

**Loizides v Siu**

2016 NY Slip Op 31396(U)

July 14, 2016

Supreme Court, New York County

Docket Number: 805082/2014

Judge: Joan B. Lobis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X

BARBARA LOIZIDES and JAMES LOIZIDES,

Plaintiffs,

Index No. 805082/2014

-against-

**Decision and Order**

PAUL J. SIU, D.D.S. and PAUL J. SIU GROUP, L.L.C.,

Defendants.

-----X

**Joan B. Lois, J.S.C.:**

In this dental malpractice action plaintiffs allege that defendants did not properly treat their periodontal disease. Both were patients of Dr. Paul Siu. Currently, defendant Siu on behalf of himself and his dental group seek to dismiss all claims pursuant to CPLR § 241-a, CPLR § 3211, and CPLR § 3212 arising out of dental treatment prior to September 7, 2011. Since the summons and verified complaint were filed on March 7, 2014, it is defendants' argument that the statute of limitations bars all claims for treatment prior to the September date. Plaintiffs oppose the motion on several grounds. They assert that defendants have not made a prima facie showing for dismissal. They argue that the motion should be denied because defendants have not submitted any expert affidavits, that because of defendants' negligent or intentional destruction of the records the use of reconstructed records should not be permitted thereby leaving defendants without admissible evidence in support of their motion, and, finally, that the continuous treatment doctrine is applicable to the whole of plaintiffs' treatment allowing claims back to 2004 to be considered. For the reasons stated below the defendants' motion is denied.

The defendants' attorney recites a history of treatment for Barbara Loizides that starts in 1996. During the early years of treatment Barbara Loizides saw Dr. Siu for routine care plus occlusal adjustments. Starting in 2004, defendant occasionally prescribed antibiotics for gum inflammation. Defendant Dr. Siu first diagnosed periodontal disease on July 28, 2007 and over the course of the next four years at various appointments defendant treated her with scaling and planing and made a referral to a periodontist. Scaling and tooth planing are treatments for gum disease. Ms. Loizides last saw Dr. Siu on March 16, 2012.

The defendants' attorney's affirmation also recites the history of treatment of James Loizides. He first saw Dr. Siu in 1992 or 1993 for various restorative and endodontic treatments as well as what defendants identified as twice yearly cleaning and checkups from 1993 to 1997. He was treated for TMJ and bruxism or grinding. The affirmation says that in 2009 Dr. Siu treated James Loizides for gingival and periodontal problems by scaling his teeth and prescribing mouthwash and antibiotics to address these conditions. He continued to be seen by Dr. Siu for a variety of reasons including root canals and bridge work. According to the affirmation, at the last bridge work visit in 2011 plaintiff was advised that he needed comprehensive implants from specialists and periodontal care. Dr. Siu asserts that financial problems precluded plaintiff James Loizides from proceeding with this plan. Nevertheless Dr. Siu continued to treat plaintiff. It is Dr. Siu's position that he never treated plaintiff James Loizides for periodontal disease.

The defendants argue that the statute of limitations requires that all treatment dates prior to September 7, 2011 be precluded from consideration in this lawsuit. Citing Massie v. Crawford, 78 N.Y.2d 516 (1991) and a line of subsequent cases, defendants argue that continuous

treatment cannot be applied if the treatment afforded the patient is limited to routine checkups. They argue that the doctrine can only be evoked to toll the application of the statute of limitations for the period during which there was ongoing continuing treatment of a condition that is the same as the act or omission or failure at issue in the lawsuit. Nykorchuk v. Henriques, 75 N.Y.2d 255 (1991). Defendants argue that the prerequisites for applying the doctrine are not present. Therefore, all treatment prior to September 7, 2011 is time-barred.

Plaintiffs argue that defendants' motion must be denied. They point out that defendants' motion includes no expert opinion on the issues of periodontal treatment. They argue that the lack of expert testimony is a fatal defect. In addition, Dr. Siu has not produced original charts for many of the appointments. The doctor alleges that he relocated dental records to the basement of his home on Long Island. In October 2012, he alleges, his basement was flooded as a consequence of Hurricane Sandy and dental records stored there were destroyed. He has recreated notes on treatment for both plaintiffs from partial records and other sources like billing records. Because the original records have been destroyed plaintiffs argue that defendant should not be able to argue that treatment was not continuous when in reality he cannot document what was done and when. Moreover, many of the records he is relying on would not be admissible at trial. Finally, plaintiffs argue that based on their expert's opinions, the plaintiffs were continually treated for periodontal disease from around 2004. In particular, the expert states that the symptoms plaintiffs presented are signs of periodontal disease. Therefore, they have met the criteria for application of the continuous treatment doctrine.

In reply defendants argue that plaintiffs do not deny they had routine dental care prior to September 7, 2011 and thus they have made a showing that the claims prior to that date are time-barred as outside the two-and-one-half year statute of limitations for medical malpractice. They argue that there is sufficient admissible evidence citing, inter alia, the depositions and records that are available, to support their motion regarding the nature of the treatment rendered. They argue that there is no requirement of expert testimony when seeking dismissal on statute of limitations grounds. Furthermore, they state that plaintiffs have offered opinions of continuous treatment for periodontal disease that are invalid and merely unsupported conclusions. They argue that the treatments were routine periodic dental treatment.

Like other doctrines in the law, the continuous treatment doctrine can be easy to define but difficult to apply. In Nykorchuck, the Court of Appeals held:

A medical malpractice claim generally accrues on the date of the alleged wrongful actor or omission and is governed by a 2 ½ year statute of limitations. Under the continuous treatment doctrine exception, however, the 2 1/2-year period does not begin to run until the end of the course when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original complaint. The purpose of the doctrine is to maintain the physician-patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure. The doctrine rests on the premise that it is in the patient's best interest that an ongoing course of treatment be continued, rather than interrupted by a lawsuit, because the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so.

Nykorchuk, 75 N.Y.2d at 258 (internal citations omitted).

In this case, the parties dispute if and when Dr. Siu treated the plaintiffs for periodontal disease. Both sides agree that tooth scaling and planning were performed on both plaintiffs. The plaintiffs' expert opines that their repeated complaints were all signs of the worsening periodontal disease that Dr. Siu mistreated. The mistreatment of periodontal disease is the malpractice alleged. In the reply papers Dr. Siu's attorney dismisses plaintiffs' expert's testimony as unfounded and conclusory. Counsel does not dispute the analysis of the expert that bruxism and periodontal disease present with similar symptoms of teeth mobility and gum inflammation. Further, defendants do not rebut the expert's opinion that Dr. Siu's treatment for bruxism was mistreatment of the periodontal disease. The attorney's affirmation is not competent to rebut plaintiffs' expert. Factual issues exist as to whether a course of treatment for periodontal disease of did exist that allows the toll of the statute of limitations. Moreover, because of the questions surrounding the maintenance of records, the dates of treatment also raise factual issues. The Court cannot determine as a matter of law that all pre-September 7, 2011 treatment is precluded from this action. The motion is denied without prejudice to raising the issue at trial.

The parties shall appear on July 26, 2016 in Part 6 at 9:30 a.m. for a pretrial conference.

This constitutes the decision and order of the Court.

Dated: *July 14*, 2016

ENTER:

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.