

Oropeza v New York City Health & Hosps. Corp.

2018 NY Slip Op 31762(U)

March 23, 2018

Supreme Court, New York County

Docket Number: 805605/2015

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER PART 10

Justice

ESTEBAN OROPEZA,

Plaintiff

MOTION INDEX NO. 805605/2015

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and YURY ROTHSHEYN, DPM,

Defendants.

Cross-Motion: Yes No

In this medical malpractice action, defendants New York City Health and Hospitals Corporation (“NYCHHC”) and Yury Rothshteyn, D.P.M (hereinafter collectively “defendants”) move for an order dismissing plaintiff’s claims as to treatment rendered prior to July 1, 2013 pursuant to CPLR § 3211 for failure to serve a timely notice of claim, and ask that this court grant summary judgment, pursuant to CPLR § 3212, to defendants for claims after July 1, 2013. Plaintiff opposes the application to dismiss claims as to treatment rendered prior to July 1, 2013 by arguing that the action arises from malpractice defendants’ committed over a course of continuous treatment. Plaintiff also opposes summary judgment by arguing that defendants’ conduct deviated from acceptable medical practice, and proximately caused plaintiff’s injuries.

The motion is decided as follows:

This is an action sounding in medical malpractice relating to plaintiff’s treatment at Metropolitan Hospital Center on December 3, 2012 through September 15, 2014. A notice of claim was served on NYCHHC on June 12, 2014. The action was commenced on August 18, 2015. An answer was served on behalf of NYCHHC on August 31, 2015 and on behalf of Dr. Rotshteyn on October 23, 2015. It is alleged that defendants improperly performed three podiatric surgeries on plaintiff’s

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

left foot. Plaintiff also claims that defendants failed to obtain informed consent. Plaintiff's alleged injuries include destruction of the left first metatarsal head, damage to first left toe and foot, persistent pain in first left toe, impaired gait, additional procedures, medical expenses and lost wages.

Defendants set forth that plaintiff's claims premised on treatment prior to July 1, 2013, should be dismissed. It is argued that plaintiff's notice of claim was not timely filed and plaintiff did not commence this action within the one year and 90 day statute of limitations. Moreover, defendants aver that plaintiff may not rely on the continuous treatment doctrine to render his notice of claim or commencement timely. Defendants contend that while plaintiff, arguably, sought continuous treatment related to his left MTPJ from September 24, 2012 until July 1, 2013, no further treatment at the podiatry clinic was contemplated after July 1, 2013 and plaintiff did not receive a new appointment date at that last visit, thus constituting a break in continuous treatment. Indeed, defendants highlight that plaintiff did not get another podiatry appointment but instead was told to return only "as needed" as no further treatment was anticipated at the time. An entire year passed before plaintiff sought treatment at the podiatry clinic again in response to new complaints that had arisen only several months before. Thus, defendants argue that the treatment beginning in July 2014 constitutes new and separate treatment, not warranting the application of the continuous treatment doctrine. Using July 1, 2013 as the accrual date the time to serve a timely notice of claim for the initial course of treatment expired on September 30, 2013. In the instant case, plaintiff served the defendant on June 12, 2014, almost twelve months after plaintiff's last date of podiatry treatment with defendant Rotshteyn on July 1, 2013.

In opposition, plaintiff argues that a continuous course of treatment relative to plaintiff's left foot was established. Indeed, plaintiff alleges that he presented at Metropolitan Hospital on September 24, 2012 with pain in the first metatarsophalangeal joint ("MTPJ"), presented again shortly thereafter for a

work-related injury, and thereafter was treated continuously for about one year for the same condition without any gaps in treatment until September 5, 2013. Plaintiff further avers that defendant Rotshteyn scheduled multiple routine examinations, performed two surgeries, and recommended frequent physical therapy throughout this time period, again all related to the same injury and any attendant complications. Thus, plaintiff argues that he is entitled to the continuous treatment doctrine, which would toll the statute of limitations and render claims predating July 1, 2013 timely.

Defendant's request for summary judgment is supported by the expert affirmation of Richard Frankel, D.P.M., FACFAS, an expert in podiatric surgery, who reviewed the Metropolitan Hospital Center medical record, plaintiff's Verified Bills of Particulars for NYCHHC and defendant Rotshteyn, and the deposition transcripts of plaintiff and defendant Rotshteyn. Based on a review of those materials and his clinical and academic experience, Dr. Frankel opines, to a reasonable degree of medical certainty, that the care rendered by defendants conformed at all times to good and acceptable medical practice. He further states that defendants committed no departures from the standard of care, and that none of the alleged actions or inactions by defendants resulted in or contributed to the injuries alleged by plaintiff. It is also his opinion to a reasonable degree of medical certainty that plaintiff's complaints of residual chronic pain and stiffness are the results of normal degenerative changes and pre-existing arthritis in the joint that unfortunately were not resolved by his treatment at Metropolitan Hospital Center.

Plaintiff's opposition to summary judgment is supported by an expert affirmation of Dr. David Plotkin, also a podiatrist, who states that it was predictable that cheilectomy would fail since plaintiff's preoperative X-rays do not show any spurring. As such, plaintiff contends that defendants departed from acceptable medical practice that proximately caused his injuries.

