

Arias v New York Presbyt. Hosp.

2020 NY Slip Op 31940(U)

June 16, 2020

Supreme Court, New York County

Docket Number: 805465/17

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 1 MMSP

 FAUSTO ARIAS,

INDEX NO.: 805465/17

Plaintiff,

-against-

THE NEW YORK PRESBYTERIAN HOSPITAL,

Defendant.

SHULMAN, J.:

In this action seeking damages for alleged medical malpractice and lack of informed consent, defendant, The New York and Presbyterian Hospital, s/h/a New York Presbyterian Hospital, moves for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint based on statute of limitations grounds as set forth in CPLR 214-a. Plaintiff, Fausto Arias, opposes the motion. For the reasons set forth below, the motion is granted.

BACKGROUND

This action, which was commenced on December 27, 2017, arises out of the medical treatment and care allegedly provided to plaintiff by defendant between November 2013 and August 2016. On November 15, 2013, plaintiff appeared at defendant's emergency room and was diagnosed with an abscess of the rectum or perianal abscess (verified complaint at ¶13). Plaintiff's treatment for his condition consisted of an incision and drainage (I&D) of a buttocks boil, performed by a surgical resident (*id.*). Plaintiff alleges that during the incision procedure, defendant perforated plaintiff's rectum and left him with a chronic draining wound (*id.*, at ¶¶ 14-15).

Following the procedure, defendant was given a follow up appointment for a wound check on November 21, 2013 at defendant's Charles Rangel Clinic (clinic). Plaintiff appeared at the clinic on November 21, 2013 and was examined by defendant's employee, Dr. Gaines. Dr. Gaines allegedly told plaintiff that the wound had healed and everything was fine (plaintiff's deposition, tr. at 48-49). Defendant scheduled another follow up appointment for December 5, 2013. Plaintiff appeared at the appointment and again saw Dr. Gaines. After Dr. Gaines checked the wound, plaintiff claims he was once again told that everything was fine and the wound had healed (*id.*, at tr. at 53:12-16). Plaintiff claims defendant did not make another appointment for him to return.¹

Plaintiff alleges that although his symptoms persisted, he did not seek treatment until June 20, 2016, a period of approximately two and a half years. He sought treatment on June 20, 2016 from Dr. Lee-Kong, having been referred by an acquaintance. On July 20, 2016, Dr. Lee-Kong performed an anoscopy, colonoscopy and fistulotomy on plaintiff at defendant's facility. After receiving the results of the procedures, plaintiff claims he learned that the initial procedure in November 2013 caused a perforation to his rectum.

Plaintiff's complaint alleges in relevant part that defendant departed from good and accepted standards of medical care by: 1) negligently and carelessly failing to timely and properly diagnose and treat his condition; 2) negligently performing the I&D on November 15, 2013; and 3) lack of informed consent.

¹ Defendant alleges that plaintiff was advised to follow up within 3 to 4 months, but then never returned.

Defendant now argues that plaintiff's medical malpractice claims are time barred. In opposition, while plaintiff concedes that there was no treatment between December 15, 2013 and June 20, 2016 (plaintiff's opposition at ¶31), plaintiff argues that triable issues of fact exist as to whether: 1) the statute of limitations has been tolled by the continuous treatment doctrine; and 2) the statute of limitations defense is barred by equitable estoppel.

LEGAL ANALYSIS

The issue to be addressed by the court is whether this action, which was commenced on December 27, 2017, is barred by the applicable statute of limitations. "An action for medical malpractice must be commenced within two years and six months of the date of accrual." (*Massie v Crawford*, 78 NY2d 516, 519 [1991], citing CPLR 214-a). Moreover, "[a] claim accrues on the date the alleged malpractice takes place." (*Id.*) [internal citation omitted]. However, under the continuous treatment doctrine exception, the two years and six month period does not begin to run until the end of the course of treatment "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." (*Prinz-Schwartz v Levitan*, 17 AD3d 175, 177 [1st Dept]); see also CPLR 214-a. In such cases, the limitations period does not begin to run until the end of treatment (*Smith v Fields*, 268 AD2d 579, 580 [2d Dept 2000]).

Here, defendant contends that the malpractice allegedly occurred, and plaintiff's claims accrued, on November 15, 2013 and the statute of limitations thus expired on May 15, 2016. This action having been commenced on December 27, 2017, defendant maintains that it is untimely. However, if the continuous treatment doctrine is applicable

to toll the statute of limitations, and plaintiff's last treatment for the condition at issue was in 2016, the action would be timely.

"The [continuous treatment] doctrine rests upon the belief that the best interests of a patient warrant continued treatment with an existing provider, rather than stopping treatment, as the [existing provider] not only is in a position to identify and correct his or her malpractice, but is best placed to do so." (*Rudolph v Lynn*, 16 AD3d 261, 262 [1st Dept 2005]; citing *McDermott v Torre*, 56 NY2d 399, 408 [1982]). "To invoke the doctrine, a plaintiff must establish a continuous course of treatment with a particular health care provider with respect to the condition that gives rise to the lawsuit." (*id.*) [Internal citation omitted].

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [citations omitted]" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Here, defendant satisfied its burden by demonstrating that the complaint was filed after the expiration of the two-year-and-six-month statute of limitations period for the medical malpractice claims at issue here (*see*, CPLR 214-a). Consequently, the burden shifts to plaintiff to establish the existence of triable issues of fact that the continuous treatment doctrine tolls the statute of limitations for those claims (*id.*, at *Massie*, 78 NY2d 516 [1991]).

In opposition, plaintiff does not dispute the fact that after the December 5, 2013 appointment at the clinic, he did not return to defendant's facility for further treatment of the same condition until June 20, 2016. Plaintiff asserts that issues of fact exist as to whether the continuous treatment doctrine applies to toll the limitations period.

Specifically, plaintiff testified at his deposition that defendant told him that "everything was fine" at the first follow up visit on November 21, 2013 (NYSCEF Doc. No. 21; tr. at 49:8). At that visit, defendant scheduled another follow up appointment "to do a physical" (*id.*, at tr. 49:3-4). Specifically, plaintiff testified that despite complaining to defendant about pain and bleeding when he used the bathroom, Dr. Gaines stated "he didn't know why it was bleeding if the wound was healing" (*id.*, at tr. 51:9-24). Plaintiff further testified that defendant did not make any referrals for additional care or treatment (*id.*, at tr. 51-52).

Plaintiff was given another appointment in December 2013, where his wound was examined and, despite indicating to defendant that he was experiencing "a lot of pain, and that I was bleeding in the toilet paper, I was looking at the blood" (*id.*, at tr. 53:4-6), plaintiff was told that "the wound was fine" (*id.*, at tr. 53:15-16). Plaintiff stated that he continued to experience symptoms, but relied on Dr. Gaines' assurances that his condition was normal. Approximately thirty months later, plaintiff sought care from Dr. Lee-Kong on June 20, 2016 for further treatment due to continued pain. Dr. Lee-Kong subsequently performed an examination under anesthesia and various other procedures on July 20, 2016 at one of defendant's facilities.

Plaintiff fails to establish a continuous course of treatment by defendant as he last treated with defendant on December 5, 2013. The alleged continuing treatment in 2016 was performed by Dr. Lee-Kong, who is not affiliated with defendant. Plaintiff delayed seeking treatment for over two years despite persistent symptoms. He testified that he then sought treatment from Dr. Lee-Kong at his office, having been referred to him by an acquaintance. Plaintiff did not seek further treatment from defendant's emergency department or the clinic as an existing patient. Rather, he was a new

patient of Dr. Lee-Kong, who merely performed the July 20, 2016 procedures at one of defendant's facilities.

Plaintiff also argues that defendant should be equitably estopped from seeking dismissal of this action based upon the expiration of the statute of limitations because a physician at the clinic advised him on December 5, 2013 that he had healed and was fine. However, plaintiff cannot toll the limitations period by attempting to avail himself of the doctrine of equitable estoppel where he delayed for over two years in seeking treatment when his symptoms returned, and then sought treatment from a new provider.

Finally, plaintiff's cause of action alleging lack of informed consent is also time barred for the same reasons that his medical malpractice cause of action is time barred. As such, the cause of action is dismissed. Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment seeking to dismiss the complaint is granted.

The Clerk is directed to enter judgment in favor of defendant The New York and Presbyterian Hospital, s/h/a The New York Presbyterian Hospital, dismissing the action with prejudice.

DATED: June 16, 2020

ENTER:



Hon. Martin Shulman, JSC