

Nigro v Siu

2016 NY Slip Op 31397(U)

July 14, 2016

Supreme Court, New York County

Docket Number: 805084/2014

Judge: Joan B. Lobis

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

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JOSEPH NIGRO,

Plaintiff,

Index No. 805084/2014

-against-

Decision and Order

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

Defendants.

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Joan B. Lobis, J.S.C.:

In this dental malpractice action plaintiff alleges that defendants mistreated his periodontal disease. Defendant Siu on behalf of himself and his dental group seek to dismiss all claims arising out of dental treatment prior to September 7, 2011 as untimely under CPLR § 241-a, CPLR § 3211, and CPLR § 3212. 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. Plaintiff opposes the motion on several grounds. He asserts that defendants have not made a prima facie showing for dismissal. He argues 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 plaintiff's treatment allowing claims back to 1998 to be considered. For the reasons stated below the defendants' motion is denied.

The plaintiff first saw Dr. Siu on October 22, 1998 and last saw him on January 4, 2012. During that period Dr. Siu provided all of Mr. Nigro's dental care. Over the course of this treatment, Dr. Siu measured pocket depths, and treated plaintiff for signs of bruxism with which he was diagnosed in 2001 as well as temporomandibular joint disorder for which he was treated with repeated occlusal adjustments. He also provided crowns and did other restorative work on various teeth and did periodic cleanings. In the records the defendant relies upon, defendant noted that he considered referring plaintiff to a periodontist in February of 2002 for increased teeth mobility. Dr. Siu proscribed tetracycline in 2005 for a form of periodontal disease. Repeated incidents of pain which Dr. Siu attributed to teeth grinding or bruxism were treated with antibiotics.

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.

Plaintiff argues that defendants' motion must be denied. He argues that defendants' motion includes no expert opinion on the issues of periodontal treatment. He argues 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 plaintiff from partial records and other sources like billing records. Because the original records have been destroyed plaintiff argues 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, plaintiff argues that based on his expert's opinions, the plaintiff was continually treated for periodontal disease from around 2005. In particular, the expert states that the symptoms plaintiff presented are signs of periodontal disease. Therefore, he has met the criteria for application of the continuous treatment doctrine.

In reply defendants argue that plaintiff does not deny he had dental care prior to September 7, 2011, and thus defendants argue 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 dispute that plaintiff has offered opinions of continuous treatment for periodontal disease that are valid and not 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 plaintiff for periodontal disease. The parties do not dispute that Mr. Nigro presented with teeth mobility, pain and gum inflammation. The plaintiff's expert opines that Mr. Nigro's 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 plaintiff's expert's statement as merely offering unfounded medical conclusions. Defendant's 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 plaintiff's 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.