

Edwards v Zung

2019 NY Slip Op 35178(U)

February 19, 2019

Supreme Court, Bronx County

Docket Number: Index No. 29865/2018E

Judge: Doris M. Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK — BRONX COUNTY

PRESENT: HON. DORIS M. GONZALEZ

Justice

ALTHEA EDWARDS,

INDEX NO. 29865/2018E
SEQ NO. 001,002

- 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. HON. DORIS M. GONZALEZ

In this medical malpractice action, defendants NEW YORK-PRESBYTERIAN HOSPITAL (“NYPH”) and EAR, NOSE & THROAT ASSOCIATES OF NEW YORK, P.C. and BORA V. KIM, D.O. (“ENT Associates”) (collectively, “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. Indeed, defendants contend that action must be dismissed, with prejudice, as it was commenced on August 24, 2018, 3 years, 5 months and 12 days following the date of loss, and is therefore barred by a 2 ½ year statute of limitations (*see* CPLR. §214-a).

To that end, defendants argue that even though this action surrounds the failure to timely diagnose cancer, plaintiff’s case is not saved by Lavern’s Law as the date of alleged

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negligence fell outside the 2 ½ year retroactive grace period from the effective date, January 31, 2018, and six months following the date of enactment. Indeed, given the date of alleged negligence, the date of the cancer diagnosis, March 11, 2016, is not dispositive.

Plaintiff does not oppose NYPH's application. In opposition to ENT Associates' motion, plaintiff argues that ENT Associates' application is premature under CPLR §3211(d) since ENT Associates' medical records have not yet been disclosed to plaintiff. Plaintiff contends that receipt of those records would afford plaintiff an opportunity to determine whether this action is time-barred as against ENT Associates. Plaintiff consulted with Dr. Kim of ENT Associates on March 12, 2015. Plaintiff's complaint refers to this visit, indicating that ENT Associates had undertaken to render diagnosis and treatment to plaintiff on that date. A report taken on the date of plaintiff's visit indicates that serology tests were taken, and medication was prescribed to plaintiff. Plaintiff submits that she consulted with ENT Associates at follow-up appointments, but cannot recall the date of those visits. As such, plaintiff argues that she has requested complete copies of the records of ENT Associates to determine when plaintiff's follow-up visits occurred. Plaintiff concedes that if plaintiff's March 12, 2015 visit to ENT Associates was her only visit, then the action against them is time-barred. However, if there were additional diagnosis and treatment by movants extending up to or beyond July 31, 2015, the action would be timely. Since this is an issue of fact that is not presently determinable, plaintiff requests that ENT Associates' pre-answer motion be denied to allow ENT Associates to assert an objection in its responsive pleadings, or alternatively permit the necessary disclosures to be made.

In reply, ENT Associates contends that since plaintiff did plead a date of alleged negligence that fell during the applicable retroactive grace period of Lavern's Law, and failed to commence this action within the 6-month grace period following Lavern's Law's enactment, the instant motion must still be granted in its favor irrespective of plaintiff's claims regarding potential treatment after March 12, 2015.

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 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

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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 care and treatment by NYPH on February 8 through February 12, 2015, the court finds that this action is time-barred as against NYPH. As previously mentioned, plaintiff does not dispute this, and concedes that the action is time-barred as to NYPH.

Separately, however, plaintiff argues that this action was commenced in timely fashion under “Lavern’s Law” against ENT Associates (*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 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

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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, the only date that plaintiff is aware that she saw ENT Associates is March 12, 2015, which is before the July 31, 2015 date for retroactive cancer diagnosis cases. As such, plaintiff was seen at ENT Associates outside the limited retroactive reach of Lavern’s Law. Plaintiff does not have any credible allegations to the contrary to prevent dismissal. While plaintiff contends that additional discovery may reveal additional dates of treatment, plaintiff cannot recollect any dates after March 12, 2015 when she was seen by ENT Associates. Even in the absence of additional disclosures from ENT Associates, had plaintiff been treated after March 12, 2015, plaintiff would likely have a receipt, appointment card, or some other indicia of continuous treatment with ENT Associates to provide a basis for avoiding dismissal. No such allegation has been made. Even if plaintiff had made such an allegation, plaintiff’s case would still not be saved from dismissal. Indeed, even under chapter 506, § 4 of the 2017 Session Laws (which in any event has been repealed), this suit is time-barred. Under that section, claimants were given a six-month grace period for commencing suit. This ended July 31, 2018. As this action was not commenced until September 10, 2018, plaintiff again cannot invoke the aforementioned grace period for purposes of avoiding the realization that this suit is time-barred.

Accordingly, it is hereby

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

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

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

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ORDERED that the remaining parties in this action are directed to appear for a conference before the court on 3-20-19 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: 2/19/19



HON. DORIS M. GONZALEZ