

Ayangbesan v Finkelstein

2020 NY Slip Op 30631(U)

March 3, 2020

Supreme Court, New York County

Docket Number: 162328/15

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

----- X Index No.: 162328/15

ADERONKE AYANGBESAN,,
Plaintiff,

-against-

SETH FINKELSTEIN, M.D.,
Defendant,

----- X

JOAN A. MADDEN, J.:

In this medical malpractice action, defendant Seth Finkelstein, M.D. (“Dr. Finkelstein” or “defendant”) moves for an order pursuant to CPLR 603 and CPLR 4011 severing defendant’s statute of limitations issue from plaintiff Aderonke Ayangbsan’s claims of medical malpractice, and directing a bifurcated trial with the first trial to consider the statute of limitation defense and, then, if necessary a second trial, before a different jury to consider the medical malpractice claims. Defendant contends that the statute of limitation issue and medical malpractice claims are separate and distinct, with little overlap, and that, as plaintiff contends defendant should be equitably estopped from asserting this defense based on defendant’s fraud and misrepresentations, defendant will be prejudiced if a single trial is held.

Plaintiff opposes the motion for severance, arguing defendant has failed to establish that convenience or prejudice warrant separate trials; that the statute of limitations issue and medical malpractice claims are interrelated; and that the evidence regarding whether defendant should be estopped from asserting the statute of limitations defense and the medical malpractice claims are intertwined, and bear on defendant’s credibility with respect to all issues.

CPLR 603 permits a court to sever a claim or action for trial “[i]n furtherance of

convenience or to avoid prejudice.” At the same time while it is “within a trial court’s discretion to grant a severance, this discretion should be exercised sparingly.” Shanley v. Callanan Indus., Inc., 54 NY2d 52, 57 (1981). As the Court of Appeals explained:

Where complex issues are intertwined, ... it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one.

Id.

Thus, “[w]here two actions arise from the same nucleus of facts, a trial court should only sever the actions to prevent prejudice or substantial delay to one of the parties.” Sichel v Community Synagogue, 256 AD2d 276, 276 (1st Dept 1998); see also Global Imports Outlet, Inc. v. The Signature Group, LLC., 85 AD3d 662, 662-663 (1st Dept 2010) (trial court providently exercised its discretion in denying the motion to sever where moving party “failed to demonstrate that a joint trial would result in substantial prejudice”).

For the reasons discussed below, I conclude that defendant’s motion for severance is denied as the statute of limitations defense and medical malpractice claims are intertwined, and defendant has failed to establish that a single trial will result in substantial prejudice.

In this action, plaintiff alleges that defendant misdiagnosed her on June 7, 2011, with retained products of conception from her labor and delivery on May 27, 2011 at Downstate Medical Center (“Downstate”) when, in fact, she did not have any retained products. As a result of the misdiagnosis, plaintiff alleges that on June 7, 2011, defendant performed an unnecessary dilation and curretage procedure, and that on May 17, 2012, defendant negligently performed a hysteroscopy. Plaintiff further alleges that defendant’s misdiagnosis and the procedures he

performed contributed to, and prevented her from, receiving treatment for Asherman's Syndrome, a condition, which, due to adhesions on the walls of the cervix and uterus, prevents menstruation, and which condition plaintiff alleges caused her to be infertile.

Plaintiff commenced this action by filing a summons and complaint on December 2, 2015. Plaintiff does not dispute that the action was commenced beyond the two and a half year statute of limitations for medical malpractice claims, which claims are based on the two procedures performed by defendant on June 7, 2011 and May 17, 2012.

Prior to commencing this lawsuit, plaintiff instituted an action against Downstate, asserting negligence with respect to the alleged retained products of conception after delivery. As to defendant's statute of limitations defense, plaintiff contends that defendant should be estopped from asserting such defense as plaintiff's prior attorney, Richard Jaegars, Esq.,¹ before initiating the suit against Downstate, discussed the case with Dr. Finkelstein. The discussion included allegations regarding retained products of conception, and the medical records of the June 7, 2011 procedure, in which Dr. Finkelstein's preoperative and postoperative diagnosis indicates that he removed the remaining products of conception from plaintiff during the dilation and curettage. Plaintiff contends that Dr. Finkelstein implicated Downstate as having committed malpractice in connection with leaving the products of conception inside plaintiff at the time of delivery. In support of her contention, plaintiff relies upon an affidavit of merit, which plaintiff alleges Dr. Finkelstein executed in connection with plaintiff's action against Downstate. In the affidavit, plaintiff contends that Dr. Finkelstein described the nature of the case and stated that plaintiff had retained the products of conception. Plaintiff further contends

¹Mr. Jaegars is now deceased.

that when the action against Downstate was about to be tried, Dr. Finkelstein refused to testify at trial and plaintiff necessarily consulted another expert who informed plaintiff that in his opinion, at the time of the dilation and curettage, plaintiff did not have retained products of conception.

Plaintiff then discontinued the action against Downstate and commenced this action against Dr. Finkelstein. Plaintiff argues that based on Dr. Finkelstein's conduct, he should be estopped from asserting the statute of limitations defense.

Dr. Finkelstein, in this motion, for the first time, in his attorney's affirmation, denies that he executed the affidavit of merit. Defendant argues, putting aside the issue of the authenticity of the affidavit, that plaintiff was not justified in relying upon the affidavit of merit or other information implicating Downstate which was allegedly conveyed to plaintiff by Dr. Finkelstein. Defendant bases this argument on his contention that plaintiff had Dr. Finkelstein's medical records which included the pathology report. Defendant contends the pathology report indicates that there were no retained products of conception. In this connection, in a prior motion to dismiss before Justice Schlesinger, based on the statute of limitations, Dr. Finkelstein submitted an affidavit dated April 8, 2016 which states:

On June 7, 2011, I performed a dilation and curettage procedure on plaintiff. The surgical pathology report found "MOSTLY BLOOD ADMIXED WITH ACUTELY AND CHRONICALLY INFLAME MYOMETRIUM AND FRAGMENTS OF PARTLY NECROTIC DECIDUA NO CHORIONIC ELEMENTS IDENTIFIED IN THE EXAMINED SECTION."...this means there were no retained products of conception in the pathology specimen. Affidavit ¶ 5; see also June 7, 2011 Surgical Pathology Report, (capitalization in original)

Defendant argues that, while under principles of estoppel, the statute of limitations is

tolled,² estoppel does not apply here based on the pathology report, as plaintiff possessed timely knowledge to have placed her under a duty to make an inquiry to ascertain the facts. Under the doctrine of equitable estoppel "a defendant is estopped from pleading a statute of limitations defense if the "plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action. For the doctrine to apply, a plaintiff may not rely on the same act that forms the basis for the claim-the later fraudulent misrepresentation must be for the purpose of concealing the former tort." Ross v Louise Wise Services, 8 NY3d 478, 491(2007)(internal citations and quotations omitted).

It must be noted that with respect to whether equitable estoppel applies, on appeal in this case, the Appellate Division held that issues of fact exist precluding the determination of this issue as a matter of law. See Ayangbesan v. Finkelstein, 169 AD3d 561 (1st Dept 2019). These factual issues include, but are not limited to, plaintiff's allegations of the discussions between Mr. Jaegars and Dr. Finkelstein and the authenticity and impact of the affidavit. Significantly, on the motion before Justice Schlesinger, Dr. Finkelstein failed to assert that he did not sign the affidavit, nor was such assertion made before the First Department. Moreover, on this motion, Dr. Finkelstein fails to submit an affidavit stating that he did not sign the affidavit of merit. Under these circumstances, the determination as to whether the principles of equitable estoppel apply is necessarily dependent, in part, on whether Dr. Finkelstein signed the affidavit. A meaningful exploration of this issue must include Dr. Finkelstein's possible motive to

²It is well established that "[e]quitable estoppel will preclude [a party] from using the statute of limitations as a defense where it is the [party's] affirmative wrongdoing ... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding" Putter v. North Shore University Hosp., 7 NY3d 548, 552-553 (2006)(internal citations and quotations omitted)

misrepresent that he removed retained products of conception so as to implicate Downstate.

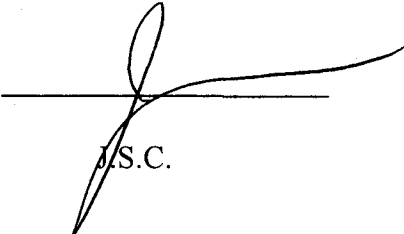
The exploration of Dr. Finkelstein's motive, if any, must be viewed in the context of Ms. Ayangbesan's medical malpractice claims and her condition at the time of treatment provided by Dr. Finkelstein. In this connection, not only does the disputed affidavit state that the products of conception were retained, but Dr. Finkelstein's preoperative and postoperative diagnosis state the such products were removed. Thus, the evidence regarding the authenticity of the affidavit and plaintiff's medical malpractice claims are inextricably intertwined, so that the statute of limitations defense should not be severed from the medical malpractice claims. Sichel v Community Synagogue, supra at 276.

As for defendant's contention that he will be prejudiced from a single trial, the potential prejudice, if any, can be sufficiently addressed with instructions by the court that the jury consider any factual issues related to the statute of limitations and medical malpractice causes of action separately, based on the law applicable to each assertion. Similarly, contrary to defendant's argument, any prejudice based on different burdens of proof can be addressed with clear instructions by the court and on the verdict sheet which will ensure the jury is adequately instructed as to such difference.

Accordingly, it is

ORDERED that defendant's motion to sever is denied.

Dated: March 3, 2020



J.S.C.

HON. JOAN A. MADDEN
J.S.C.