Tedeschi v Cohen
2018 NY Slip Op 30413(U)
March 9, 2018
Supreme Court, New York County
Docket Number: 805293/16
Judge: Martin Shulman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

----------x

EVE TEDESCHI and PHIL TEDESCHI,

Plaintiffs,

-against-

LILIAN COHEN, M.D., THE NEW YORK AND PRESBYTERIAN HOSPITAL, WEILL CORNELL MEDICAL COLLEGE and QUEST DIAGNOSTICS, INC.,

Defendants.

----------x

Index No. 805293/16

Decision & Order

Hon. Martin Shulman:

In motion sequence number 2, plaintiffs Eve Tedeschi and Phil Tedeschi (Mr. and Mrs. Tedeschi, or collectively plaintiffs) move pursuant to CPLR 2221 to renew and reargue this court's bench decision dated September 28, 2017, which was issued after oral argument on the record on September 13, 2017 (NYSCEF Doc. No. 50) (the decision). In motion sequence number 3, defendants Lilian Cohen, M.D. (Dr. Cohen), The New York and Presbyterian Hospital (NYPH) and Cornell University s/h/a as Weill Cornell Medical Center (collectively the co-defendants) move to reargue[1] the decision, which granted defendant Quest Diagnostics, Inc.'s (Quest) motion for summary judgment dismissing this action against it as time barred. Quest opposes plaintiffs' and the co-defendants' motions, which are consolidated for disposition.

The amended complaint herein alleges causes of action for medical malpractice, negligence, lack of informed consent, loss of services (on behalf of Mr. Tedeschi),

[1] Although the co-defendants' notice of motion seeks "to reargue and/or renew" the decision, they clarify in reply that they only seek reargument.

negligent hiring and supervision, as well as negligent and intentional infliction of emotional distress. Plaintiffs' claims arise from defendants' alleged misdiagnosis of plaintiff Eve Tedeschi as being positive for DiGeorge/Velocardiofacial Syndrome (VCFS).[2] Plaintiffs' minor son suffers from this condition and, prior to having more children, Mrs. Tedeschi underwent genetic testing to determine if she carried the genetic microdeletion associated with VCFS.

On July 30, 2013, Dr. Cohen ordered the testing and blood was drawn from Mrs. Tedeschi and her son, then sent to Quest for analysis at one of its laboratories. On August 21, 2013, Quest reported that Mrs. Tedeschi was positive for VCFS.

Thereafter, in April 2016, Elaine Zackai, M.D., a physician at Children's Hospital of Philadelphia, questioned Mrs. Tedeschi's diagnosis and ordered a retest. A blood sample from this second test was also sent to Quest for analysis, albeit at a different laboratory. On May 10, 2016, Quest reported that Mrs. Tedeschi was negative for VCFS. This report states that "the most likely cause of the discrepancy between the previous and the current . . . results . . . was a sample mix-up in 2013." Presumably, plaintiffs' son's blood sample was transposed with that of his mother.

As a result of the incorrect diagnosis, plaintiffs opted not to have more children. They allege that Mrs. Tedeschi is now unable to conceive as a result of the approximately three year delay between the accurate and inaccurate diagnoses.

---

[2] As alleged in the amended complaint and reiterated by plaintiffs' counsel in his supporting affirmation, VCFS "is a disorder caused by the deletion of a small piece of chromosome 22 and can cause heart abnormalities, immune and autoimmune disorders, and potential psychiatric and developmental issues." Merson Aff. in Supp. of Motion, ¶ 8; Exh. 2, ¶33.

This court's decision found that this action was time barred under the two and one half year statute of limitations for medical malpractice actions (CPLR §214-a). It is uncontested that if plaintiffs' claims sounded in ordinary negligence, the action would be timely, having been commenced on July 18, 2016, within three years of Quest's August 21, 2013 report. See CPLR §214.

Reargument

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v Roche*, 68 AD2d 558 (1st Dept 1979). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984); *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1st Dept 1992).

In support of their motions to reargue, both plaintiffs and the co-defendants reanalyze and attempt to distinguish *Annunziata v Quest Diagnostics Inc.*, 127 AD3d 630 (1st Dept 2015), upon which this court based its decision. As in the case at bar, *Annunziata* involved a failure to properly diagnose. In *Annunziata,* the First Department found that Quest's misreading of a tissue sample constituted medical malpractice, stating:

> It is settled that a negligent act or omission "that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice" (*see Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). Laboratory services, such as Quest's,

> performed at the direction of a physician are an integral part of the process of rendering medical treatment (*see Spiegel v Goldfarb*, 66 AD3d 873, 874 [2d Dept 2009], *lv denied* 15 NY3d 711 [2010]). Accordingly, a claim stemming from the rendition of such services is a medical malpractice claim (*id.*).

(*id.* at 631).

In determining the applicable statute of limitations, the court found that:

> courts must look to the reality or essence of a claim rather than its form. The critical factor in distinguishing whether conduct may be deemed malpractice or ordinary negligence is the nature of the duty owed to the plaintiff that the defendant allegedly breached (citations omitted).

Id. "Where '[n]either specialized medical knowledge nor professional expert testimony is necessary to determine' the nature of the duty to the plaintiff which has allegedly been breached . . ., an action sounds in simple negligence (citations omitted)." *De Leon v Hospital of Albert Einstein College of Med.*, 164 AD2d 743, 748 (1st Dept 1991).

Plaintiffs attempt to distinguish the case at bar from *Annunziata* by noting that a physician committed the malfeasance there and that misreading a specimen is clearly related to medical treatment.[3] By contrast, the alleged sample mix-up in this case could have been caused by a doctor, nurse, medical staff, transporter or anyone else, and a trier of fact could readily determine Quest's actions to be negligent based on common knowledge and without the need for expert medical testimony. See *Rodriguez v Saal*, 43 AD3d 272, 276 (1st Dept 2007).

The co-defendants add that an issue of fact exists as to how Quest received and processed the samples, which is relevant to determining if plaintiffs' claims sound in

---

[3] As Quest's counsel correctly notes, *Annunziata* involved a cytotechnologist who screened the plaintiff's tissue sample, rather than a physician.

general negligence. They further note that, unlike in *Annunziata*, the plaintiffs here allege separate and distinct claims, to wit, that Quest not only improperly read Mrs. Tedeschi's 2013 blood sample, but also that Quest or Dr. Cohen/NYPH mishandled her blood sample.

The co-defendants contend that *Playford v Phelps Mem. Hosp. Ctr.*, 254 AD2d 471 (2d Dept 1998), is more on point than *Annunziata*. There, the plaintiff was told she was HIV negative, however, another patient's report had erroneously been placed in her medical chart. The Second Department held that "the switching of the plaintiff's HIV test results with those of another patient was an act of simple negligence rather than of medical malpractice (citations omitted)."

In opposition, Quest responds to both reargument motions by submitting a copy of the complaint in *Annunziata*, which contains allegations substantially similar to those in the case at bar. See Hensley Opp. Aff., ¶¶ 45-47; Mem. of Law in Opp., pp 2-5. Quest also disputes that the *Playford* case is controlling since it is a non-binding Second Department decision and is distinguishable since it involved a hospital performing blood tests on a patient it was treating rather than a diagnostic laboratory. Quest also characterizes the Second Department's finding that the mix-up of the plaintiff's HIV test sounded in ordinary negligence as mere dicta since the case was ultimately dismissed as time barred for other reasons.

The motions for reargument are granted and upon granting reargument, this court adheres to the decision's determination that plaintiffs' claims sound in medical malpractice and are subject to the two and one half year statute of limitations. While

compelling and well articulated, plaintiffs and the co-defendants' attempts to distinguish *Annunziata* by differentiating a diagnostic laboratory's improper analysis of a blood sample, as opposed to improperly mishandling it, is ultimately unavailing.

The First Department's determination in *Annunziata* that laboratory services performed at a physician's direction are an integral part of rendering medical treatment is unequivocal. The holding in *Spiegel v Goldfarb*, 66 AD3d 873, 874 (2d Dept 2009), *lv denied* 15 NY3d 711 (2010), cited by the First Department and the lower court in *Annunziata*, supports this finding, emphasizing that a laboratory's ultimate test **reports** are "a crucial component of plaintiff's diagnosis and treatment and an integral part of the process of rendering medical treatment to her." See *Annunziata v Quest Diagnostics Inc.*, 2013 WL 6219928, at *7 (Sup Ct Bronx County). This authority does not suggest that the cause of an inaccurate laboratory report is relevant to analyzing whether a claim sounds in negligence or medical malpractice.

As for *Playford v Phelps Mem. Hosp. Ctr.*, *supra*, this court agrees that it is distinguishable from *Annunziata* since it involved a hospital performing blood tests on a patient it was treating rather than a diagnostic laboratory. As stated in *Annunziata*, the nature of the duty defendant owed to the plaintiff and allegedly breached must be considered in determining whether conduct constitutes malpractice or ordinary negligence. While *Playford* also involved a "mix-up", as previously stated, diagnostic reports are an integral part of treatment relied upon by physicians, and a laboratory's duty is to provide accurate reports. By contrast, placing a patient's test results in the wrong patient file is a clerical error which does not constitute medical treatment or bear

a substantial relationship to the rendition thereof (*see Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). For all of the foregoing reasons, the motions to reargue are granted and upon granting reargument, this court adheres to its determination that the statute of limitations for medical malpractice actions applies to plaintiffs' claims.

Renewal

CPLR 2221(e) requires, *inter alia*, that a motion for leave to renew "shall be based upon new facts not offered on the prior motion . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." However, "courts have discretion to relax this requirement . . . in the interest of justice (citations omitted)." *Mejia v Nanni*, 307 AD2d 870, 871 (1st Dept 2003).

In support of renewal, plaintiffs argue that additional facts not previously available to them confirm that the continuous treatment doctrine applies for purposes of tolling the two and a half year statute of limitations for medical malpractice claims. Specifically, plaintiffs rely upon records they received from Quest which were unavailable to them to refresh Mrs. Tedeschi's recollection at the time plaintiffs submitted their opposition to Quest's motion. Had these records been provided, Mrs. Tedeschi would have been in a position to provide an affidavit establishing that she had a continuing relationship with Quest.

Plaintiffs contend that an issue of fact exists regarding continuous treatment on two grounds. First, Mrs. Tedeschi specifically chose Quest for further laboratory testing in connection with her family planning. Second, she had a continuing relationship with

the physicians who utilized Quest's testing for her family planning purposes and relied upon Quest's reports of her results.

To this end, plaintiffs now submit an affidavit from Mrs. Tedeschi, attesting to tests ordered by Dr. Cohen and her obstetrician/gynecologist for family planning purposes. Prior to receiving Quest's records, she states she was unable to recall specific dates and tests performed. Having reviewed Quest's records, she now states that specimens were sent to Quest on March 25, 2015, April 14, 2015, August 13, 2015 and March 16, 2016 to perform various testing.

Plaintiffs cite *McDermott v Torre*, 56 NY2d 399, 403 (1982), for the proposition that continuous treatment is applicable to laboratories where there is a "continuing relationship between the laboratory and the patient." They also rely upon *Elkin v Goodman*, 285 AD2d 484, 486 (2d Dept 2001), which held that the continuous treatment exception to the medical malpractice statute of limitations can apply to diagnostic laboratories where periodic diagnostic testing is performed for the purpose of ongoing care of a patient's existing condition, as anticipated by both the physician and the patient.

In opposition, Quest argues that the additional testing it performed was not for Mrs. Tedeschi's existing VCFS, but rather was routine blood work. Quest further notes that the tests for VCFS were ordered by two different doctors almost 3 years apart. Quest denies that *Elkin* is controlling because it is a Second Department decision. Nonetheless, in the event it was controlling, neither Mrs. Tedeschi nor Quest anticipated ongoing treatment, and there was no agency or special relationship

between Quest and her physicians. Moreover, Quest was unaware that her purpose in undergoing testing was for family planning.

Although plaintiffs and the co-defendants argued that they had not received records from Quest, this court's determination that the continuous treatment doctrine did not apply was predicated upon the fact that neither Mrs. Tedeschi nor Dr. Cohen had submitted affidavits detailing her having undergone additional testing relative to her VCFS diagnosis. Although Quest claims to have provided all of its records to them approximately one month prior to oral argument, plaintiffs' counsel states that he did not have sufficient time to have an expert review them.

While Quest's observations are well taken, nonetheless, on this more developed record, this court agrees that summary judgment was prematurely granted as an issue of fact exists as to whether Mrs. Tedeschi can establish continuing treatment to toll the medical malpractice statute of limitations. Accordingly, the portion of plaintiffs' motion seeking renewal is granted.

Accordingly, it is

ORDERED that both motions for reargument are granted, and upon granting reargument, this court adheres to its determination that plaintiffs' claims sound in medical malpractice; and it is further

ORDERED that the portion of plaintiffs' motion seeking renewal is granted, and upon granting renewal defendant Quest Diagnostics, Inc.'s underlying motion for summary judgment is denied and the complaint's causes of action are reinstated as to said defendant.

The foregoing is this court's decision and order.

Dated: March 9, 2018

Hon. Martin Shulman, J.S.C.