

Chvetsova v Family Smile Dental

2019 NY Slip Op 30647(U)

March 11, 2019

Supreme Court, Kings County

Docket Number: 507838/15

Judge: Ellen M. Spodek

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part MMESP-6 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 11th day of March 2019

PRESENT:

HON. ELLEN M. SPODEK, Justice

-----X
INNA CHVETSOVA,

Plaintiff,

-against-

FAMILY SMILE DENTAL, MICHAEL GELFAND, DDS,
MICHAEL IRLIN, DDS, and ANNA Z. SULER, DDS,

Defendants.
-----X

DECISION AND ORDER

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Defendants Michael Gelfand, DDS., Michael Irlin, DDS, and Anna Z. Suler, DDS, moved pursuant to CPLR §§ 3211 (a)(5), § 3212, and § 214-a, for an order dismissing all claims of medical malpractice pertaining to care rendered to plaintiff Inna Chvetsova prior to December 24, 2012, as time barred by the Statute of Limitations and, for such other, further and different relief as this Court may deem

just, proper, and equitable. Defendants also moved to dismiss plaintiff's cause of action for breach of contract. Plaintiff opposed the motion.

On September 18, 2018, plaintiff cross moved pursuant to CPLR § 3212, for an order granting plaintiff summary judgment and dismissing the defendants' statute of limitations defense. Defendants opposed plaintiff's cross motion.

Plaintiff Inna Chvetsova first went to defendant Family Smile Dental on September 12, 2007 for a general evaluation. Defendant Anna Z. Suler, DDS performed the initial evaluation, cleaning, and ultimate extraction of teeth. Dr. Suler and Defendant Michael Irlin, DDS recommended a treatment plan to plaintiff that involved the extraction of the remaining teeth in the upper jaw, and the insertion of implants and a fixed upper bridge. Dr. Suler also recommended treatment for plaintiff's lower teeth and the subsequent appointments regarding her lower teeth were separate from those with Dr. Irlin. Dr. Suler last treated plaintiff for issues with her lower teeth on May 20, 2012. The treatment regarding her lower teeth is not at issue in this malpractice claim.

On December 21, 2007, Dr. Irlin extracted two teeth in preparation for the four implants, which were installed on January 24, 2008. On various visits between February 14, 2008 and July 21, 2008, Dr. Irlin adjusted and replaced these implants to prepare for the upper bridge. On November 18, 2008, Dr. Irlin fitted the upper bridge on the plaintiff and it was permanently installed. At that time, the treatment plan to install an upper bridge using implants was completed and there were no follow up appointments scheduled.

Plaintiff next presented to Family Smile Dental on December 30, 2009. Dr. Irlin examined the plaintiff and removed the upper bridge in order to adjust the size and number of teeth included. A new impression was taken, and the new bridge was inserted on February 2, 2010.

On November 10, 2010, Dr. Irlin found the upper bridge to be loose and recommended the plaintiff return in a week. The plaintiff did not return until February 10, 2011. At that time, two of the implants had become loose and Dr. Irlin informed the plaintiff that they would need to be removed. During this visit, Dr. Irlin presented a new treatment plan for a full denture. Dr. Irlin inserted two new implants on March 17, 2011 in preparation for the full denture. While the new implants were healing, the plaintiff was improperly wearing the fixed bridge. This improper wear caused another implant to detach. On June 30, 2011, Dr. Irlin then fitted the plaintiff for an interim full upper denture to wear until the implants were completely healed. On May 3, 2012, the permanent full denture was inserted over the implants, which was the final stage of the intended treatment plan.

Dr. Irlin examined the plaintiff on August 1, 2012 and determined that one of the implants came out. He recommended the plaintiff to return in three months to replace the implant. On November 28, 2012, Dr. Irlin noted that another implant had also become loose. Following this appointment, Dr. Irlin removed all of the upper implants on December 17, 2012 and removed the sutures on December 24, 2012. The plaintiff never returned to Dr. Irlin or Family Smile Dental.

In their motion, defendants seek dismissal pursuant to CPLR §§ 3211 (a)(5), § 3212, and § 214-a, as time barred medical malpractice claims relating to the treatment rendered prior to December 24, 2012. Defendants argue that the treatment rendered prior to December 24, 2012 is time barred as plaintiff failed to timely commence the action. Defendants also argue that the continuous treatment doctrine is not applicable to the plaintiff's medical malpractice claims.

Plaintiff argues that the continuous treatment doctrine is applicable to the claims because Dr. Irlin continuously treated the plaintiff at Family Smile Dental, tolling the statute of limitations.

Under CPLR § 214, an action for medical malpractice must be commenced within two years and six months following the act, omission or failure complained thereof. The statute of limitations begins to run on the date of the alleged medical malpractice. Schwelnus v. Urological Assoc. of L.I, P.C., 94 A.D.3d, 971, 943, N.Y.S.2d 141, 143 (2d Dept. 2012). If there was continuous treatment of the plaintiff for the same illness, injury or condition, which gave rise to the malpractice claim, then the statute of limitations begins to run when that treatment is completed. CPLR § 214-a. In the case at bar, the defendants have made a *prima facie* showing of entitlement to dismissal as a matter of law, for the lapse of the statute of limitations. The plaintiff bears the burden of proof to demonstrate continuous treatment occurred tolling the statute of limitations. Hofsiss v. Goodman, 128 A.D.3d 898, 900 9 N.Y.S.3d 614, 615 (2d Dept. 2015).

In Gomez v. Katz, 61 A.D.3d108 (2d Dept. 1995), the Second Department held that the plaintiff needed to demonstrate three factors to apply the continuous treatment doctrine: (1) The plaintiff continued to seek and obtained an actual course of treatment from the defendant during the relevant period; (2) The course of treatment provided by the physician must be for the same condition, complaint, or injury underlying the malpractice claim; and (3) The physician's treatment of this condition was in fact continuous.

In Massie v. Crawford, 78 N.Y.2d 516 (1991), the Court of Appeals held that routine examinations conducted repeatedly over time or continuing efforts to arrive at a diagnosis are not considered a "course of treatment". The Court also held that treatment unrelated to previous visits was considered a resumption of treatment rather than continuous treatment and does not toll the statute of limitation. Id. See also, Chulla v. DiSefano, 242 A.D.2d 657, 662 N.Y.S.2d 570 (2d Dept. 1997) (The Second Department held that evidence of an ongoing patient-physician relationship does not satisfy the requirement that the defendant provided continuous treatment for the condition giving rise to the claim.)

Applying these factors to the present case, plaintiff had the permanent fixed upper bridge installed on November 18, 2008. At that time, both parties believed the treatment to be complete. The patient-dentist relationship continued after that date in follow up visits for routine maintenance and general upkeep. Plaintiff returned to Family Smile Dental on February 10, 2011 and a new treatment plan was formulated for a full upper denture. This does not constitute continuous treatment, but instead is

a resumption of treatment. On May 3, 2012, the full upper denture was installed, and treatment was completed. In the interim, there was an ongoing dentist-patient relationship that does not amount to continuous treatment. Similarly, when the plaintiff returned to Family Smile Dental on December 17, 2012, the previous treatment plan was completed on May 3, 2012 and therefore it was not continuous treatment, but a resumption of treatment.

The treatment rendered to plaintiff on various occasions demonstrates the ongoing dentist-patient relationship and does not constitute a course of treatment for the purposes of the continuous treatment doctrine and tolling the statute of limitations. The plaintiff was unable to offer any legal precedent to refute the well-established position of the Court of Appeals and Appellate Division, Second Department that an existing patient-physician relationship is insufficient to demonstrate continuous treatment provided by the defendant, in regard to the application of the continuous treatment doctrine. Therefore, the treatment rendered by the defendants does not invoke the continuous treatment doctrine and the claims of malpractice prior to December 24, 2012 are barred by the statute of limitations.

The action was commenced on June 24, 2015 by the filing of plaintiff's Summons and Complaint. The limitations period for allegations relating to treatment rendered prior to December 24, 2012 expired before the action was commenced. The limitations period for allegations relating to the installation of the upper bridge completed on November 18, 2008, expired on May 18, 2011. The limitations period for allegations pertaining to the installation of the full upper denture completed on

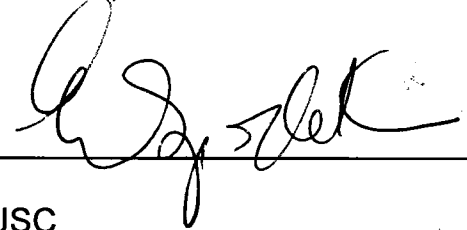
May 3, 2012, expired on November 3, 2014. The patient-dentist relationship terminated on December 24, 2012. Thus, plaintiff's malpractice claims against Michael Gelfand, DDS, Michael Irlin, DDS, and Anna Z. Suler, DDS, relating to treatment rendered prior to December 24, 2012 are barred by the statute of limitations.

Defendants' motion to dismiss is granted. Plaintiff's cross motion is denied.

Plaintiff's complaint is dismissed, as to all defendants.

This constitutes the decision and order of the court.

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