

<b>Breytman v Riskevich</b>
2014 NY Slip Op 31507(U)
June 12, 2014
Supreme Court, Kings County
Docket Number: 500864/11
Judge: Gloria M. Dabiri
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At IAS Part 2 of the Supreme Court of the State of New York, Kings County, on the 4<sup>th</sup> day of June, 2014.

**PRESENT: Hon. Gloria M. Dabiri, JSC**

**Boris Breytman,**

*Plaintiff(s)*

**Index No. 500864/11**

-against -

**Michael Riskevich, M.D., et. al.,**

*Defendant(s)*

<b>The following papers numbered <u>1</u> to <u>4</u> read on this motion</b>	<b>Papers Numbered</b>
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	4
Affidavit (Affirmation)	

Upon the foregoing papers defendants Alexander Ovchinsky, M.D. and Daniel Branovan, M.D. seek summary judgment dismissing the complaint as to Dr. Ovchinsky based upon expiration of the statute of limitations (CPLR 214-a).

Defendants have demonstrated that Dr. Ovchinsky was served with the complaint after expiration of the two-year-and-six-month statute of limitations period for the medical malpractice claims at issue (*see* CPLR 214-a). Plaintiff's treatment with Dr. Ovchinsky in October 2011 was subsequent to the diagnosis and surgical treatment of the acoustic brain neuroma which is the subject of this claim. Plaintiff fails to meet his burden of demonstrating the existence of triable issues of fact as to application of the continuous treatment toll to the statute of limitations (*Cox v Kingsboro Medical Group*, 88 NY2d 904, 906 [1996]).

Plaintiff testified at his examination before trial, on October 31, 2013, that in January 2009 Dr. Ovchinsky performed a hearing test, prescribed Prednisone, and advised plaintiff that his hearing nerve was normal and that his hearing loss was attributable to old age. Plaintiff testified that after obtaining Dr. Ovchinsky's opinion as to the cause of his hearing loss, he decided to seek a second opinion and that was not offered further treatment by Dr. Ovchinsky. Plaintiff's testimony that he anticipated no further treatment by, or appointment with, Dr. Ovchinsky was unequivocal. Plaintiff, in fact, decided to see a different doctor for his condition, and in the summer of 2009 saw Dr. Samuel G. Nodelman, an otolaryngologist who was recommended by a friend.

The plaintiff was not aware of the need for further treatment and did not seek, or undergo, treatment with Dr. Ovchinsky following his January 2009 visit (*Wei Wei v Westside Women's Med. Pavilion, P.C.*, 115 AD3d 662, 663-664 [2014]). Thus, had plaintiff timely commenced a malpractice claim against Dr. Ovchinsky, it would not have resulted in the disruption of treatment for the condition at issue or threatened an ongoing physician/patient relationship with Dr. Ovchinsky (*Allende v New York City Health & Hosps. Corp.*, 90 NY2d 333, 339 [1997]; *Nykorchuck v Henriques*, 78 NY2d 255, 259 [1991]). Moreover, plaintiff's testimony reveals that the "continuing trust and confidence," which underpins the continuous treatment doctrine, came to an end when plaintiff chose not to schedule a follow up appointment with Dr. Ovchinsky and instead sought treatment for his right ear symptoms with Dr. Nodelman in March 2009 and with Dr. Branovan in April 2010 (*Gomez v Katz*, 61 AD3d 108, 115 [2009]; *Allende v New York*

*City Health & Hosps. Corp.*, 90 NY2d 333, 339 [1997]; *Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985]). While plaintiff asserts that he merely sought a "second opinion," the record does not support a conclusion that plaintiff intended uninterrupted reliance upon Dr. Ovchinsky's observation, directions, concern, and responsibility for his condition (*Sarjoo v N.Y. City Health & Hosps. Corp.*, 309 AD2d 34, 41 [2003], *lv denied* 1 NY3d 506 [2003]; *Allende v New York City Health & Hosps. Corp.*, 90 NY2d 333, 339 [1997]; *Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985]).<sup>1</sup>

Plaintiff's argument that there is an agency relationship between Dr. Ovchinsky and Dr. Branovan is unpersuasive. When plaintiff treated with Dr. Branovan in April 2010, plaintiff was unaware of any connection between the two physicians and plaintiff specifically intended to receive treatment from Dr. Branovan. Plaintiff testified that he learned of Dr. Branovan when he "saw his name in the newspapers . . . heard his name over TV . . . [and], people were talking about him." More importantly, Dr. Ovchinsky had not established a course of treatment for plaintiff. Thus, even if an agency relationship existed between Dr. Ovchinsky and Dr. Branovan, plaintiff's visit with Dr. Branovan in April 2010 amounted to nothing more than an attempt to have his hearing loss re-evaluated and is insufficient to invoke the continuous treatment doctrine (*Norum v Landau*, 22 AD3d 650, 652 [2005]). Accordingly, it is

ORDERED, that the motion is granted to the extent that the claims against Alexander

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<sup>1</sup> Plaintiff received further treatment by Dr. Ovchinsky in September 2011, following his surgery. Plaintiff required physical therapy for his balance disorder and believed that there was no other doctors who could perform such therapy. He testified that he, therefore, "had to go to see him."

Ovchinsky, M.D. are dismissed; and it is

ORDERED, that Alexander Ovchinsky, M.D. is severed from the action; and it is

ORDERED, that the caption is amended to read as follows:



Boris Breytman,

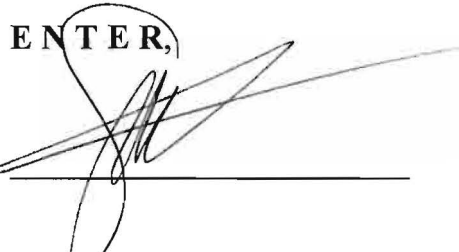
*Plaintiff(s)*

-against -

Michael Riskevich, M.D., Daniel Branovan, M.D.,  
Samuel Nodelman, M.D. and Sofia Yurfeld, M.D.,

*Defendant(s)*



ENTER,  


HON. GLORIA DABIRI