

<b>Duvall v Montefiore Med. Ctr.</b>
2017 NY Slip Op 32820(U)
May 4, 2017
Supreme Court, Bronx County
Docket Number: 23220/2014E
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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JAMILAH DUVALL,

Plaintiff(s),

- against -

INDEX NO:23220/2014E

MONTEFIORE MEDICAL CENTER, THE INSTITUTE  
FOR WOMEN'S HEALTH, MONTEFIORE MEDICAL  
PARK, HARRIET O. SMITH, M.D., JOHN DOE, M.D.,  
and JANE DOE, M.D.,

DECISION/ORDER

Defendant(s).

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**HON. DOUGLAS E. MCKEON**

Motion by defendants Montefiore Medical Center, s/h/a The Institute for Women's Health, Montefiore Medical Park and Harriet O. Smith, M.D., for an order dismissing with prejudice all claims against them prior to July 29, 2013 as time barred is decided as follows.

This is a medical malpractice action where plaintiff alleges that she was never informed she had a ureteral stent placed in November 2010 or that it would need to be removed or replaced after a few months. Defendants argue that plaintiff's claims must be dismissed as they are time barred pursuant to CPLR § 214 which states that an action for 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 continued treatment for the same illness, injury or condition.

Plaintiff commenced the instant action against defendants on July 17, 2014. According to the Complaint and Bill of Particulars, the negligent act occurred when the stent was placed on November 8, 2010. Further, the action should have been commenced by August 14, 2010 based upon the February 14, 2011 last date of treatment.

In contrast, movants argue the only timely date of treatment was July 29, 2013. Movants argue that the ureteral stent placed on November 8, 2010 was a fixation device and not a foreign object. As such, plaintiff cannot claim that the statute of limitations did not begin to run until the date that the stent was discovered. In Labarbera v New York Eye and Ear Infirmary, 91 NY2d 207 (1998) the Court of Appeals concluded that a plastic stent placed in plaintiff's nose was not a foreign object. In that case a stent was placed to provide temporary nasal support and was expected to be removed approximately 10 days after the nasal surgery at which time the doctor only removed the packing material. In 1992 that plaintiff underwent a rhinoscopy where the stent was discovered and removed and a year later commenced the action within one year of the discovery and extraction of the stent. The court dismissed the action against the doctor as untimely on the ground that the foreign object exception to the statute of limitations did not apply. The Appellate Division affirmed. Here, the stent placed at

Montefiore on November 8, 2010 was deliberately placed and left inside the patient with the intention that it remain to serve a continuing treatment purpose. At such, it was a fixation devise and not a foreign object. The last day of treatment with the doctor who placed the stent was February 14, 2011. Plaintiff was instructed to return three months later but did not instead returning to Dr. Smith July 29, 2013 over two years and five months after the last date of treatment and over three years and four months after the stent was placed.

In opposition, plaintiff states that plaintiff does not need to rely on the statute of limitations toll for a foreign object because she is within the statute of limitations based on continuance treatment. Here, plaintiff argues that the statute of limitations period did not begin to run until July 29, 2013 when plaintiff made a return visit to defendant Dr. Smith to continue treatment related to procedures Dr. Smith had performed in November and December of 2010. On February 14, 2011 plaintiff saw Dr. Smith as a follow up to those surgeries. Plaintiff argues that on July 29, 2013, two years and five months later, plaintiff made a return visit to Dr. Smith for a condition directly related the prior treatment. Therefore, the return visit of July 29, 2013 is the date from which the statute of limitations began to run and the action was timely commenced on June 10, 2014.

Plaintiff's argument that the visit of July 29, 2013 was instigated by plaintiff for a complaint clearly related to the stent as to trigger the running of the statute of limitations is rejected by movants. Movants argue that the July 29, 2013 visit with

Dr. Smith represented renewal of care and is not subject to a discovery toll. Since plaintiff claims she did not know the stent was placed she could have no reasonable expectation that treatment with defendant for that condition would continue.

Because plaintiff does not dispute that the stent was a fixation device and the foreign object toll does not apply all claims by plaintiff that the stent was a foreign object are dismissed with prejudice. The three elements that must be demonstrated to establish that the continuance treatment doctrine applies to toll the statute of limitations are continued treatment by the physician is anticipated by both the patient and physician, plaintiff continued to seek and obtain an actual course of treatment from defendant physician, and the actual course of treatment was for the same conditional complaint underlying the plaintiff's medical malpractice action. Movants argue that plaintiff cannot meet any of those three tests. Movants argue that plaintiff could not have anticipated the continuance treatment with defendants because she claims the condition was unknown to her. Furthermore, her actions do not reveal that she anticipated any subsequent treatment with defendants as only after she treated with two other doctors and one of them, Dr. Boteng, suggested plaintiff return to defendants did she do so. As such, there is no basis to conclude that plaintiff had anticipated continuing treatment with defendants.

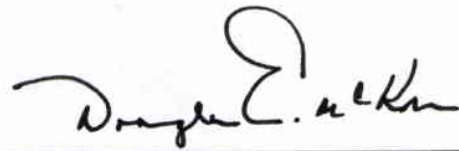
The court agrees with movants. Given plaintiff's claim that she was unaware

of the stent as a condition warranting further treatment, the purpose of the continuous treatment doctrine would not be served by its application in this matter. The court finds that the return visit of July 29, 2013 was initiated by patient for what she believed was a new complaint and not for the purpose of seeking further treatment for a condition or complaint for which treatment was previously provided. Plaintiff cannot offer a contradictory argument that she sought further treatment for the condition about which she claimed she was unaware.

The instant motion is granted. The court finds that defendants have shown all claims prior to July 29, 2013 are time barred by the two and a half year statute of limitations. The foreign object toll does not apply because the stent is a fixation device. The continuous treatment doctrine does not apply to this two year and five month break in plaintiff's treatment with defendants because the visit of July 29, 2013 was not instigated by plaintiff for a complaint related to the stent and was, instead, a renewal of care prompted by a different doctor. Finally, as plaintiff claims she did not know the stent was placed, she could have no reasonable expectation that treatment with defendants for that condition would continue.

So ordered.

Dated: 5/4/17



Douglas E. McKeon, J.S.C.