Lombardi v Bernhardt
2017 NY Slip Op 31616(U)
June 6, 2017
Supreme Court, Bronx County
Docket Number: 22877/2012E
Judge: Mary Ann Brigantti

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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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JOHN LOMBARDI,

Plaintiff,

-against-

DECISION / ORDER
Index No. 22877/2012E

BERNARD BERNHARDT, et als.,

Defendants.

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The following papers numbered 1 to 14 read on the below motion noticed on January 5, 2017 and duly submitted on the Part IA15 Motion calendar of **February 2, 2017:**

Papers Submitted	Numbered
Defs.' Notice of Motion, Exhibits	1,2
Pl. Cross-Motion, Opp., Exhibits	3,4
Defs.' Opp. to Cross-Motion, Exhibits	5,6
Defs.' Reply Aff., Exhibits	7,8
Co-Def. Bernhardt, et al. Opp. To Cross-Motion, Exhibits	9,10
Co-Def. Samolsky Opp. to Cross-Motion, Exhibits	11,12
Co-Def. Geisler Opp. to Cross-Motion, Exhibits	13,14

Upon the foregoing papers, the defendants Howard N. Kivell, M.D., s/h/a Howard Kivell ("Kivell") and Associates for Urologic Care, P.C. ("Urologic")(collectively, "Defendants") move for an order: (1) pursuant to CPLR 3211(a)(5), dismissing the complaint of the plaintiff John Lombardi ("Plaintiff") as time-barred, or in the alternative granting summary judgment pursuant to CPLR 3212; (2) imposing sanctions and the cost of bringing the instant motion upon plaintiff; and (3) directing the Clerk to enter judgment in favor of Kivell with costs; together with such other, further and different relief as this Court may deem just and proper.

Plaintiff opposes the motion and cross-moves for an order: (1) compelling Defendants, as well as defendants Bernard Bernhardt, Elizabeth Phillips, Warren Geisler, Marc R. Samolsky, Advanced Oncology Associates, LLP., Medical Renal Associates, P.C., Stephen C. Klass, M.D., P.C., Sound Shore Medical Center of Westchester, Emergency Medical Association-Sound Shore, PLLC., and Emergency Medical Associates/CHS, LLC., to provide responses to Plaintiff's combined demands for discovery and inspection dated July 23, 2015; and (2) compelling depositions of Defendants, as well as Defendants, as well as defendants Bernard

Bernhardt, Elizabeth Phillips, Warren Geisler, Marc R. Samolsky, Advanced Oncology Associates, LLP., Medical Renal Associates, P.C., Stephen C. Klass, M.D., P.C., Sound Shore Medical Center of Westchester, Emergency Medical Association-Sound Shore, PLLC., and Emergency Medical Associates/CHS, LLC., to be conducted as per the Preliminary Conference Order. Defendants, as well as co-defendants Bernard Bernhardt, M.D., Elizabeth Phillips, M.D., Advanced Oncology Associates, LLP., Marc R. Samolsky, M.D. s/h/a Marc. R. Samolsky, and Warren Geisler, M.D., oppose the cross-motion.

I. Background

This medical malpractice action alleges that the defendants departed from good and accepted medical practices when they, among other things, failed to diagnose and/or treat an invasive adenocarcimona of Plaintiff's colon. Defendant-movant Kivell is a urologist employed by Urologic. Defendants assert that Kivell examined Plaintiff on a single occasion on November 23, 2009, when he presented with complaints of left flank pain. Kivell performed a physical examination and noted, among other things, point tenderness over Plaintiff's lower left ribs, which appeared to be skeletal and not kidney-related. Kivell directed Plaintiff to return in one week and ordered a CT scan of the abdomen and pelvis without contrast, "with special attention to the left lower ribs." The CT scan was performed at Montefiore Advanced Imaging on December 10, 2009. In an affirmation, Kivell details the findings of the CT scan which revealed some abnormalities of the colon. Kivell faxed the report to Dr. Geisler, one of Plaintiff's primary care physicians, and "within days of receiving the report," Kivell discussed the findings with Dr. Lovich – Dr. Geisler's partner. Kivell states that Dr. Lovich was to follow up with Plaintiff to discuss the abnormal findings. Kivell concludes that because he ruled out a urological cause for Plaintiff's left flank pain, and having referred the matter to Plaintiff's primary care physicians for follow up in December 2009, he had no further involvement with Plaintiff's treatment.

Defendants now move to dismiss the Plaintiff's complaint asserted against them as time-barred, because Plaintiff did not commence the action against these Defendants until November 20, 2012, more than 2 ½ years after Defendants' last treated Plaintiff in December 2009. Defendants support their motion with Kivell's affirmation and medical records detailing his

treatment of Plaintiff. A handwritten notation on the November 23, 2009 report from Kivell states "CT/labs faxed to Dr. Geisler. 12/11/09 - CT findings regarding ribs discussed with Dr. Lovich who will follow up with patient." Defendants also submit Plaintiff's medical records from Dr. Warren Geisler.

In the alternative, Defendants seek summary judgment on the grounds that they owe no duty of care to Plaintiff. Defendants argue that Kivell had no duty to continue following Plaintiff once Kivell ruled out a urological cause of Plaintiff's pain and reported the abnormal CT scan findings to Plaintiff's primary care physicians. Defendants also seek the imposition of costs and sanctions against Plaintiff, because Plaintiff's counsel has maintained a "frivolous" time-barred lawsuit against Defendants, and counsel refused to reply to multiple communications attempting to avoid the need for this motion.

Plaintiff opposes the motion and cross-moves to compel the defendants to provide responses to discovery demands and to appear for depositions in compliance with a Preliminary Conference Order. Plaintiff argues that Defendants' motion must be denied as premature, because he has received no discovery from any defendant in this action. Plaintiff asserts that Defendants rely on uncertified records from Dr. Geisler, and this court has no way of knowing if this is a complete copy of Geisler's chart. Plaintiff also argues that the records that have been provided reflect conversations between Kivell and Geisler, and discovery is necessary to determine to what extent Kivell interacted with the co-defendant doctors after treating Plaintiff, beyond the November 2009 visit. Plaintiff notes that he does not have access to the records maintained by Defendants or any of the co-defendants, and Plaintiff is entitled to challenge Defendants on the issues raised through discovery. Plaintiff also cross-moves to compel discovery, as he has not received any response to his initial discovery request, which has been outstanding for over a year.

Defendants, as well as Co-defendants Bernard Bernhardt, M.D., Elizabeth Phillips, M.D., Advanced Oncology Associates, LLP., Marc R. Samolsky, M.D. s/h/a Marc. R. Samolsky, and Warren Geisler, M.D., oppose the cross-motion. Each of these defendants submit responses to the outstanding discovery demands and contend that the cross-motion is now moot.

In reply, Defendants argue *inter alia* that the motion is not premature as Plaintiff has

received records from Defendants and Dr. Geisler clearly indicating that Kivell did not provide any treatment to Plaintiff which falls within the statutory time period. In addition, Plaintiff has failed to offer opposition to the fact that the question of duty is to be determined by the court as a matter of law, and in this case, Kivell - a urologist- had no duty to treat Plaintiff's non-urological conditions once he handed his treatment over to Plaintiff's primary care physicians.

II. Standards of Review

CPLR 3211(a)(5)

In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, the defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired (*see City of Yonkers v. 58A JVD Indus., Ltd.*, 115 A.D.3d 635 [2d Dep't 2014]) "The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period" (*Id.*).

CPLR 3212

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide

issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

An action sounding in medical 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" (CPLR 214-a). In this matter, Defendants established their prima facie entitlement to judgment as a matter of law by asserting that Plaintiff's only date of treatment with them was on November 23, 2009, when Kivell physically examined him and then ordered a CT scan. Kivell states that he obtained the results of the CT scan on or about December 10, 2009, and then faxed the results to other doctors who were to follow up with Plaintiff regarding the abnormal abdominal findings. Because he ruled out any urological cause for Plaintiff's left flank pain, and because he referred Plaintiff to his primary care physicians for follow up, Kivell had no further involvement with Plaintiff's treatment. Plaintiff did not commence this action until November 20, 2012, more than 2 ½ years after his treatment with Defendant ceased in December 2009. The burden therefore shifted to Plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable as to the moving defendants (*see Cox v. Kingsboro Med. Group*, 88 N.Y.2d 904, 906 [1996]).

In opposition to the motion, and in support of his cross-motion, Plaintiff's affirmation of counsel argues that the motion is premature because these Defendants failed to produce any discovery. Plaintiff asserts that the records that have been provided make references to conversations between Kivell and co-defendant Dr. Geisler, Plaintiff's primary care physician. Plaintiff asserts that whether additional conversations were had between these two doctors is unknown. He further argues that Kivell is asking the Court to take him at his word concerning his involvement in treating Plaintiff, and Plaintiff is entitled to challenge Kivell on these issues

through discovery. In essence, Plaintiff contends that the outstanding discovery could produce evidence that Defendants interacted with other co-defendant doctors and thus engaged in a continuous course of treatment that would toll the applicable statute of limitations.

A medical malpractice action generally accrues from the date of the alleged wrongful act (*see Chestnut v. Bobb-McKoy*, 94 A.D.3d 659 [1st Dept. 2012]; CPLR 214-a). Where, however, "there is a continuous course of treatment for the conditions giving rise to the malpractice action, the running of the applicable statutory period is tolled during the period of continuous treatment" (*id.*, citing *Young v. New York City Health & Hosps. Corp.*, 91 N.Y.2d 291[1998]; *Langsam v. Terraciano*, 22 A.D.3d 414, 802 N.Y.S.2d 449 [2005]). The policy reasons supporting the doctrine are that "a plaintiff should not have to interrupt ongoing treatment to bring a lawsuit, because the doctor not only is in a position to identify and correct the malpractice, but also is best placed to do so" (*id.*, [internal quotations omitted]). Where there are no continuing efforts by a doctor "to treat a particular condition or complaint, however, those policy reasons do not justify the patient's delay in bringing suit" (*id.*, [internal citations omitted]). In determining whether the "continuous treatment" doctrine applies, "the focus is on whether the patient believed that further treatment was necessary, and whether he sought such treatment" (*see Devadas v. Niksarli*, 120 A.D.3d 1000 [1st Dept. 2014], citing *Rizk v. Cohen*, 73 N.Y.2d 98, 104 [1989]). Furthermore, "a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician (*id.*, citing *Ramirez v. Friedman*, 287 A.D.2d 376, 377 [1st Dept. 2001]).

In this case, Plaintiff has not submitted any affidavit averring that he sought further treatment from Kivell after November 23, 2009, or that he was aware of the need for further treatment from Kivell – a urologist. Plaintiff himself does not refute Kivell's claim that he referred Plaintiff for CT scan, then referred Plaintiff to his own primary care physician, and then had no further involvement with Plaintiff's treatment. "Having purportedly been unaware of the need for further treatment, [Plaintiff] was never confronted with the dilemma that led to the judicial adoption of the continuous treatment doctrine" (*Rizk v. Cohen*, 73 N.Y.2d at 104).

Plaintiff instead argues – through an affirmation of counsel – that he requires further discovery in order to determine what extent Kivell interacted with co-defendant doctors after

Plaintiff last saw Kivell in November 2009, and to discover whether there existed any professional relationship between or consultation between Kivell and the co-defendants. Where an alleged continuous treatment "is provided by someone other than the allegedly negligent practitioner, there must be "'an agency or other relevant relationship'" between the health care providers" (*see Allende v. New York City Health & Hosps. Corp.*, 90 N.Y.2d 333, 339 [1997], citing *Meath v Mishrick*, 68 NY2d 992, 994 [1986], quoting *McDermott v Torre*, 56 NY2d 399, 403 [1982]).

"Should it appear from *affidavits* submitted in opposition to the motion that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just" (CPLR 3212[f][emphasis added]; *see also* CPLR 3211[d]). In this case, however, Plaintiff cannot avail himself of CPLR 3212(f) or 3211(d) because he has not submitted any affidavit himself establishing an evidentiary basis suggesting that discovery may lead to relevant evidence (*see generally Chemical Bank v. PIC Motors Corp.*, 58 N.Y.2d 1023, 462 N.Y.S.2d 438 [1983]; *Ruttura & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 [2nd Dept. 1999]). A plaintiff alleging that a motion for summary judgment is premature for want of discovery must demonstrate that "the claims in opposition are supported by something other than mere hope or conjecture" (*see Voluto Ventures LLC. v. Jenkens, Gilchrist Parker Chapin LLP*, 44 A.D.3d 557, 557 [1st Dept. 2007][internal citations omitted]). Here, Plaintiff has failed to point to any evidence whatsoever demonstrating that a possible agency or other relevant relationship existed between Kivell/Urologic and Plaintiff's primary care physicians. Again, Plaintiff himself submitted no affidavit expressing any belief that such a relationship ever existed. Furthermore, in opposition to Plaintiff's cross-motion, the moving defendants have submitted Plaintiff's deposition transcript wherein he testified that he did not recall treating with Kivell or Urologic (Pl. EBT at 109; 116). Plaintiff's mere hope that discovery may reveal a course of continuous treatment with Kivell/Urologic does not warrant denial of this motion (*see Cracolici v. Shah*, 127 A.D.3d 413, 413 [1st Dept. 2015]). Plaintiff also alleges that Defendants relied in part upon uncertified records from Dr. Geisler. However, Defendant's motion is also supported by records from his own office detailing the extent of his treatment of the Plaintiff.

Defendant's affirmation certified those records as true and accurate.

Plaintiff relies in part on *Colonresto v. Good Samaritan Hospital*, 128 A.D.2d 825 [2nd Dept. 1987]) in support of his contention that the motion is premature. In that case, the moving defendant provided an affidavit claiming that he only diagnosed plaintiff and then referred her to a doctor and hospital for surgery. The defendant, however, also averred that he visited the plaintiff while she was at the hospital, but the visit was only "social" and "upon information and belief" he did not bill the patient for that visit or make any notes or orders in her hospital chart (*id* at 827). The Appellate Division found that the defendant's motion should have been denied as premature because, among other reasons, the record was silent as to a professional relationship between the defendant and the co-defendant doctor and hospital; the action had only been pending for three months and therefore plaintiff had no opportunity to conduct meaningful discovery; and discovery was needed to explore the nature of the relationship between defendant and the co-defendants in light of defendant's admission that he visited plaintiff during the course of her hospital stay (*id* at 828-29). Here, to the contrary, Kivell has provided his medical records and has stated unequivocally that he was a urologist who examined plaintiff on a single occasion, obtained a CT scan of his abdomen and pelvis, reported and discussed the abnormal findings with his treating physicians, and because there was no urological cause for plaintiff's pain, he had no further involvement with plaintiff's treatment. The record is not silent as to the lack of a professional relationship between plaintiff's urologist and his primary care physicians, as Kivell has stated that because the cause of plaintiff's pain was not urological in nature, had no further treatment role. Moreover, unlike in *Colonresto*, there is no evidence that Kivell ever attempted to treat or contact plaintiff at any point after December 2009.

In light of the foregoing, Plaintiff has failed to carry his burden of demonstrating the existence of a triable issue of fact as to whether Kivell/Urologic maintained a continuous course of treatment for the condition giving rise to Plaintiff's medical malpractice action. Accordingly, Kivell/Urologic's motion to dismiss Plaintiff's cause of action against them as time-barred is granted.

The court further notes that Plaintiff failed to oppose that branch of Kivell/Urologic's motion which sought summary judgment on the basis that the defendants owed no legal duty to

Plaintiff. "[A]lthough physicians generally owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied upon by the patient" (*Burtman v. Brown*, 97 A.D.3d 156, 161-62 [1st Dept. 2012], quoting *Markley v. Albany Med. Ctr.*, 163 AD2d 639, 640 [3rd Dept. 1990]). The question of whether a doctor owes plaintiff a duty of care is a question of law for the court, and generally not a subject for expert opinion (*id.*, citing (*McNulty v City of New York*, 100 NY2d 227, 232 [2003]; *Dallas-Stephenson v Waisman*, 39 AD3d 303 [1st Dept 2007]). Kivell here demonstrated that he referred Plaintiff's abnormal CT scans to Plaintiff's primary care physicians after performing his limited function of determining whether Plaintiff's left flank pain was urological in nature. Kivell therefore cannot be charged with a duty to diagnose Plaintiff's tumor, as he was not involved in that aspect of Plaintiff's care (*see Wasserman v. Staten Is. Radiological Assoc.*, 2 A.D.3d 713, 714 [2nd Dept. 2003]; *Yasin v. Manhattan Eye, Ear & Throat Hosp.*, 254 A.D.2d 281, 282-83 [2nd Dept. 1998]). In opposition, Plaintiff failed to present any evidence, expert or otherwise, to suggest that further discovery will lead to evidence that would raise an issue of fact. Accordingly, even if Plaintiff had raised an issue of fact as to whether his claims against these defendants was time-barred, the defendants would nevertheless be entitled to summary judgment because they owed him no duty of care.

That branch of defendants' motion seeking imposition of sanctions and costs against Plaintiff is denied. Contrary to defendants' contentions, Plaintiff's conduct in commencing this action or failing to discontinue the action against the defendants was not frivolous within the meaning of 22 NYCRR §130-1.1(c).

Plaintiff's cross-motion to compel defendants Kivell and Urological to provide responses to Plaintiff's combined demands for discovery and inspection, and to appear for deposition, is denied as moot. Plaintiff's cross-motion to compel the aforementioned discovery from the remaining defendants is denied because Plaintiff failed to provide a "good faith affirmation" in compliance with 22 NYCRR 202.7(a) and (c), and the record does not show that "any further attempt to resolve the dispute nonjudicially would have been futile" (*Jackson v. Hunter Roberts Constr. Group, LLC.*, 139 A.D.3d 429, 429 [1st Dept. 2016]).

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IV. Conclusion

Accordingly, it is hereby

ORDERED, that defendants Howard Kivell and Associates for Urologic Care, P.C.'s motion to dismiss Plaintiff's complaint as asserted against them as time-barred pursuant to CPLR 3211(a)(5) is granted, and it is further,

ORDERED, that the defendants' motion for an order imposing costs and sanctions upon Plaintiff is denied, and it is further,

ORDERED, that Plaintiff's cross-motion to compel discovery is denied.

This constitutes the Decision and Order of this Court.

Dated: 6/6, 2017

Mary Ann Brigantti

Hon. Mary Ann Brigantti, J.S.C.