Estrella v Montefiore Med. Ctr.
2020 NY Slip Op 31018(U)
March 16, 2020
Supreme Court, Bronx County
Docket Number: 22286/2015E
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART 19A
---X
JENNIFER ESTRELLA,

Plaintiff,

-against-

MONTEFIORE MEDICAL CENTER, ARED GARAN, M.D., and ARED GARAN, INC.,

Defendants.
---X

Index No. 22286/2015E
Motion Seq. 003 & 004

DECISION & ORDER

GEORGE J. SILVER, J.S.C.:

In this medical malpractice action, defendants ARED GARAN, M.D. and ARED GARAN, INC. (collectively "Dr. Garan"), and MONTEFIORE MEDICAL CENTER ("Montefiore") separately move for summary judgment. Plaintiff JENNIFER ESTRELLA ("plaintiff") opposes both motions.[1] For the reasons discussed below, the court grants both motions.

On October 4, 2012, plaintiff, then 19-years-old presented to Montefiore North Division emergency room ("ER"), with a chief complaint of lower right quadrant abdominal pain since the prior day. Plaintiff reported that she had polycystic ovary syndrome, consistent with ovarian cyst. Melissa Elie, a physician assistant, performed an initial evaluation, and Christina Mannine, an osteopathic doctor, interviewed plaintiff. A pelvic and abdominal CT scan with contrast included an "impression" of a normal appendix, as well as a finding of a right adnexal cyst and a lesion within the liver. It was noted that this finding "may represent a hemangioma but its appearance on this single phase of contrast CT is nonspecific," and a "follow up MRI can be performed to further

[1] Plaintiff submits one brief in opposition to Dr. Garan and Montefiore's motion, which addresses both defendants' respective arguments. Accordingly, the court will address both motions (Sequence Nos. 003 and 004) collectively in the decision herein.

characterize as clinically indicated." Plaintiff was discharged with instructions to follow up with the pediatrics/adolescent and obstetrics/gynecology clinics. Plaintiff was also instructed to "return to the [ED] immediately for any worsening of symptoms including difficulty breathing, severe pain, vomiting, bleeding or weakness."

On October 22, 2012, plaintiff visited Dr. Garan, an obstetrician/gynecologist ("OB/GYN"). Dr. Garan documented that plaintiff had presented to the ER on October 4, 2012 for ovarian cyst, which was confirmed by a CT scan. Dr. Garan performed a transvaginal ultrasound to evaluate plaintiff's cysts as well as a pap smear, which confirmed "left ovarian cysts bilobed approx. 5 cm in totl length." Dr. Garan offered plaintiff oral contraceptives to address the cysts, but plaintiff refused. Plaintiff did not return to Dr. Garan's office.

On February 24, 2015, plaintiff was brought to Montefiore's ER by the FDNY with a chief complaint of moderate to severe upper abdominal pain for the past two days. A CT scan revealed an ill-defined hypodense lesion[2] on plaintiff's liver. Plaintiff was admitted to Montefiore's Cancer Center ("MCC"), where she was diagnosed with Stage II hepatocellular carcinoma of the liver.

On March 2, 2019, Dr. Sarah Bellemare ("Dr. Bellemare"), a hepatobiliary surgeon, performed a liver resection surgery to remove plaintiff's liver cancer and gallbladder, and a resection of part of plaintiff's stomach and distal small bowel. Plaintiff was discharged home on March 10, 2015, but was followed by Drs. Bellemare and Anderas Kaubisch, an oncologist.

On March 18, 2015, plaintiff presented to MCC as an outpatient. Dr. Kaubisch noted that plaintiff's cancer had various adverse features which would make her rate of recurrence high. Plaintiff alleges that due to Dr. Garan and Montefiore's negligence, there was a two-year-and-five-month delay in diagnosing her liver cancer.

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[2] A hypodense mass or lesion is a deformity in the liver tissue that appears less dense than the surrounding tissue in radiological scans such as CT scans or MRIs.

ARGUMENTS

Based on the record before the court, Dr. Garan argues that summary judgment must be granted, because plaintiff cannot establish that his medical treatment of plaintiff deviated from accepted standards of care or proximately caused plaintiff's alleged injuries.

