

Javaid v Jajoo
2012 NY Slip Op 33247(U)
September 27, 2012
Supreme Court, Nassau County
Docket Number: 7472/10
Judge: Antonio I. Brandveen
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5

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

TANWEER JAVAID and SHAHLA
TABASSUM-JAVAID,

TRIAL / IAS PART 29
NASSAU COUNTY

Plaintiffs,

Index No. 7472/10

- against -

Motion Sequence No. 001

KRISHANA K. JAJOO, PHYSICIAN, P.C. and
KRISHANA K. JAJOO,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u> </u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u> </u>

The defense moves pursuant to CPLR 3211(a)(5) to dismiss the complaint on the ground it may not be maintained because of the statute of limitations. The defense contends the medical malpractice action commenced more than two years and two months after the alleged act, omission or failure complained of or the last treatment where there was continuous treatment. The plaintiff opposes the motion. The plaintiff contends the claim is not barred by the statute of limitations the continuous treatment exception applies to these circumstances. The plaintiff adds the derivative claim by the plaintiff's spouse is

tolled by the continuous treatment doctrine.

The underlying medical malpractice action arises from injuries allegedly sustained by the plaintiff from the defendant's failure to diagnose and treat cardiovascular conditions with cardiac related symptoms before a major cardiac event on May 28, 2007. The action commenced by the filing of a summons with notice on April 16, 2010. The plaintiff served the summons with notice and the verified complaint on May 26, 2010. The plaintiffs served their verified bill of particulars on or about September 3, 2010, and depositions of both plaintiffs and the defendant physician were subsequently conducted followed by an amended verified bill of particulars.

"A cause of action alleging medical malpractice accrues on the date of the alleged wrongful act or omission, and, thus, the statute of limitations begins to run on that date (*see Udell v Naghavi*, 82 AD3d 960 [2011])" (*Schwelnus v Urological Assoc. of L.I., P.C.*, 94 A.D.3d 971, 972-973, 943 N.Y.S.2d 141 [2d Dept, 2012]). The date of the filing of the summons and complaint here was beyond the two-year-and-six- month statute limitation of CPLR 214-a. The defendants satisfied their *prima facie* burden of establishing the plaintiffs commenced this action after the expiration of the statute of limitations.

Under the continuous treatment doctrine exception, however, the 2 1/2-year period does not begin to run until the end of the course of 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' " (*McDermott v. Torre, supra*, 56 N.Y.2d at 405, 452 N.Y.S.2d 351, 437 N.E.2d 1108, quoting *Borgia v. City of New York, supra*, 12 N.Y.2d at 155,

237 N.Y.S.2d 319, 187 N.E.2d 777). The purpose of the doctrine is to “maintain the physician-patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure” (*McDermott v. Torre, supra*, 56 N.Y.2d at 408, 452 N.Y.S.2d 351, 437 N.E.2d 1108). The doctrine rests on the premise that it is in the patient’s best interest that an ongoing course of treatment be continued, rather than interrupted by a lawsuit, because “the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so.” (*Id.*)

Nykorchuck v. Henriques, 78 N.Y.2d 255, 258, 577 N.E.2d 1026 [1991].

To satisfy the first element, that the treatment be continuous, “further treatment must be explicitly anticipated by both the physician and patient, as demonstrated by a regularly-scheduled appointment for the near future, which was agreed upon at the last visit and conforms to the periodic appointments relating to the treatment in the immediate past” (*Monello v. Sottile, Megna*, 281 A.D.2d 463, 464, 722 N.Y.S.2d 41; *see Young v. New York City Health & Hosps. Corp.*, 91 N.Y.2d at 296, 670 N.Y.S.2d 169, 693 N.E.2d 196; *McDermott v. Torre*, 56 N.Y.2d at 405, 452 N.Y.S.2d 351, 437 N.E.2d 1108; *McInnis v. Block*, 268 A.D.2d 509, 702 N.Y.S.2d 358).

To satisfy the second element, the course of treatment must have been “established with respect to the condition that [gave] rise to the lawsuit” (*Nykorchuck v. Henriques*, 78 N.Y.2d 255, 259, 573 N.Y.S.2d 434, 577 N.E.2d 1026; *see Young v. New York City Health & Hosps. Corp.*, 91 N.Y.2d at 295, 670 N.Y.S.2d 169, 693 N.E.2d 196)

Roca v. Perel, 51 A.D.3d 757, 760, 859 N.Y.S.2d 203 [2d Dept, 2008].

In opposition, the plaintiffs present evidence raising a triable issue of fact as to whether the continuous treatment doctrine applies to toll the limitations period (*see Gomez v. Katz*, 61 A.D.3d 108, 874 N.Y.S.2d 161 [2d Dept, 2009]). The plaintiffs satisfy both CPLR 214-a elements. The plaintiffs show the patient here had a regularly-scheduled appointment for the near future, which was agreed upon at the last visit by the doctor and the patient, and the appointment conformed to the periodic appointments relating to the cardiovascular treatment in the immediate past of the patient.

The plaintiffs demonstrate the course of treatment was established with respect to the cardiovascular condition which gave rise to this medical malpractice action. Thus, the defendants have not met their burden under CPLR 3211(a)(5) to dismiss the complaint.

Accordingly, the motion is denied.

So ordered.

Dated: **September 27, 2012**

ENTER:



J. S. C.

NON FINAL DISPOSITION

ENTERED
OCT 01 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE