Orthopedic Spine Care of Long Is., P.C. v Friend
2019 NY Slip Op 32820(U)
September 24, 2019
Supreme Court, Suffolk County
Docket Number: 12-9738
Judge: David T. Reilly

SHORT FORM ORDER

COPY

INDEX No. 12-9738
CAL. No. 18-01951CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 3-13-19
ADJ. DATE
Mot. Seq. # 002 - MG
003 - MD

---X

ORTHOPEDIC SPINE CARE OF LONG ISLAND, P.C.,

Plaintiff,

- against -

DARNEL FRIEND,

Defendant.

---X

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Upon the following papers numbered 1 to 136 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-21; 22-116; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 117-126; Replying Affidavits and supporting papers 127-136; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by plaintiff for summary judgment dismissing the counterclaim is granted; and it is further

ORDERED that the motion by plaintiff for summary judgment in its favor for the relief demanded in the complaint is denied.

Plaintiff commenced this action to recover damages for breach of contract. It is undisputed that plaintiff's surgeon, Dr. Arnold Schwartz, performed orthopedic spine surgery on defendant Darnel Friend on two occasions, March 30, 2006 and January 25, 2007. It is also undisputed that Dr. Schwartz provided pre- and post-operative care to Friend between March 22, 2006 and March 23, 2007. It is further undisputed that plaintiff and Friend entered into a written financial agreement, by which surgical services were exchanged for payment. In the complaint, plaintiff alleges that Friend failed to pay the balance of the second surgery, despite demand. Plaintiff further alleges that Friend owes plaintiff $169,500.00 and seeks that amount in damages. By her answer, Friend counterclaims against plaintiff, alleging medical malpractice.

The facts of this case, as they relate to the instant motions, are subject to some dispute, and can best be summarized as follows. Plaintiff is a professional corporation, organized to provide orthopedic medical services. Dr. Arnold Schwartz is the founder, a shareholder, and an officer of the corporation. His partner, Dr. Paul Alongi, is the only other shareholder and officer. On March 22, 2006, Darnel Friend presented to Dr. Schwartz with complaints of increasing back pain. Upon presentation, Friend completed a series of paperwork, including a history and a financial agreement. As relevant to the instant motion, the financial agreement stated, *inter alia*:

> (1) Payment is due at the time of service unless arrangements have been made in advance by your [insurance] carrier.
>
> * * *
>
> (3) We have made prior arrangements with many insurance companies and other health plans to accept an assignment of benefits. We will bill them, and you are required to pay a copayment at the time of your visit.
>
> (4) If you are insured by a plan that we do not have a prior arrangement with, we will prepare and send the claim for you on an unassigned basis. This means the insurer will send the payment directly to you. Therefore, our charges for your care are due at the time of service.
>
> (5) Not all insurance plans cover all services. In the event your insurance plan determines a service to be "not covered," you will be responsible for the complete charge. Payment is due upon receipt of a statement from our office.

Friend testified she understood the financial agreement, that she understood that she would be responsible to pay any bills owed to Dr. Schwartz, and that she signed it. Friend further testified she understood that Dr. Schwartz did not accept her insurance as an in-network provider, but that Dr. Schwartz would prepare a claim and send it to her health insurance carrier under the terms of her policy. During this visit, Dr. Schwartz recommended surgery to relieve her pain and to stabilize her spine.

On March 28, 2006, Friend underwent surgery, performed by Dr. Schwartz. The surgery was extensive and included removal of hardware that had previously been implanted, excision of a herniated disc, extension of a spinal fusion, various bone grafts, and the insertion of additional spinal

instrumentation. Dr. Schwartz testified there were no complications associated with plaintiff's procedure or her post-operative inpatient recovery, and she was discharged home on April 4. Friend testified that following the first surgery, she received multiple checks from her insurance carrier for the balance owed to Dr. Schwartz, and testified that she forwarded those checks to Dr. Schwartz as payment for his services.

Between April 4, 2006 and January 25, 2007, Friend remained under the care of Dr. Schwartz, but continued to experience pain. Dr. Schwartz recommended several diagnostic tests and presented Friend with the options of a revision surgery or continued monitoring of her healing. Friend opted to have a second surgery, which occurred on January 25, 2007. Dr. Schwartz performed the surgery, which included exploration of the March 28 fusion, and he made an intraoperative decision to remove the previously implanted hardware, augment the fusion, and add additional protein to help stimulate the healing of her spine. Dr. Schwartz testified that there were no problems associated with the surgical procedure, and Friend was discharged home on January 28.

On February 7, Friend presented to Dr. Schwartz's office after two days of intractable right hip and groin pain. Dr. Schwartz admitted her to Huntington Hospital, out of concern that an infection was causing the pain. During her admission, she underwent multiple tests, but there was no clear cause of the pain she was experiencing. She was discharged from the hospital on February 9. She subsequently underwent further outpatient diagnostic testing.

On February 28, Friend had a post-operative visit with Dr. Schwartz. During this appointment, he reviewed the results of her outpatient MRI and CT scans. Dr. Schwartz suspected that Friend may have developed a condition wherein a fracture occurred at the fusion site, or that the fusion had not yet healed as expected. He believed the testing was inconclusive, however, and recommended further testing. Friend underwent the additional testing, and returned to Dr. Schwartz on March 23. At this visit, Friend had complaints of sacrum and pelvic pain, which Dr. Schwartz testified he did not expect based upon her history. He testified that he believed she might have had an insufficiency fracture of her sacrum and asked her to follow up with him in six weeks. She made an appointment for April 11.

It is undisputed that sometime between the January 25 surgery with Dr. Schwartz and April 11, Friend received checks from her insurance carrier that exceeded $160,000, attached to an explanation of benefits detailing the January 25 surgery. Friend acknowledged that those checks were for the surgery that was performed by Dr. Schwartz on January 25 and for all pre- and post-operative appointments associated with that procedure. She testified she had no reason to dispute the issuance of the checks for the work performed. Friend testified that upon receiving the checks, she "held onto it until [she] spoke with Dr. Schwartz." Friend further acknowledged that plaintiff's billing office contacted her to ask if she had received the checks from the insurance carrier, and she acknowledged to the billing department that she had.

On April 11, Friend did not go to her appointment with Dr. Schwartz. Instead, her husband, Christopher Friend, attended the appointment and spoke with Dr. Schwartz about his concerns. Christopher Friend testified that his intention for this meeting was to ask Dr. Schwartz to "walk away" from the money that Friend received from the insurance company. Christopher Friend testified that Dr.

Schwartz stated to him, "you do what you have to do." He testified that he wasn't sure what Dr. Schwartz meant by that, and that he did not know if Dr. Schwartz meant he accepted the offer.

On July 24, Friend and Dr. Schwartz had a telephone conversation. It is undisputed that the sum and substance of this conversation was that Friend acknowledged receipt of insurance payments for the January 25 surgery that were in excess of $160,000. Friend stated to Dr. Schwartz that she felt he should "write off" the balance that she owed to him. She further testified she considered the money paid by her insurance to be compensation for the pain she suffered post-operatively from the perceived mistake on the part of Dr. Schwartz in removing her hardware, and in exchange for keeping the money, she would not file a medical malpractice lawsuit. Dr. Schwartz testified that he did not agree to this proposal, and that he told her "she could do what she wanted to do." Friend testified that she believed his statement meant he accepted her offer.

At some point after the January 25 surgery, though unclear with respect to the July 24 telephone conversation, Friend testified that she retained an attorney to prepare a document expressing their "agreement" and that it was sent to Dr. Schwartz. Friend acknowledged that Dr. Schwartz never signed the agreement, adding that his failure to sign "meant nothing" to her. Friend also acknowledged that she did not pay Dr. Schwartz for the services rendered during and after the January 25 surgery.

Additionally, Friend's sister, Dawn Rella, testified she also reached out to members of plaintiff's staff on behalf of her sister to attempt to "settle" the amount owed by Friend. Rella testified she spoke with Rob McCord, a physician assistant from Orthopedic Spine Care and to unidentified members of the front desk staff at the office.

On January 19, 2012, plaintiff delivered to Friend a letter and an invoice dated January 16, 2012, demanding payment. Friend has not made a payment pursuant to that demand.

Plaintiff now moves for summary judgment on its complaint, arguing that Friend breached the binding agreement between them for surgical services in exchange for a fee, which was to be paid to Friend by her insurance company and which would then be forwarded to Dr. Schwartz to satisfy the bill. Plaintiff submits, *inter alia*, certified medical records, transcripts of the depositions of the parties, and transcripts of the depositions of nonparty witnesses, Christopher Friend and Dawn Rella. Friend opposes the motion, arguing that factual issues exist with respect to whether plaintiff satisfied a condition precedent in the agreement before demanding payment, or whether the agreement had been modified in an attempt to settle.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once the moving party has made the requisite showing, the burden then shifts to the opposing party, who is then required to present admissible evidence and facts sufficient to require a trial on any issue of fact

(CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). On such motion, the court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the non-moving party; the court is not responsible for resolving issues of fact or determining issues of credibility (***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]).

