

Edwards v Zung

2019 NY Slip Op 34120(U)

June 12, 2019

Supreme Court, Bronx County

Docket Number: 29865/2018E

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK —BRONX COUNTY

PRESENT: GEORGE J. SILVER

Justice

ALTHEA EDWARDS,

**INDEX NO. 29865/2018E
SEQ NO. 003**

- v -

**MURRAY ZUNG, M.D., DERMATOLOGY
ASSOCIATES OF WESTCHESTER, P.C.,
LAWRENCE D. JAEGER, M.D., SARAH SEGALL,
R.P.A, ADVANCED DERMATOLOGY OF NEW
YORK, P.C., NEW YORK-PRESBYTERIAN/
LAWRENCE HOSPITAL, NEW YORK
PRESBYTERIAN HEALTHCARE SYSTEM, INC,
CLAUDETTE H. TROYER, M.D., MOUNT
VERNON NEIGHBORHOOD HEALTH
CENTER, INCL, VELITCHEKA MIHALEVA,
M.D, JAYNE AGYEPONG, FNP, BORA V. KIM,
D.O., EAR, NOSE & THROAT ASSOCIATES OF
NEW YORK, P.C., AMERIPATH NEW YORK,
LLC d/b/a DERMPATH DIAGNOSTICS
PATHOLOGY ASSOCIATES, JASON A. COHEN,
M.D. and YING GUO, M.D,**

HON. GEORGE J. SILVER:

In this medical malpractice action, defendants JASON A. COHEN, M.D., YING GUO, M.D., and AMERIPATH NEW YORK, LLC, d/b/a DERMPATH DIAGNOSTICS PATHOLOGY ASSOCIATES (“defendants”) move for an order pursuant to CPLR §3211(a)(5) granting dismissal in favor of defendants because this medical malpractice action is barred by the applicable statute of limitations. As conceded by plaintiff ALTHEA EDWARDS (“plaintiff”) at oral argument before the court on June 12, 2019, plaintiff does not oppose the instant application.

DISCUSSION

A medical malpractice claim accrues on the date the alleged malpractice takes place (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991]; *Matter of Daniel J. v New York City Health & Hosps. Corp.*, 77 NY2d 630, 634-635 [1991]).

Under CPLR §304(a), an action is commenced “by filing a summons and complaint or summons with notice...” Subdivision (b) of section 304 states that “filing shall mean the delivery of the summons with notice, summons and complaint or petition to the clerk of the court in the

29865 | IVE

county in which the action or special proceeding is brought or any other person designated by the clerk of the court for that purpose.”

CPLR §203(c) states that in an action “which is commenced by filing, a claim asserted in the complaint is interposed against the defendant ... when the action is commenced” the moment of commencement by filing “constitutes the crucial date for determining whether the Statute of Limitations is satisfied” (*Matter of Spodek v New York State Commr. of Taxation & Fin.*, 85 NY2d 760, 763 [1995]).

Here, plaintiff’s summons and complaint were filed on August 24, 2018. Her supplemental summons and amended verified complaint were filed on September 10, 2018. An action for medical malpractice must be commenced within two years and six months of the date of accrual (CPLR §214-a; *Massie v Crawford*, 78 NY2d 516, 519 [1991]). Because this action was undisputedly commenced well over two years and six months after the alleged misdiagnoses by defendants on July 19, 2013 and July 1, 2014, this action is time-barred.

Moreover, this action was not timely commenced under “Lavern’s Law” (*see* “NY Reaches Agreement on Lavern’s Law Med Mal Bill,” NYLJ, Jan. 30, 2018, col. 1). Lavern’s Law is codified in the recently amended version of CPLR §214-a. Under this law, in cases involving an alleged failure to diagnose cancer, the statute of limitations begins to run from the date of discovery of the alleged malpractice, as opposed to the date of the act or omission complained of.

In this case, however, Lavern’s Law does not apply because its limited retroactive effect does not apply to plaintiff’s claim. Specifically, effective January 31, 2018, CPLR §214-a states that a medical malpractice action must be commenced

within two years and six months of the act, omission or failure complained of, provided, however, 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 no later than seven years from such alleged negligent act or omission.

Under the Session Laws of 2017, ch 506, § 4 (S.6800/A.8516), as amended by the Session Laws of 2018, ch 1 (S.7588A), the new discovery rule for failure-to-diagnose-cancer claims applies to acts, omissions, or failures occurring on or after the January 31, 2018 effective date of the new legislation. The rule also applies retroactively to a narrow set of cases that were already time-barred when the legislation was enacted.

Under the 2017 enacting legislation, if a claim became time-barred within 10 months of the January 31, 2018 effective date, i.e., March 2017, claimants were given a grace period of six

29865/18E

months from the effective date within which to bring suit (L.2017, 506, §4 [“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 time-barred 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 above-quoted language was then amended during the next session of the Legislature. Specifically, under Session Laws 2018, chapter 1, §6, the above-quoted section of the 2017 Session Laws was repealed and replaced with a rule that new discovery rule for failure to-diagnose-cancer cases “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.” (L.2018, c. 1, §6).

As such, under the 2018 Session Laws (chapter 1, §6), the new discovery rule is retroactive only to claims involving acts or omissions occurring as far back as July 31, 2015 (i.e., 2 ½ years prior to the January 31, 2018 effective date).

Here, plaintiff’s interactions with defendants are outside the limited retroactive reach of Lavern’s Law. Plaintiff does not have any credible allegations to the contrary to prevent dismissal.

Accordingly, it is hereby

ORDERED that defendants’ motion to dismiss plaintiff’s complaint as against them is granted, unopposed and with prejudice, as this suit is time-barred as against defendants; and it is further

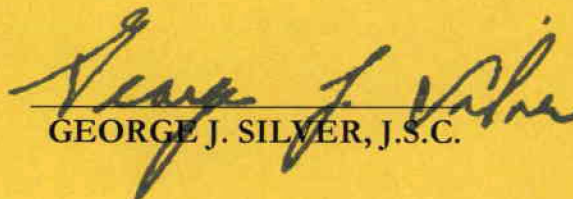
ORDERED that the Clerk of the Court, Bronx County, is directed to enter judgment in favor of defendants dismissing this case as against them; and it is further

ORDERED that the remaining parties in this case are directed to execute a stipulation amending the caption to omit those parties that have been dismissed from this action, and present that fully executed stipulation to the court at the next conference; and it is further

ORDERED that the remaining parties in this action are directed to appear for a conference before the court on July 17, 2019 at 9:30 AM in Room 600 (Part 19A) of the courthouse located at 851 Grand Concourse, Bronx, New York.

This constitutes the decision and order of the court.

Dated: 6-12-19


GEORGE J. SILVER, J.S.C.