

**Leace v Kohlroser**

2015 NY Slip Op 30510(U)

March 20, 2015

Supreme Court, Suffolk County

Docket Number: 11-27521

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 10-28-14 (#012 & #013)  
MOTION DATE 11-25-14 (#014)  
ADJ. DATE 12-23-14  
Mot. Seq. # 012 - MG  
              # 013 - XMG  
              # 014 - XMG

-----X  
MELISSA LEACE,

Plaintiff,

- against -

JAMES KOHLROSER, D.O., ISLAND  
DIGESTIVE DISEASE CONSULTANTS, P.C.,  
JEFFREY NAKHJAVAN, D.O., JEFFREY M.  
NAKHJAVAN, D.P., P.C., ELLIOTT  
EISENBERGER, M.D., and GOOD  
SAMARITAN HOSPITAL MEDICAL  
CENTER.

Defendants.  
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant James Elliot Eisenerger, M.D., dated September 26, 2014, and supporting papers; (2) Notice of Cross Motion by the defendant Good Samaritan Hospital Medical Center, dated October 22, 2014 , supporting papers; Notice of Cross Motion by the

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defendants Jeffrey M. Nakhjavan, D.O. and Jeffrey M. Nakhjavan, D.O. , P.C., dated November 18, 2014 (3) Affirmations in Opposition by the plaintiff, dated November 17, 2014; November 17, 2014, and December 16, 2014; and supporting papers; (4) Reply Affirmation by the defendant James Elliot Eisenerger, M.D., dated December 4, 2014, by the defendant Good Samaritan Hospital Medical Center, dated December 22, 2014, by the defendants Jeffrey M. Nakhjavan, D.O. and Jeffrey M. Nakhjavan, D.O. , P.C., dated December 16, 2014; and supporting papers; (5) Other \_\_\_ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that these motions are consolidated for the purposes of this determination; and it is further

**ORDERED** that the motion by defendant Elliott Eisenberger, M.D. ("Dr. Eisenberger") pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred by the applicable statute of limitations is granted; and it is further

**ORDERED** that the cross motion by defendant Good Samaritan Hospital Medical Center ("Good Samaritan") pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred by the applicable statute of limitations is granted; and it is further

**ORDERED** that the cross motion by defendants Jeffrey M. Nakhjavan, D.O. ("Dr. Nakhjavan") and Jeffrey M. Nakhjavan, D.O., PC ("Nakhjavan PC") pursuant to CPLR 3211(a)(5) to dismiss the complaint as time-barred by the applicable statute of limitations is granted.

This is an action for medical malpractice based upon plaintiff's claims of an alleged failure to timely diagnose and treat a retained endoscopic camera capsule, after a capsule endoscopy performed in January of 2008. This allegedly worsened plaintiff's existing Crohn's Disease, requiring surgery in 2011. This action was commenced by the filing of a summons and complaint on or about August 24, 2011.

Defendant Dr. Eisenberger now moves for summary judgment on the ground that this action is barred by the relevant statute of limitations. In support of the motion defendant submits, *inter alia*, his attorney's affirmation, copies of the pleadings, plaintiff's verified bill of particulars, three deposition transcripts of the plaintiff, the deposition transcript of defendant James Kohlroser, D.O., medical records of the plaintiff, the affidavit of Dr. Eisenberger, sworn to July 8, 2014, and a CT scan interpretation report dated January 21, 2009. Defendant Good Samaritan cross-moves for summary judgment, as have the defendants Dr. Nakhjavan and Jeffrey M. Nakhjavan, D.O., PC. In addition to their respective attorneys affirmations, each of these defendants have submitted the same documents as the defendant Dr. Eisenberger. Plaintiff has submitted her attorneys affirmations in opposition to each of the motions.

The testimony of the plaintiff and the medical records submitted establish the relevant facts set forth below. Plaintiff suffered for many years from Crohn's disease. Defendant Dr. Nakhjavan was the plaintiff's primary care physician between October 2006 and April 2011, although records establish that there were several lengthy periods of time during which plaintiff did not see this defendant. However, as early as August of 2007 plaintiff was referred to defendant Dr. James Kohlroser, a partner of Island Digestive Disease Consultants, P.C. for treatment of her Crohn's disease. On the advice of Dr. Kohlroser,

a capsule endoscopy was performed on January 22, 2008 at the offices of Island Digestive Disease Consultants, P.C. This test requires the patient to swallow a capsule camera which takes pictures as it passes through the digestive system. The pictures are recorded on a computer worn on the outside of the patient's body. The capsule camera is supposed to pass through the body and be excreted. On January 21, 2009, a CT scan was performed on the plaintiff at defendant Good Samaritan. The scan was interpreted on that date by defendant Dr. Eisenberger. As part of his report he noted that a "metallic artifact is noted at the base of the cecum, not seen previously. Correlate clinically." While Dr. Kohlroser could not recall speaking to plaintiff about the CT scan report, plaintiff testified that she did speak to Dr. Lobo, who was also a member of defendant Island Digestive Disease Consultants, P.C. Plaintiff also testified that she never discussed the capsule camera with Dr. Nakhjavan. Surgery was performed to remove the capsule camera on April 25, 2011.

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it was barred by the applicable statute of limitations, the moving party must establish, prima facie, that the time in which to commence the action so as to interpose that cause of action has expired (*see Ross v Jamaica Hosp. Medical Center*, 122 AD3d 607, 996 NYS2d 118 [2d Dept 2014]; *Baptiste v Harding–Marin*, 88 AD3d 752, 753, 930 NYS2d 670 [2d Dept 2011]; *LaRocca v DeRicco*, 39 AD3d 486, 486–487, 833 NYS2d 213 [2d Dept 2007]). The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see Ross v Jamaica Hosp. Medical Center, supra*; *Rakusin v Miano*, 84 AD3d 1051, 1052, 923 NYS2d 334 [2d Dept 2011]; *Texeria . BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405, 840 NYS2d 417 [2d Dept 2001]; *Massie v Crawford*, 78 NY2d 516, 519, 577 NYS2d 223, [1991]).

The defendants have made a prima facie showing of entitlement to judgment as a matter of law by demonstrating, through the submission of, inter alia, the plaintiff's testimony and medical records, that the action was not commenced until after the expiration of the two-year-and-six-month statute of limitations applicable to medical malpractice actions (*see CPLR 214–a; Ross v Jamaica Hosp. Medical Center, supra; Adams . Kohan*, 105 AD3d 880, 881, 963 NYS2d 342[2d Dept 2013]; *Gomez v Katz, supra; Cox v Kingsboro Med. Group*, 88 NY2d 904, 906, 646 NYS2d 659, [1996]). Measured from January 21, 2009, the date on which the retained capsule was detected by a CT scan, two years, seven months and three days passed prior to the plaintiff filing this action on August 24, 2011. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was tolled under the continuous treatment doctrine.

Initially, it is noted that, contrary to plaintiff's contention, it is well settled that an intentionally implanted device is not a "foreign object" within the meaning of CPLR 214–a, since it was intentionally placed in the plaintiff's body for a medical purpose (*see LaBarbera v New York Eye & Ear Infirmary*, 91 NY2d 207, 212–213, 668 NYS2d 546 [1998]; *Rockefeller v Moront*, 81 NY2d 560, 564–565, 601 NYS2d 86 [1993]; *Provenzano v Becall*, 138 AD2d 585, 585, 526 NYS2d 167 [2d Dept 1988]; *Walton v Strong Memorial Hosp.*, 114 AD3d 1289, 980 NYS2d 691 [4th Dept 2014]; *Jacobs v University of Rochester*, 103 AD3d 1205, 959 NYS2d 345 [4th Dept 2013]). Here, the endoscopic capsule was intentionally placed in the plaintiff's body to examine her bowels.

Nor has the plaintiff set forth facts sufficient to invoke the continuous treatment doctrine which would toll the two and a half year statute of limitations with regard to the moving defendants. The

continuous treatment doctrine is codified at CPLR 214–a, which provides, in pertinent part, that “[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months 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 the said act, omission or failure.” In order to receive the benefit of that doctrine, a plaintiff is required to demonstrate that there was a course of treatment, that it was continuous, and the treatment was for the condition or complaint underlying the claim of malpractice (see *Ceglio v Bab Nuclear Radiology, P.C.*, 120 AD3d 1376, 992 NYS2d 580 [2d Dept 2014]; *Gomez v Katz*, 61 AD3d 108, 111–112, 874 NYS2d 161 [2d Dept 2009]; *McDermott v Torre*, 56 NY2d 399, 406–407, 452 NYS2d 351 [1982]). In the absence of continuing efforts by a doctor to treat a particular condition, the policy underlying the continuous treatment doctrine does not justify tolling the statute of limitations (see *Udell v Naghavi*, 82 AD3d 960, 919 NYS2d 79 [2d Dept 2011]; *Stewart v Cohen*, 82 AD3d at 876, 918 NYS2d 193 [2d Dept 2011]).

“In general, the continuous treatment doctrine does not apply to a diagnostician, such as a radiologist, who renders discrete, intermittent medical services, unless the diagnostician has a continuing or other relevant relationship with the patient or acts as an agent for the physician or otherwise acts in relevant association with the physician” (*Kaufmann v Fulop*, 47 AD3d 682, 684, 849 NYS2d 615 [2d Dept 2008]; see *Cole v Karanfilian, M.D., P.C.*, 117 AD3d 670, 985 NYS2d 141 [2d Dept 2014]). The record herein establishes that the only contact defendant Dr. Eisenberger had with the plaintiff was his single (correct) interpretation of plaintiff’s CT scan on January 21, 2009 in which he detected the retained capsule camera that forms the basis of plaintiff’s malpractice claim. On this basis, no claim can be made that Dr. Eisenberger engaged in the continuous treatment of the plaintiff and his motion must be granted.

Separate instances of medical treatment, such as routine physicals or intermittent diagnostic examinations, do not constitute continuous treatment if each instance of treatment is discrete and complete (see *Norum v Landau*, 22 AD3d at 652, 802 NYS2d 723 [2d Dept 2005]; *Charalambakis v City of New York*, 46 NY2d 785, 787, 413 NYS2d 912 [1978]). A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll (see *Venditti v St. Catherine of Siena Med. Ctr.*, 98 AD3d 1035, 950 NYS2d 759 [2d Dept 2012]; *Gomez v Katz*, *supra*; *Nykorchuck v Henriques*, 78 NY2d 255, 259, 573 NYS2d 434 [1991]; *McDermott v Torre*, *supra*). In this regard, the evidence presented also establishes that there was no continuous treatment of the plaintiff by the defendant Good Samaritan. While plaintiff was admitted for treatment of her Crohn’s disease symptoms and medical tests were performed at Good Samaritan at the behest of plaintiff’s doctors, it did not engage in the continuous treatment of plaintiff’s disease and had no involvement in the capsule endoscopy which forms the basis of plaintiff’s action. The same result must also be found with regard to defendants Dr. Nakhjavan and Nakhjavan PC. While on occasion Dr. Nakhjavan treated plaintiff for Crohn’s disease, and other complaints as her primary care doctor, there is no evidence of any course of continuous treatment of her Crohn’s disease and he also had no involvement in the capsule endoscopy which forms the basis of plaintiff’s action. Thus, the continuous treatment doctrine does not toll the statute of limitations with regard to the moving defendants.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Scoyni v*

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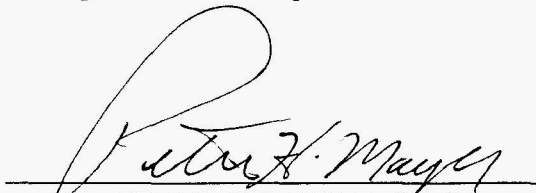
*Chabowski*, 72 AD3d 792, 898 NYS2d 482 [2d Dept 2010]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). The Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v Martinez*, *supra*; *Ofman v Katz*, 89 AD3d 909, 933 NYS2d 101 [2d Dept 2011]; *International Oil Field Supply Services Corp. v Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (*AGS Marine Insurance Company v Scottsdale Insurance Company*, 102 AD3d 899, 958 NYS2d 753 [2d Dept 2013]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; *see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 570 NYS2d 799 [1st Dept 1991], *lv. denied*, 80 NY2d 788, 587 NYS2d 284, [1992]).

As to the second cause of action alleged in the complaint, it is noted that the plaintiff fails to set forth a cause of action to recover damages for malpractice based on lack of informed consent against the moving defendants. To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (*see Tsimbler v Fell*, 123 AD3d 1009, 999 NYS2d 863 [2d Dept 2014]; *Khosrova v Westermann*, 109 AD3d 965, 966, 971 NYS2d 565 [2d Dept 2013]; *Spano v Bertocci*, 299 AD2d 335, 337-338, 749 NYS2d 275 [2d Dept 2002]). None of the moving defendants had any involvement in the professional treatment, the capsule endoscopy, which forms the basis of plaintiff's malpractice action. Therefore, these defendants were in no position to disclose alternatives to the proposed treatment or to fail to inform the plaintiff as to the foreseeable risks of said treatment. Thus, the complaint fails to set forth a cause of action against the moving defendants for lack of informed consent.

Finally, plaintiff has not established that additional discovery would disclose facts essential to justify opposition to defendants' motions (*see CPLR 3211 [d]*; *Englert v Schaffer*, 61 AD3d 1362, 1363, 877 NYS2d 780 [4th Dept 2009]; *Gillies v National Fire Ins. Co. of Hartford*, 56 AD3d 1236, 1238, 867 NYS2d 295 [4th Dept 2008], *lv. denied*, 12 NY3d 702, 876 NYS2d 349 [2009]).

Accordingly, the motion and cross motions to dismiss are granted in all respects.

Dated: March 20, 2015

  
 PETER H. MAYER, J.S.C.