

Rhodes v Bosshart

2017 NY Slip Op 33457(U)

October 26, 2017

Supreme Court, Nassau County

Docket Number: Index No. 602127-17

Judge: Robert A. Bruno

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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PATRICIA RHODES,
Plaintiff,

TRIAL/IAS PART 14

-against-

Index No.: 602127-17
Submission Date: 9-11-17
Motion Sequence: 001

DANIEL C. BOSSHART, M.D., KATHLEEN VAN VALKENBURG, M.D., NORTH SHORE LIJ UNIVERSITY HOSPITAL AT SYOSSET NORTH SHORE UNIVERSITY HOSPITAL, NORTH SHORE-LIJ HEALTH SYSTEM INC., n/k/a/ NORTHWELL HEALTH, INC., NORTH AMERICAN PARTNERS IN ANESTHESIA, L.L.P., and NORTH SHORE EYE CARE,

DECISION & ORDER

Defendants.

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Sequence #001

Papers Numbered

Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, motion by defendant DANIEL BOSSHART, M.D. ("Dr. BOSSHART") for an Order (1) pursuant to CPLR §3211(a)(5) and CPLR §214-a, dismissing the Complaint herein as to Dr. BOSSHART, due to the plaintiff's failure to comply with the applicable Statute of Limitations; and (2) severing Dr. BOSSHART from the caption and amending the caption accordingly, is determined as set forth below.

The following facts are taken from the pleadings and submitted papers and do not constitute findings of fact by this Court. This is a medical malpractice action arising out of a cataract surgery performed on plaintiff's left eye on July 16, 2013. The surgery was performed by ocular surgeon defendant KATHLEEN VAN VALKENBURG, M.D. ("Dr. VAN VALKENBURG"), at NORTH SHORE LIJ UNIVERSITY HOSPITAL AT SYOSSET ("NORTH SHORE SYOSSET"). Dr. BOSSHART, who is employed by defendant NORTH AMERICAN PARTNERS IN ANESTHESIA, L.L.P. ("NAPA") was the anesthesiologist for the surgery. Plaintiff alleges that deviations from the standard of care occurred during the July 16,

Rhodes v Bosshart, M.D. et al
Index No.: 602127-17

2013 surgery, which caused injuries to her left eye and resulted in the need for subsequent surgeries to her left eye, which were performed on March 5, 2014 and on January 5, 2015.

The action was commenced by the filing of the Summons and Verified Complaint on March 10, 2017 (*Mot. Exh. A*). Issue was joined as to defendants Dr. BOSSHART and NAPA by the filing of their Verified Answer on April 13, 2017 (*Mot. Exh. C*).

Dr. BOSSHART now moves to dismiss the Complaint as against him on the ground that it is time-barred by the applicable 2-1/2 year statute of limitations (see CPLR §214). In support of his motion, Dr. BOSSHART submits, among other things, the Affidavit In Support of Dr. BOSSHART, sworn to on May 17, 2017 (*Mot. Exh. D*), and the billing record in connection with the July 16, 2013 surgery, which supports the statements in his Affidavit (*Mot. Exh. E*). Dr. BOSSHART avers that: (i) he was employed by NAPA on July 16, 2013; (ii) on that date, he supervised Certified Registered Nurse Anesthetist (CRNA) Vanessa Mahoney, who administered intravenous sedation and monitored anesthesia care for plaintiff's eye surgery; (iii) the only contact he had with plaintiff was on July 16, 2013 – he did not have any contact with plaintiff prior to July 16, 2013, and he did not have any contact, nor expect any contact, with plaintiff after July 16, 2013; (iv) he did not speak to any physicians or care providers regarding plaintiff's care subsequent to July 16, 2013; (v) he was never contacted by plaintiff or any of plaintiff's medical care providers to discuss any complaints plaintiff had or made regarding the anesthesia care provided on July 16, 2013; (vi) he did not have any employment relationship with any of the defendants other than NAPA.

Based upon the foregoing, Dr. BOSSHART asserts that the action must be dismissed as time-barred. His only encounter with plaintiff occurred more than 2-1/2 years prior to the filing of the complaint. Thus, the limitations period had expired by the time the action was commenced.

Plaintiff opposes the motion based upon her contention that the statute of limitations was tolled to the date of the January 5, 2015 surgery by application of the "continuous treatment doctrine." The crux of plaintiff's argument is two-fold. First, plaintiff argues that, although Dr. BOSSHART himself had no further contact with plaintiff, the anesthesiologists for both of the subsequent surgeries on March 5, 2014 and January 5, 2015 were, like Dr. BOSSHART, employees of NAPA. Under the rule articulated in *Watkins v Fromm* [108 AD2d 233, 243 (2d Dept. 1985)] and progeny, any continuous treatment by members of the same practice group may be imputed to the individual doctors, and the statute of limitations is tolled to the latest date of treatment by that group. To evidence the employment relationship, plaintiff submits print-outs from the NAPA Website depicting general information about NAPA's practice and billing (*Aff. In Opp, Exh. A*), and website information regarding each of the anesthesiologists who

Rhodes v Bosshart, M.D. et al
Index No.: 602127-17

participated in the March 5, 2014 and January 5, 2015 surgeries, indicating that they were employed by NAPA (*Aff. In Opp, Exhs. C&D*).

Second, plaintiff argues that both the March 5, 2014 and January 5, 2015 surgeries evidence a continuing course of treatment. Both surgeries addressed medical conditions that were the same or related to the conditions for which plaintiff had surgery on July 16, 2013, or which arose as a result of the original July 16, 2013 surgery. In support of this contention, plaintiff submits the medical and surgical records pertaining to the treatment of plaintiff's left eye (*Aff. In Opp., Exhs. E, F, G, H*), and the Affidavit of her expert Ophthalmologist (*Aff. In Opp., Exh. B*). Based upon his review of the records, plaintiff's expert opined (among other things): (i) that there were deviations from the standard of care in the July 16, 2013 surgery, including the inappropriate administration, management or supervision of anesthesia, which caused damage to plaintiff's eye; (ii) that the March 5, 2014 and January 5, 2015 surgeries were necessitated because of the damage to plaintiff's eye during the July 16, 2013 surgery; (iii) that the March 5, 2014 and January 5, 2015 surgeries addressed the same or related ocular complaints and visual limitations that gave rise to the July 16, 2013 surgery; and (iv) that the treatment provided by the anesthesiologists was an integral part of the medical/surgical treatment of plaintiff's ocular conditions.

In the alternative, plaintiff opposes the motion on the basis that it is premature. Plaintiff argues that relevant discovery has not been exchanged and that depositions have not been conducted. Plaintiff states that, in the event no issue of fact is found on the record to date, the motion should be denied to afford her the opportunity to obtain necessary discovery (see CPLR §§ 3211[d]; 3212[f]), including complete and certified copies of all of the relevant medical records, as well as information regarding NAPA, including the employment details pertaining to the anesthesiologists who treated plaintiff, and the custom and practice of physician interaction within the group.

The Court notes, at the outset, that although characterized as a motion to dismiss pursuant to CPLR §3211, the instant motion is the functional equivalent of a motion for summary judgment pursuant to CPLR §3212, insofar as issue has been joined and both parties have submitted evidence in support of their respective positions. Plaintiff argues that the motion should be treated as such (in which event, the motion is premature), and defendant submits that, in any event, the burdens of proof are essentially the same.

Whether characterized as a motion pursuant to CPLR §3211 or §3212, the party moving to dismiss the action as time-barred must establish, *prima facie*, that the period in which to commence the action has expired. Upon such showing, the burden then shifts to the nonmoving party to raise an issue of fact as to whether the Statute of Limitations was tolled or otherwise

Rhodes v Bosshart, M.D. et al
Index No.: 602127-17

inapplicable. See *Nisanov v Khulpateea*, 137 AD3d 1091 (2d Dept. 2016); *Muscat v Mid-Hudson Med. Group, P.C.*, 135 AD3d 915 (2016); *Ceglio v BAB Nuclear Radiology, P.C.*, 120 AD3d 1376 (2d Dept. 2014); *Wei Wei v Westside Women's Medical Pavillion, P.C.*, 115 AD3d 662 (2d Dept. 2014). "To establish that the continuous treatment doctrine applies, a plaintiff is required to demonstrate that there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice." *Nisanov*, 137 AD3d at 1093. See also *Murray v Charap*, 150 AD3d 752 (2d Dept. 2017); *Gomez v Katz*, 61 AD3d 108 (2d Dept. 2009).

At bar, the Court finds that Dr. BOSSHART has met his initial burden to establish *prima facie* that the action is time-barred, by the submission of evidence that more than 2-1/2 years had elapsed between the alleged malpractice and the commencement of the action. See *Muscat v Mid-Hudson*, 135 AD3d at 916.

The Court finds further, however, that plaintiff has failed to raise an issue of fact as to the applicability of the continuous treatment doctrine with respect to the anesthesiology services provided by Dr. BOSSHART and/or NAPA. Assuming, without deciding, that the anesthesiologists who participated in the March 5, 2014 and January 5, 2015 surgeries were employees of NAPA, and that the subsequent treatment by employees of NAPA could be imputed to Dr. BOSSHART, and assuming that there was a course of treatment related to plaintiff's ocular condition (albeit by different physicians), the court nonetheless finds no continuous treatment with respect to the provision of anesthesiology services.¹

The Court finds that the anesthesiology services performed by Dr. BOSSHART were "discrete and complete, and not part of a course of treatment." See *Nisanov*, 137 AD3d at 1093. The course of treatment, if any, related to plaintiff's eye conditions, and not to the provision of anesthesiology services. There is no evidence (other than the vague and conclusory statement of plaintiff's ophthalmology expert) that the anesthesia from the first surgery caused plaintiff's eye conditions or otherwise prompted further treatment. Compare *Oden v Long Island Jewish-Hillside Medical Center*, 94 AD2d 719 (2d Dept. 1983). There is no evidence that plaintiff, Dr. BOSSHART, or any employee of NAPA contemplated further provision of anesthesiology services after the initial surgery, and subsequent services were provided on March 5, 2014 and January 5, 2015 only at the behest of plaintiff's eye surgeons. *Id.*

¹ In the absence of some agency or other affiliation between the surgeon and the anesthesiologist, the surgeons' treatment of a patient is not imputable to an anesthesiologist for purposes of the continuous treatment doctrine. *Harris v North Shore University Hosp. at Syosset*, 16 AD3d 549 (2d Dept. 2005). See also *McDermott v Torre*, 56 NY2d 399, 407-408 (1982). Thus, assuming, *arguendo*, that the same surgeon performed the July 16, 2013, March 5, 2014 and January 5, 2015 surgeries, and that the treatment was for the same or related ocular conditions, such continuous treatment could not be imputed to NAPA, which presumably, has no agency or other affiliation with the surgeon or hospital.

Rhodes v Bosshart, M.D. et al
Index No.: 602127-17

Moreover, “[t]he policy underlying the continuous treatment doctrine seeks to maintain the physician-patient relationship.” *McDermott v Torre*, 56 NY2d 399 (1982). As the Court of Appeals held in *McDermott*, these considerations do not apply to an independent provider performing a discrete service at the request of a patient’s physician. See also *Elkin v Goodman*, 24 AD3d 717 (2d Dept. 2005). In this context, the inquiry must be directed to the nature of the provider’s relationship to the patient (see *McDermott v Torre*, 56 NY2d at 408). The relationship is considered from the point of view of the patient, as demonstrated by whether or not the patient initiated the contact (see *Rizk v Cohen*, 73 NY2d 98 [1989]). Where, as here, neither the patient nor the provider contemplated any further contact beyond the initial encounter, and where the subsequent contact was not initiated by plaintiff but rather was at the behest of the patient’s physician, there is no evidence of the continuing trust on the plaintiff’s part that the continuous treatment doctrine requires. See *Rizk v Cohen*, 73 NY2d 98 (1989).

In view of the foregoing, the Court does not find that the motion is premature for want of discovery. Plaintiff seeks discovery of her complete medical record and information pertaining to NAPA. Both of these are relevant to the question of whether there was a continuing course of treatment for her eye conditions, and whether the provision of anesthesia services by NAPA employees can be imputed to Dr. BOSSHART. For purposes of discussion, however, the Court has assumed an affirmative answer to both of these questions. On the determinative issue – that is, whether the plaintiff had an ongoing relationship with Dr. BOSSHART or NAPA – plaintiff has not shown that “discovery may lead to relevant evidence or that the facts essential to opposing the motion are in the movant’s exclusive knowledge and control” (see *Sehgal v www.nyairportsbus.com, Inc.*, 100 A.D.3d 860 [2d Dept. 2012]).

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that the motion by Dr. BOSSHART for an Order dismissing the Complaint herein as to Dr. BOSSHART and amending the caption accordingly, is *granted*.

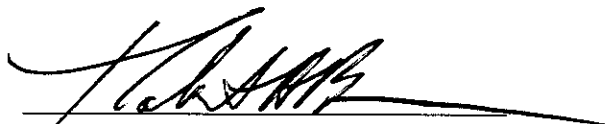
All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: October 26, 2017
Mineola, New York

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ENTERED



Hon. Robert A. Bruno, J.S.C.

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