Defendants' motion to dismiss for claims as to treatment rendered prior to July 1, 2013

Actions against HHC are governed by McKinney's Unconsolidated Laws of N.Y. § 7401(2) which, in relevant part, provides that such action may not be commenced "unless a notice of intention to commence such action and of the time when and the place where the tort occurred and the injuries or damage, were sustained [...] shall have been filed with a director or officer of the corporation within ninety days after such cause of action shall have accrued." Pursuant to General Municipal Law (GML) § 50-e, the timely filing of a notice of claim is a statutory precondition to the initiation of personal injury suits against a municipality. Thus, a party has 90 days from the date the claim arises to file a notice of claim and when a notice of claim is served beyond the required ninety-day period, without leave of court, it is deemed a nullity (see *McShane v. Town of Hempstead*, 66 AD3d 652 [2d Dept. 2009]).

Under CPLR § 214, the statute of limitations for medical malpractice does not begin to run until the continuous course of care or treatment has terminated. Essential to the application of the doctrine is the notion that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit (see *Nykorchuck v. Henriques*, 78 NY2d 255 [1991]). Neither the mere continuing relationship between physician and patient nor the continuing nature of a diagnosis is sufficient to satisfy the requirements of the doctrine (*id.*). Instead, it must be shown that defendants rendered an actual course of treatment during the applicable period for the same conditions or complaints underlying the plaintiff's medical malpractice claims (see *C'hambers v. Mirkinson*, 68 AD3d 702, 705 [2d Dept. 2009]). Here, in essence, plaintiff alleges that the podiatry clinic's suggestion that plaintiff return to the clinic "as needed" without a specific appointment constituted continuous treatment. Plaintiff maintains that claim even though an entire year passed before plaintiff sought treatment at the podiatry clinic for new complaints

that had arisen only a few months earlier. Nothing in the record shows that plaintiff and his physician explicitly contemplated further treatment for his foot issues after July 1, 2013 (see *Young v. New York City Health & Hospitals Corp.*, 91 NY2d 291 [1998]). A patient remains under the continuous treatment or care of a physician between the time of the last visit and the next scheduled one where the latter's purpose is to administer ongoing corrective efforts for the same or a related condition (see *Richardson v. Orentreich*, 64 NY2d 896 [1985]). Indeed, continuous treatment may be found only when further treatment is explicitly anticipated by both the physician and the patient as manifested in the form of a regularly scheduled future appointment agreed upon during the last visit (*id.*). The suggestion that plaintiff return to the podiatry clinic "as needed" does not constitute a regularly scheduled appointment. More to the point, at his return visits, plaintiff had new chief complaints that were not directly linked to his previous treatment. As such, plaintiff's return to the podiatry clinic constituted new rather than continuous treatment. Consequently, plaintiff is not entitled to the continuous treatment doctrine's toll.

Accordingly, defendant's motion to dismiss plaintiff's complaint as to treatment rendered prior to July 1, 2013, is granted.

Summary Judgment in favor of defendants as to claims for treatment rendered on and subsequent to July 1, 2013

Defendants concede that the action is timely with respect to care rendered after July 1, 2013 and continuing up to and beyond the time plaintiff filed a notice of claim. Thus, defendant's motion for summary judgment must be construed as relevant to claims for treatment rendered subsequent to July 1, 2013.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that in treating the plaintiff there was no departure from good and accepted

medical practice or that any departure was not the proximate cause of the injuries alleged (see *Roques v. Nobel*, 73 AD3d 204 [1st Dept. 2010]). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars (*id.*). If the movant makes a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require trial of the action (*id.*). Specifically, in a medical malpractice action, a plaintiff opposing summary judgment must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of plaintiff's injuries (see *Roques*, 73 AD3d at 207, *supra*).

Here, defendants have made a prima facie showing of its entitlement to summary judgment. Defendants' position is supported by the affirmation of Dr. Frankel who opines, to a reasonable degree of medical certainty, that the care rendered to plaintiff on and subsequent to July 1, 2013 was in accordance with accepted standards of medical practice that were in effect at the time in question. Notably, however, plaintiff opposes defendants' request for summary judgment, and annexes to his opposition Dr. Plotkin's affidavit, which opines that defendants' surgical procedures on plaintiff were unnecessary and constituted a departure from acceptable podiatric practice. At least one of those procedures was performed after July 1, 2017. Additionally, Dr. Plotkin avers that had each surgical procedure not been performed, plaintiff likely would not have suffered predictable pain and suffering. Therefore, to the extent that plaintiff can show that defendants' actions subsequent to July 1, 2013 proximately caused his alleged injuries, summary judgment cannot be granted, as issues of fact exist.

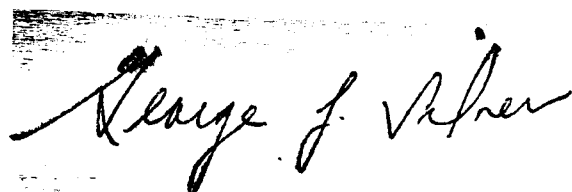
Accordingly, defendants' application for an order granting summary judgment is denied. It is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint as to

treatment rendered prior to July 1, 2013, is granted; and it is further

ORDERED that defendants' application for an order granting summary judgment for treatment rendered on and subsequent to July 1, 2013, is denied.

This constitutes the decision and order of the court.



Dated: March 23, 2018

HON. GEORGE J. SILVER

- 1. Check one: Case Disposed Non-Final Disposition
- 2. Check as Appropriate: Motion is: Granted Denied Granted in Part