

Stebbins v Ling Xu, DDS
2015 NY Slip Op 30508(U)
April 2, 2015
Supreme Court, Suffolk County
Docket Number: 11-20393
Judge: Joseph A. Santorelli
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10-7-14
ADJ. DATE 12-24-14
Mot. Seq. # 002 - MG

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MONROE STEBBINS,

Plaintiff,

- against -

LING XU, DDS, ROBERT P. REINER, DMD,
VINCENT J. IACONO, DMD, STONY BROOK
MANAGEMENT PLAN, INC. and STONY
BROOK DENTAL ASSOCIATES, INC.,

Defendants.

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 21; Replying Affidavits and supporting papers 22 - 23; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Vincent J. Iacono, DMD for summary judgment dismissing the third, eighth, thirteenth and eighteenth causes of action asserted against him is granted; and it is further

ORDERED that the complaint is amended to conform to the evidence pursuant to CPLR 3025[c] such that the complaint is deemed to include a cause of action for breach of contract against defendant Vincent J. Iacono, DMD; and it is further

ORDERED that plaintiff shall serve an amended complaint on counsel within twenty (20) days of the entry of this order, otherwise the breach of contract claim will be deemed waived, and defendant Vincent J. Iacono shall thereafter respond in accordance with the CPLR.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Monroe Stebbins, inter alia, as a result of defendants' dental malpractice. Plaintiff alleges in the complaint that while under the care of defendant Vincent J. Iacono, DMD ("Iacono"), Iacono departed from good and

accepted standards of dental care, and further misrepresented the quality of care provided, which caused him to sustain serious and permanent injuries, in addition to economic injuries.

Plaintiff commenced this personal injury dental malpractice action against defendants on June 28, 2011. The complaint contains four causes of action that pertain to Iacono. The claims are for dental malpractice (third cause of action); a violation of Education Law § 6601 (eighth cause of action); prima facie tort (thirteenth cause of action); and fraud and deceit (eighteenth cause of action).

By his bill of particulars, plaintiff alleges that Iacono and his agents, servants and/or employees, were negligent, among other things, in failing to take X-rays and provide instruction, failing to properly fit dentures and install porcelain crowns, misplacing implants and causing injury to teeth Nos. 6, 7, 8, 9, 10 and 11. Plaintiff further alleges that as a result of Iacono's conduct, he has suffered "serious and permanent injuries, including loss of teeth, bone damage, damage to jaw alignment, which have necessitated additional procedures including root canals, repair and re-cementing of teeth three times, mouth pressure [and] pain and suffering". Moreover, he claims Iacono misrepresented that the "work was guaranteed" and failed to provide "porcelain implants" as promised.

Prior to the completion of discovery, Iacono now moves for summary judgment dismissing the complaint as asserted against him on the grounds that the dental malpractice, Education Law and prima facie tort claims are barred by the applicable statute of limitations. In support of the motion, Iacono submits the affirmation of counsel, the pleadings, bill of particulars, his affidavit, and medical records regarding his treatment of plaintiff. In addition to asserting that the claims are time barred, Iacono denies that he departed from good and accepted standards of dental care. With respect to the fraud claim, he asserts that plaintiff cannot sustain a separate cause of action because the alleged injuries stem solely from the underlying dental malpractice claim.

In opposition, plaintiff submits the affirmation of counsel, an affidavit of plaintiff's expert, Christopher J. Puglisi, D.D.S., plaintiff's own affidavit, and billing statements and records maintained by dentists he subsequently visited as a result of the alleged misconduct. Plaintiff asserts the motion should be denied because there are issues of fact with respect to the level of care and treatment Iacono provided, whether his conduct departed from good and accepted standards of dental care, and whether Iacono misrepresented material facts upon which plaintiff relied regarding the quality of the dental work performed.

The parties' submission establish that on February 14, 2001, plaintiff presented for the first time at the office of Iacono, and he did not return until four years later, on June 8, 2005. At that time, a periodontal examination was performed which allegedly showed that plaintiff had "slight to moderate" chronic periodontitis and several non-restorable teeth. During several follow-up visits, Iacono, with the consent of plaintiff, extracted teeth Nos. 5, 9, 10, 13, 14, 23, 24, 25, 26 and 27. On November 18, 2005, following healing of the extract sites, Iacono allegedly placed six mandibular (lower) implants at sites 19-20, 22, 24, 25, 27 and 29-30. On February 17, 2006, Iacono placed additional implants at sites 5, 9, 12, 13 and 14. Thereafter, plaintiff presented for multiple follow-up visits to monitor his healing in which no complications were reported. According to Iacono, plaintiff last visited on May 26, 2006, at which time, an additional follow-up visit was scheduled for two months

later. Plaintiff failed to show, and he did not re-schedule. Plaintiff contends without any specifics that Iacono's treatment and care ended "on or about April 30, 2007" (Stebbins Affidavit, ¶ 5).

The statute of limitations for commencing a dental malpractice action is two years and six months after "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 the said act, omission or failure" (CPLR 214-a). It is well-settled that a party seeking dismissal based on the statute of limitations has the initial burden of proving that the time in which to commence the action had expired when the action was brought (*Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 840 NYS2d 417 [2d Dept 2007]). The burden then shifts to the plaintiff to establish the statute of limitations was tolled or inapplicable (*Peykarian v Chien*, 109 AD3d 806, 971 NYS2d 152 [2d Dept 2013]).

Under the continuous treatment doctrine, the 2½-year limitations period does not begin to run until the end of the course of treatment "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the original condition or complaint" (*Borgia v City of New York*, 12 NY2d 151, 237 NYS2d 319 [1962]; *Gomez v Katz*, 61 AD3d 108, 874 NYS2d 161 [2d Dept 2009]). To establish the tolling of the limitations period, plaintiff must show further treatment was explicitly anticipated and that there was actual treatment or care of the subject condition in the form of "ongoing corrective efforts" by the medical provider (*Richardson v Orentreich*, 64 NY2d 896, 487 NYS2d 731 [1985]). The statute is not tolled, however, where the "patient initiates return visits to have his or her condition checked" (*McDermott v Torre*, 56 NY2d 399, 452 NYS2d 351 [1982]) or "intermittent treatment where substantial gaps of time exist between consultations" (*Cuercio v Ippolito*, 97 AD2d 497, 467 NYS2d 692 [2d Dept 1983]). Further, where the gap between visits or treatments is longer than the statute of limitations period, the continuous treatment doctrine will not apply (*Denlea v Hanswirth*, 303 AD2d 711, 758 NYS2d 85 [2d Dept 2003]; *Bulger v Nassua Cnty. Med. Ctr.*, 266 AD2d 212 [2d Dept 1999]).

Here, Iacono established prima facie entitlement to summary judgment dismissing the dental malpractice claim. Giving plaintiff the benefit of the doubt that Iacono provided treatment until April 30, 2007 (Stebbins Affidavit, ¶ 5), the action would have been required to be commenced by October 30, 2009. However, this action was not commenced until June 28, 2011, approximately one year and eight months after the statute of limitations expired. Plaintiff did not directly address the statute of limitations claim in his opposition or offer any evidence that he received continuous treatment, or any treatment for that matter, from Iacono beyond April 30, 2007 for the same illness or condition. As a result, plaintiff failed to raise an issue of fact as to whether the statute of limitations was extended beyond October 30, 2009 (see *Ceglio v BAB Nuclear Radiology, P.C.*, 120 AD3d 1376, 922 NYS2d 580 [2d Dept 2014]; *Peykarian v Chien*, *supra*). Under these circumstances, Iacono's motion to dismiss the dental malpractice claim (third cause of action) is granted.

The evidence further established Iacono's prima facie entitlement to summary judgment dismissing so much of the complaint as alleges a violation of Education Law § 6601 because that section is a general definition provision that does not give rise to a nondelegable duty. Section 6601, which is titled "Definition of Practice of Dentistry", provides, in pertinent part, "The practice of the profession of dentistry is defined as diagnosing, treating, operating, or prescribing for any disease, pain, injury,

deformity, or physical condition of the oral and maxillofacial area related to restoring and maintaining dental health ... [and] includes the prescribing and fabrication of dental prostheses and appliances.” As such, the Education Law § 6601 claim is embodied in and duplicative of the third cause of action to recover damages for dental malpractice, and does not give rise to a separate cause of action. As a result, the Education Law § 6601 claim asserted against Iacono (eighth cause of action) is dismissed.

With regard to the prima facie tort claim, Iacono moves for summary judgment claiming the claim is time barred and further that plaintiff failed to state a cause of action pursuant to CPLR 3211(a)(7). It is well established that the requisite elements of a prima facie tort are “(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful” (*Smith v Meridian Technologies, Inc.*, 86 AD3d 557, 927 NYS2d 141 [2d Dept 2011]). Recovery stemming from a prima facie tort necessitates a showing that defendant’s sole motive for his otherwise lawful act was malevolence towards plaintiff (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 464 NYS2d 712 [1983]). In other words, “a claim of prima facie tort does not [arise] where the defendant’s action has any other motive other than a desire to injure the plaintiff” (*Smith v Meridian Technologies, Inc.*, *supra*).

Although the complaint in substance asserts a claim for dental malpractice, plaintiff alleges in connection with this cause of action that Iacono acted “without justification and solely to harm plaintiff” (Complaint, ¶ 112). “In classifying a cause of action for statute of limitations purposes, the controlling consideration is not the form in which the cause of action is stated, but its substance” (*Faiella v Tysens Park Apts., LLC*, 110 AD3d 1028, 975 NYS2d 71 [2d Dept 2013] (quoting *Rutzinger v Lewis*, 302 AD2d 653, 754 NYS2d 735 [3d Dept 2003])). Here, the prima facie tort claim is time barred regardless of whether the cause of action is based upon an intentional tort or dental malpractice. As to the extent plaintiff claims Iacono intentionally inflicted injury upon him, the claim is barred by the one-year statute of limitations (*see* CPLR 215). On the other hand, to the extent plaintiff claims personal injury was inflicted upon him due to dental malpractice, as discussed above, the claim is barred by the two and one-half year statute of limitations (CPLR 214-a; *see Gaska v Heller*, 29 AD3d 945, 816 NYS2d 523 [2d Dept 2006]). Plaintiff did not commence this action until June 28, 2011, more than 2½ years from April 30, 2007, the last date plaintiff claims he was under the care of Iacono. Accordingly, the prima facie tort claim (thirteenth cause of action) is dismissed as untimely. In light of the above, the remaining arguments regarding the sufficiency of the cause of action have been rendered academic.

Iacono further established prima facie entitlement to summary judgment dismissing the fraud and deceit claim that Iacono knowingly misrepresented plaintiff’s diagnosis and his “guarantee” of corrective results. The elements of a cause of action for fraud in connection with dental malpractice claims are (1) knowledge on the part of the physician of both the malpractice and resulting injury to the patient, and a (2) subsequent intentional, material misrepresentation (3) upon which the patient relied (*Simcuski v Saeli*, 44 NY2d 442, 406 NYS2d 259 [1991]). It is well settled that concealment by a physician or failure to disclose his or her own malpractice does not give rise to a cause of action in fraud or deceit separate from the customary malpractice action (*Id.*). Rather, to sustain a claim of fraud, plaintiff must demonstrate that the damages due to the fraud are separate and distinct from those resulting from the malpractice (*Giannetto v Knee*, 82 AD3d 1043, 919 NYS2d 176 [2d Dept 2011]).

Here, the injuries allegedly sustained by plaintiff due to Iacono's fraud are identical to the damages stemming from the dental malpractice claim. A review of the complaint shows that the cause of action is predicated upon Iacono's alleged misrepresentation of plaintiff's diagnosis and plaintiff's reliance upon same. Plaintiff's expert Dr. Puglisi opines that "breaches of the standard of care resulted in the failure of [plaintiff's] treatment. In order to correct the failed dentistry, [plaintiff] will need to undergo extensive corrective treatment that will result in pain and suffering". In opposition, plaintiff failed to submit any evidence to raise a triable issue of fact regarding the fraud claim. Accordingly, since the fraud claim seeks damages stemming from the dental malpractice claim, it must be dismissed (*see Brenner v Milhorat*, 95 AD3d 812, 942 NYS2d 897 [2d Dept 2012]; *Harja v Milhorat*, 95 AD3d 829, 942 NYS2d 885 [2d Dept 2012]). Based on the foregoing, the cause of action alleging fraud and deceit against Iacono (eighteenth cause of action) is dismissed.

In accordance with the foregoing, the four causes of action in the complaint asserted against Iacono are dismissed. However, plaintiff's counsel further asserts for the first time in his opposition that this is an action, inter alia, for breach of contract, although, it is noted that the complaint does not include such a claim, and plaintiff has neither submitted a proposed amended complaint nor sought leave to amend the pleadings pursuant to CPLR 3025.

A Court may amend the pleadings to conform them to the evidence before or after judgment absent prejudice or undue surprise from the delay (*see* CPLR 3025[c]; *Rodriguez v Panjo*, 81 AD3d 805, 916 NYS2d 239 [2d Dept 2011]). It is well established that amendments to conform pleadings should be "freely given upon such terms as may be just" and are to be granted "even if the amendment substantially alters the theory of recovery" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 998 NYS2d 740 [2014]).

Here, a review of the bill of particulars and affidavits in opposition to the motion for summary judgment demonstrates plaintiff has a potentially meritorious claim for breach of contract arising out of the same conduct alleged in the complaint. To this end, plaintiff alleges in his affidavit that Iacono "stated I would be receiving 'porcelain fixtures' which I did not" (Stebbins Affidavit, ¶ 10) and he submitted the accompanying billing records. Moreover, Dr. Puglisi states in his report that plaintiff "was billed for a porcelain fused to metal bridge to restore the entire lower arch but was provided with a hybrid implant denture set with plastic denture teeth that did not include the four lower molars" (Puglisi Report, at 2). Accordingly, the pleading is amended to conform to this evidence (*see generally MRI Enters., Inc. v Comprehensive Medical Care of New York, PC*, 122 AD3d 595, 996 NYS2d 119 [2d Dept 2014]) (holding trial court providently exercised its discretion in, sua sponte, amending the pleadings to conform to the evidence at trial and allowing plaintiff to reopen its case to introduce additional evidence regarding damages)).


Nonetheless, plaintiff still has the burden of demonstrating that the relation-back doctrine applies since the six-year statute of limitations for breach of contract claims expired prior to this order. The bill of particulars, which according to the record is the earliest Iacono was put on notice of the claim, is dated September 17, 2012. Thus, using April 30, 2007 for the purpose of this motion as the date Iacono's treatment of plaintiff ended, then Iacono, who has been a party in this litigation from its commencement, had notice of the claim within the applicable limitations period (*see Deputron v A & J*

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Tours, Inc., 93 AD3d 629, 939 NYS2d 713 [2d Dept 2012]). The bill of particulars states under the subheading of “misrepresentations of fact”, that plaintiff was “billed \$18,000 for crowns; no crowns” (see generally *Hine v Jafa Transp.*, 97 AD3d 794, 949 NYS2d 139 [2d Dept 2012]). Further, although he did not specifically address the relation-back doctrine, Iacono responded to the proposed breach of contract claim in his reply in further support of the motion. Nor is there any prejudice to Iacono since discovery has not been completed (see *Rizzo v Kay*, 79 AD3d 1001, 915 NYS2d 92 [2d Dept 2010]). Under these circumstances, the pleadings are amended to conform to the proof to the extent the complaint is deemed to include a cause of action against Iacono for breach of contract.

Accordingly, plaintiff’s counsel shall serve and file an amended complaint along the parameters set forth herein within twenty (20) days of the entry of this order, otherwise the claim will be deemed waived. Defendant is to respond in accordance with the CPLR.

Dated: APR 02 2015



HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION