Whelan v Mordkoff
2016 NY Slip Op 30940(U)
May 16, 2016
Supreme Court, New York County
Docket Number: 805012/2012
Judge: Joan B. Lobis

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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MAURICE ALAN WHELAN and FRANCIS WHELAN,

Plaintiffs,

Index No. 805012/2012

-against-

Decision and Order

KAREN MORDKOFF, as the Executor of the Estate of DR. MARVIN MORDKOFF,

Defendant.

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Plaintiffs Maurice Alan Whelan and Francis Whelan allege that defendant Dr. Marvin Mordkoff, who was Mr. Whelan's primary care physician, did not refer Mr. Whelan for a colonoscopy in a timely fashion, and as a result there was a delay in diagnosing him with colon cancer. Discovery is complete, although Dr. Mordkoff passed away before a deposition was possible. Plaintiffs filed the note of issue around August 3, 2015. Currently, Karen Mordkoff, the executor of Dr. Mordkoff's estate, moves to dismiss a portion of this action. Defendant argues that the continuous treatment doctrine does not apply here, and therefore the claims should be limited to treatment that occurred within the two-and-a-half year period prior to the commencement of the action. Plaintiffs oppose the motion, arguing for the application of the continuous treatment doctrine. For the reasons below, the Court grants the motion.

Mr. Whelan had treated with Dr. Mordkoff since around 1995 when, in 2011, he was diagnosed with metastatic colon cancer. Other than orthopedic work, Mr. Whelan testified at deposition, he did not see any doctors other than Dr. Mordkoff. Dr. Mordkoff allegedly took a family history, which indicated that Mr. Whelan's father and his siblings had a history of cancer,

and that Mr. Whelan himself had been treated successfully for skin cancer some years earlier. By the time of his diagnosis, Mr. Whelan treated with the doctor for his semi-annual physical examinations, and occasionally had appointments for specific illnesses not related to any complaints that are relevant to the continuous treatment doctrine.

Mr. Whelan stated at deposition that Dr. Mordkoff performed rectal examinations at one of his initial physicals and at a physical five or ten years later, but did not perform any subsequent rectal examinations. Mr. Whelan stated that in the late 1990's, when he was in his late fifties, he asked Dr. Mordkoff about the possibility of having a colonoscopy and the doctor said it was unnecessary because of his overall good health. In addition, around this time he reported problems with his bowel movements. In response, he said, the doctor advised him to use over-the-counter laxatives. He contended that the doctor's advice did not change although he continued to report these symptoms for a period of around two years, and he continues to use laxatives to this day. He stated that due to a friend's death from metastatic colon cancer he continued to inquire about the possibility of a colonoscopy, and that the doctor said that he would inform Mr. Whelan when he needed a colonoscopy. He stated that he did not seek a colonoscopy from another physician or ask for a referral to a specialist, placing his trust in his doctor's judgment. Starting around 2000, he additionally related to the doctor that he experienced discomfort during his bowel movement. Between 2004 and 2009, however, he stated, he probably did not discuss complaints with his bowel movements. Because he noticed blood in his stool around November 2010, he scheduled an appointment with Dr. Mordkoff. Further, he said, at this appointment, in December, he insisted upon a colonoscopy and the doctor wrote him a prescription. The procedure that followed, in January 2011, resulted in Mr. Whelan's cancer diagnosis. In their complaint, plaintiffs

allege that Dr. Mordkoff committed malpractice by failing to recommend a colonoscopy earlier and that as a result his cancer was more advanced when it was finally diagnosed.

In support of the current motion, defendant argues that Mr. Whelan's appointments with Dr. Mordkoff were for routine checkups and thus are not sufficient to trigger application of the continuous treatment doctrine. There was no continuity of treatment for gastrointestinal problems, she says, other than in 1999 or 2000 when the doctor suggested the use of over-the-counter laxatives. She cites Nykorchuck v. Henriques, 78 N.Y.2d 255, 258 (1991) for the proposition that even if Dr. Mordkoff's failure to establish a course of treatment for Mr. Whelan's recurrent problems were negligent, this lack of treatment would not constitute continuous treatment. Defendant alleges that because of this, all claims involving treatment prior to September 13, 2009 should be dismissed as untimely.

In opposition plaintiffs assert that the continuous treatment doctrine applies. They allege that the doctor's failure to perform regular two rectal and prostate exams over the course of the years was negligent, especially as Mr. Whelan did not decline to undergo such examinations. They further argue that the failure to prescribe a colonoscopy despite Mr. Whelan's continuous inquiries -- starting in 1999, when he was around sixty years old, and continuing periodically thereafter -- was negligent. They allege that there was continuous treatment as long as Mr. Whelan took the nonprescription laxatives – which was at least until December 2010. They state that although Mr. Whelan did not discuss bowel problems with the doctor between 2004 and 2009, his continuing questions to Dr. Mordkoff about the possibility of a colonoscopy or colon cleanse render the gastrointestinal treatment "continuous." They point out that according to their expert,

the facts of this case show not only that the doctor committed malpractice but in addition show that there was a continuous course of treatment.[1] Plaintiffs say they are not arguing failure to diagnose colon cancer, but failure to screen Mr. Whelan by way of a colonoscopy.

In reply, defendant stresses that at deposition plaintiff stated that, with one exception, he did not complain to the doctor of gastrointestinal problems between 1998 and 2010. Defendant notes that Dr. Mordkoff was a cardiologist and other than routine checkups Mr. Whelan treated with him only when he was sick and when he underwent echocardiogram studies and stress tests. Moreover, defendant argues, although Mr. Whelan continued to take nonprescription laxatives for years after the doctor recommended this does not render the treatment "continuous" as plaintiff presents no evidence that the doctor discussed Mr. Whelan's laxative use after he initially recommended it in 1999 or 2000. Defendant restates that the basis of this motion is not summary judgment but statute of limitations and therefore plaintiff's expert affirmation is irrelevant.

Section 3211(a)(5) of the Civil Practice Law and Rules provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . statute of limitations [.]" When moving to dismiss a cause of action pursuant to Section 3211(a)(5), "a defendant bears the initial

[1] Plaintiff quotes extensively from the affirmation, but the Court cannot locate a copy of the actual document in the electronic filing system for this case. Defendant also cites to specific paragraphs of the affirmation, so it is clear that defendant had access to the expert's statement. Moreover, the issue of whether there is continuous treatment sufficient to extend the statute of limitations is a legal and not a medical question. In light of these factors, the contents of the affirmation do not impact the ruling and its absence is not an issue.

burden of demonstrating, prima facie, that the time within which to commence the action has expired." Plain v. Vassar Bros. Hops. 115 A.D.3d 922, 923 (2d Dep't 2014). Under CPLR 214-a, a medical malpractice action "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[.]" Underlying the doctrine is the policy that the best interests of a patient warrant continued treatment with an existing provider, rather than stopping treatment, since the provider is best positioned to identify and correct any malpractice. E.g., Rudolph v. Lynn, D.D.S., P.C., 16 A.D.3d 261, 412 (1st Dep't 2005).

On the facts at hand, the Court concludes that the doctrine does not apply here. Routine examinations such as Mr. Whelan's annual checkups are insufficient to comprise continuous treatment. Instead, for the continuous treatment to apply the doctor's continuing treatment of Mr. Whelan would have had to have been "for the conditions giving rise to the malpractice action." Chestnut v. Bobb-McKoy, 94 A.D.3d 659, 660 (1st Dep't 2012). That is, plaintiffs would have raise a triable issue as to whether both Mr. Whelan and Dr. Mordkoff viewed the checkups to include "a continuing course of treatment regarding the condition that was eventually diagnosed . . . ." Stewart v. Cohen, 82 A.D.3d 874, 876 (2nd Dep't 2011). In Stewart, the Second Department found that the plaintiff's treatment for various ailments, including breathing problems, did not establish a continuous course of treatment relating to plaintiff's ultimate diagnosis of lung cancer. Similarly, Mr. Whelan's presentation of problems with bowel movements on two occasions, and his continued use of over-the-counter laxatives without the knowledge of his doctor does not extend the period of treatment in 1999 or 2000 by ten years. See

Chestnut, at 660-661. Moreover, following 1999, in the mid-2000s, there was a four-year period during which Mr. Whelan did not complain of gastrointestinal problems. Plaintiffs' theory that there Dr. Mordkoff's failure to order a colonoscopy given Mr. Whelan's age, complaints of gastrointestinal problems in 1999 and 2000, and his family history of cancer, does not change the outcome. Even if this were malpractice, it does not extend the limitations period because the doctor's "failure to establish a course of treatment cannot be deemed a course of treatment" for the purpose of the continuous treatment doctrine. Flint v. Zielinski, 130 A.D.3d 1460, 1462 (4th Dep't 2015).

For these reasons, it is

ORDERED that the motion is granted and plaintiffs' claims relating to treatment prior to September 2009 are severed and dismissed. The remainder of the action shall continue.

Dated: May 16, 2016

ENTER:

JOAN B. LOBIS, J.S.C.