

<b>Matthews v Kimmelstiel</b>
2020 NY Slip Op 30368(U)
February 5, 2020
Supreme Court, New York County
Docket Number: 805128/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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REGINA MATTHEWS,  
Plaintiff,

Index No.  
805128/2019

Decision and  
Order

-against-

Mot. Seq. 1, 2, 3

FRED KIMMELSTIEL, M.D.,  
RICHARD GOLD, M.D., BRADLEY HANDLER,  
M.D., PETER MASLIN, M.D., MARK GRAY, M.D.,  
MARK LERNER, M.D., ELLEN ROONEY, M.D.,  
NEW YORK RADIOLOGY PARTNERS WEST  
SIDE RADIOLOGY ASSOCIATES, P.C.,  
WEST CARE MEDICAL, and MEMORIAL  
SLOAN KETTERING CANCER CENTER,

Defendants  
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Regina Matthews (“Plaintiff”) alleges that the defendants failed to timely diagnose and properly treat her breast cancer. Plaintiff contends that her cancer is now Stage IV metastatic disease and her prognosis is poor.

Defendants Fred Kimmelstiel, M.D. (“Kimmelstiel”), Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan Kettering Cancer Center (“Memorial”)<sup>1</sup>, and Bradley Handler, M.D. (“Handler”), and Peter Maslin, M.D. (“Maslin”), move to dismiss the claims as against them as barred by the statute of limitations. Plaintiff opposes the motions. Plaintiff argues that the motions are premature, not based on evidence in admissible form, and include her medical records without her authorization.

<sup>1</sup> Plaintiff has agreed to discontinue the action as against Memorial, and no cross claims have been asserted against Memorial. The Court has so-ordered the Stipulation of Discontinuance, which renders Memorial’s motion to dismiss moot.

### Motion Sequence 1:

Kimmelstiel moves for an Order granting partial dismissal of all claims related to the treatment he rendered prior to September 13, 2016.

Kimmelstiel treated Plaintiff from May 31, 2006 through July 1, 2009. Plaintiff's next visit with him was on January 17, 2017 at which time "the patient resumed treatment." Kimmelstiel claims that from March 2010 to January 17, 2017, he had no contact with Plaintiff and did not render any treatment to her. Kimmelstiel contends that "[a]s such, the patient's return to the defendant on January 17, 2017 was not a 'timely return visit' and constitutes 'renewal, rather than a continuation' of the prior physician-patient relationship."

Plaintiff states that "[t]hough it does not appear that [Kimmelstiel] seeks dismissal of the plaintiff's claims arising from the 2017 treatment, the action is clearly timely for such treatment." Plaintiff's opposition does not specifically address Kimmelstiel's claim that any claims related to the medical care provided by him prior to September 13, 2016 are time-barred in light of Plaintiff's gap in treatment with him.

Kimmelstiel's motion for partial dismissal is granted and all claims related to treatment rendered by Kimmelstiel to Plaintiff prior to September 13, 2016 are time-barred.

### Motion Sequence 3:

Handler and Maslin moves to dismiss the action as against them as time-barred.

According to Handler and Maslin, Plaintiff underwent mammograms on March 26, 2008 and May 10, 2012, at a location maintained by West Side Radiology, interpreted by Maslin. After May 10, 2012, Maslin was not involved in Plaintiff's care. Plaintiff underwent breast ultrasounds on February 16, 2007 and July 15, 2016, at a location maintained by West Side Radiology, and interpreted by Handler. After July 15, 2016, Handler was not involved in Plaintiff's care. On September 25, 2017, Plaintiff underwent a right diagnostic mammogram and ultrasound performed at West Side Radiology, interpreted by Dr. Mona Darwish who is not a named defendant to this action. That ultrasound revealed evidence of cancer in Plaintiff's

right breast, a diagnosis confirmed through the performance of a right breast ultrasound-guided biopsy. On October 3, 2017, Plaintiff underwent a PET scan at West Side Radiology and has not returned to the facility for any imaging studies since that date.

