

Gaber v Benhuri Ctr. for Laser Dentistry

2013 NY Slip Op 30378(U)

February 15, 2013

Supreme Court, New York County

Docket Number: 800164/11

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

GABER, MICHAEL

INDEX NO.

800164/11

MOTION DATE

1-8-13

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -

THE BENHURI CENTER FOR
LASER DENTISTRY, ET AL.

The following papers, numbered 1 to 10 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-8

9

10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION &
ORDER

FILED

FEB 20 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/15/13

JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
MICHAEL GABER,

Plaintiff,

Index No. 800164/11

-against-

Decision and Order

THE BENHURI CENTER FOR LASER DENTISTRY
and MARK BENHURI, DDS,

Defendants.
-----X

JOAN B. LOBIS, J.S.C.:

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

This dental malpractice case arises out of a treatment plan that the Defendants, the Benhuri Center for Laser Dentistry and Mark Benhuri, D.D.S., provided for the Plaintiff, Michael Gaber. The Defendants move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules, claiming that Plaintiff's cause of action is barred by the statute of limitations. Defendants claim that Plaintiff's visit to Dr. Benhuri in September 2009 was not part of a continuous course of treatment under C.P.L.R. § 214-a to toll the running of the statute of limitations for Defendants' treatment of Plaintiff in April 2008 and earlier, which treatment occurred prior to two and half years before the filing of this action in May 2011. For the following reasons that motion is denied.

Dr. Benhuri created a dental treatment plan for the plaintiff, Michael Gaber, in June 2005, which was implemented over several years. Treatment included extractions, implants, bridges, and crowns, among others. Mr. Gaber, who is a Ukrainian-born U.S. citizen, is president of a Russian manufacturing company. He travels to Russia approximately four times a year and spends approximately six months of each year in Russia. When needed he has sought dental treatment in Russia but considers Dr. Benhuri to have been his dentist during the events of this case. The last treatment activity to which both sides agree occurred was in April 2008. At that time Dr. Benhuri

3] permanently cemented a bridge at sites 12-14. At his deposition, Mr. Gaber testified that he had previously seen a dentist in Russia for complaints with his implant and upper left side bridge as provided by Dr. Benhuri. Plaintiff claims that he spoke with Dr. Benhuri and the doctor told him he would send a missing screw to the Russian dentist, but he did not. Mr. Gaber testified in his deposition that Dr. Benhuri suggested that the Russian dentist cut the bridge and cement it to an earlier tooth. In treating Mr. Gaber in April 2008, following Gaber's return from Russia, Dr. Benhuri asked Mr. Gaber to pay the laboratory costs for creating a new bridge at sites 12-14, but Mr. Gaber refused.

Approximately 17 months later, on September 16, 2009, Mr. Gaber returned to Dr. Benhuri. Mr. Gaber reported that he had lost one of his implants three months earlier. Mr. Gaber, who at that time resided in Florida, presented a treatment plan to Dr. Benhuri from a dentist in Florida that proposed redoing all of Dr. Benhuri's work. Dr. Benhuri disagreed. Dr. Benhuri cleaned Mr. Gaber's teeth and offered to place an implant around tooth 13 and a new bridge or sinus lift and charge him laboratory fees only. He took five x-rays.

The statute of limitations for an action for dental malpractice provides in pertinent part that the action is to be commenced within two years and six months of "the . . . last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." C.P.L.R. § 214-a. The statute further defines continuous treatment as excluding "examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition." *Id.* Underlying the doctrine is the policy that the best interests of a patient warrant continued treatment with an existing provider, rather than stopping treatment,

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since the provider is best positioned to identify and correct any malpractice. E.g., Rudolph v. Lynn, D.D.S., P.C., 16 A.D.3d 261, 412 (1st Dep't 2005). Treatment need not actually be performed provided it was timely sought. E.g., Stahl v. Smud, 210 A.D.2d 770, 771 (3rd Dep't 1994) (citing McDermott v. Torre, 56 N.Y.2d 399, 406 (1982)). Gaps in treatment do not necessarily preclude application of the doctrine where further treatment was contemplated. Rudolph, 16 A.D.3d at 413 (upholding 22 month gap in treatment).

Defendants argue that they completed treating the Plaintiff on April 18, 2008, and that the visit in September 2009 was merely an examination to ascertain the state of Mr. Gaber's condition, which conduct is expressly excluded from the definition of continuous treatment under Section 214-a. Based on the May 12, 2011, commencement of this suit, Defendants contend any challenge to treatment that occurred before November 12, 2008, is untimely. Plaintiff opposes summary judgment, claiming genuine issues of material fact remain whether the September 2009 visit was part of Dr. Benhuri's continuous treatment. Plaintiff contends that the visit arose from Dr. Benhuri's treatment plan and the gap between visits was consistent with earlier gaps due to Plaintiff's travel for work.

Where there is conflicting evidence regarding the purpose of a dentist's visit, the issue is a question of fact for the jury's resolution. E.g., Dansby v. Trumpatori, 298 A.D.2d 265 (1st Dep't 2002); see also PJI 2:149. Defendants' claim that the September 2009 visit was merely for a routine cleaning or neutral assessment is not borne out by their own factual records. Their papers, which include Dr. Benhuri's medical records and deposition testimony relate that at the September 2009 visit Plaintiff also requested repair to bridge work previously performed by Dr. Benhuri. Dr. Benhuri

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took five x-rays at that visit. He proposed placing an implant around site 13 as well as a new bridge or sinus lift. And he offered to perform those services for laboratory costs only. Indeed in their reply Defendants appear to abandon their earlier claim that no further treatment was contemplated after the April 2008 visit as grounds to preclude the continuous treatment doctrine in this case, but rather they aver there was no treatment beyond a cleaning at the September 2009 visit. These disparities between Defendants' characterizations of the visit as at most an examination to ascertain Mr. Gaber's condition and the evidence cited present a jury question precluding summary judgment.¹ Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on Tuesday, March 5, 2013, at 9:30 a.m., to pick a trial date.

Dated: February 15, 2013

ENTER:



JOAN B. LOBIS, J.S.C.

FILED

FEB 20 2013

NEW YORK
COUNTY CLERK'S OFFICE

¹This Court separately notes that Defendants' motion for summary judgment seeking to dismiss Plaintiff's cause of action as barred by the statute of limitations was itself filed more than a week outside the time limits set by this Court in its Part Rules for making motions for summary judgment.