In support of his motion, Dr. Garan annexes the affirmation of Thomasena L. Ellison, M.D. ("Dr. Ellison"), a physician board-certified in obstetrics and gynecology. Dr. Ellison opines that the standard of care in the field of obstetrics and gynecology did not require Dr. Garan to personally request and review a copy of plaintiff's October 4, 2012 CT scan report because Dr. Garan had planned to, and indeed performed a transvaginal ultrasound to evaluate plaintiff's ovarian cysts during plaintiff's October 22, 2012 visit. Dr. Ellison explains that an ultrasound is the diagnostic tool used to evaluate cystic structures in the pelvis, especially the adnexa, and that because Dr. Garan's role as an OB/GYN was limited to evaluating plaintiff's ovarian cysts, it was appropriate for Dr. Garan to perform a transvaginal ultrasound on plaintiff during this visit. Moreover, Dr. Ellison posits that once Dr. Garan was able to diagnose plaintiff's condition, there was no need for Dr. Garan to obtain a copy of plaintiff's CT scan report as the report would not have added anything of value to Dr. Garan's diagnosis or treatment of plaintiff's ovarian cysts.

In addition, Dr. Ellison opines that plaintiff's allegation that had Dr. Garan obtained the CT scan report, which would have revealed the incidental liver lesion, Dr. Garan would have informed plaintiff of the liver lesion and/or referred plaintiff to another physician to evaluate the liver lesion is speculative. According to Dr. Ellison, liver cancer in a young 19-year-old woman is incredibly rare, and even if Dr. Garan had read the October 4, 2012 CT scan report, the report only noted that the liver lesion was probably a hemangioma. As such, Dr. Ellison notes that there would be a low index of suspicion that the liver lesion was cancerous or potentially malignant, and

therefore, it is mere speculation to suggest that Dr. Garan would have informed of about the lesion. Moreover, Dr. Ellison opines that it would not have been a departure from the standard of care for Dr. Garan to have seen the CT scan report, and not mention the liver lesion to plaintiff because there was a low index of suspicion with respect to the liver lesion, and because Dr. Garan's role as plaintiff's treating OB/GYN was limited to evaluating her ovarian cysts.

Dr. Garan also argues that this case must be dismissed as untimely. Dr. Garan contends that since plaintiff's only treatment with Dr. Garan occurred on October 22, 2012, plaintiff had until April 21, 2015 to commence an action against Dr. Garan. As such, Dr. Garan asserts that since plaintiff did not commence this action until April 24, 2015, this action is time-barred.

Dr. Garan also argues that plaintiff may not benefit from the 2018 amendment of CPLR § 214-a to create a new calculation for statute of limitations purposes in cases dealing with the "alleged negligent failure to diagnose cancer or a malignant tumor" in order for plaintiff to commence such action "within two years and six months of . . . (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 . . . or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition." Dr. Garan contends that this provision was not available to plaintiff when she commenced this action in 2015 as the revised statute was to be applied prospectively.

Furthermore, Dr. Garan argues that there was a revival mechanism put into place for claims that became time-barred in the ten months leading up to the enactment of the amendment, which required revived actions to be commenced by July 31, 2018. However, Dr. Garan maintains that plaintiff does not get the benefit of the revival mechanism, and is therefore bound by the two-year-and-six-months statute of limitations as it was in effect in CPLR § 214-a.

Montefiore also moves for summary judgment on the ground that plaintiff's claims are barred by the statute of limitations. Montefiore argues that plaintiff's claims pertaining to her October 4, 2012 ER visit are time-barred as the statute of limitations for these claims expired on April 6, 2015, and plaintiff did not commence an action against Montefiore until April 24, 2015. Montefiore contends that plaintiff's hospital records establish that plaintiff was not seen at Montefiore between October 4, 2012 and February 24, 2015, at which time her cancer was diagnosed.

Montefiore also submits that plaintiff's reliance on her subsequent treatment by Dr. Garan on October 22, 2012 does not change the outcome because plaintiff's claims regarding Dr. Garan's treatment are also time-barred, as the statute of limitations expired on April 22, 2015. Similarly, Dr. Garan argues that CPLR §214-a(b) does not apply to this action since the amendment is to be applied prospectively.

In opposition, plaintiff argues that Dr. Garan departed from the standard of care by failing to obtain a copy of her October 4, 2012 CT scan report. In support of her opposition, plaintiff annexes an affidavit of merit of a physician board-certified in obstetrics and gynecology.[3] According to plaintiff's expert, based on the findings of ovarian cysts on plaintiff's CT scan, good and accepted standards of medical practice requires a physician to obtain and review the report, especially since the report found ovarian cysts, and since plaintiff was a new patient to Dr. Garan's practice. In that regard, plaintiff's expert opines that had Dr. Garan obtained the report, he would have seen the findings of a 2.5 hypodense lesion in plaintiff's liver and made appropriate recommendations for an evaluation.

[3] As plaintiff has redacted the name of her expert, the court will refer to the expert as "plaintiff's expert" (CPLR § 3101(d)(1)(i)).

In plaintiff's expert's opinion, plaintiff's liver mass was not diagnosed in a timely manner due to Dr. Garan's failure to obtain the CT scan report, failure to be aware of the liver lesion found on the report, failure to advise plaintiff of her liver abnormality, and failure to recommend an MRI. Plaintiff's expert posits that plaintiff's cancerous tumor was permitted to grow from a 2.5 cm lesion wholly contained within the liver to a 5.9 cm x 5.7 cm x 5.6 cm ill-defined heterogeneously hypodense liver lesion, and diffuse intrahepatic biliary ductal dilatation due to the tumor's extension into the porta hepatis, which invaded the common hepatic duct and origins of the right and left hepatic ducts. Plaintiff argues that as a result of Dr. Garan's malpractice, she was not afforded the best chance for a cure, and her chances of survival were reduced.

Plaintiff also argues that there is a triable issue of fact as to whether the continuous treatment doctrine tolled the statute of limitations since plaintiff has continuously treated at Montefiore for liver cancer to the present. Specifically, plaintiff contends that she presented to Montefiore for abdominal pain, and on both visits, she had a CT scan and blood work, including an October 4, 2012 CT scan which showed an abnormal liver mass that needed further evaluation, and a February 25, 2015 visit in which the results of her first CT scan were revealed. Plaintiff notes that she returned to Montefiore prior to the expiration of the statute of limitations for the same complaints that she had in October of 2012, and the fact that she was not seen at Montefiore between October of 2012 and February of 2015 is irrelevant since she began her treatment for liver cancer within the statute of limitations, and has continuously treated at Montefiore since that time. As such, plaintiff argues that she timely commenced an action against Montefiore on April 24, 2015.

Similarly, plaintiff argues that because her October 22, 2012 pap smear results did not return until October 29, 2012, the "continuing trust and confidence" doctrine dictates that treatment

related to her October 22, 2012 visit did not end until October 29, 2012. Plaintiff explains that under the continued trust and confidence doctrine, treatment does not end when a defendant refers a patient for more care, or upon the patient's last visit with his or her physician—rather, it ends when the entire course of treatment is over, including when any test results return. Plaintiff highlights that as part of Dr. Garan's work up to evaluate her for ovarian cysts based on her complaints of the abdominal pain, and based on Montefiore's CT scan results, Dr. Garan performed a pap smear on October 22, 2012, the results of which came back on October 29, 2012. Accordingly, plaintiff maintains that because her treatment with Dr. Garan extended to October 29, 2012, she timely commenced an action against Dr. Garan on April 24, 2015, as the statute of limitations against Dr. Garan expired on April 27, 2015.

Moreover, plaintiff argues that even if the continuous treatment doctrine did not apply with respect to Montefiore, the same argument outlined above would apply to Montefiore, as plaintiff's treatment related to her October 4, 2012 presentation at Montefiore ended when her pap smear results came back on October 29, 2012. Plaintiff contends that Montefiore's referral of plaintiff to Dr. Garan did not end Montefiore's treatment under the continuous treatment doctrine.

In reply, Montefiore argues that unlike the case at bar, the cases that plaintiff relies on found continuous treatment based on a conclusion that the patient had a continuous relationship with the defendant, including numerous visits over the interval at issue. Specifically, Montefiore avers that while plaintiff alleges that Montefiore failed to diagnose a liver mass when she presented to the ER on October 4, 2012, plaintiff was not seen at Montefiore again until February 25, 2015, at which time she was diagnosed with liver cancer. Montefiore points out that between these two visits, plaintiff did not return to, or sought care at Montefiore for any reason. Montefiore also notes that during these two ER visits, plaintiff did not make any complaints or inquiries about her

October 4, 2012 CT scan, or request a copy of the report or film. Similarly, Montefiore highlights that it did not discuss the abnormal lab test with plaintiff, and plaintiff was not aware of the test results. Montefiore further maintains that there was no contemplation of follow-up testing, and that there was a total lack of contact between plaintiff and Montefiore during the relevant period.

Additionally, Montefiore argues that plaintiff has failed to show a nexus between Dr. Garan and Montefiore sufficient to impute Dr. Garan's treatment onto Montefiore. Montefiore contends that there is no evidence of an "agency or other relevant relationship" between Montefiore and Dr. Garan to warrant extending the statute of limitations as against Montefiore based on any acts or omissions by Dr. Garan.

DISCUSSION

To prevail on summary judgment in a medical malpractice case, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause the patient's injury (*Roques v. Noble*, 73 A.D.3d 204, 206 [1st Dept. 2010]). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g.*, *Joyner-Pack v. Sykes*, 54 A.D.3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts in the record or personally known to the expert (*Roques*, 73 A.D.3d at 207). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 A.D.3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 A.D.2d 225, 226 [1st Dept. 2003]).

Once defendant makes a *prima facie* showing, the burden shifts to plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, plaintiff must submit an expert affidavit attesting that defendant departed from accepted medical practice and that the departure proximately caused the injuries (*see Roques*, 73 A.D.3d at 207). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id.*).

Here, defendants set forth a *prima facie* case in favor of dismissal, as evidenced by the submission of defendants' medical records, and defendants' expert affidavit, all of which attest to the fact that defendants' treatment of plaintiff was in accordance with accepted standards of care and did not proximately cause plaintiff's alleged injuries. To be sure, defendants' expert affirmation is detailed and predicated upon ample evidence within the record. As defendants have made a *prima facie* showing, the burden shifts to plaintiffs.

I. Dr. Garan

a. *Statute of Limitations*

Plaintiff's treatment with Dr. Garan terminated on October 22, 2012, the only day that plaintiff saw and treated with Dr. Garan. While plaintiff argues that her treatment terminated on October 29, 2012, the date that her test results came back, there is no allegation or indication that plaintiff saw Dr. Garan on October 29, 2012, or at any time after October 22, 2012.

Moreover, the date that plaintiff's test results came back does not necessarily extend the time period in which plaintiff treated with Dr. Garan. "Although 'treatment' does not necessarily end upon a patient's last visit to the doctor, further treatment must be in some way 'explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled

appointment for the near future, agreed upon during that last visit, [or] in conformance with the periodic appointments which characterized the treatment in the immediate past'" (*Waring v. Kingston Diagnostic Radiology Ctr.*, 13 A.D.3d 1024, 1026 [3d Dept. 2004]). Therefore, neither "the mere 'continuing relation between physician and patient' [nor] 'the continuing nature of a diagnosis' is sufficient to satisfy the requirements of the [continuous treatment] doctrine" (*id.*). Here, Dr. Garan did not schedule a further appointment for plaintiff with respect to treatment for her ovarian cysts or abdominal pain during her October 22, 2012 visit, and neither plaintiff nor Dr. Garan "explicitly" anticipated further treatment for the same (*id.* [plaintiff did not establish continuous treatment where, "While the continuous treatment toll may apply to a diagnostician where 'periodic diagnostic examinations are prescribed as part of ongoing care for a plaintiff's existing condition [and] are explicitly anticipated by physician and patient alike,' here, there is no such evidence. Notably, after numerous scans and X rays revealed that . . . decedent's lung had remained unchanged as of February 1996, plaintiff's primary care physician did not order subsequent chest exams and decedent visited this doctor only for unrelated health concerns during that subsequent four-year period."]).

At most, Dr. Garan's records refer to a "F/U" in "6-8 weeks if still present then laparoscopy," however, such a vague directive to "follow-up" without a definitive appointment mutually agreed upon by both plaintiff and Dr. Garan is insufficient to establish continuous treatment, particularly where plaintiff never returned to Dr. Garan's office after her October 22, 2019 visit (*id.* ["'A comparison of test results suggests adherence to appropriate diagnostic procedure, not a change in the level or nature of trust and confidence between patient and radiologist.' Rather than demonstrating an existing course of treatment, this fact pattern shows 'a resumption of treatment rather than a continuation thereof'"]). Accordingly, because plaintiff's

treatment with Dr. Garan terminated on October 22, 2012, plaintiff's commencement of this action against Dr. Garan on April 24, 2015 is untimely, as two-years-and-six-months from her last date of treatment expired on April 21, 2015.

b. Plaintiff's Expert Affidavit Lacks Certificate of Conformity

As a second procedural issue, plaintiff's expert's affidavit is inadmissible. CPLR § 2309(c) requires that an oath taken outside of New York be accompanied by a certificate of conformity. As plaintiff's expert is not licensed to practice medicine in New York, his/her affidavit fails since it was not accompanied by a certificate of conformity. Accordingly, Dr. Garan is entitled to summary judgment, as plaintiff has proffered inadmissible evidence to rebut Dr. Garan's *prima facie* showing.

c. *Plaintiff's Submission of a Physician Affidavit of Merit*

Plaintiff's submission of a physician affidavit of merit is insufficient to rebut Dr. Garan's *prima facie* showing of entitlement to summary judgment as a matter of law. "[E]xpert opinion evidence from a party defendant in a medical malpractice action which is otherwise sufficient to show entitlement to summary judgment requires some expert response from plaintiff on the question of alleged deviation from proper and approved medical practice" (*Nevarez v. Univ. of Rochester*, No. 18-00946, 2019 WL 2400361, at *2 [4th Dept. 2019]). Because plaintiff's physician affidavit pre-date Dr. Garan's motion for summary judgment by over three-and-a-half years, it does not address the arguments contained in Dr. Garan's motion, or the opinions of Dr. Garan's expert with respect to the standard of care, whether Dr. Garan departed from those standards, and whether such departures proximately caused plaintiff's alleged injuries. Moreover, because the physician's affidavit pre-date discovery in this action, it fails to address plaintiff's

complete medical records as well as the parties' respective deposition testimony (*see id.* [plaintiff's expert affidavits were insufficient to raise a triable issue of fact where the affidavits "pre-date defendants' motion by approximately 5 years, and were previously submitted in opposition to an earlier motion to dismiss the complaint," and therefore, did not address defendants' expert's opinions regarding the notes in plaintiff's medical records that were made after the affidavits were drafted, and opinions that defendants' expert gave during her deposition with respect to plaintiff's care and proximate cause]). Accordingly, the court will not consider the affirmation of plaintiff's expert.

d. No Triable Issue of Fact

Substantively, absent an expert affirmation, plaintiff cannot raise a triable issue of fact sufficient to rebut Dr. Garan's *prima facie* showing of entitlement to summary judgment as a matter of law. In a medical malpractice action, "expert medical opinion evidence is required to demonstrate merit" "except as to matters within the ordinary experience and knowledge of laymen" (*Fiore v. Galang*, 64 N.Y.2d 999, 1001 [1985] [granting defendants summary judgment where the "failure to diagnose cancer and the performance of an abdominal operation are not matters within the ordinary experience of laypersons," and plaintiff failed to supply an affidavit of merits from a person competent to attest to the meritorious nature of the claim]; *Bartolacci-Meir v. Sassoon*, 149 A.D.3d 567, 570 [1st Dept. 2017] ["Defendants correctly argue ... that their experts showed in detail that there was no departure from the standard of care in treating plaintiff and that plaintiffs failed to rebut that showing with a qualified expert"]; *Schuller v. Martinelli*, 304 A.D.2d 967, 968 [3d Dept. 2003] ["When plaintiff offered no medical testimony in response, Supreme Court found that plaintiff did not meet her burden to submit medical evidence tending to rebut the opinion of defendants' expert, despite an issue of fact as to who had cancelled the

catheterization appointments."]; *Schuller*, 304 A.D.2d at 968, *supra* [granting defendants summary judgment where "plaintiff's responding submissions were insufficient to establish, by competent medical proof, that defendants were negligent and that there was a causal nexus between that negligence and decedent's death," and "contrary to plaintiff's contentions, expert testimony was needed here because the medical consequences of a failure to have a catheterization are not 'within the ordinary experience and knowledge of laypersons'"]).

Specifically, absent expert testimony, plaintiff cannot rebut defendant's assertion that Dr. Garan was not required to request or review a copy of plaintiff's October 4, 2012 CT scan report since Dr. Garan had planned to, and indeed performed a transvaginal ultrasound to evaluate plaintiff's ovarian cysts during plaintiff's October 22, 2012 visit. Similarly, plaintiff failed to dispute defendant's contention that once Dr. Garan was able to diagnose plaintiff's condition, there was no need for Dr. Garan to obtain a copy of plaintiff's CT scan report, as the report would not have added anything of value to Dr. Garan's diagnosis or treatment of plaintiff's ovarian cysts (*see*, *Colletti v. Schiff*, 98 A.D.3d 887, 888 [1st Dept. 2012] ["The IAS court properly concluded that plaintiff failed to rebut defendant's *prima facie* showing with medical evidence attesting that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged."]; *Schuller*, 304 A.D.2d at 968, *supra*). Accordingly, there are no triable issues of fact here sufficient to preclude summary judgment.

Significantly, plaintiff failed to address or rebut defendant's argument that even if Dr. Garan had seen the CT scan report, it would not have been be a departure for Dr. Garan to not mention the liver lesion to plaintiff due to the low index of suspicion with respect to the liver lesion. At most, as Dr. Garan correctly highlights, plaintiff's bald and conclusory assertion that had Dr. Garan obtained the CT scan report, Dr. Garan would have informed plaintiff of the liver

lesion and/or referred plaintiff to another physician to evaluate the liver lesion, is mere conjecture (*see, e.g., Grzelecki v. Sipperly*, 2 A.D.3d 939, 941 [3d Dept. 2003], *supra*; *Biondi v. Behrman*, 149 A.D.3d 562, 565 [1st Dept. 2017] [granting defendants summary judgment where plaintiff's expert did not explain how pre-surgical testing would have changed the result, and advanced only conclusory opinions that a specific infection was somehow the cause of her injuries]); *Graziano*, 79 A.D.3d at 805, *supra* [granting defendants summary judgment where plaintiff's expert affidavit was conclusory, speculative, and failed to address defendants' expert assertion regarding proximate cause]).

Moreover, even if plaintiff's argument had merit, the lack of expert testimony to support plaintiff's proposition that Dr. Garan's failure to obtain the CT scan report allowed plaintiff's cancerous tumor to grow, which ultimately diminished plaintiff's "best chance" for cure, and reduced plaintiff's chances of survival is fatal (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 327 [1986] [granting defendant summary judgment where, "[I]n order to defeat defendant's motion for summary judgment some statement of expert medical opinion was required to demonstrate the viability of the new theory of liability hypothesized by plaintiff's counsel"]). Accordingly, there are no triable issues of fact here sufficient to preclude summary judgment.

II. Montefiore

a. Continuous Treatment

CPLR § 214-a provides for the tolling of the statute of limitations in a medical malpractice action where there is "continuous treatment for the same illness, injury or condition" (*Batiste v. Brooklyn Hosp. Ctr.*, 255 A.D.2d 474, 474 [2d Dept.1998]). Under the continuous treatment doctrine, the statute of limitations is tolled "'when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or

complaint'" (*Nespola v. Strang Cancer Prevention Ctr.*, 36 A.D.3d 774, 774 [2d Dept. 2007]). To invoke the continuous treatment doctrine, a plaintiff must establish that "there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice" (*Baptiste v. Harding-Marin*, 88 A.D.3d 752, 753 [2d Dept. 2011]). However, "The continuing nature of a diagnosis or misdiagnosis does not itself amount to continuous treatment" (*Fox v. Glens Falls Hosp.*, 129 A.D.2d 955, 956 [3d Dept. 1987]). Similarly, "Continuing efforts to arrive at a diagnosis fall short of a course of treatment, as does a physician's failure to properly diagnose a condition that prevents treatment altogether" (*Gomez v. Katz*, 61 A.D.3d 108, 112 [2d Dept. 2009] [citations omitted]).

Here, plaintiff has failed to establish that she received continuous treatment at Montefiore so as to toll the statute of limitations. Between plaintiff's initial visit at Montefiore on October 4, 2012 for complaints related to abdominal pain and ovarian cysts and plaintiff's ultimate diagnosis of liver cancer on February 25, 2015, plaintiff did not receive any treatment at Montefiore (*Gomez*, 61 A.D.3d at 111–12, *supra* ["The term 'course of treatment' speaks to affirmative and ongoing conduct by the physician such as surgery, therapy, or the prescription of medications"]). Moreover, like Dr. Garan, Montefiore never scheduled a further appointment for plaintiff with respect to treatment for her ovarian cysts, abdominal pain, or "hemangioma" during her October 4, 2012 visit, and neither plaintiff nor Montefiore "explicitly" anticipated further treatment for the same (*id.*; *Baptiste*, 88 A.D.3d at 753-54, *supra* [no triable issue of fact where plaintiff "alleges nothing more than defendants' failure to timely diagnose and establish a course of treatment for [decedent's] condition, omissions that do not amount to a 'course of treatment'"]; *Fox*, 129 A.D.2d at 956, *supra* [granting defendant summary judgment upon finding that plaintiff failed to establish continuous treatment where "any relationship of continuing trust and confidence between plaintiff

