

**McKinnon v North Shore-Long Is. Jewish Health
Sys. Labs.**

2018 NY Slip Op 34398(U)

November 2, 2018

Supreme Court, Nassau County

Docket Number: Index No. 601250-15

Judge: Robert A. Bruno

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

JUDITH McKINNON,
-----X

Plaintiff,

-against-

NORTH SHORE-LONG ISLAND JEWISH
HEALTH SYSTEM LABORATORIES,

Defendants.
-----X

TRIAL/IAS PART 13

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Submission Date: 8-30-18
Motion Sequence: 002

DECISION & ORDER

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Upon the foregoing papers, the motion by defendant NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM LABORATORIES for an Order pursuant to CPLR §§ 214(a) and 3211(a)(5), dismissing plaintiff's Verified Complaint in its entirety, with prejudice, as barred by the applicable statute of limitations, is determined as set forth below.

This is a medical malpractice action based upon the claim that defendant failed to timely diagnose plaintiff's endometrial cancer. Plaintiff alleges that on August 26, 2011, her gynecologist submitted an endometrial polyp biopsy to the defendant's laboratory for a pathology analysis. Defendant's report dated August 29, 2011 indicated no malignancy (Mot. Exh. K; Aff. In Opp., Attachment). On January 14, 2014, the plaintiff's gynecologist again collected an endometrial biopsy from plaintiff and the sample was submitted to the defendant's laboratory for a pathology analysis. This time, the defendant's report dated January 23, 2014 indicated a final diagnosis of "[h]igh grade endometrial carcinoma with serous features." (Aff. In Opp., Attachment). The report stated that "[t]he prior specimen was reviewed and reveals a serous carcinoma involving an endometrial polyp in specimen #2. The serious carcinoma in the endometrial polyp and the current high grade endometrial carcinoma have a similar morphologic appearance." Id.

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Plaintiff commenced the instant action on March 2, 2015 by the filing of a Summons With Notice (*Mot. Exh. A*). In her Verified Complaint, filed on May 21, 2015 (*Mot. Exh. C*), Verified Bill of Particulars (*Mot. Exh. E*) and Supplemental Verified Bill of Particulars (*Mot. Exh. F*), plaintiff alleges, essentially, that defendant departed from the accepted standard of practice by misreading the specimen submitted in 2011 as negative, when the sample was, in fact, positive for malignancy. Plaintiff alleges that the incorrect reading of the pathology study led to a delay in her diagnosis of endometrial cancer.

Defendant now seeks to dismiss the action on the ground that it is barred by the applicable statute of limitations. CPLR 214-a provides:

“An action for medical, dental or pediatric 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 action, omission or failure;”

In this case, defendant asserts that the act, omission or failure complained of occurred in August 2011. Accordingly, defendant argues, the applicable statute of limitations expired in February 2014. The instant action was not filed until March 2015. Thus, defendant concludes, it is time-barred. Defendant maintains that plaintiff cannot establish continuous treatment between the time of the act, omission or failure complained of (August 2011) and the time of discovery of the alleged malpractice (January 2014), because there is no evidence of a continuing relationship between plaintiff and defendant, either directly or through an agency relationship with plaintiff's gynecologist. See *McDermott v Torre*, 56 NY2d 399 (1982). No specimens were submitted to the defendant's laboratory during that period of time, and plaintiff's own deposition testimony revealed that she did not visit her gynecologist nor any other gynecologist until January 2014. See *Mot. Exh. J*, pp. 47-49, 55-56.

In opposition, plaintiff asserts that the action is timely pursuant to the recent amendment to CPLR §214-a, amended by L. 2018, c. 1, § 2, effective January 31, 2018, also known as “Lavern's Law” (the “Amendment”). The Amendment provides that:

“(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

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no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition.”

The action is timely, in plaintiff’s view, because it was filed (March 2, 2015) only one year and one month after plaintiff could have known of the alleged negligent act or omission (January 23, 2014), and well within seven years from the alleged malpractice (August 2011).

In reply, defendant asserts that the Amendment does not apply to this action. The Amendment became effective on January 31, 2018. The legislation by which it was enacted provided for a limited revival of claims that were time-barred under the former statute. Chapter 1, Section 4 of the 2018 Session Laws provides that:

“... with regard to any action or claim arising from alleged medical malpractice based upon an alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, which, within ten months prior to the effective date of the act that created this section, became timebarred under any applicable limitations period then in effect, such action or claim may be commenced within six months of the effective date of the act that created this section, and not beyond. The provisions added by section one and amended by section two of the act that created this section shall not apply to such actions.”

Under this provision, any action based upon failure to diagnose, which became time barred between March 31, 2017 and January 31, 2018, could be commenced by July 31, 2018. Defendant notes that the instant action became time barred in February of 2014, and thus is not revived by this provision.

Chapter 1, Section 6 of the 2018 Session Laws affords the Amendment a limited retroactive application, providing that: “the provisions amended by section two of this act 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.” Defendant notes that the alleged malpractice complained of here occurred over six years prior to the effective date, and thus the Amendment cannot be retroactively applied pursuant to this section.

On a motion to dismiss a cause of action on the ground that it is barred by the applicable statute of limitations, the moving defendant bears the initial burden to demonstrate, *prima facie*, that the time within which to commence the action has expired. If the defendant satisfies this burden, then the burden shifts to the plaintiff to raise an issue of fact as to whether the statute of

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limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period. *Campane v Panos*, 142 AD3d 1126 (2d Dept. 2016); *Nisanov v Khulpateea*, 137 AD3d 1091 (2d Dept. 2016); *Muscat v Mid-Hudson Med. Group, P.C.*, 135 AD3d 915 (2016); *Ceglio v BAB Nuclear Radiology, P.C.*, 120 AD3d 1376 (2d Dept. 2014); *Wei Wei v Westside Women's Medical Pavillion, P.C.*, 115 AD3d 662 (2d Dept. 2014).

At bar, the Court finds that defendant has met its *prima facie* burden by the submission of proof that the acts, omission, or failure complained of occurred more than two and a half years prior to the commencement of this action. The opposition fails to raise an issue of fact. Plaintiff does not address the question of continuous treatment and thus effectively concedes that the doctrine does not apply. See *Kuehne & Nagel v Baiden*, 36 NY2d 539 (1975); *Brown v George*, 138 AD3d 466 (1st Dept. 2016); *McNamee Const. Corp. v City of New Rochelle*, 29 AD3d 544, 545-546 (2d Dept. 2006); *Failla v Amodeo*, 220 AD2d 965 at n.3 (3d Dept 1996). Moreover, the Court finds that the Amendment relied upon by plaintiff was not effective with respect to the alleged malpractice in this case. See *Forbes v Caris Life Sciences, Inc.*, 159 AD3d 1569 (4th Dept. 2018).

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that defendant's motion for an Order pursuant to CPLR §§ 214(a) and 3211(a)(5), dismissing plaintiff's Verified Complaint in its entirety, with prejudice, is *granted*.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: November 2, 2018
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE