

Kandell v Rose

2014 NY Slip Op 33403(U)

December 3, 2014

Supreme Court, Bronx County

Docket Number: 303088/11

Judge: Stanley B. Green

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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PHYLLIS KANDELL and DENNIS KANDELL,

Plaintiff,

INDEX № 303088/11

-against-

LOUIS C. ROSE, LOUIS C. ROSE, M.D., P.C.,
ENRIQUE BARRIENTOS and THROGS NECK
MULTICARE, P.C.,

Defendant(s)

DECISION

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HON. STANLEY GREEN:

The motion by Louis C. Rose, M.D. and Throgs Neck Multicare, P.C. for an order pursuant to CPLR §3211 dismissing the complaint based on the statute of limitations is granted. (Pursuant to the order of this court dated April 9, 2014, all claims against Enrique Barrientos were discontinued).

Plaintiffs claim that, during surgery on Ms. Kandell's left shoulder in 2004, Dr. Rose negligently left behind a surgical guide wire or needle that had been placed in her that is still migrating and requires complicated surgical extraction, causing pain and tenderness in the area where the foreign object is embedded, post-traumatic stress and anxiety.

Plaintiff first consulted Dr. Rose in June 2004, following a fall in which she injured her left shoulder. An x-ray taken in the office was consistent with a chip fracture at the inferior portion of the capsule of the left shoulder. Dr. Rose initially recommended conservative treatment, but, after MRI testing, he recommended surgery to repair the shoulder.

On October 14, 2004, Dr. Rose performed an arthroscopic left shoulder repair on plaintiff at New York Westchester Square Medical Center. After the surgery plaintiff underwent physical therapy and was unaware of any complication with the surgery. Plaintiff's last visit to Dr. Rose was on December 3, 2004.

On April 23, 2005, plaintiff presented to Westchester Square Medical Center for a chest x-ray that was ordered by Dr. Adapa to investigate respiratory wheezing. The radiologist noted that there was a metallic density, which had the appearance of a needle or a pin, overlying the left axilla. However, plaintiff was not informed of that finding.

On December 18, 2007, plaintiff presented to East Tremont Urgent Medical with a complaint of pain under the left side of her breast and underwent an x-ray of the chest and left rib. The radiologist noted that she had a questionable metallic needle in the left axilla, but plaintiff was not informed of the finding.

On March 11, 2009, plaintiff presented to her primary care physician, Dr. Golden, with a complaint of increased shortness of breath. He ordered a chest x-ray, which was performed that day at Westchester Square Medical Center. The x-ray was interpreted by the radiologist as showing a metallic object overlying the left axilla which had the appearance of a pin or needle. The radiologist also noted that the metallic object had been present since the prior study of April 23, 2005. Plaintiff was informed of the metallic object and instructed to remain at the hospital until Dr. Rose came to look at her films. However, a physician's assistant from Dr. Rose's office arrived and told her that she should follow up with Dr. Rose.

Plaintiff obtained copies of her films and, a few days later, brought them to Dr. Rose's office. Dr. Rose reviewed the films and told plaintiff that it appeared that a straight pin was

inside her. According to plaintiff, when she asked how the pin could have come to be inside her, Dr. Rose stated that she may have picked up a sewing needle or something of that nature while lying on the floor. He denied that the pin could have resulted from her shoulder surgery because he used bio-absorbable anchors, not pins. He recommended leaving the pin in its location and keeping an eye on it. Plaintiff never saw Dr. Rose again.

After some discussion with her husband, plaintiff decided to obtain a second opinion regarding the "pin." On June 5, 2009, she consulted Dr. David Gonzalez, an orthopedist. Dr. Gonzalez advised plaintiff that he observed a "a metallic piece" behind the scapula, but he didn't know what it was. Dr. Gonzalez explained that removal of the object would be quite difficult and he advised her to observe it for the time being and return for a repeat CT scan and x-ray in several months. However, plaintiff did not return to his office.