and [defendants] terminated when, following her second visit to the emergency room, plaintiff was discharged with directions to see another doctor, and her subsequent return nearly 2½ years later "constituted a resumption of treatment rather than a continuation thereof"]).[4]

Furthermore, while plaintiff may argue that Montefiore's failure to diagnose her liver cancer during the relevant time period amounts to continuous treatment, courts have generally held that "the absence of continuing efforts by a doctor to treat a particular condition, the policy underlying the continuous treatment doctrine does not justify tolling the statute of limitations" (*Baptiste*, 88 A.D.3d at 753, *supra*; *Chestnut*, 94 A.D.3d at 660–61, *supra*; *Gomez*, 61 A.D.3d at 112, *supra; Fox*, 129 A.D.2d at 956, *supra*). Because plaintiff has failed to establish that she "continued to seek, and in fact obtained, an actual course of treatment" at Montefiore from October 4, 2012, the continuous treatment doctrine does not apply to toll the statute of limitations with respect to plaintiff's October 4, 2012 claims. Accordingly, plaintiff's claim that Montefiore failed to diagnose her liver cancer on October 4, 2012 must be dismissed as time-barred.

b. Imputation of Dr. Garan's Treatment

Because the court has previously found that plaintiff failed to timely commence an action against Dr. Garan, plaintiff's attempt to extend the time period in which she treated with

[4] *See also, Peykarian v. Yin Chu Chien*, 109 A.D.3d 806, 807 [2d Dept. 2013] ["After his initial diagnosis, in 1991, the decedent typically returned for treatment only when he was symptomatic, experiencing hematuria. Thus, between December 1999 and April 2003, and again, from December 2004 until October 2007, the decedent did not visit with the defendant. As a result of these temporal gaps, because the decedent did not continue to seek a course of treatment, any continuity in treatment that had existed was severed."]; *Chestnut*, 94 A.D.3d at 660–61, *supra* ["Other than noting that the levels were elevated, there is nothing in the record to show that defendants ever discussed these results with the decedent, much less agreed to monitor the abnormal readings at her future examinations. Thus, given that the patient was not aware of the need for further treatment of this condition, the decedent was not faced with the dilemma that the continuous treatment doctrine is designed to prevent; *Batiste*, 255 A.D.2d at 475, *supra* [action dismissed as time barred under CPLR 214-a where plaintiff failed to appear for any appointments, and the "failure to make a timely return visit to seek corrective action may be viewed as a break in the continuity of treatment, which is asserted for the application of the doctrine"]).

Montefiore by imputing Dr. Garan's treatment and/or liability onto Montefiore must be denied as moot. Notwithstanding the same, plaintiff may not invoke her treatment with Dr. Garan so as to impute liability onto Montefiore for purposes of extending the statute of limitations (*Meath v. Mishrick*, 68 N.Y.2d 992, 994 [1986] ["Nor is the Statute of Limitations extended against the Hospital by imputing to it the continuous treatment of decedent by Dr. Mishrick by virtue of his status as a physician affiliated with the Hospital."]). Accordingly, plaintiff's action against Montefiore must be dismissed.

Accordingly, based on the foregoing, it is hereby

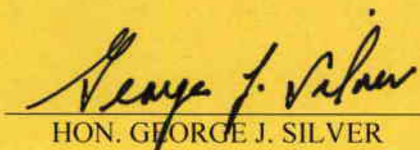
ORDERED that Dr. Garan's motion for summary judgment (Motion Seq. No 003) is GRANTED; and it is further

ORDERED that Montefiore's motion for summary judgment (Motion Seq. No 004) is GRANTED; and it is further

ORDERED that the clerk is directed to enter judgment in favor of Dr. Garan and Montefiore, and dismissing this case in its entirety.

This constitutes the decision and order of the court.

Date: March 16, 2020



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