

Baldwin v Argubano
2019 NY Slip Op 34021(U)
August 21, 2019
Supreme Court, Saratoga County
Docket Number: 20172042
Judge: Thomas D. Nolan
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STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

DANIELLE M. BALDWIN and MICHAEL J. BALDWIN,

Plaintiffs,

DECISION AND ORDER

RJI No. 45-1-2017-1641

Index No. 20172042

-against-

RENEE A. ARGUBANO, M.D., ARUNA BAPAT, M.D.,
DAVID A. ELLIS, M.D., ST. PETER'S HEALTH PARTNERS,
ST. PETER'S HEALTH PARTNERS MEDICAL ASSOCIATES, P.C.
SETON HEAL SYSTEM, INC., ST. PETER'S HEALTH CARE
SERVICES, and ALBANY ADVANCED IMAGING, P.L.L.C.,

Defendants.

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: LAFAVE, WEIN & FRAMENT, PLLC
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SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

Two motions and one cross-motion are pending in this medical malpractice action in which plaintiffs allege that the defendant physicians negligently failed to timely diagnose the plaintiff Danielle Baldwin's breast cancer.¹ The first is a motion by defendants Bapat and Argubano and their medical practices and employers for an order striking the plaintiffs' note of issue and to compel the service of an amended bill of particulars.² The second is by defendant Bapat for an order dismissing the complaint based on the statute of limitations on the assertion that her treatment of plaintiff Danielle Baldwin ended more than 2 ½ years prior to the commencement of the action. Plaintiffs' cross-motion seeks dismissal of defendant Bapat's affirmative defense alleging the expiration of the statute of limitations.

First the operative facts relevant to the dismissal motion and cross-motion. In 2001, plaintiff Danielle Baldwin became a patient of Dr. Bapat, a board-certified family practice physician. In August 2013, plaintiff noticed a painful lump in her left breast. On August 13, 2013, plaintiff was examined by Dr. Bapat for that complaint. As documented in her office note, Dr. Bapat noted that plaintiff had a history of breast lumps and fibrocystic breast disease, found palpable cysts in both breasts, noted a large cyst in the left breast at 3:00 o'clock which was tender on palpation. Dr. Bapat ordered an ultrasound and mammogram which were immediately performed. Dr. Ronald Karo, a radiologist interpreted and reviewed both tests, reported no

¹Other defendants include the medical practices and employers of the physicians alleged to be negligent.

²A third motion to strike the note of issue and to compel further discovery made by defendants Ellis and Albany Advanced Imaging has been withdrawn.

lesions and no abnormal architecture and concluded that the mammogram was normal.³ Dr. Bapat promptly notified plaintiff of the negative test results. Dr. Bapat next saw plaintiff on March 7, 2014. On that examination, Dr. Bapat noticed three fibrocysts in the right breast and two fibrocysts in the left breast. No further tests were ordered. Dr. Bapat left the group medical practice on July 31, 2014, relocated to South Carolina, and never again examined or treated plaintiff.⁴

This action was commenced in July 2017, three years after Dr. Bapat left the medical practice and three years and four months after she last examined the plaintiff. In her motion, defendant Bapat relying on CPLR 214-a asserts that since it is uncontroverted that she last treated plaintiff on March 7, 2014, the action against her is time barred. Defendant further contends that the continuous treatment doctrine, tolling the statute of limitations when a plaintiff is under active treatment by a medical professional, does not apply to the facts of this case.

Plaintiffs contend that since plaintiff Danielle Baldwin was being regularly monitored by Dr. Bapat, as confirmed in her medical records since at least 2005 for breast cysts, tender breasts and lumpy breasts also which Dr. Bapat diagnosed as chronic fibrocystic breast disease and that Dr. Bapat initiated a course of treatment including monthly self-breast exams for that condition, the continuous treatment doctrine applies since plaintiff's care for the same condition continued with Dr. Argubano after Dr. Bapat left the medical practice.

³In February 2018, plaintiffs' complaint against Dr. Karo and his radiology practice was dismissed when their motion for summary judgment was granted following plaintiffs' withdrawal of their opposition to the motion.

⁴In May 2015, plaintiff's came under the care of defendant Dr. Argubano of the same medical practice and she was subsequently diagnosed with breast cancer in April 2016. In this action, plaintiff alleges Argubano was negligent in failing to earlier diagnose her cancer.

In reply, defendant Bapat asserts that her monitoring of the plaintiff's chronic fibrocystic breast disease was not a course of treatment and further that that condition was distinct and different from the invasive ductal carcinoma later diagnosed.

As a preparatory comment, recently enacted Lavern's Law (CPLR §§203(g)(2) and 214-a) which revived for a limited period, claims related to the non-diagnosis of cancer does not apply, a point conceded by plaintiffs.

In considering defendant Bapat's motion for summary judgment, the court must accept as true plaintiffs' factual allegations and draw all favorable reasonable inferences from them. Young v New York City Health & Hospitals Corp., 91 NY2d 291, 296 (1998); Rizk v Cohen, 73 NY2d 98, 103 (1989). The doctrine of continuous treatment, established in Borgia v City of New York, 12 NY2d 151 (1962), is now embodied in CPLR 214-a, which provides that "[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 wherein there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure***. For the purposes of this section of the term 'continuous treatment' shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition".

"Essential to the application of the continuous treatment doctrine is 'a course of treatment established with respect to the condition which gives rise to the lawsuit' (citation omitted). Routine examinations of a seemingly healthy patient or visits concerning matters unrelated to the condition at issue giving rise to the claim are insufficient to invoke the benefit of the doctrine." Plummer v New York City Health and Hosp. Corp., 98 NY2d 263, 268 (2002). "Under the

continuous treatment doctrine, the running of the statute of limitations is tolled until the end of a course of treatment when the ‘course of treatment which includes the wrongful acts of omissions has run continuously and is related to the same original condition or complaint (citations omitted).’ Johanson v Sullivan, 68 AD3d 1303 (3rd Dept 2009).

Contrary to defendant Bapat's claim and since there is no conflicting decision of the Third Department, the Second Department's holding in Matthews v. Barram, 150 AD 836 (2d Dept 2017) that the continuous treatment doctrine may apply in a failure to diagnose care to a physician who has left a medical practice by imputing to the departed physician the continued treatment provided to the plaintiff by a successor physician of that practice. Notwithstanding that holding, in this case, neither plaintiffs nor defendant support their respective motions with competent medical opinion testimony on the issue of whether a continuing course of treatment had been established. Defendant Bapat's counsel argues that the conceded monitoring of plaintiff's fibrocystic breast disease did not constitute a continuing course of treatment, a critical element which triggers the application of the continuous treatment doctrine and thus tolls the running of the statute of limitations against defendant. Absent competent medical opinion on that issue, the court cannot determine whether the continuous treatment doctrine applies to the facts presented.

Defendant Bapat's motion to dismiss the complaint and plaintiffs' cross-motion to dismiss the affirmative defense of the statute of limitations are denied, without costs.

Next the motion of defendant Bapat alleging deficiencies in plaintiffs' bill of particulars. In medical malpractice actions against multiple parties, a bill of particulars must detail the specific acts of negligence attributed to each defendant and the use of open-ended phrases like "including but not limited to" or "among other things" are improper. Stoddard v New York Oncology

Hematology PC, 172 AD 3d 1504 (3rd Dept. 2019).

Here six defendants - two physicians and the four business entities that employed those physicians - are represented jointly by one law firm and these defendants served one joint demand for a bill of particulars - a practice which after review of the issues raised on defendants' motion may have precipitated the situation which results in the current motion. Plaintiffs served their initial bill of particulars in June 2018. Defendants' counsel responded with correspondence identifying alleged deficiencies in the plaintiffs' responses to demands numbered 4 and 5 as improper and overbroad in specifying claims of negligence and as well as by specifying claims of negligence against codefendant Dr. Ellis who is not one of the demanding defendants. In response, plaintiffs served a supplemental bill of particulars in July 2018. Defendants pointed out that the bill still included information relating to the defendant radiologists and did not differentiate the claims made against Drs. Bapat and Argubano. Plaintiff's then served a second supplemental bill of particulars in December 2018 which was met with the same objection that plaintiffs again did not distinguish and separate the claims alleged against the two physicians Bapat and Argubano.

Following a conference in January 2019 with the court during which the alleged deficiencies in the December 2018 second supplemental bill of particulars were discussed, the defendants Bapat and Argubano and their employers made this motion in which it is asserted that plaintiffs have continued to fail to differentiate and particularize the claims of negligence between the two doctors and as well, continue to include proscribed phrases such as "including, but not limited to". Plaintiffs on March 15, 2019 send their third supplemental bill of particulars.⁵

⁵As plaintiffs admit that bill was incorrectly labeled as their "second" bill of particulars.

The court has reviewed plaintiffs' third supplemental bill of particulars and in particular the objections to the allegations raised in paragraphs 39, 40, 41 and 42 of the affidavit of Molly C. Casey, Esq. Before addressing the specific objections, the court notes that the plaintiffs' claim of negligence is a relatively narrow one - namely, that Danielle Baldwin's breast cancer should have been diagnosed earlier than May 2015 based on plaintiff's complaints and symptoms and her history of fibrocystic breast disease.

The court rules on the specific objections made to the plaintiffs' third supplemental bill of particulars dated March 15, 2019 as follows:

<u>Page</u>	<u>Paragraph</u>	<u>Ruling</u>
7	4(f)	Objection Sustained: paragraph stricken - overly broad
7	4(k)	Objection Sustained to extent words "including but not limited to" stricken
8	4(o)	Objection Sustained to extent words "and/or any other health care provider who examined the plaintiff" stricken
8	4(p)	Objection Sustained to extent words "and/or any other health care provider who examined the plaintiff" stricken
10-11	4(y) and 4(oo)	Objection Sustained - both paragraphs stricken
12	4(rr) 4(uu)	Objection Denied
13	4(vv)	Objection Sustained - paragraph stricken

<u>Page</u>	<u>Paragraph</u>	<u>Ruling</u>
14	4(ggg) 4(jjj)	Objection Denied
18	4(kkkk)	Objection Denied
18	4(hhhh)	Objection Granted - paragraph stricken
18	4(iiii)	Objection Granted - paragraph stricken
19	4(oooo)	Objection Sustained - paragraph stricken
19	4(pppp)	Objection Sustained - paragraph stricken
20	4(d)	Objection Sustained - paragraph stricken
20	4(e)	Objection Sustained - paragraph stricken
28	4(aaa)	Objection Denied
29	4(ddd)	Objection Denied
30	4(c)	Objection Denied
	4(d)	Objection Denied
	4(e)	Objection Denied
31	4(k)	Objection Granted to extent words "and Renee A. Argubano MD" stricken
31	4(g)	Objection Denied
31	4(i)	Objection Granted - paragraph stricken

<u>Page</u>	<u>Paragraph</u>	<u>Ruling</u>
32	4(o)	Objection Granted to extent words "and Renee A. Argubano MD" stricken
32	4(v)	Objection Granted - paragraph stricken
33	4(x)	Objection Granted to extent the word "perform" stricken
33	4(y)	Objection Granted to extent the word "perform" stricken
33	4(z)	Objection Denied
33	4(aa)	Objection Granted - paragraph stricken
33	4(bb)	Objection Denied
36	4(ww)	Objection Granted - paragraph stricken
36	4(xx)	Objection Granted - paragraph stricken
37	4(a)	Objection Granted - paragraph stricken
37	4(b)	Objection Granted - paragraph stricken
37	4(c)	Objection Denied
37	4(d)	Objection Denied
38	4(e)	Objection Denied
38	4(f)	Objection Granted - paragraph stricken
38	4(g)	Objection Granted - paragraph stricken
38	4(h)	Objection Granted - paragraph stricken
38	4(i)	Objection Granted - paragraph stricken
39	4(n)	Objection Granted - paragraph stricken

<u>Page</u>	<u>Paragraph</u>	<u>Ruling</u>
39	4(o)	Objection Granted - paragraph stricken
39	4(t)	Objection Granted - paragraph stricken
42	4(hh)	Objection Granted - paragraph stricken
42	4(ii)	Objection Granted - paragraph stricken

Lastly, there is no reason shown to strike the plaintiffs' trial note of issue. Discovery has been extensive and the case is ready for trial scheduled to start on March 9, 2020.

Defendants' motion to strike the note of issue is denied, and defendants' motion to compel an amended bill of particulars is denied except to the extent that certain portions of plaintiffs' third amended bill of particulars are stricken as detailed above and the motion is otherwise denied, all without costs.

Now that these motions have been decided, the deadline for the filing of summary judgment motions by any party, unless the parties otherwise agree, is November 15, 2019.

This constitutes the decision and order of the court. The original decision and order and all original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. The signing of this decision and order and the delivery of this decision and order to the Saratoga County Clerk shall not constitute notice of entry under CPLR Section 2220, and the plaintiffs are not relieved from the applicable provisions of that rule regarding service of notice of entry.

So Ordered.

DATED: August 21, 2019
Saratoga Springs, New York

ENTERED
Craig A. Hayner
Craig A. Hayner
Saratoga County Clerk

Thomas D. Nolan, Jr.
HON. THOMAS D. NOLAN, JR.
Supreme Court Justice
SARATOGA COUNTY CLERKS OFFICE
BALDWIN SPA, NY
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ENTERED