Leace v Kohlroser
2018 NY Slip Op 32034(U)
August 6, 2018
Supreme Court, Suffolk County
Docket Number: 11-27521
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 11-27521
CAL No. 13-01087OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-22-17 (016)
ADJ. DATE 2-9-18
Mot. Seq. # 016 - MD

MELISSA LEACE,

Plaintiff,

- against -

JAMES KOHLROSER, D.O., ISLAND DIGESTIVE DISEASE CONSULTANTS, P.C., JEFFREY NAKHJAVAN, D.O., JEFFREY M. NAKHJAVAN, D.P., P.C., ELLIOTT EISENBERGER, M.D., and GOOD SAMARITAN HOSPITAL MEDICAL CENTER,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants James Kohlroser, D.O. and Island Digestive Disease Consultants P.C., dated November 17, 2017, and supporting papers; (2) Affirmations in Opposition by the plaintiff, dated January 5, 2018 and February 15, 2018; and supporting papers; (3) Reply Affirmation by the defendants James Kohlroser, D.O. and Island Digestive Disease Consultants P.C. , dated January 22, 2018; and

supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendants James Kohlroser, D.O., and Island Digestive Disease Consultants, P.C., pursuant to CPLR 3211(a)(5) to dismiss the complaint as barred by the applicable statute of limitations or pursuant to CPLR 3212 for summary judgment is denied.

This is an action for medical malpractice based upon plaintiff's claims of an alleged failure to timely diagnose and treat a retained endoscopic camera capsule, following a capsule endoscopy performed in January of 2008. According to the pleadings, such failure worsened plaintiff's existing Crohn's disease, requiring her to undergo surgery in 2011. This action was commenced by the filing of a summons and complaint on or about August 24, 2011.

Plaintiff began treating with defendant James Kohlroser, a partner of Island Digestive Disease Consultants, P.C., for her Crohn's disease in August 2007. On January 22, 2008, a capsule endoscopy was performed at the office. The test required plaintiff to swallow a capsule camera, which takes pictures as it passes through the digestive system. The capsule camera was supposed to pass through her body and be excreted, but it did not. Approximately one year after the procedure, on January 21, 2009, plaintiff presented to the emergency department of Good Samaritan Hospital, with complaints of vomiting and abdominal pain related to her Crohn's disease. While at the hospital, a CT scan was performed on plaintiff and the report noted that a "metallic artifact" was located at the base of the cecum. After her hospitalization, plaintiff saw Dr. Kohlroser at his office on February 2, 2009, and followed up with him March 12, 2009, and again on April 10, 2009. On January 7, 2011, plaintiff underwent a CT scan of her abdomen and pelvis at the referral of her primary physician, and the results showed several narrowed areas of ileum, indicative of Crohn's disease, and a radiopaque camera within a small bowel loop. On March 22, 2011, she presented to the offices of defendant Island Digestive Disease Consultants with abdominal pain, vomiting, and diarrhea. On April 25, 2011, plaintiff underwent laparoscopic exploration at Mount Sinai Hospital, and Dr. Greenstein performed an ileocolic resection and small bowel resection.

Defendants Dr. Kohlroser and Island Digestive Disease Consultants, P.C. (hereinafter referred to collectively as the Kohlroser defendants) now move for dismissal on the ground that this action is barred by the relevant statute of limitations. They further move for summary judgment dismissing the complaint, arguing that their alleged malpractice was not the cause of plaintiff's injuries. In support of the motion the Kohlroser defendants submit, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, medical records of plaintiff, and an expert affidavit of Dr. Perry Gould.

