Matthews v Barrau
2014 NY Slip Op 33912(U)
May 7, 2014
Supreme Court, Nassau County
Docket Number: 11889/13
Judge: Michele M. Woodard
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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CYNTHIA MATTHEWS and LIONEL MATTHEWS,

Plaintiffs,

-against-

LIONEL P. BARRAU, M.D.,

Defendant.

---x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 11889/13
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

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In motion sequence number one, the defendant moves for a judgment dismissing this action on the grounds that it is time-barred pursuant to CPLR §214-a, and the Court's lack of personal jurisdiction over the defendant pursuant to CPLR §308.

In motion sequence number two, the plaintiffs move by cross-motion for an extension of the 120-day period to effect service upon defendant pursuant to CPLR §306-b, and for the designation of an alternative method of service of process pursuant to CPLR §308(5).

This is the second of two medical malpractice actions commenced by plaintiffs. In this action plaintiff, Cynthia Matthews, alleges a negligent failure by defendant, Dr. Barrau, to timely and properly diagnose and treat her lung cancer. Mrs. Matthews had been a patient with the medical group known as Yunis, Roberts, Barrau, P.C. ("the Group"), since 1989, and Dr. Barrau was a member of the Group.

Mrs. Matthews testified that she had a "hacking cough" for about one year before her hospital

admission at Long Island Jewish Medical Center ("LIJ") in March, 2011 (Cynthia Matthews, transcript p. 47). Records of the Group show that on March 5, 2010, Mrs. Matthews sought treatment for pulmonary and respiratory complaints. On March 10, 2010, Mrs. Matthews returned for a follow-up visit, again seeking treatment for pulmonary and respiratory complaints. Chest x-rays were taken in house at the Group. The physician's progress notes in the Group's records for Mrs. Matthews for these two visits in March 2010 (Exhibit H to the cross-moving papers), are not legible.

Mrs. Matthews sought treatment at the Group on September 22, 2010. At that time she saw Dr. Heisler, a physician with the Group, whose notes state that Mrs. Matthews was "not feeling well," "under stress," and had a "decreased appetite" (Heisler transcript, p. 44-45). Additional visits took place at the Group on November 12, 2010, and December 14, 2010.

On March 19, 2011, Mrs. Matthews returned to the Group with complaints of a persistent dry cough, night sweats, shortness of breath, tiredness and weakness. Dr. Heisler performed in house x-rays. Due to a "grossly abnormal chest x-ray" (Heisler transcript, p. 25), Mrs. Matthews was directed to go immediately to LIJ for testing and evaluation. After she was discharged, Dr. Heisler told Mrs. Matthews that the preliminary diagnosis was cancer and that she should follow up with an oncologist.

Mrs. Matthews was diagnosed with Stage IV lung cancer. She has been treated with intensive chemotherapy and radiation. Nevertheless, the cancer has spread to the bone. Her survival rate is "very poor" (Schwartz affirmation, par. 6, annexed as Exhibit I to the cross-moving papers).

Plaintiffs commenced a medical malpractice action ("the first action"), against the Group and Dr. Heisler, on September 1, 2012. In the course of discovery in the first action, plaintiffs' attorneys learned that the physician at the Group who treated Mrs. Matthews on March 5, 2010, and March 10,

2010, was Dr. Barrau.[1] This discovery took place during a deposition of plaintiff Lionel Matthews, who accompanied Mrs. Matthews on one of the two visits in March 2010, and recalled speaking with Dr. Barrau (Lionel Matthews transcript, pp. 42-44). The same day, this action for medical malpractice against Dr. Barrau ("the second action"), was commenced.

Dr. Barrau has submitted an answer with affirmative defenses, including expiration of the Statute of Limitations, and improper service. At this time, Dr. Barrua seeks judgment dismissing the second action against him on the basis of these two affirmative defenses. Apparently Dr. Barrau retired from the Group in 2010, divorced his wife in February 2011, and subsequently moved to Haiti. Michaleen Barrau, Dr. Barrau's former wife testifies that Dr.Barrau "currently lives in Haiti with his brother who is ill and he will be there indefinitely to the best of my knowledge" (Michaleen Barrau affidavit, p.2).

Plaintiffs cross-move for an extension of the 120-day period to effect service on Dr. Barrau, and a court-ordered alternative method of serving the summons and complaint herein on Dr. Barrau pursuant to CPLR §308(5).

Summary Judgment Dismissal Standard

Summary judgment is the procedural equivalent of a trial (*S.J.Capelin Assoc., v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]). The proponent must make a *prima facie* showing of entitlement

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[1] Mrs. Matthew recalled being treated by Dr. Barrau over the years when she sought treatment from the Group, but she did not remember any specific visit with Dr. Barrau (Cynthia Matthews transcript, pp. 42-43).

to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 82 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The evidence must be viewed in the light most favorable to the non-moving party and the court must accord the non-moving party the benefit of every favorable inference (*Negri v Stop & Shop,* 65 NY2d 625, 626 [1985]; *Zapata v Buitriago*, 107 AD3d 977, 978 [2d Dept 2013]; *Chernin v New York City Metro. Tr. Auth.*, 52 AD3d 763 [2d Dept 2008]). "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]). "[A] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility"(*Pavane v Marte*, 109 AD3d 970, 972 [2d Dept 2013], quoting *LeBlanc v Skinner*, 103 AD3d 202, 212 [2d Dept 2012]).

Discussion

The Limitations Period and The Continuous Treatment Doctrine

It is undisputed that the limitations period for medical malpractice is two years and six months (CPLR §214-a). According to Dr. Barrau, the action accrued on March 10, 2010, when Mrs. Matthews had her last contact with him. Since this second action was not commenced until September 27, 2013, approximately three years and six months later, Dr. Barrau argues that this action is time-barred. On the moving papers, Dr. Barrau has made out a *prima facie* case for dismissal on the basis of the expiration of the applicable limitations period. The burden now shifts to the plaintiffs.

Plaintiffs argue that the limitations period for the alleged medical malpractice was tolled by the "continuous treatment doctrine." They state that because Mrs. Matthews was treated for respiratory complaints by the Group from March 5, 2010, continuously until her last visit to Dr. Heisler on March 29, 2011, the limitations period was tolled, and the cause of action for medical malpractice did not accrue until that last office visit. As this second action was commenced on September 27, 2013, less than two years and six months later, plaintiffs insist that this action is timely.

The "continuous treatment" doctrine is codified in CPLR §214-a; the triggering date is that of "the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure" (CPLR §214-a; see *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 295 [1998]). The course of treatment must be related to the original condition or complaint (see *Young*, *supra* at 296; *McDermott v Torre*, 56 NY2d 399, 405 [1982]).

"With respect to failure to diagnose cases, courts have held that a 'failure to make the correct diagnosis as to the underlying condition while continuing to treat the symptoms does not mean, for purposes of continuity, that there has been no treatment'" (*Chestnut v Bobb-McKoy*, 94 AD3d 659, 660-661 [1st Dept 2012] citing *Hein v Cornwall Hosp.*, 302 AD2d 170, 174 [1st Dept 2003] and *Dellert v Kramer*, 280 AD2d 438 [1st Dept 2001]). Therefore, a physician cannot escape liability under the continuous treatment doctrine "merely because of a failure to make a correct diagnosis as to the underlying condition," where the physician "treated the patient continuously over the relevant time period for symptoms that are ultimately traced to that condition" (*Chestnut*, *supra* at 661; see also *Chkhartishvili v Volovoy*, 44 AD3d 893 [2d Dept 2007] (failure to diagnose lung cancer while treating plaintiff for various upper body aches and pains, "the core symptoms") and *Couch v County of Suffolk*,

296 AD2d 194 [2d Dept 2002] (failure to diagnose Lyme disease during treatment of core conditions and complaints)).

The continuous treatment doctrine will be applied where the patient initiates a timely visit to complain about and seek treatment for a problem related to an initial treatment (*Shifrina v Ciy of New York*, 5 AD3d 660 [2d Dept 2004]; *Glasby v Fogler*, 303 AD2d 718 [2d Dept 2003]). In short, "there will be continuing treatment when a patient, instructed that he or she does not need further attention, soon returns to the doctor because of continued pain in that area for which medical attention was first sought" (*McDermott, supra* at 406).

Moreover, the doctrine may be applied to a physician who has left a medical group by imputing to her or him the continued treatment provided by subsequently-treating physicians in that group (*Ozimek v State Is. Physicians Practice, PC.*, 101 AD3d 833 [2d Dept 2012]; *Mule v Peloro*, 60 AD3d 649, 650 [2d Dept 2009]; *Solomonik v Elahi*, 282 AD2d 734 [2d Dept 2001]; *Watkins v Fromm*, 108 AD2d 233 [2d Dept 1985]).

On this record, plaintiffs have raised a triable issue of fact as to whether the treatment of Mrs. Matthews for her respiratory complaints continued from March 5, 2010, until her last visit with Dr. Heisler in the end of March 2011, for purposes of the continuous treatment doctrine. Even if the Court were only to consider: (1) the March 2010 office visit and x-rays with Dr. Barrau, (2) the March 2011 office visit and x-rays with Dr. Heisler, and (3) Mrs. Matthews' hospitalization from March 19-24, 2011, and (4) Mrs. Matthews' final visit with Dr. Heisler, a triable issue of fact exists as to whether the aforementioned treatments fall within the scope of the continuous treatment doctrine for the same underlying condition, namely lung cancer. For this reason, summary judgment dismissing the complaint as time-barred must be ***denied*** (*Ozimek, supra* at 835; *Piro v Macura*, 92 AD3d 658, 661 [2d Dept

2012], lv app dsmd 19 NY3d 1014 [2012]).

Extension of Time to Serve in the Interests of Justice

Dr. Barrau also seeks dismissal of the complaint on the grounds that he was not properly served. According to Dr. Yunis, the president of the Group, Dr. Barrau retired at the end of March 2010. Michaleen Barrau testifies that she and Dr. Barrau were divorced on February 9, 2011, that Dr. Barrau has not resided at his former home since the divorce, and that he now lives in Haiti. Plaintiffs cross-move for an extension of time to serve Dr. Barrau, and a court-ordered method of service.

CPLR §306-b provides for service of process within 120 days after the commencement of an action. Where a plaintiff needs additional time to serve a defendant, it may request an extension of time either "upon good cause shown" or "in the interests of justice" (CPLR §306-b).

Whether to grant an extension of time for service is a matter within the court's discretion (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]; *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 35 [2d Dept 2009]). "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" (*Leader*, *supra* at 105). The court may consider any relevant factor including the expiration of the limitations period, the meritorious nature of the action, the length of the delay in service, the promptness of a plaintiff's request for an extension of time, prejudice to the defendant, and the diligence with which the plaintiff attempted to serve the defendant (*Leader, supra* at 105-106; *Thompson v City of New York*, 89 AD3d 1011, 1012 [2d Dept 2011]).

Here plaintiff has attempted to serve Dr. Barrau at his place of business and his home, only to find that Dr. Barrau no longer works at the former, nor resides at the latter. Service on Dr. Barrau has also been attempted at two addresses in Glen Cove. One of the addresses does not exist, and Dr. Barrau

no longer resides at the other.

While the limitations period for medical malpractice has expired since the commencement of this action, all attempts at service were made within the 120-day period for service. The affidavit of service for defendant's answer with the affirmative defense of improper service indicates that service by mail took place on October 29, 2013, and plaintiff's cross-motion for an extension of time was made promptly, approximately nine weeks later. There is nothing in the record to suggest that the complaint lacks merit (*Bumpus*, *supra* at 37).

Prejudice involves impairment of the defendant's ability to defend on the merits (*Busler v Corbett*, 259 AD2d 13, 16 [4th Dept 1999]). No demonstrable prejudice to Dr. Barrau, attributable to the delay in service, has been shown. Furthermore, plaintiffs annex a letter from Dr. Barrau's excess professional liability insurer (Exhibit Q to the cross-moving papers), allegedly written in response to correspondence from Dr. Barrau dated December 9, 2013. On the basis of this letter plaintiffs argue that Dr. Barrau has actual notice of this action, and actual notice precludes prejudice (*Chiaro v D'Angelo*, 7 AD3d 746 [2d Dept 2004]).

Overall, the Court concludes that an extension of time to serve Dr. Barrau is warranted in the interests of justice. Consequently plaintiffs' request for an extension of time is ***granted*** as set forth below.

An Alternative Method of Service

Plaintiffs further request that this Court designate a method of service upon Dr. Barrau pursuant to CPLR §308(5), since all their attempts at service have been defective. CPLR §308(5) authorizes a court with the discretion to direct an alternative method for service of process, when the court determines that the methods set forth in CPLR §308 (1), (2), and (4) are "impracticable" (*Matter of*

Kaila B., 64 AD3d 647, 648 [2d Dept 2009]). The standard of "impracticability" is not easily defined (*State Street Bank & Trust Co. v Coakley*, 16 AD3d 403 [2d Dept 2005], lv app dsmd 5 NY3d 746 [2005]; *Astrologo v Serra*, 240 AD2d 606 [2d Dept 1997]). Where a defendant had sold his properties and closed his business, and there was some information that he was residing at an unspecified location in a foreign country, service pursuant to the other sections of CPLR §308 was found to be impracticable (*Astrologo*, *supra*). Such is the case here.

Based upon all of the efforts by plaintiffs' process server herein to serve Dr. Barrau, as documented by the affidavits of Kenneth Reilly in the record, the Court finds that service of process on Dr. Barrau pursuant to CPLR §308 (1), (2), or (4) is impracticable.

Notice reasonably calculated, under all of the circumstances, to apprise a defendant of the pendency of an action against him or her, and afford the defendant the opportunity to be heard, is a fundamental requirement of due process (*Dobkin v Chapman*, 21 NY2d 490, 502 [1968], citing *Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [1950]). On this record, it appears that the only entity that may have had recent communication with Dr. Barrau is his excess professional liability carrier, Healthcare Professional Insurance Company ("Healthcare"). In circumstances such as this, service upon the insurer is authorized pursuant to CPLR §308(5) (*Cives Steel Co. v Unit Bldrs,* 262 AD2d 164 [1st Dept 1999]; *Beacom v Mangone Homes,* 233 AD2d 470 [2d Dept 1996]; *Thomas v Pauyo*, 203 AD2d 450 [2d Dept 1994]; *Esposito v Ruggerio*, 193 AD2d 713 [2d Dept 1993]; *Saulo v Noumi*, 119 AD2d 657 [2d Dept 1986]). Accordingly, plaintiffs' request for an alternative method of service pursuant to CPLR §308(5) is ***granted***. The Court hereby directs service upon Dr. Barrau by service upon Healthcare. It is hereby

ORDERED, that the plaintiffs are directed to submit an Order within ten days of service or

receipt of a copy of this determination, authorizing service upon Dr. Barrau by service upon Healthcare within twenty days of the date of service or receipt of a copy of the signed Order. It is further

ORDERED, that all parties are directed to appear for a Preliminary Conference on July 8, 2014 at 9:30 a.m. in DCM.

This Constitutes the decision and order of the Court.

DATED: May 7, 2014
Mineola, N.Y. 11501

ENTER:

MICHELE M. WOODARD
J.S.C.

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