

Kaufman v Jacobskind
2012 NY Slip Op 31586(U)
June 5, 2012
Supreme Court, Nassau County
Docket Number: 008094/10
Judge: Randy Sue Marber
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAUPresent: **HON. RANDY SUE MARBER****JUSTICE**

TRIAL/IAS PART 14

X
ANDREA KAUFMAN,

Plaintiff,

-against-

Index No.: 008094/10
Motion Sequence...03
Motion Date...03/20/12
XXX

NORMAN JACOBSKIND, D.D.S.,

Defendant.

X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant, NORMAN JACOBSKIND, D.D.S., (hereinafter "Dr. Jacobskind"), for an order pursuant to CPLR § 3212 and CPLR § 214-a granting him summary judgment and dismissing the complaint against him, is decided as hereinafter provided.

This action sounds in dental malpractice and arises out of the care and treatment rendered to the Plaintiff by the Defendant. The Plaintiff claims that the Defendant deviated from accepted standards of care in connection with said treatment and claims that the Defendant failed to advise her of the risks and alternative treatments available. The Plaintiff filed a complaint on April 26, 2010. Issue was joined by service of the Defendant's

Verified Answer on June 2, 2010.

The gravamen of the Plaintiff's complaint is that the Defendant departed from accepted standards of care in connection with the treatment of two parts of the Plaintiff's mouth. The first allegation is that the Defendant negligently inserted a bridge in violation of Ante's Rule in that it was too large of a span. The bridge spanned from Tooth # 17 through Tooth # 22. The Plaintiff claims that the Defendant was also negligent in using a wisdom tooth as a bridge abutment and in failing to timely remove the bridge. With respect to the insertion of the allegedly over-sized bridge, the Plaintiff further claims that the Defendant failed to advise her of the risks associated with said treatment as well as alternative methods of treatment. The second allegation is that the Defendant failed to properly treat Tooth # 8 in re-cementing Tooth # 8 three times without properly investigating the underlying cause of the problems of said tooth. (*See* Plaintiff's Supplemental Verified Bill of Particulars, dated July 27, 2011, ¶ 3, attached to the Defendant's Notice of Motion as Exhibit "F")

As a result of the Defendant's negligence, the Plaintiff alleges that she suffers from the following injuries, inter alia: periodontitis, surgical removal of Tooth # 20, severe gum pain; severe gum swelling, bridge removal, root removal of Tooth # 8 and periodontal surgery. (*Id.* at ¶ 8. a.)

Based upon the allegations contained in both the Plaintiff's complaint and Supplemental Verified Bill of Particulars, the acts of alleged dental malpractice occurred

between October 15, 1997 up to and including December 4, 2007.

“On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Sheppard-Mobley v. King*, 10 A.D.3d 70, 74 (2d Dept. 2004), *aff’d as mod.*, 4 N.Y.3d 627 (2005), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York Univ. Med Ctr.*, 64 N.Y.2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Sheppard-Mobley v. King*, *supra* at 74; *Alvarez v. Prospect Hosp.*, *supra*; *Winegrad v. New York Univ. Med Ctr.*, *supra*. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v. Prospect Hosp.*, *supra* at 324. The evidence presented by the opponent of summary judgment must be accepted as true and must be given the benefit of every reasonable inference. *See Demishick v. Community Housing Management Corp.*, 34 A.D.3d 518, 521 (2d Dept. 2006) citing *Secof v. Greens Condominium*, 158 A.D.2d 591 (2d Dept. 1990).

The Defendant contends that all treatment of the Plaintiff prior to October 26, 2007 is time barred. With respect to this claim, it is well settled that “[a] defendant who seeks dismissal of a complaint ... 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. 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.” *Texeria v. BAB Nuclear Radiology, P.C.*, 43 A.D.3d 403,405 (2d Dept. 2007). A dental malpractice claim generally accrues on the date of the wrongful act or omission, and a two and one-half year statute of limitations applies (CPLR § 214-a).

It should be noted preliminarily that Tooth # 8 was surgically extracted on June 7, 2001, well before the complaint was filed. (See Jacobskind Affidavit, ¶¶ 17 and 24) Additionally, the Plaintiff fails to dispute the branch of the Defendant’s motion for summary judgment with respect to Tooth # 8. Accordingly, any and all claims of alleged malpractice with respect to Tooth # 8 are **DISMISSED**. The Court will limit its review of the alleged malpractice in connection with the bridge insertion, spanning from Tooth # 17 through Tooth #22 and the injuries resulting therefrom.

Based upon Dr. Jacobskind’s medical records (Exhibit “H”) and his Affidavit (Exhibit “A”), the dates of treatment with respect to Tooth # 17 through Tooth # 22 spanned from October 15, 1997 through August 20, 2007. Dr. Jacobskind states in his Affidavit that he last treated the bridge on August 20, 2007. (See Jacobskind Affidavit ¶¶ 14-15) He further states that the visit with the Plaintiff on December 4, 2007 consisted only of a routine check-up, cleaning and x-rays.

Dr. Jacobskind first treated the Plaintiff on October 15, 1997, when she presented with severe pain in the lower left side of her mouth. At that time, Dr. Jacobskind

found a bridge spanning from Tooth # 17 through Tooth # 21 which was ill-fitted. (*See* Jacobskind Affidavit, ¶ 20) At that time, he gave the Plaintiff the following two options: (1) Tooth # 20 and Tooth # 17 extracted and the removal of partial removable denture placed or (2) root canal on Tooth # 17 and to fabricate a new bridge extending from Tooth #17 through Tooth # 22. The Plaintiff chose the latter of the two options and the Defendant fabricated and inserted a new bridge. (*See* Jacobskind Affidavit, ¶ 20)

Thereafter, Dr. Jacobskind treated the Plaintiff in connection with the bridge on November 5, 1997, December 3, 1997, December 10, 1997, December 22, 1997, January 21, 1998, January 28, 1998, February 11, 1998, August 13, 2001, December 15, 2004 and August 20, 2007. (*Id.* at ¶ 14) According to Dr. Jacobskind, on August 20, 2007, the Plaintiff presented because the left lower bridge spanning from Tooth # 17 through Tooth # 22 became loose. (*Id.* at ¶ 30) At that time, he re-cemented the bridge with permanent cement. Dr. Jacobskind states that after re-cementing the bridge, the treatment was complete and it was the last time he treated said bridge. (*Id.*) On October 17, 2007, Dr. Jacobskind re-cemented the crown on Tooth # 10. (*Id.*) Finally, on December 4, 2007, he performed a routine check-up, cleaning and x-rays. Based upon his examination, there were no problems that needed to be addressed from a dental perspective. (*Id.*)

The Defendant's evidence shows that his treatment of the bridge spanning from Tooth # 17 through Tooth # 22 was during the time period from October 15, 1997-August 20, 2007. Based on the evidence proffered by the Defendant, no treatment was rendered to

Teeth #s 17-22 after August 20, 2007.

Accordingly, based upon the Defendant's moving papers, he met his burden of establishing that treatment prior to October 26, 2007 is barred by the statute of limitations as it occurred over two and one half years prior to the commencement of this action on April 26, 2010. (CPLR § 214-a)

The burden thereby shifts to the Plaintiff to establish that the treatment falls into an exception. As noted earlier, the Plaintiff's opposition is limited solely to the treatment rendered to the Plaintiff referable to Teeth #s 17-22. In reference to Teeth #s 17-22, the Plaintiff contends that since the treatment of the bridge was within the applicable Statute of Limitations that all the treatment dates for Teeth #17-22 would be actionable under the continuous treatment doctrine.

"Under the continuous treatment doctrine, the two and one-half year Statute of Limitation for a medical or dental malpractice action is tolled until after the plaintiff's last treatment when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint." *Grippi v. Jankunas*, 230 A.D.2d 826, 826 (2d Dept. 1996); *Kaufmann v. Fulop*, 47 A.D.3d 682, 684 (2d Dept. 2008).

In order for the continuous treatment doctrine to toll the statute of limitations, the burden is on the Plaintiff to establish that Dr. Jacobskind rendered an actual course of treatment during the applicable period for the same conditions or complaints underlying the

Plaintiff's dental malpractice claims. *Chambers v. Mirkinson*, 68 A.D.3d 702, 705 (2d Dept. 2009). "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. Neither the mere 'continuing relation between physician and patient' nor 'the continuing nature of a diagnosis' is sufficient to satisfy the requirements of the doctrine". *Grippi v. Jankunas*, *supra* at 830, citing *Nykorchuck v. Henriques*, 78 N.Y.2d 255, 258-259 (1991).

Here, the Plaintiff failed to raise a viable issue of fact regarding continuous treatment despite the Plaintiff's counsel's contentions to the contrary. Counsel for the Plaintiff states that Dr. Jacobkind's assertions that he performed a general exam at the December 4, 2007 visit is directly contradicted by the Plaintiff's deposition testimony that she was in the Defendant's office in connection with problems with the bridge every four months. (See Affirmation in Opposition, page 14, citing Plaintiff's Deposition Transcript at page 107) Upon review of the referenced portion of the Plaintiff's deposition, the testimony does not support the contention by the Plaintiff's counsel. The Plaintiff testified, generally, that on average, the bridge would become loose every three to four months. (See Kaufman Deposition Transcript, page 7, attached to the Defendant's Notice of Motion as Exhibit "K") The Plaintiff did not testify, as counsel suggests, that the bridge did in fact become loose every three to four months which required a visit with the doctor. In fact, prior to the August 20, 2007 visit, the Plaintiff saw Dr. Jacobkind in connection with the bridge on December 15, 2004, 2 years and 8 months earlier. As such, counsel's arguments are unavailing.

Further review of the Plaintiff's deposition reveals that the Plaintiff could not recall the last date on which she was treated by Dr. Jacobskind in connection with the bridge spanning from Tooth # 17 through Tooth # 22. (*Id.* at page 98) She could not recall the last time she saw the doctor, the last time the bridge came loose or what the visit consisted of on December 4, 2007. (*Id.* at pages 98-99)

The Plaintiff's contentions that there was a course of treatment related to the same original condition and complaint extending to December 4, 2007 are speculative, at best. There is simply no evidence proffered by the Plaintiff that rebuts the Defendant's evidence establishing that he last treated the bridge on August 20, 2007. In addition to the Defendant's Affidavit, the medical records establish that the visit on December 4, 2007 consisted of a general exam. There is no reference in the records of the bridge being treated or any reference to Teeth #s 17-22. (*See* Exhibit "H", annexed to the Defendant's Notice of Motion) Based upon the record, the Plaintiff has failed to raise an issue of fact as to whether there has been a course of treatment established with respect to the condition that gives rise to the lawsuit.

Therefore, all of the allegations by the Plaintiff against the Defendant, Dr. Jacobskind, for dental malpractice for treatment rendered prior to October 26, 2007, are hereby dismissed as time barred.

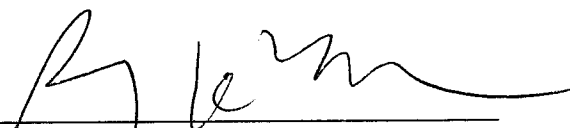
Accordingly, it is hereby

ORDERED, that the branch of the Defendant's motion seeking summary

judgment pursuant to CPLR § 214-a, is hereby **GRANTED**, and the Plaintiff's complaint is **DISMISSED**.

This decision constitutes the decision and order of the Court.

DATED: Mineola, New York
June 5, 2012



Hon. Randy Sue Marber, J.S.C.
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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE