

Dyckes v Stabile

2013 NY Slip Op 32907(U)

May 29, 2013

Supreme Court, Suffolk County

Docket Number: 16869/2011

Judge: William B. Rebolini

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

COPY

Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Paul Dyckes,

Index No.: 16869/2011

Plaintiff,

Attorneys [See Rider Annexed]

-against-

Motion Sequence No.: 002; MOT.DMotion Date: 2/21/13Dr. Richard Stabile, Dr. George Manolarakis
and Dr. Anthony Maresca,Submitted: 3/13/13

Defendants.

Motion Sequence No.: 003; XMOT.DMotion Date: 2/21/13Submitted: 3/13/13

Upon the following papers numbered 1 to 24 read upon this motion and cross-motion to dismiss: Notice of Motion and supporting papers, 1 - 8; Notice of Cross Motion and supporting papers, 13 - 20; Answering Affidavits and supporting papers, 9 - 10; 21 - 22; Replying Affidavits and supporting papers, 11 - 12; 23 - 24; it is

ORDERED that this motion by defendant, Dr. Richard Stabile, for an order pursuant to CPLR 241(a) and CPLR 3211(a)(5) dismissing the complaint of plaintiff, Paul Dyckes, as to all allegations that pre-date December 8, 2008 is granted; and it is further

ORDERED that the cross-motion by defendant, Dr. George Manolarakis, for an order pursuant to CPLR 3211(a)(5) and CPLR 3212 is granted only to the extent that plaintiff's claims of malpractice against him which arise prior to April 18, 2003 are dismissed and such application is otherwise denied, without prejudice to renew the application for summary judgment following completion of all discovery proceedings.

Plaintiff commenced this action by the filing of a summons and complaint on June 8, 2011 to recover damages for alleged dental malpractice. It is alleged in the complaint that plaintiff was treated by the defendants continuously from April 2002 through September 2010, and that the

defendants were negligent, *inter alia*, in ignoring “signs of an unphysiologic occlusion, ankylosis, bone loss, root resorption, and failure to respond to treatment”. Defendant Stabile submitted an affidavit in which it is averred that he first treated the plaintiff on March 7, 2002, and that he treated plaintiff until March 4, 2003. Defendant Stabile sold his dental practice to defendant Dr. George Manolarakis on April 18, 2003. Stabile rendered no dental care to plaintiff during the period from April 18, 2003 to March 16, 2010, when he again saw plaintiff in consultation and continued to see plaintiff as a patient until October 28, 2010. Defendant Stabile now moves for an order pursuant to CPLR 3211(a)(5) dismissing all claims arising out of treatment prior to December 8, 2008. Defendant Manolarakis has cross-moved for identical relief or, in the alternative, for an order dismissing all claims of malpractice arising prior to April 18, 2003. Plaintiff opposed both applications.

In support of the cross-motion, defendant Manolarakis submitted an affidavit in which he avers that he purchased the dental practice of Dr. Stabile on April 18, 2003. He first treated plaintiff for a general check-up and dental cleaning on May 12, 2003, and formulated a treatment plan at a visit on July 14, 2003 for restorations on teeth #18, 30 and 31. On August 8, 2003, plaintiff returned to Dr. Manolarakis, when teeth #1 and 16 were extracted. The plaintiff was seen again on August 16, 2003, August 22, 2003, September 3, 2003, September 10, 2003, and October 15, 2003. Thereafter, the plaintiff was seen on February 11, 2004, June 2, 2004, and February 23, 2005. On September 27, 2006, Dr. Manolarakis “evaluated the external resorption on the distal aspect of tooth #11.” According to the affirmation of plaintiff’s counsel, the external resorption on the distal aspect of tooth #11 “is the very basis for the suit against both Dr. Stabile and Dr. Manolarakis”, although neither the complaint nor the plaintiff’s bill of particulars identify tooth #11 as the tooth which is claimed to be the subject of plaintiff’s malpractice claim. The plaintiff continued to seek dental care from Dr. Manolarakis on multiple occasions through 2006 and 2007. According to Dr. Manolarakis, “after October 18, 2007, [he] only rendered care and treatment to the plaintiff on June 12, 2009” when a check-up and cleaning were performed.

Generally, a cause of action alleging medical or dental malpractice accrues on the date of the alleged wrongful act or omission, and the statute of limitations begins running on that date (*Stewart v Cohen*, 82 AD3d 874, 875, 918 NYS2d 193 [2d Dept 2011]). To establish that the doctrine applies, plaintiff is “required to demonstrate that there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice” (*Baptiste v Harding-Marin*, 88 AD3d 752, 753, 930 NYS2d 670 [2d Dept 2011], quoting *Stewart v Cohen*, 82 AD3d 874, 876). In the absence of continuing efforts by a doctor or dentist to treat a particular condition, the policy underlying the continuous treatment doctrine does not justify tolling the statute of limitations (*Stewart v Cohen*, *supra* at 82 AD3d 876).

The undisputed facts before this Court reveal that there was a 7-year gap in treatment of the plaintiff by defendant Stabile. Under such circumstances, the continuous treatment doctrine does not apply. Accordingly, the motion to dismiss plaintiff’s allegations of malpractice against defendant Stabile which stem from treatment prior to December 8, 2008 is granted.

Dyckes v. Stabile, et al.

Index No.: 16869/2011

Page 3

On a motion to dismiss a complaint pursuant to CPLR3211(a)(5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired, and the burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled (*Rakusin v Miano*, 84 AD3d 1051, 1052, 923 NYS2d 334 [2d Dept 2011]). To the extent that defendant Manolarakis seeks dismissal pursuant to CPLR 3211(a)(5) of all malpractice claims arising prior to December 8, 2008, such application must be denied. The record before this Court presents issues of fact whether defendant Manolarakis' check-up examinations and formulations of dental treatment plans commencing in 2003 constitute continuous treatment of plaintiff's dental condition. Accordingly, dismissal of claims arising subsequent to April 18, 2003 pursuant to CPLR 3211(a)(5) is not warranted. To the extent that defendant seeks summary judgment pursuant to CPLR 3212 dismissing such claims, such application is also denied, without prejudice to renew following the completion of discovery proceedings, as the attorneys for the parties entered into a preliminary conference stipulation and order for the conduct of discovery proceedings (*see Urcan v Cocarelli*, 234 AD2d 537, 651 NYS2d 611 [2d Dept 1996]). Furthermore, it is well established that where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied, especially where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion (*see Mazzola v Kelly*, 291 AD2d 535, 738 NYS2d 246 [2d Dept 2002]; *see also Baron v Incorporated Village of Freeport*, 143 AD2d 792, 533 NYS2d 143 [2d Dept 1988]).

Dated:

5/29/2013


 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION

RIDERAttorney for Plaintiff:

Joel M. Kotick, Esq.
501 East 79th Street
New York, NY 10075

Attorney for Defendant
Richard Stabile, D.D.S.:

Fumuso, Kelly, DeVerna
Snyder, Swart & Farrell, LLP
110 Marcus Boulevard
Hauppauge, NY 11788

Attorney for Defendant
George Manolarakis, D.D.S.:

Ahmady, Demers & McManus
200 I.U. Wilets Road
Albertson, NY 11507

Attorney for Defendant
Anthony Maresca, D.D.S.:

Wilson, Elser, Moskowitz,
Edelman & Dicker
150 East 42nd Street
New York, NY 10017

Clerk of the Court