Shuck v Passick
2018 NY Slip Op 31910(U)
August 7, 2018
Supreme Court, Kings County
Docket Number: 501963/2013
Judge: Marsha L. Steinhardt

At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of August 2018.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice

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NONA KAY SHUCK,

Plaintiff,

DECISION AND ORDER
Index No. 501963/2013

-against-

JEFFREY PASSICK, M.D., CONEY ISLAND HOSPITAL and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and KINGSBROOK JEWISH MEDICAL CENTER,

Defendant.

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The following papers numbered 1 to 4 read herein:	Papers Numbered
Notice of Motion	1
Affirmation	2
Opposition	3
Reply	4

This is a motion brought on by Defendants Jeffrey Passick, M.D. and New York Health and Hospitals Corporation (HHC), pursuant to CPLR §3211(a)(5), for an Order striking Plaintiff's complaint due to her failure to commence this action within the applicable Statute of Limitations. Plaintiff opposes, relying on the continuous treatment doctrine.

The above captioned action sounds in medical malpractice. On or about December 12, 2017, the case of Shuck v. Kingsbrook Jewish Medical Center was consolidated with the action

pending against the moving Defendants. This motion concerns the timeliness of the commencement of the action pending against them.

On or about September 28, 2011, a document purporting to be a Notice of Claim was served upon HHC alleging that a claim for medical malpractice arose when a V.A.C. sponge was discovered and removed from Plaintiff's right knee. "Respondent failed to act in accordance with good and accepted medical practice with respect to the care for (*sic.*) and treatment of Claimant in a way that included, without limitation, the failure to remove a 'large 5 cm by 2 cm V.A.C. sponge packed into the proximal lateral cavity' of Claimant's right knee,..." Said sponge was inserted prior to Plaintiff's discharge from Coney Island Hospital on July 1, 2011 and discovered and removed on August 24, 2011 at New York Presbyterian Hospital. Action was commenced by service of a Summons and Complaint on April 8, 2013, more than one year and ninety days from the date of the alleged malpractice (July 1, 2011). After extensive motion practice, it was determined by a Judge of concurrent jurisdiction (Hon. Michelle Weston) that Plaintiff is limited to the allegations of malpractice as set forth in her Notice of Claim, i.e., those relating to the V.A.C. sponge.

On August 8, 2008, Plaintiff underwent a total right knee replacement at Kings County Hospital. Her course of recovery did not run smoothly and on September 14, 2010 Dr. Passick, at Coney Island Hospital, removed the prosthesis. Dr. Passick's further treatment included a reimplantation of a total right knee prosthesis and its subsequent removal, drainage, debridement, placement of spacers, application of an external fixator and a V.A.C. dressing. Plaintiff treated with Dr. Passick until July 1, 2011, at which time she was discharged from Coney Island Hospital. She saw Dr. Passick many times, thereafter, at Coney Island Hospital. Ultimately,

Plaintiff underwent a right above the knee amputation on January 20, 2012 at Kings County Hospital.

Extensive motion practice took place before the Honorable Michelle Weston. The Orders signed by Justice Weston limit Plaintiff to a theory of negligence involving a retained object in her right knee. Thus, nothing set forth in her Notice of Claim would connect the alleged malpractice to the above the knee amputation, which occurred on January 20, 2012. Service of Plaintiff's Notice of Claim took place on September 28, 2011, approximately nine months before the surgery. Although Plaintiff sought treatment elsewhere (Kings County Hospital, New York Presbyterian Hospital) she also continued to treat with Dr. Passick on numerous occasions after the sponge was removed (August 24, 2011). There are no records indicating that these visits were for treatment of the condition set forth in the Notice of Claim, i.e., the retained V.A.C. sponge, although the visits did, in fact, involve the same body part (right knee). Each visit involved treatment for her external fixator and/or her pre-existing right knee condition.

