

Nelson v Etnson

2014 NY Slip Op 32812(U)

July 2, 2014

Supreme Court, Westchester County

Docket Number: 57161/2011

Judge: Francesca E. Connolly

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
JOSETTE NELSON,

Plaintiff,

-against-

JOHN S. ETTENSON, M.D., and WESTMED MEDICAL
GROUP, P.C.,

Defendants.

-----X
CONNOLLY, J.

DECISION and ORDER
Sequence No.1
Index No.: 57161/2011

The following documents were read in connection with the defendants' motion for summary judgment:

Notice of motion, affirmation, exhibits	1-18
Affirmation in opposition, affidavit	19-20
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The plaintiff commenced this action to recover damages for medical practice relating to an April 25, 2007 right-sided intraocular lens placement performed by the defendant, John S. Ettenson, M.D., an employee of the defendant Westmed Medical Group P.C. (Westmed).

The action was commenced by the filing of a summons with notice on or about October 14, 2011, and the complaint was subsequently filed on or about January 31, 2012. The plaintiff alleges that Dr. Ettenson rendered improper ophthalmological care in connection with the April 25, 2007 right-sided intraocular lens placement, which caused the plaintiff to suffer a variety of complications, including blurred vision, glaucoma, and subsequent corrective surgery. The defendants now move for summary judgment dismissing the complaint on the ground that the plaintiff's claims are time-barred.

In support of the motion, the defendants rely upon, among other things, a copy of the pleadings, the plaintiff and Dr. Ettenson's deposition transcripts, various medical records from Dr. Ettenson and other treating doctors, an expert affidavit, and his own affidavit. The defendants contend that the plaintiff's claims are time-barred since Dr. Ettenson last treated the plaintiff following the subject surgery more than two-and-a-half years prior to the commencement of this action. Specifically, the plaintiff's verified bill of particulars alleges that Dr. Ettenson's treatment of the

plaintiff occurred from March 27, 2007 to September 14, 2009. However, the defendants contend that the medical records and plaintiff's testimony demonstrate that Dr. Ettenson's corrective care and monitoring of the subject surgery concluded on November 8, 2007 when the plaintiff was referred to and had her first appointment with non-party Dr. Mackool, who ultimately performed subsequent surgery to adjust the right-sided intraocular lens on December 19, 2007.

In an affidavit in support of the motion, Dr. Ettenson avers that he treated the plaintiff from 1992 until November 8, 2007, when he referred the plaintiff to Dr. Mackool for follow-up care concerning the intraocular repositioning, and that Dr. Ettenson thereafter only saw the plaintiff for routine check-ups and ophthalmologic care. According to the plaintiff's deposition testimony, she began seeing Dr. Mackool for conditions arising from the subject surgery and it was Dr. Mackool who performed the second surgery to adjust the intraocular lens (Plaintiff deposition at 119-122). The defendants contend that the medical records submitted demonstrate that the plaintiff also sought treatment from Dr. Maozami and Dr. Potash for continuing concerns arising from the subject surgery, but that Dr. Ettenson only treated her for routine vision and management of her intraocular pressure, which Dr. Ettenson had treated prior to the subject surgery. The defendants' expert opines, with a reasonable degree of medical certainty, that Dr. Ettenson last treated the plaintiff for complications arising from the placement of the right-sided intraocular lens on November 8, 2007. Further, after Dr. Mackool assumed the care of the plaintiff for the discrete purpose of the right-sided intraocular lens corrective care, the plaintiff did not return to Dr. Ettenson for continuous treatment related to this medical condition.

Accordingly, the defendants contend that Dr. Ettenson's treatment of the particular condition giving rise to the alleged medical malpractice claim ceased once Dr. Mackool began treating the plaintiff for that condition on November 8, 2007, and further, the mere fact that the plaintiff had a continuing relationship with Dr. Ettenson is legally insufficient to establish her entitlement to tolling under the continuous treatment doctrine.

In opposition, the plaintiff contends that defendants' submissions are inadmissible insofar as the redacted expert affidavit is insufficient to support its motion. The plaintiff also submits an affidavit from an expert who avers, inter alia, that Dr. Ettenson deviated "from accepted standards of care in performing the unnecessary surgery, in improperly continuing the surgery after the rupture of the posterior capsule during surgery and in failing to recognize the cause of the post operative inflammatory for an extended period of time" and that these deviations "caused the need for further surgeries and for permanent damage to the [plaintiff's] right eye." With regard to the issue of continued treatment, the plaintiff's expert opines:

The patient continued to treat with Dr. Ettenson and his records clearly show that he continues to monitor and treat her now aggravated glaucoma condition in her right eye. While Dr. Ettenson did not reposition the intra ocular lens, he was treating her for glaucoma and continued to treat her for the glaucoma condition. The treatment rendered by Dr. Ettenson after the patient was seen by Drs. Potash and Mackool were related to the surgery that Dr. Ettenson performed.

(Plaintiffs' Expert Affidavit ¶ 15).

DISCUSSION

The defendants met their prima facie burden for summary judgment dismissing the plaintiff's complaint as time-barred "by demonstrating that the action was commenced more than two years and six months after the alleged act of malpractice occurred" (*Cole v Karanfilian M.D., P.C.*, 2014 NY Slip Op 3225, ___ AD3d ___, [2d Dept May 7, 2014]). Accordingly the burden shifted to the plaintiff to establish the applicability of the continuous treatment doctrine, which tolls the statute of limitations until the end of the course of treatment (*see id.*; *Capece v Nash*, 70 AD3d 743, 745 [2d Dept 2010]). Here, since the action was commenced on October 14, 2011, it was incumbent upon the plaintiff to establish that Dr. Ettenson's treatment for the same or a related condition continued through April 19, 2009.

In opposition, the plaintiff failed to raise an issue of fact as to the applicability of the continuous treatment doctrine, so as to toll the state of limitations. "[A] patient remains under the 'continuous treatment or care' of a physician between the time of the last visit and the next scheduled one where the latter's purpose is to administer ongoing corrective efforts for the same or a related condition" (*Plummer v N.Y. City Health & Hosps. Corp.*, 98 NY2d 263, 268 [2002]). "Essential to the application of the continuous treatment doctrine is 'a course of treatment established with respect to the condition that gives rise to the lawsuit' Routine examination of a seemingly healthy patient, or visits concerning matters unrelated to the condition at issue giving rise to the claim, are insufficient to invoke the benefit of the doctrine" (*id.*; *see also Venditti v St. Catherine of Siena Med. Ctr.*, 98 AD3d 1035, 1037 [2d Dept 2012] ["The decedent's visits to [the defendant doctor] after the August 1, 2001, visit were in the nature of '[r]outine diagnostic examinations' or 'return visits on the patient's initiative, merely for the purpose of having [her] condition checked'. . . . A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll" (internal citations omitted)]; *Shister v City of New York*, 63 AD3d 1032, 1035 [2d Dept 2009] ["The plaintiffs failed to submit competent evidence that the decedent's subsequent treatment at NYCHHC was related to her symptoms of March and April 1999. Since the course of treatment relating to the alleged malpractice ended in April 1999, the plaintiffs' complaint, filed in August 2001, was untimely insofar as asserted against NYCHHC"]).

While the plaintiff's expert opined, in opposition to the motion, that the plaintiff's aggravated glaucoma was a condition related to the alleged malpractice involving the intraocular lens, he failed to specify the dates of the continuing treatment for the underlying condition or "related conditions" for the court to calculate the statute of limitations. Nor has the plaintiff submitted any other proof in admissible form to establish a tolling of the statute of limitations to defeat the defendant's motion for summary judgment. This failure of proof is fatal to the plaintiff's position (*see Sherry v Queens Cancer Ctr.*, 117 AD2d 663 [2d Dept 1986] ["The affidavit conspicuously failed to mention any specific dates on which these alleged examinations occurred. Such an omission is fatal when opposing a defense based on the Statute of Limitations which, of course, is predicated on the establishment of dates and the calculation of time. Plaintiff, as the opponent of a motion for partial

summary judgment, was required to tender evidentiary proof in an admissible form to support her position” (emphasis added)]).

Based upon the foregoing, it is hereby

ORDERED that the defendants’ motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
July 2, 2014



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