Defendants argue that since Handler and Maslin's interpretations occurred more than two and a half years before Plaintiff commenced this medical malpractice action, dismissal of the action against them is warranted. Defendants further argue that the continuous treatment doctrine does not apply to Handler or Maslin because there was no continuing physician-patient relationship between them and Plaintiff.

Plaintiff argues that her claims against West Side Radiology and all of its radiologists, including Maslin and Handler, are timely under the continuous treatment doctrine and agency principles. Plaintiff states in her affidavit, "It was my understanding that my doctors, Dr. Kimmelstiel, Dr. Gray, and Dr. Rooney were working in conjunction with the radiologists at West Side Radiology, including Dr. Gold, Dr. Handler, Dr. Maslin, and Dr. Lerner, to continuously monitor my breast health, and specifically for dense breast tissue, abnormal breast masses, and potential malignancies, given my prior history of developing them from age 16 and the excision of that mass." Plaintiff further states, "My understanding was that these doctors and this facility took it upon themselves to recommend and schedule regular follow ups, and they appeared to assign BI-RADS categories for purposes of their expectation that I would have future diagnostic testing at West Side Radiology and those categories could be used as points of reference." Plaintiff further states, "At no time did I ever intend to terminate my relationship with West Side Radiology and its radiologists, even when I went to MSKCC and Lenox Hill Radiology for other diagnostic test."

CPLR §3211 (a) (5), states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . statute of limitations." "A party moving a complaint as barred by the applicable statute of limitations must establish, prima facie, that the period in which to commence the action has expired." *Murray v. Charap*, 150 AD3d 752, 753 (2d Dept 2017). "The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period." *Murray*, 150 AD3d at 753.

Pursuant to CPLR §214-a, an action sounding in medical malpractice must be commenced within two years and six months of “the act, omission or failure complained of, or last treatment where continuous treatment for the same illness, injury or condition that gave rise to said act, omission or failure.” If an action is commenced beyond the two year and six month statute, it is time-barred and will be dismissed. *Bickel v. Abramson, et al.*, 178 A.D2d 138, 576 (1st Dept 1991). The continuous treatment doctrine has three elements: (1) the plaintiff continues to seek and obtain a course of treatment from the provider during the relevant period; (2) the treatment provided by the provider is for the same conditions or complaints underlying the plaintiff’s medical malpractice claim; and (3) the treatment is continuous. *Gomel v. Katz*, 61 AD3d 108, 111 (2nd Dept 2009). “[W]here treatment is provided by more than one physician or health care provider, the continuing treatment by one will be imputed to the other in the presence of an agency relationship, or some other relevant association which continues the nexus between the two providers.” See generally *Ganapolskaya v V.I.P. Med. Assoc.*, 221 AD2d 59, 62 (1st Dept 1996).

Handler and Maslin’s motion to dismiss is denied at this juncture. The parties are to go forward with discovery, including discovery as to the relationship between Handler and Maslin and West Side Radiology and their relationship with the other physicians that rendered treatment to Plaintiff. Furthermore, the Court notes that to the extent that Handler and Maslin argue in their reply that Plaintiff cannot invoke the continuous treatment doctrine against West Side Radiology, the Court notes that West Side Radiology did not make a motion to dismiss.

Wherefore it is hereby

ORDERED that Defendant Fred Kimmelstiel, M.D.’s motion for partial dismissal (Motion Sequence 1) is granted and all claims related to treatment rendered by Fred Kimmelstiel, M.D., prior to September 13, 2016 are time-barred; and it is further

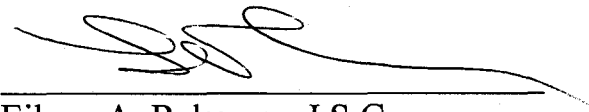
ORDERED that Defendant Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan Kettering Cancer Center’s motion (Motion Sequence 2)’s motion is denied as moot; and it is further

ORDERED that Defendants Bradley Handler, M.D., and Peter Maslin, M.D.’s motion to dismiss is denied without prejudice; and it is further

ORDERED that the parties are to proceed with Plaintiff's deposition on February 6, 2020.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: FEBRUARY 5, 2020



Eileen A. Rakower, J.S.C.