In April 2010, plaintiff accompanied a family member to a different orthopedist, Dr. Shein. While there, plaintiff asked Dr. Shein for his opinion about her needle. Dr. Shein ordered a new x-ray and identified the item as a migrating surgical artifact. He initially recommended removing the object surgically. Dr. Shein noted that plaintiff was going on a cruise. His plan was to see her when she got back and take new x-rays in May. However, plaintiff did not return to him until March 31, 2011. At that time, Dr. Shein ordered x-rays of plaintiff's chest, which showed the presence of a "K wire" (a metal wire inserted through bone and used to achieve internal traction or immobilization of bone fractures). The k-wire was in the same position it had been in previously. At that point, Dr. Shein's advice was to leave it alone and to x-ray again in three months to see if it changed position. Plaintiff was seen by Dr. Shein for repeat x-rays and re-evaluation on January 5, 2012 and August 2, 2012. Dr. Shein determined that there was "no

need for further treatment.”

On April 7, 2011, plaintiff commenced this action by filing the summons and complaint.

Dr. Rose seeks dismissal of the complaint on the ground that this action is barred by the statute of limitations because plaintiff became aware of the wire or pin in March 2009 and, pursuant to CPLR §214-a, an action that is based upon the discovery of a foreign object must be commenced within one year of the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. Thus, plaintiff’s action, filed in 2011, is untimely.

Dr. Rose also contends that plaintiffs have not developed sufficient facts to support an equitable estoppel claim, which would preclude him from raising the statute of limitations as an affirmative defense because there is no evidence that he ever saw plaintiff’s x-ray films or the official radiology report of April 23, 2005 until March 2009, when plaintiff met with him. At that time, he agreed that she appeared to have a pin or needle-like object within her chest cavity and he recommended that she monitor it, consistent with the recommendations of both Drs. Gonzalez and Shein. He also notes that there is no evidence of justifiable reliance on plaintiff’s part, as she soon went for further imaging and sought a second opinion from Dr. Gonzalez regarding the foreign body.

Plaintiffs contend that: (1) this action is timely because Ms. Kandell first learned that the surgical guide wire or pin was an artifact unintentionally left behind during Dr. Rose’s surgery at the time an x-ray was taken on April 14, 2010; (2) the doctrine of equitable estoppel is applicable to preclude defendants from raising the statute of limitations as an affirmative defense due to Dr. Rose’s fraudulent representations that the foreign object was unrelated to the 2004 surgery; and

(3) triable issues of fact as to the date of discovery of the foreign object.

Despite plaintiff's contention to the contrary, this action is untimely. Pursuant to CPLR §214-a, an action that is based upon the discovery of a foreign object in the body of the patient "may be commenced *within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.*" (Emphasis added.) While plaintiff contends that "discovery of a so-called sewing needle or pin in 2009 would not be a 'foreign object' as contemplated by the statute and could not start the statute of limitations running under CPLR 214-a," the discovery of the metallic object in 2009, be it a wire or a straight pin, on an x-ray in 2009 was sufficient information for her to investigate and discover the nature of the object, which is precisely what plaintiff did when she consulted Dr. Gonzalez. It was her decision not to pursue the matter until she happened to meet Dr. Shein in April 2010, at which point this action was already time-barred.

As to plaintiff's contention that Dr. Rose should be estopped from raising the statute of limitations as an affirmative defense due to his fraudulent representations, the doctrine of equitable estoppel will preclude a defendant from using the statute of limitations as a defense where the plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action and if the plaintiff reasonably relied on the defendant's misrepresentations (Zumpano v. Quinn 6 NY3d 666, citing Simcuski v. Saeli 44 NY2d 442). That is clearly not the case here because plaintiff consulted another orthopedist for an opinion shortly after speaking to Dr. Rose. While the issue of whether a defendant should be equitably estopped from asserting the Statute of Limitations as an affirmative defense to the plaintiff's complaint is generally a question of fact (*Id.*), the fact that plaintiff was aware of the needle/ pin that was inside her, in the

vicinity of her left shoulder surgery, and the absence of any other reasonable explanation for this finding, negates, as a matter of law, an essential element of equitable estoppel, that is, justifiable reliance on Dr. Rose's intentional misrepresentations which prevented her from discovering the malpractice or induced her to refrain from bringing suit (cf. Putter v. North Shore University Hospital 7 NY3d 548). Therefore, the doctrine of equitable estoppel is inapplicable to this case. Accordingly, the motion by Dr. Rose and Throgs Neck Multicare, P.C. for summary judgment dismissing the complaint is granted.

Movants shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: December 3, 2014



STANLEY GREEN, J.S.C.