

<b>Powell v Lal</b>
2020 NY Slip Op 32050(U)
June 23, 2020
Supreme Court, Kings County
Docket Number: 503847/19
Judge: Ellen M. Spodek
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At an IAS Term, Part MMESP-6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of June, 2020.

P R E S E N T:

HON. ELLEN SPODEK,

Justice.

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GREGORY POWELL,

Plaintiff,

- against -

Index No. 503847/19

SONALI LAL, M.D., KRISTIN SAPIENZA, P.T., KEELY FARIDI, P.T., DAVID WILLIAMS, D.C., INTEGRATIVE SPINE AND SPORTS, MICHAEL BRUNO, D.M.D., KEITH TOBIN, M.D., LENOX HILL RADIOLOGY and WEST SIDE RADIOLOGY ASSOCIATES, P.C., LIHUA MO, M.D., GOOD CARE MEDICAL, P.C., BEIJING TONG REN TANG MING QI GROUP LLC, DR. MING JIN, LAC AND MING QI ACUPUNCTURE, PLLC,  
Defendants.

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The following e-filed papers read herein:

Papers No.:

Notice of Motion/Cross Motion and Affidavits (Affirmations) and Exhibits Annexed \_\_\_\_\_

1-3 \_\_\_\_\_

Opposing Affidavits (Affirmations) \_\_\_\_\_

4 \_\_\_\_\_

Reply Affidavits (Affirmations) \_\_\_\_\_

5-7 \_\_\_\_\_

Upon the foregoing papers, and by way of separate motions, defendants Keith Tobin, M.D., Lenox Hill Radiology and West Side Radiology Associates, P.C. (Lenox Hill)

(motion sequence number 2), defendants Sonali Lal, M.D., Lihua Mo, M.D. and Good Care Medical, P.C. (Good Care) (motion sequence number 3), and defendant David Williams, D.C. (motion sequence number 4), move for an order, pursuant to CPLR 3211 (a) (5), dismissing the complaint on the ground that plaintiff's claims are time-barred as a matter of law.<sup>1</sup>

In this action, commenced with the filing of the summons and complaint on February 21, 2019, plaintiff alleges that he suffered injuries as a result of the defendants' malpractice in failing to diagnose a parotid cystic carcinoma, a malignant condition. According to the complaint, the defendants' acts of negligence occurred between October 2012 and December 2014 and the carcinoma was first diagnosed in 2018. Dr. Tobin, in an affidavit submitted in support of his and Lenox Hill's motion, asserts that plaintiff presented to Lenox Hill for MRI's performed on May 6, 2014, and May 23, 2014, and that his only personal involvement with plaintiff was his interpretation of the May 6, 2014 MRI. In affirmations submitted in support of the motion by Drs. Mo and Lal and Good Care, they assert that plaintiff saw Dr. Mo on October 24th, 28th and 31<sup>st</sup> of 2013 and Dr. Lal on various dates from January 2, 2014 to November 6, 2014. Dr. Williams, in an affidavit submitted in support of his motion, asserts that he saw plaintiff on various dates from

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<sup>1</sup> The moving defendants here are collectively referred to as defendants. The court notes that the actions as against defendant Keely Faridi, P.T, and defendant Kristin Sapienza, P.T., were discontinued by so ordered stipulations both dated February 11, 2020. Plaintiff's counsel represents that, as of January 27, 2020, there had been no appearance in the action by defendants Michael Bruno, DMD, Integrative Spine and Sports, Beijing Tong Ren Tang Ming Qi Group LLC, Dr. Ming Jin, Lac, and Ming Qi Acupuncture, PLLC.

January 2, 2014 to May 28, 2014.

Defendants contend that, assuming that the action involves a failure to diagnose cancer or a malignant tumor, the action as against them is untimely under CPLR 214-a.<sup>2</sup> Plaintiff claims that defendants, during the treating period of 2012 to 2014, failed to diagnose a cancer, that was ultimately diagnosed in 2018, is a claim that is facially encompassed within the plain language of CPLR 214-a (as amended by L 2018, ch 1, § 2 and L 2017 ch 506) for any treatment occurring on or after February 21, 2012. That section provides that a seven-year look-back period applies to any malpractice claim for failing to diagnose cancer, brought by the plaintiff within two years and six months from discovery of the cancer. Despite the facial applicability of this provision to the facts of this case, the amendments that added the discovery rule make clear that its provisions are not retroactive.

In this respect, the amendments to CPLR 203 (g) (2) and 214-a creating a discovery rule for the negligent failure to diagnose cancer or malignant tumor were only effective as of January 31, 2018 (*see* L 2018, ch 1, § 2 and L 2017 ch 506). These amendments provide, as relevant here, that, “[t]his act shall take effect immediately and shall apply to acts,

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<sup>2</sup> CPLR 214-a provides, as is relevant here, that, “An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; 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 . . .”

omissions, or failures occurring on or after such effective date” (L 2018, ch 1, § 5 [amending L 2017, ch 506, § 4]) and that, “[t]his act shall take effect immediately; . . . provided, further, that the provisions amended by section two of this act (the section that amended CPLR 214-a) 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, ch 1, § 6). Given the express language of these sections, the amendments to CPLR 203 (g) (2) and 214-a do not apply to negligent acts or omissions occurring before July 31, 2015 (*see Mula v Sasson*, 181 AD3d 686, 687 [2d Dept 2020]). As defendants have demonstrated, prima facie, that all of the negligent acts at issue here occurred no later than December 2014 and plaintiff has not submitted any evidence demonstrating a factual issue in this respect,<sup>3</sup> plaintiff’s claims against defendants are thus untimely (*see Mula*, 181 AD3d at 687; *see also Christiana Trust v Barua*, \_\_\_ AD3d \_\_\_, 2020 NY Slip Op 03095, \*6 [2d Dept 2020]).

In reaching this conclusion, the Court notes that another provision contained in the amendments allowing for the revival of certain cancer claims which became time-barred ten months prior to the effective date, i.e., on or after March 31, 2017, as long as the action was commenced within six months after the effective date, i.e. by July 31, 2018 (*see* L 2018, ch 1, § 4; *Mula*, 181 AD3d at 687-688) is inapplicable here as this action was not commenced until February 21, 2019.

Accordingly, plaintiff’s claims against defendants must be dismissed as untimely

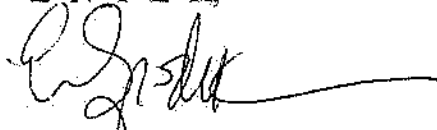
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<sup>3</sup> The court notes that plaintiff, in opposing the motion, does not allege that defendants treated plaintiff on any date after December 2014 or that there was any continuous treatment after that date that would toll the statute of limitations for purposes of CPLR 214-a.

under CPLR 214-a. Defendants' motions are granted, and the complaint is dismissed as against them. The action is severed accordingly.

This constitutes the decision and order of the Court.

ENTER,

A handwritten signature in black ink, appearing to be "J. S. C.", written over the printed text "ENTER,". The signature is cursive and extends to the right with a long horizontal stroke.

J. S. C.