A breach of contract claim requires four elements. They are (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damages (*see* ***Eun Suk Cho v Byung Ki Koo***, 164 AD3d 1306, 82 NYS3d 124 [2d Dept 2018]; ***Weatherguard Contrs. Corp. v Bernard***, 155 AD3d 921, 63 NYS3d 692 [2d Dept 2017]; ***Rayham v Multiplan, Inc.***, 153 AD3d 865, 61 NYS3d 90 [2d Dept 2017]). "[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (***Legum v Russo***, 133 AD3d 638, 639, 20 NYS3d 124, 126 [2d Dept 2015], quoting ***MHR Capital Partners LP v Presstek, Inc.***, 12 NY3d 640, 645, 884 NYS2d 211, 215 [2009]).

Here, plaintiff has established its entitlement, prima facie, to judgment as a matter of law on the breach of contract claim. It is undisputed that a contract existed between the parties, that plaintiff performed according to the contract by Dr. Schwartz's performance of the January 25, 2007 surgery, that Friend did not render payment to plaintiff for the work performed, and that plaintiff suffered damages in the amount of $169,500.00 due to Friend's nonpayment for services provided.

Therefore, the burden shifts to Friend to submit competent proof sufficient to raise a triable issue of fact (***Zuckerman v City of New York***, *supra*). Initially, Friend argues that any obligation on her to perform according to the financial agreement was subject to a condition precedent, namely the mailing of a billing statement by Orthopedic Spine Care to her.

A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises (***IDT Corp. v Tyco Group, S.A.R.L.***, 13 NY3d 209, 890 NYS2d 401 [2009]; *see* ***Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts.***, 32 NY3d 139, 88 NYS3d 96 [2018]; ***Stonehill Capital Mgt. LLC v Bank of the W.***, 28 NY3d 439, 45 NYS3d 864 [2016]; *see also* Restatement [Second] of Contracts § 224). "Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract" (***Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.***, 86 NY2d 685, 690, 636 NYS2d 734, 737 [1995]; *see* ***IDT Corp. v Tyco Group, S.A.R.L.***, *supra*; ***Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts.***, *supra*).

Here, the only provision of the financial agreement that refers to a "statement" is section five, which states that payment for services that are "not covered" is due upon receipt of a statement. Friend

fails to acknowledge the complete financial agreement, specifically sections one and four, which state that payment is due at the time of service, without reference to a "statement." Further, the financial agreement between the parties does not reference the mailing of a statement, only the receipt of a statement. Friend herself acknowledges in her testimony that she was aware that there was a balance due, and the amount that was due. Finally, it is undisputed that the financial agreement between the parties describes three scenarios which govern the payment of fees: paragraph two, which governs fee arrangements where plaintiff participates with a patient's insurance; paragraph four, which governs fee arrangements where plaintiff does not participate with a patient's insurance, but will still bill; and paragraph five, which governs fee arrangements where certain procedures are deemed "not covered" by an insurance carrier. Friend argues the existence of a condition precedent in paragraph five of the financial agreement, which refers to services that are "not covered." However, the services provided by plaintiff in relation to the January 25 surgery were procedures that Friend's insurance covered, and plaintiff did not have a financial agreement with Friend's insurance company, facts both parties admit in their testimony. Therefore, paragraph four controls here, as the services were covered and billed without a fee arrangement between plaintiff and Friend's insurance. Therefore, payment was due at the time of service, and no issue of fact exists with respect to whether an alleged condition precedent existed or was satisfied.

Friend further argues that an issue of fact exists with respect to whether plaintiff, by Dr. Schwartz, agreed to waive the bill on behalf of Friend. Once a contract is formed, the parties may "change their agreement by another agreement, by course of performance, or by conduct amounting to a waiver or estoppel" (***Kamco Supply Corp. v On the Right Track, LLC***, 149 AD3d 275, 280, 49 NYS3d 721. 726 [2d Dept 2017], citing ***CT Chems., Inc. v Vinmar Impex, Inc.***, 81 NY2d 174, 597 NYS2d 284 [1993]). A breach of contract may be waived by the non-breaching party (***New York Tel. Co. v Jamestown Tel. Corp.***, 282 NY 365 [1940]). Waiver of a contract right is a "voluntary abandonment or relinquishment of a known [contract] right" (***Jefpaul Garage Corp. v Presbyterian Hosp.***, 61 NY2d 442, 446, 474 NYS2d 458, 459 [1984]; *see* ***Colon v Martin***, 170 AD3d 1109, 97 NYS3d 311 [2d Dept 2019]; ***Sunoce Props., Inc. v Bally Total Fitness of Greater N.Y., Inc.***, 148 AD3d 751, 48 NYS3d 476 [2d Dept 2017]). Rights under a contract may be waived "if they are knowingly, voluntarily and intentionally abandoned," and "[s]uch abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" (***Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.***, 7 NY3d 96, 104, 817 NYS2d 606, 611 [2006]). However, "as the intentional relinquishment of a known right, a waiver should not be lightly presumed" and must be based on a clear manifestation of an intent to relinquish a contractual protection (***Kamco Supply Corp. v On the Right Track, LLC***, *supra* at 280, 49 NYS3d at 726; *see* ***Gilbert Frank Corp. v Federal Ins. Co.***, 70 NY2d 966, 525 NYS2d 793 [1988]). Generally, the existence of an intent to forego a contractual right is a question of fact (*see* ***Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.***, *supra*; ***Jefpaul Garage Corp. v Presbyterian Hosp.***, *supra*).

Here, viewing all of the evidence in a light most favorable to the non-moving party, Friend has raised an issue of fact necessitating a trial (*see* ***Chimbo v Bolivar***, *supra*). Waiver of a contract right must be proven to be intentional, and the defense of waiver requires a clear manifestation of an intent to relinquish a known right, and this intent is a question of fact (***Jefpaul Garage Corp. v Presbyterian Hosp.***, *supra*). The issue of whether Dr. Schwartz, on behalf of plaintiff, waived his fee pursuant to the

fee agreement during the parties' July 24 phone call is a question of fact and credibility as to Dr. Schwartz's intent, which precludes summary judgment. Additionally, plaintiff's failure to demand payment for nearly five years also raises a question of fact with respect to its alleged waiver and abandonment of his contractual right. Therefore, plaintiff's motion for summary judgment on the complaint is denied.

Plaintiff also moves for summary judgment dismissing the counterclaim as barred by the applicable statute of limitations (CPLR 214-a), arguing that Friend asserted the counterclaim after the 2½ year statute of limitations for medical malpractice actions. In the alternative, plaintiff argues that Dr. Schwartz did not deviate or depart from good and accepted medical practice during his treatment of Friend, and that, if there was a departure, it was not the proximate cause of Friend's alleged injuries. Plaintiff submits, *inter alia*, copies of the pleadings, certified medical records, transcripts of the deposition testimony of the parties, and the affirmation of Dr. Alfred Fraust, a board-certified orthopedic surgeon. Friend does not oppose the motion.

On motion for summary judgment on the ground that a complaint or claim was barred by the applicable statute of limitations, the moving party must establish, prima facie, that the time in which to commence the action has expired (*see* ***Xiu Jian Sun v Wuhua Jing***, 136 AD3d 613, 24 NYS3d 395 [2d Dept 2016]; ***Ross v Jamaica Hosp. Med. Ctr.***, 122 AD3d 607, 996 NYS2d 118 [2d Dept 2014]; ***Baptiste v Harding-Marin***, 88 AD3d 752, 930 NYS2d 670 [2d Dept 2011]; ***LaRocca v DeRicco***, 39 AD3d 486, 833 NYS2d 213 [2d Dept 2007]). The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see* ***Xiu Jian Sun v Wuhua Jing***, *supra*; ***Ross v Jamaica Hosp. Med. Ctr.***, *supra*; ***Rakusin v Miano***, 84 AD3d 1051, 923 NYS2d 334 [2d Dept 2011]; *see also* ***Massie v Crawford***, 78 NY2d 516, 577 NYS2d 223 [1991]).

"An action sounding in medical malpractice must be commenced within 2 ½ years of either the act or omission complained of, or the last treatment where there has been continuous treatment for the same condition which gave rise to the act or omission" (*see* ***Gray v Wyckoff Hgts. Med. Ctr.***, 155 AD3d 616, 617, 62 NYS3d 540, 541 [2d Dept 2017]; *see* CPLR 214-a; ***Glamm v Allen***, 57 NY2d 87, 453 NYS2d 674 [1982]). A plaintiff claiming that the statute of limitations period for a medical malpractice claim was tolled under the continuous treatment doctrine must show that he or she "continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period," that such "course of treatment was for the same condition or complaints underlying the malpractice patient's malpractice claim, and that the treatment is continuous" (***Murray v Charap***, 150 AD3d 752, 754, 54 NYS3d 28, 30 [2d Dept 2017]; *see* ***Mello v Long Is. Vitreo-Retinal Consultant, P.C.***, 172 AD3d 849, 99 NYS3d 414 [2d Dept 2019]; ***Gomez v Katz***, 61 AD3d 108, 874 NYS2d 161 [2d Dept 2009]).

Plaintiff has established its prima facie entitlement to judgment as a matter of law by demonstrating that the counterclaim was interposed on May 9, 2012, more than five years after the alleged malpractice last occurred on March 23, 2007, the date on which Friend was last treated by Dr. Schwartz. Friend has failed to oppose the motion, and therefore has failed to raise a triable issue of fact

as to whether there was any continuation of the course of treatment which would have tolled the statute of limitations.

Accordingly, the motion by plaintiff for summary judgment dismissing the counterclaim is granted. The motion by plaintiff for summary judgment on its complaint is denied.

Dated: Sept 24, 2019
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**