the background for this action, counsel points out that her client is 58 years old with a history of Multiple Sclerosis for approximately 14 years. She says that despite the fact that her client lived in California, she regularly came to New York on business. Her relationship with Dr. Lautin, a radiologist who performed cosmetic procedures, began in December 2007 and lasted through August 2009. She points out further that at a trial she would anticipate calling an endocrinologist who would testify that it was malpractice to administer Sculptra to a patient with an autoimmune disorder such as Multiple Sclerosis. Dr. Lautin was informed of the plaintiff's condition before the treatments began. Plaintiff's claimed injuries include numerous facial and intra-oral granulomas, serious osteoporosis, an aggravation of her Multiple Sclerosis, a reawakening of a latent thyroid disease, and Graves syndrome.

These papers also include an affidavit from the plaintiff. She says that on December 17, 2007, she and Dr. Lautin discussed a treatment plan which consisted of different procedures to accomplish her goal of improving the appearance of her face. This plan included Sculptra and Botox injections, laser treatments, and the application of various creams. She states that the defendant doctor told her that the initial phase would require subsequent treatments to maintain her appearance as the effects of Sculptra would only last for about 1 to 1½ years. She would then have to return for further injections.

Her lawyer urges that the whole purpose of the continuous treatment doctrine is to protect the patient from having to choose between commencing an action and continuing to receive treatment from her physician. In this regard, counsel argues that Ms. Pitkow was Dr. Lautin's patient through August 2009. They had a telephone conversation in April 2009 when painful lumps appeared on her face and in her mouth. According to Ms. Pitkow, Dr. Lautin asked her to send photographs and asked her to come to New York so that he could see her. She told him she would be in New York in August and she did schedule a visit in that month (¶¶ 5 & 6).

As to her cross-motion to amend the complaint to include additional dates, counsel argues that this would not result in prejudice to the moving defendant. The dates that counsel wishes to include are the same dates that she provided in her Bill of Particulars, which defense counsel had rejected.

There is also a cross-motion by co-defendants Suzanne Levine and Suzanne M. Levine D.P.M. d/b/a as Institute Beaute. These defendants are also moving to dismiss on statute of limitations grounds. Dr. Levine is a podiatrist and claims that she was never involved in plaintiff's treatment. She includes an affidavit where she asserts this claim and

[*6]

explains that the only treatment she provides involves feet. She insists that she had nothing to do with the Sculptra injections. She also states that she never discussed Ms. Pitkow with Dr. Lautin or in any way advised as to her treatment. She also states that Dr. Lautin's practice is independent from her own and that he is not her employee. She states that their only relationship relates to a sub-lease contract. In other words, he rents office space from her. Finally, she points out that in the plaintiff's Bill of Particulars, there is no claim of direct treatment by her or her Institute. The only allegation against her involves the principle of vicarious liability for the actions of Dr. Lautin, and she insists that there is nothing to show any vicarious liability.

Plaintiff responds by saying that Dr. Lautin is wrong when he characterizes his treatment of Ms. Pitkow as a series of discreet procedures. She argues again that the continuous treatment doctrine applies here to the overall cosmetic treatment he provided to her, as his patient. As to Dr. Levine and her Institute, counsel claims again, consistent with the complaint, that in fact this defendant would be vicariously liable for the actions of Dr. Lautin as she insists that Dr. Levine and Dr. Lautin were involved in a partnership or some kind of a joint practice. She believes that discovery and depositions, which have not yet occurred, will show that these allegations are correct.

As part of plaintiff's response to Dr. Levine's motion, counsel includes documents and photographs showing that there appears to be a real connection between these defendants. For example, all of Ms. Pitkow's records and correspondence show the name of Institute Beaute as well as the names of both defendants side by side. Secondly, every patient account statement is issued by defendant Dr. Levine and all payments were made out to this defendant. Further, it appears that the defendants own a website which states

that "Institute Beaute is the New York City practice of podiatrist Suzanne Levine DPM and Dr. Everett Lautin." Also, the defendants co-authored a book entitled "The Botox Book" that states that they are the "physician-owners of Institute Beaute" which is "A medical center which provided head to toe - rejuvenating medical treatments." There is also a photograph included in plaintiff's Reply papers which purports to show Dr. Levine and Dr. Lautin performing a cosmetic procedure together.

I am denying the defendants' motions to dismiss but without prejudice. I am also denying the plaintiff's cross-motion to strike the Affirmative Defenses. However, I will allow the amendment of the complaint so as to add additional alleged dates of treatment. As is pointed out in the plaintiff's opposition papers to both motions, there has been no discovery. Counsel for the plaintiff has only recently received additional pages from her client's medical records, some of which she says she is not able to decipher. While it is true that the continuous treatment doctrine speaks of treatment for a particular condition, I am not able to say based on all of the above that the additional treatment Ms. Pitkow received, additional to the Sculptra injections, was or was not part of treatment for one particular condition. Therefore, it is too early to decide whether or not this action is barred.

Discovery is essential, further, as to any vicarious liability of Dr. Levine and her Institute for the actions of Dr. Lautin. I believe plaintiff's counsel has shown enough here to suggest that there is in fact a relationship between these two defendants beyond simply one of landlord/tenant. If that is so and depending on what the relationship was, then arguably Dr. Levine and /or her Institute could be responsible for Dr. Lautin's action. At the conclusion of discovery, if the facts warrant it, all parties can move again for the relief that they are seeking now.

Accordingly, it is hereby

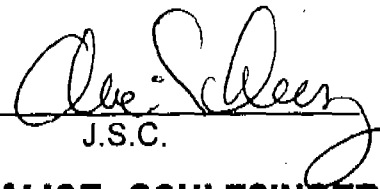
ORDERED that plaintiff's motion is granted to the extent of allowing leave to amend the complaint, but is denied insofar as it seeks to strike the Affirmative Defenses based on the Statute of Limitations. Plaintiff shall serve defense counsel and file with the County Clerk a copy of the Amended Complaint by April 10, 2012, and defendants shall answer by April 30, 2012; and it is further

ORDERED that the motion and cross-motion by the various defendants to dismiss this action as time-barred are denied; and it is further

ORDERED that counsel shall appear for a discovery conference on May 30, 2012.

Dated: March 22, 2012

MAR 22 2012


J.S.C.
ALICE SCHLESINGER

FILED
MAR 26 2012
CLERK'S OFFICE