

**Mula v Sasson**

2018 NY Slip Op 34069(U)

July 24, 2018

Supreme Court, Orange County

Docket Number: Index No. EF001436-2018

Judge: Catherine M. Bartlett

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X

DANIELLE M. MULA,

Plaintiff,

-against-

AARON D. SASSON, M.D., JOSEPH L. RACANELLI,
M.D., HUDSON VALLEY DIAGNOSTIC IMAGING,
PLLC d/b/a HUDSON VALLEY IMAGING,
MARGARITA KOGAN, D.O., and ST. LUKE'S
CORNWALL MEDICAL GROUP,

Defendants.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. EF001436-2018

Motion Date: May 17, 2018
May 31, 2018

-----X

The following papers numbered 1 to 11 were read on the motions of Defendants Aaron D.
Sasson, M.D., Joseph L. Racanelli, M.D. and Hudson Valley Diagnostic Imaging, PLLC for
dismissal of the claims against them on the ground that said claims are barred by the statute of
limitations:

Notice of Motion (Sasson) - Affirmation / Exhibits ..... 1-2
Affirmation in Opposition / Exhibits - Affidavit ..... 3-4
Reply Affirmation ..... 5
Notice of Motion (Racanelli / HVDI) - Affirmation / Exhibits ..... 6-7
Affirmation in Opposition / Exhibits - Affidavit ..... 8-9
Reply Affirmation - Affidavit ..... 10-11

Upon the foregoing papers, it is ORDERED that the motions are disposed of as follows:

This is an action for medical malpractice. Defendants Aaron D. Sasson, M.D., Joseph L. Racanelli, M.D. and Hudson Valley Diagnostic Imaging, PLLC move for dismissal on the ground that said claims asserted against them are barred by the statute of limitations.

**Pertinent Facts**

On April 5, 2014, plaintiff Danielle M. Mula underwent a bilateral screening mammogram at defendant Hudson Valley Diagnostic Imaging, PLLC (“HVDI”) which was read by defendant radiologist Aaron D. Sasson, M.D., and a bilateral ultrasound that was read by defendant radiologist Joseph L. Racanelli, M.D. On April 16, 2014, Ms. Mula underwent a right breast mammogram and right breast ultrasound at HVDI that was read by Dr. Sasson, who concluded that there was no specific mammographic or sonographic evidence of malignancy.

On April 18, 2015, Plaintiff underwent a bilateral screening mammogram at HVDI that was read by Dr. Racanelli, who found no suspicious nodules or microcalcifications, and no changes when compared to the prior exam. That same date, she underwent a right breast ultrasound, also read by Dr. Racanelli, who recommended at right breast biopsy.

Ms. Mula avers that Dr. Racanelli and HVDI failed to notify her of the April 18, 2015 ultrasound’s suspicious abnormality and recommendation for biopsy until the last week of October, 2015. She disputes the Defendants’ evidence that she was timely and appropriately notified by letter dated April 24, 2015 that “[y]our ultrasound shows a suspicious abnormality for which a biopsy has been recommended for further evaluation,” and that the results had been sent to her health care provider. A biopsy was performed on November 5, 2015, and Ms. Mula learned on November 9, 2015 that she had breast cancer.

This medical malpractice action was commenced by filing on February 5, 2018, more than three years and nine months after Dr. Sasson's review of diagnostic studies in April 2014, and more than two years and nine months after Dr. Racanelli's review of diagnostic studies in April 2015.

The complaint asserts causes of action for medical malpractice and lack of informed consent. It alleges that Dr. Sasson was negligent and departed from accepted medical practice with regard to the care and treatment provided on or about April 16, 2014 in failing to diagnose a suspicious right breast mass and hence failing to timely refer Ms. Mula for appropriate medical work up. It further alleges that Dr. Racanelli was negligent and departed from accepted medical practice with regard to the care and treatment provided on or about April 18, 2015 in failing to diagnose right breast cancer, and failing to timely notify Ms. Mula of his suspicious findings and timely refer her for appropriate medical work up. It further alleges that HVDI was negligent and departed from accepted medical practice with regard to the care and treatment provided on or about April 18, 2015 in failing to timely notify Ms. Mula of the suspicious findings contained in the diagnostic studies of said date and timely refer her for appropriate medical work up.

Defendants Sasson, Racanelli and HDVI move to dismiss Plaintiff's claims against them on the ground that they are barred by the two year, six month statute of limitations set forth in CPLR §214-a.

### Legal Analysis

Prior to January 31, 2018, CPLR §214-a provided in pertinent part that "[a]n action for medical...malpractice must be commenced within two years and six months of the act, omission or failure complained of..." Effective January 31, 2018, Section 214-a was amended to provide

to provide a “discovery rule” of accrual in cases involving failure to diagnose cancer. As amended, Section 214-a provides in pertinent part:

(b) where the action is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within two years and six months of the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission....

However, the “discovery rule” does not apply to this case. The Act amending CPLR §214-a, approved by the Legislature on January 31, 2018, provided in pertinent part:

§4. This act shall take effect immediately and shall apply to acts, omissions, or failures occurring on or after such effective date.

§6. This act shall take effect immediately;...provided, further, that the provisions amended by Section 2 of this act [*i.e.*, the amendments to CPLR §214-a] shall also apply to acts, omissions, or failures occurring within 2 years and 6 months prior to the effective date of this act, and not before.

*See*, 2018 Sess. Law News of N.Y. Ch. 1 (S. 7588A). Thus, the “discovery rule” in CPLR §214-a as amended applies only to acts, omissions or failures occurring on or after July 31, 2015 (*i.e.*, within 2 years and 6 months of the January 31, 2018 effective date of the amendment). It is therefore inapplicable in the circumstances of this case, wherein the acts of medical malpractice are alleged to have occurred no later than April of 2015. In consequence, Plaintiff was required to commence her medical malpractice action “within two years and six months of the act, omission or failure complained of.” CPLR §214-a.

Inasmuch as the acts, omissions or failures by Dr. Sasson are alleged to have occurred in April of 2014, more than three years and nine months prior to the commencement of this action, and those of Dr. Racanelli and HVDI are alleged to have occurred in April of 2015, more than

two years and nine months prior to the commencement of this action, Plaintiff's malpractice claims against all three of these Defendants are barred by the statute of limitations.

This conclusion is not altered by the allegation that the Defendants failed to timely notify Ms. Mula of the suspicious findings contained in the April 2015 diagnostic studies and refer her for appropriate medical work up. "Passive failure to disclose the existence of a condition warranting further medical treatment is not a continuing wrong" that extends the limitations period. *See, Neumann v. Nassau County Medical Center*, 210 AD2d 301, 302 (2d Dept. 1994); *Phelps v. Greco*, 177 AD2d 559, 560 (2d Dept. 1991); *Ross v. Community General Hosp. of Sullivan County*, 150 AD2d 838, 839-840 (3d Dept. 1989). Moreover, there is neither allegation nor proof of misrepresentation or concealment such as would give rise to an equitable estoppel barring Defendants from invoking the statute of limitations. *See, Rizk v. Cohen*, 73 NY2d 98, 105-106 (1989); *Simcuski v. Saeli*, 44 NY2d 442, 448-449 (1978); *Campbell v. Chabot*, 189 AD2d 746, 747 (2d Dept. 1993).

Finally, Plaintiff's allegation that Dr. Racanelli and HVDI failed to timely report the suspicious findings contained in the diagnostic studies of April 2015 to Ms. Mula or to her health care provider sounds in ordinary negligence, not medical malpractice. *See, Bennett v. Long Island Jewish Medical Center*, 51 AD3d 959, 961 (2d Dept. 2008); *Mosezhnik v. Berenstein*, 33 AD3d 895, 898 (2d Dept. 2006); *Glasheen v. Long Island Diagnostic Imaging*, 306 AD2d 515 (2d Dept. 2003), *lv. denied* 3 NY3d 612 (2004); *Yaniv v. Taub*, 256 AD2d 273, 274 (1<sup>st</sup> Dept. 1998). While Plaintiff's complaint does not assert a claim sounding in common law negligence, such claim, if interposed in an amended pleading, would be governed by the three year statute of limitations set forth in CPLR §214(5), not the two year, six month statute applicable to medical

malpractice claims; and that claim would presumably be rendered timely by the "relation back" provisions of CPLR §203(f).

Accordingly, in conjunction with the dismissal of Plaintiff's claims against Dr. Racanelli and HVDI, Plaintiff is granted leave to move to amend her Complaint to assert a common law negligence claim predicated on the allegation that Dr. Racanelli and HVDI failed to timely report the suspicious findings contained in the diagnostic studies of April 2015 to Ms. Mula or to her health care provider. *See, Bennett v. Long Island Jewish Medical Center, supra.*

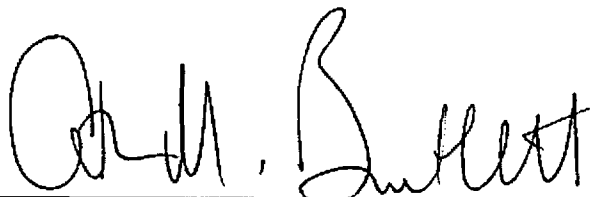
It is therefore

ORDERED, that the motion of defendant Aaron D. Sasson, M.D. is granted, and all claims asserted against him in this action are hereby dismissed, and it is further

ORDERED, that the motion of defendants Joseph L. Racanelli, M.D. and Hudson Valley Diagnostic Imaging, PLLC is granted, all claims asserted against them in this action are hereby dismissed, and Plaintiff is granted leave to move to amend her Complaint to assert a common law negligence claim against said Defendants as discussed hereinabove.

The foregoing constitutes the decision and order of the court.

Dated: July 24, 2018          ENTER  
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.  
HON. C. M. BARTLETT  
JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUSTICE