

Diamond v Walker

2017 NY Slip Op 33554(U)

January 4, 2017

Supreme Court, Suffolk County

Docket Number: Index No. 69157/2014

Judge: Joseph Farneti

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ORIGINAL

SHORT FORM ORDER

INDEX NO. 69157/2014

**SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

KATHLEEN DIAMOND and ALAN DIAMOND,

Plaintiffs,

-against-

JAMES WALKER, M.D., PAUL GRAPPELL,
M.D., PAUL M. GRAPPELL, M.D., JAMES T.
WALKER, M.D., P.C. and MEDICAL ARTS
RADIOLOGICAL GROUP, P.C.,

Defendants.

ORIG. RETURN DATE: MAY 3, 2016
FINAL SUBMISSION DATE: JUNE 9, 2016
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: MAY 3, 2016
FINAL SUBMISSION DATE: JUNE 9, 2016
MTN. SEQ. #: 002
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 10 read on this motion _____
FOR LEAVE TO AMEND PLEADINGS AND CROSS-MOTION TO DISMISS _____.
Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; Affirmation in Opposition to Cross-motion and supporting papers 7, 8; Physician's
Affirmation 9; Reply Affirmation 10; it is,

ORDERED that this motion (seq. #001) by plaintiffs KATHLEEN DIAMOND and ALAN DIAMOND for an Order: (1) pursuant to CPLR 3025 (b), granting plaintiffs leave to amend the Complaint to add a cause of action for wrongful death; (2) deeming the Amended Complaint served; (3) pursuant to CPLR 1015, substituting ALAN DIAMOND, as Executor of the Estate of KATHLEEN DIAMOND, deceased, as a plaintiff in this action in place and stead of KATHLEEN DIAMOND; and (4) amending the caption of this action to henceforth reflect same, is hereby **GRANTED** in its entirety as set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #002) by defendants JAMES WALKER, M.D., PAUL GRAPPELL, M.D., PAUL M. GRAPPELL, M.D., JAMES T. WALKER, M.D., P.C. and MEDICAL ARTS RADIOLOGICAL GROUP, P.C.

(collectively "defendants") for an Order, pursuant to CPLR 3211 (a) (5), dismissing plaintiffs' Complaint as against defendants JAMES WALKER, M.D. and JAMES T. WALKER, M.D., P.C. ("Dr. Walker"), on the grounds that the action is time-barred by the statute of limitations, is hereby **DENIED** for the reasons set forth hereinafter. The Court has received an attorney's affirmation as well as a redacted physician's affirmation from plaintiffs in opposition to this cross-motion. Plaintiffs have also submitted the unredacted version of the physician's affirmation for the Court's *in camera* review.

In this medical malpractice action commenced on or about October 30, 2014, plaintiffs allege that defendants were negligent in failing to timely diagnose and treat plaintiff KATHLEEN DIAMOND's right breast carcinoma, thereby allowing the carcinoma to metastasize and spread to her liver and right hip. Specifically, plaintiffs allege that defendants failed to properly identify and investigate suspicious nodules/asymmetries in Mrs. Diamond's right breast on three sonograms and three mammograms performed between December 30, 2010 and August 1, 2012. Plaintiffs allege that this negligence caused and/or contributed to Mrs. Diamond's death on June 14, 2015.

As Mrs. Diamond passed away after commencement of the instant action, plaintiffs have filed the instant motion to amend the Complaint to add a cause of action for wrongful death, and to substitute ALAN DIAMOND, as Executor of the Estate of KATHLEEN DIAMOND, deceased, as a plaintiff in this action in place and stead of KATHLEEN DIAMOND.

CPLR 3025 (b) provides in pertinent part that, "[a] party may amend his or her pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" (CPLR 3025 [b]). Leave to amend a pleading is to be freely given absent surprise or prejudice resulting from the delay. Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (*Pergament v Roach*, 41 AD3d 569 [2007]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 41 AD3d 554 [2007]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

Here, defendants do not oppose plaintiffs' motion but for the relief sought with respect to Dr. Walker. Accordingly, this motion for leave to amend the Complaint and for related relief is **GRANTED**. The proposed Amended Verified Complaint, annexed to plaintiffs' moving papers as Exhibit "5," shall be deemed served upon defendants as of the date of service of the instant Order upon defendants with notice of entry. Defendants may then serve responsive pleadings in accordance with CPLR 3025 (d), if so advised.

