

Kelly v Baldwin

2019 NY Slip Op 34121(U)

April 16, 2019

Supreme Court, Kings County

Docket Number: 511881/2018

Judge: Marsha L. Steinhardt

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 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 16th day of April 2019.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice

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CYNTHIA KELLY,

Plaintiff,

DECISION AND ORDER
Index No. 511881/2018

-against-

HILARY E. BALDWIN, M.D., NEGHMEH
YOUSEFZADEH, M.D., and AMERIPATH NEW
YORK, LLC. d/b/a DERMPATH DIAGNOSTICS,

Defendants.

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The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion _____	_____ 1 _____
Opposition _____	_____ 2 _____
Reply _____	_____ 3 _____

Upon the foregoing papers, and after oral argument, Defendant, Hilary E. Baldwin, M.D., moves for an Order, pursuant to CPLR §§ 3211(a)(5), 203, and 214-a, granting dismissal in her favor. Defendant argues that the action is time-barred by the applicable medical malpractice statute of limitations. Defendant contends that Plaintiff's Complaint, as against her, must be dismissed as the action was commenced on June 8, 2018, over four-and-half years ~~since~~ ^{after} Plaintiff had an appointment with Defendant, and is therefore barred by the two-and half-year statute of limitations (*see* CPLR § 214-a). Plaintiff opposes and argues that the action is saved by Lavern's Law. Defendant disagrees and states that the action is not saved by Lavern's Law as the date of the alleged malpractice fell outside the two-and-half-year retroactive grace period from the

effective date, January 31, 2018, and six months following the enactment.

Plaintiff commenced this action alleging Defendant failed to diagnose basal cell carcinoma, a type of skin cancer. Plaintiff presented to Defendant for treatment of various skin conditions between 2009 and 2013. Plaintiff's last visit to Defendant was on December 3, 2013. On November 13, 2017, approximately four years later, Plaintiff presented to a different dermatologist who performed a skin check and took a biopsy. On November 15, 2017, the pathology for the biopsy was read and reported as positive for cancer.

"The statute of limitations in a medical malpractice action begins to run on the date of the alleged malpractice" (*B.F. v Reproductive Medicine Associates of New York, LLP*, 30 NY3d 608, 616 [2017]). 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]).

Here, Plaintiff last saw the Defendant on December 3, 2013. Plaintiff commenced this action with the filing of a Summons and Complaint on June 8, 2018 – over four-and-a-half years later. Plaintiff relies on the newly enacted "Lavern's Law" to render the action timely. Lavern's Law is codified in the 2018 amended version of CPLR § 214-a. Under this section, 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. Effective January 31, 2018, CPLR § 214-a states that

an action for medical . . . malpractice action 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 act, omission or failure; 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, § 4 (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. The rule also applies retroactively to a narrow set of cases that were already time-barred when the legislation was enacted. Under the legislation, if a claim became time-barred within ten months of the January 31, 2018 effective date, claimants were given a grace period of six months from the effective date within which to bring the suit (L.2018, ch 1, § 4, as amended). Further, under Session Laws 2018, ch 1, § 6, the 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, ch 1, § 6).

Therefore, the new discovery rule is retroactive only to claims involving acts or omissions occurring as far back as July 31, 2015. Here, Plaintiff last saw Defendant on December 3, 2013, which is before the July 31, 2015 date for retroactive cancer diagnosis cases. Therefore, Plaintiff was seen by Defendant outside the limited retroactive reach of Lavern’s Law and this suit is time-barred.

Based on the foregoing, Defendant Baldwin’s motion to dismiss is granted and Plaintiff’s complaint against Defendant Baldwin is dismissed.

This constitutes the opinion, decision and Order of this court.

ENTER,



HON. MARSHA L. STEINHARDT
J.S.C.