As to the Kohlroser defendants' application to dismiss this action as barred by the relevant statute of limitations, pursuant to CPLR 214-a, "[a]n action for 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." Under the continuous treatment doctrine, the two and one-half-year Statute of Limitations for a medical malpractice action (see CPLR 214-a) is tolled until after a plaintiff's last treatment "'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, 405, 452 NYS2d 351 [1982], *quoting* ***Borgia v City of New York***, 12 NY2d 151, 155, 237 NYS2d 319 [1962], *affd* 15 NY2d 665, 255 NYS2d 878 [1964]; *see* ***Young v New York City Health & Hosps. Corp.***, 91 NY2d 291, 670 NYS2d 169 [1998]; ***Allende v New York City Health & Hosps. Corp.***, 90 NY2d 333, 338, 660 NYS2d 695 [1997]). The doctrine is based on the premise that "[i]t would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent or by filing a notice of claim in the case of a city hospital" (***Borgia v City of New York***, *supra* at 156). There is the added premise that "the trust and confidence that marks the physician-patient relationship puts the patient at a disadvantage to question the doctor's techniques * * * and gives the patient the right to rely upon the doctor's professional skill without the necessity of interrupting a continuing course of treatment by instituting suit" (***Barrella v Richmond Mem. Hosp.***, 88 AD2d 379, 383, 453 NYS2d 444 [2d Dept 1982]; *see also* ***McDermott v Torre***, *supra*; ***Watkins v Fromm***, 108 AD2d 233, 238, 488 NYS2d 768 [2d Dept 1985]).

Here, a triable issue of fact exists as to whether the continuous treatment doctrine applies under the circumstances and whether there was an "ongoing treatment of a medical condition" (*see* ***Lohnas v Luzi***, 30 NY3d 752, 71 NYS3d 404 [2018]; ***Massie v Crawford***, 78 NY2d 516, 577 NYS2d 223 [1991]). Moreover, while the Kohlroser defendants contend that no continuous treatment existed as plaintiff's treatment in 2009 was due to her underlying Crohn's disease and unrelated to the retained endoscopic capsule, the affidavit of plaintiff's expert states that the capsule camera intermittently blocked her intestines, abutted certain strictures in her intestines, causing pain and blockage. Thus, it is not clear that the 2009 treatment was unrelated to the retained endoscopic capsule. Accordingly, the Kohlroser defendants' application to dismiss the complaint as time-barred is denied.

With regard to the Kohlroser defendants' application for summary judgment dismissing the complaint, on such a motion, the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice, and evidence that such departure was a proximate cause of plaintiff's injury or damage (*see* ***Ahmed v Pannone***, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014]; ***Feinberg v Feit***, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept], *lv denied* 92 NY2d 814, 681 NYS2d 475 [1998]). On a motion for summary judgment dismissing the complaint, a defendant hospital or physician has the burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (*see* ***Carioscia v Welischar***, 124 AD3d 816, 2 NYS3d 550 [2d Dept 2015]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176

[2d Dept 2011]; ***Luu v Paskowski***, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]). In opposition, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (***Deutsch v Chaglassian***, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]). Further, the plaintiff "need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (***Stukas v Streiter***, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011]).

Here, the Kohlroser defendants established a prima facie case that they did not deviate or depart from accepted medical practice through the submission of plaintiff's medical records, the transcripts of the parties' deposition testimony, and the expert affirmation of Dr. Gould (*see* ***Sandmann v Shapiro***, 53 AD3d 537, 861 NYS2d 760 [2d Dept 2008]; ***Bengston v Wang***, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]; ***Jonassen v Staten Island Univ. Hosp.***, 22 AD3d 805, 803 NYS2d 700 [2d Dept 2005]). Dr. Gould, a physician licensed in New York and board certified in internal medicine and gastroenterology, states in his affidavit that plaintiff, who had a 10-year history of Crohn's disease, first presented to the offices of Island Digestive Disease Consultants on August 20, 2007 and saw Dr. Kohlroser with complaints of intermittent abdominal pain and bloating. Plaintiff continued treating with Dr. Kohlroser in the fall of 2007, and when she reported that continued abdominal pain after a colonoscopy, Dr. Kohlroser's impression was Crohn's disease of the small bowel with terminal ileum stricture and recommended a capsule endoscopy. Plaintiff underwent a capsule endoscopy at the office to rule out small bowel Crohn's disease on January 22, 2008.

Dr. Gould states that plaintiff presented to the emergency department of Good Samaritan Hospital on January 21, 2009, complaining of vomiting and abdominal pain. On February 2, 2009, plaintiff was seen by Dr. Kohlroser at his office and diagnosed plaintiff as suffering from Crohn's disease of the small bowel with a history of partial small bowel obstruction and ulcers. She followed up with Dr. Kohroser in March and April of 2009. Plaintiff underwent a CT scan of the abdomen and pelvis at Good Samaritan Hospital on January 7, 2011. The CT scan showed several narrowed areas of ileum indicative of Crohn's disease. It also revealed that a radiopaque camera was present within a small bowel loop. On April 25, 2011, Dr. Greenstein performed a laparoscopic exploration at Mount Sinai Hospital, "exteriorized the entire bowel and performed an ileocolic resection [which] consisted of approximately 4 inches of disease terminal ileum." Dr. Greenstein found the capsule located within 6 inches of diseased bowel with 4 strictures and decided to proceed with small bowel resection due to the proximity of the strictures and severe inflamation of the small and large bowel.

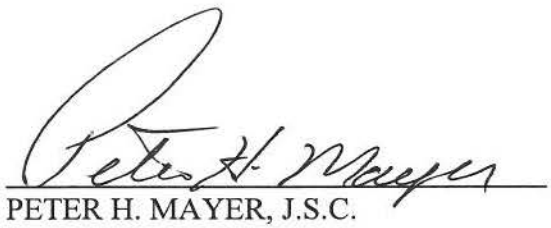
Dr. Gould opines that the retained capsule in plaintiff's bowels was asymptomatic, and that her symptomology of abdominal pain, and vomiting was related to her underlying Crohn's disease. He states that a person can live for many years with a retained capsule and be unaware of it. He states that the retained capsule did not cause any injury to plaintiff and did not cause or worse the stricture in plaintiff's bowels which was caused by her underlying Crohn's disease. He states that the indications for plaintiff to undergo the laparoscopic ileocolic resection and small bowel resection were due to her underlying Crohn's disease, not the retained capsule. Dr. Gould further states that the jejunum, which is the section of the small intestine where the retained capsule was recovered, was significantly diseased by Crohn's disease and that the stricturing in that area was due to diseased bowel unrelated to the retained capsule. He states that plaintiff would have needed to undergo surgery to remove this area of diseased bowel regardless of the presence of the retained capsule. He concludes that plaintiff did not experience any injury due to the retained capsule.

Plaintiff opposes the motion, arguing that the continuous treatment doctrine applies under the circumstances and that a triable issue of fact exists as to whether the Kohlroser defendants departed from accepted medical practice in their treatment of plaintiff. In opposition, plaintiff submits, among other things, a redacted copy of the affirmation of her expert.

Plaintiff's expert, a physician licensed in New York and board certified in gastroenterology and internal medicine states in the affidavit that the performance of a camera capsule endoscopy in a patient with already diagnosed Crohn's and strictures, such as plaintiff, is contraindicated and a departure of accepted medical care, as there is a risk of the camera getting stuck. Further, the affidavit states that as the last image from the capsule report reveals that it was only in the small bowel, and not the large intestine, plaintiff should have been asked to look for passage to find the camera or a post-operative diagnostic test should have been done. It states that failure to do any of these tests was a departure from the applicable standards of medical care. It states that the capsule camera intermittently blocked plaintiff's intestines, abutted certain strictures in her intestines, causing pain and blockage.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions...such credibility issues can only be resolved by a jury" (***Feinberg v Feit***, *supra* at 519; *see* ***Hayden v Gordon***, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; ***Graham v Mitchell***, 37 AD3d 408, 829 NYS2d 628 [2d Dept 2007]; ***Shields v Baktidy***, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]). Here, plaintiff raised a triable issue of fact by submitting the affidavit of her expert which contradicts the expert of the Kohlroser defendants by opining that there was a deviation from accepted standards of care in the treatment of plaintiff (*see* ***Magel v John T. Mather Mem. Hosp.***, 95 AD3d 1081, 945 NYS2d 113 [2d Dept 2012]; ***Bengston v Wang***, *supra*). Accordingly, the motion by the Kohlroser defendants for summary judgment dismissing the complaint against them is denied.

Dated: August 6, 2018



PETER H. MAYER, J.S.C.