With respect to defendants' cross-motion to dismiss, defendants allege that the last time Dr. Walker interpreted any of Mrs. Diamond's mammograms or sonograms was on July 28, 2011. Therefore, defendants argue that under the applicable two and one-half years statute of limitations, plaintiffs' complaint as asserted against Dr. Walker is time-barred, having been interposed thirty-nine months after the last treatment provided by Dr. Walker (see CPLR 214-a). As such, defendants seek dismissal of the Complaint as asserted against Dr. Walker.

On a motion to dismiss a claim on statute of limitations grounds pursuant to CPLR 3211 (a) (5), the moving defendant must establish *prima facie* that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled, is otherwise inapplicable, or whether the action was actually commenced within the applicable limitations period (see e.g. *Baptiste v Harding-Marin*, 88 AD3d 752 [2011]; *Rakusin v Miano*, 84 AD3d 1051 [2011]).

Pursuant to CPLR 214-a, "[a]n action [alleging] 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). Thus, under the continuous treatment doctrine, "the time in which to bring a malpractice action is stayed 'when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint' " (*McDermott v Torre*, 56 NY2d 399 [1982], quoting *Borgia v City of New York*, 12 NY2d 151 [1962]; see *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291 [1998]). 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' " (*Baptiste*, 88 AD3d at 753, quoting *Stewart v Cohen*, 82 AD3d 874, 876 [2011]; see *Gomez v Katz*, 61 AD3d 108 [2009]). Although "[r]outine examination of a seemingly healthy patient, or visits concerning matters unrelated to the condition at issue giving rise to the claim, are insufficient to invoke the benefit of the doctrine" (*Plummer v New York City Health & Hosps. Corp.*, 98 NY2d 263, 268 [2002]), "[t]he monitoring of an abnormality to ascertain the presence . . . of a disease or condition may constitute treatment for purposes of tolling" the statute of limitations (*Oksman v City of New York*, 271 AD2d 213, 215 [2000]; see *Young*, 91 NY2d 291).

The Court finds that defendants have established *prima facie* that the claims against Dr. Walker are time-barred pursuant to CPLR 214-a (see *Ceglio v BAB Nuclear Radiology, P.C.*, 120 AD3d 1376 [2014]). However, plaintiffs have raised questions of fact with respect to whether the continuous treatment doctrine applies herein. Indeed, plaintiffs have demonstrated that Mrs. Diamond was treating with defendant MEDICAL ARTS RADIOLOGICAL GROUP, P.C. ("MAR") and was monitored by Dr. Walker and defendant PAUL GRAPPELL, M.D. ("Dr. Grappell") for breast nodular densities which continued uninterrupted from on or about December 30, 2010 through on or about August 1, 2012. Although defendants argue that Dr. Walker provided no treatment to Mrs. Diamond after July 28, 2011, Dr. Walker recommended a follow-up mammography and ultrasound which were conducted on August 1, 2012, and interpreted by Dr. Grappell. Dr. Walker alleges that he was "merely associated" with MAR, but fails to provide the nature of the professional relationship or the time frame thereof. If there existed a relationship between Dr. Walker and MAR, and Dr. Grappell and MAR, then the continuous treatment of Mrs. Diamond by MAR would serve as a basis for tolling the statute of limitations as to Dr. Walker (see *McDermott*, 56 NY2d 399; *Oviedo v Weinstein*, 102 AD3d 844 [2013]; *Mendrzycki v Cricchio*, 58 AD3d 171 [2008]; *Cardenales v Queens-Long Island Med. Group, P.C.*, 18 AD3d 689 [2005]; *Kimiatek v Post*, 240 AD2d 372 [1997]).

Accordingly, the Court finds that issues of fact exist regarding whether Dr. Walker's treatment of Mrs. Diamond falls within the continuous course of treatment exception to the statute of limitations (see *Nykorchuck v Henriques*, 78 NY2d 255 [1991]; *McDermott*, 56 NY2d 399; *Pace v Caron*, 232 AD2d 617 [1996]). Based upon the foregoing, this cross-motion by defendants to dismiss plaintiffs' complaint as asserted against Dr. Walker is **DENIED**.

The parties shall appear for a Preliminary Conference of this matter on **February 23, 2017, at 9:30 a.m., in Part 37, Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York.**

The foregoing constitutes the decision and Order of the Court.

Dated: January 4, 2017



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

NON-FINAL DISPOSITION