A defendant who seeks dismissal of a complaint pursuant to CPLR § 3211(a)(5), because the action is time-barred by the Statute of Limitations, bears the initial burden of proving, that the time in which to commence an action has expired (*see LaRocca v DeRicco*, 39 AD3d 486, 486-487 [2d Dept 2007]; *Gravel v Cicola*, 297 AD2d 620 [2d Dept 2002]). The burden then shifts to plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations or raising an issue of fact as to whether such an exception applies (*see LaRocca,* 39 AD3d at 487; *Gravel,* 297 AD2d at 621).

Pursuant to General Municipal Law § 50-i(1)(c), an action against HHC shall be commenced within one year and ninety days after the happening of the event upon which the

claim is based. The Courts are permitted no discretion to extend the date of service, unless a tolling provision is applicable. It is undisputed that the above captioned action was commenced more than one year and ninety days from the date of the alleged occurrence. Plaintiff, however, argues that the allegations against Defendant HHC are timely because of the continuous treatment doctrine.

Generally, a medical malpractice action accrues on the date of the alleged wrongful act (*Nykorchuck v Henriques,* 78 NY2d 255, 258-259 [1991]). The doctrine of continuous treatment, however, may toll the period during which an action against the municipal corporation may be commenced (*Lohnas v. Luzi*, 30 NY3d 752 [2018]). "...[T]he continuous treatment doctrine is limited to "treatment for the same or related illnesses or injuries, continuing after the alleged acts of malpractice, not mere continuity of a general physician-patient relationship" (*Borgia v City of New York,* 12 NY2d 151, 157 [1962]).

"[W]hen the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the 'accrual' comes only at the end of the treatment" (*Roca v Perel,* 51 AD3d 757, 760 [2d Dept 2008], *quoting Borgia v City of New York,* 12 NY2d at 155). Therefore, the course of treatment must have been related to the condition that gave rise to the lawsuit (*Roca*, 51 AD3d at 760, *quoting Nykorchuck v Henriques,* 78 NY2d at 259). Further, "[c]ontinuity of treatment is often found to exist when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during th[e] last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past" (*Nisanov v Khulpateea*, 137 AD3d 1091, 1093 [2d Dept 2016] quoting *Gomez v. Katz,* 61

AD3d 108, 112 [2d Dept 2009]). However, "visits concerning matters unrelated to the condition at issue giving rise to the claim, are insufficient to invoke the benefit of the [continuous treatment] doctrine" (*Plummer*, 98 NY2d 263, 268 [2002]).

"Thus, essential to the application of the doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit" (*Nykorchuck v Henriques,* 78 NY2d at 259). ...[N]either the mere 'continuing relation between physician and patient' nor 'the continuing nature of a diagnosis' is sufficient to satisfy the requirements of the doctrine (*id.* at 259). In the absence of continuing efforts by a doctor to treat a particular condition, none of the policy reasons underlying the continuous treatment doctrine justify the patient's delay in bringing suit (*Borgia v. City of New York*, 12 NY2d at 155]).

Defendants concede that Dr. Passick continued to treat Plaintiff for a minimum of eight visits prior to the above the knee amputation of her right leg on January 19, 2012. Were the January date determinative of the end of treatment, Plaintiff's commencement of the action on April 18, 2013 would be timely. However, a careful review of the medical records submitted with the moving papers makes clear the fact that Dr. Passick was not treating Plaintiff for any ailment or malady related to the retention of the sponge. It is apparent that once the sponge was removed, Plaintiff had no further complaints with reference to it. All treatment thereafter concerned her underlying condition of infectious arthritis. As Plaintiff is bound by the four corners of her Notice of Claim, this Court finds that Dr. Passick rendered no treatment to Plaintiff related to the same original condition or complaint as set forth in that document. Plaintiff's time to commence an action relating to the retention of the V.A.C. sponge expired on September 29, 2012, not the approximately six months later, April 8, 2013, when the action was

commenced.

Defendants' motion is granted in its entirety. The case against Kingsbrook Jewish Medical Center is severed and the action pending against Jeffrey Passick, M.D. and Coney Island Hospital and New York City Health and Hospitals Corporation is dismissed.

This constitutes the decision, opinion and order of the Court.

ENTER,

HON. MARSHA L. STEINHARDT

J.S.C.