Caraballo v Mount Sinai Queens Hosp.
2020 NY Slip Op 33373(U)
October 14, 2020
Supreme Court, New York County
Docket Number: 805123/2018
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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JEREMY CARABALLO,

Plaintiff,

- v -

MOUNT SINAI QUEENS HOSPITAL, NEW YORK PRESBYTERIAN HOSPITAL/WEILL CORNELL MEDICAL CENTER, JOHN AND JANE DOE #1-10

Defendant.

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INDEX NO. 805123/2018

MOTION DATE 09/28/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for DISMISSAL.

In this action to recover damages for medical malpractice, The New York and Presbyterian Hospital, incorrectly sued herein as New York Presbyterian Hospital/Weill Cornell Medical Center, a part of the New York Presbyterian Healthcare System (hereinafter NYPH), moves pursuant to CPLR 3211(a)(5) to dismiss the complaint against it as time-barred. The plaintiff opposes the motion. The motion is granted.

To secure dismissal of the complaint as time-barred, NYPH has the initial burden of establishing that the action was commenced after the expiration of relevant limitation period. If NYPH satisfies its initial burden in this regard, the plaintiff becomes obligated to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether he actually commenced the action within the applicable limitations period (*see Williams v New York City Health & Hosps. Corp*., 84 AD3d 1358, 1359 [2d Dept 2011]).

The limitations period applicable to causes of action alleging medical malpractice is two years and six months, measured from "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" (CPLR 214-a). Hence, in accordance with the continuous treatment doctrine, the two-year-and-six-month limitations period applicable to a discrete act, omission, or failure is tolled until the last date of treatment.

> "'The continuous treatment doctrine may be invoked where there was 'further treatment . . . anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during th[e] last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past'"

(*Blaier v Cramer*, 303 AD2d 301, 302 [1st Dept 2003], quoting *Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985]).

The plaintiff alleges that NYPH committed malpractice in failing to diagnose a tumor in his pituitary gland, despite treating him for diabetes over a period of several years. The parties' submissions reflect that the plaintiff's last treatment at NYPH occurred on July 28, 2015, the last date that he actually presented at that hospital. Hence, the applicable limitations period expired on January 26, 2018, unless that period was tolled by virtue of related treatment continuing after that date. The plaintiff claims that the limitations period was tolled because, after July 28, 2015, several physicians affiliated with NYPH prescribed medicines and pharmaceutical products to him, and spoke with him on the telephone. He thus asserts that his commencement of the action against NYPH on April 17, 2018 was timely.

Specifically, the plaintiff alleges that NYPH's Weill Cornell Medical Center Endocrinology Clinic (the Clinic) began treating him on August 17, 2010. He asserts that, although he complained to the physicians at the Clinic of headaches, jaw pain, excessive sweating, and joint pain, they only diagnosed him with Type I Diabetes Mellitus, but failed to diagnose his pituitary tumor. According to the plaintiff, as a consequence, the Clinic's physicians prescribed treatment only for diabetes, including various medications and pharmaceutical testing equipment, including Humalog, insulin syringes, Ascensia glucose test strips, Lisinopril, and Metformin. The plaintiff contends that, as of January 20, 2015, his treatment at the clinic was assumed by Dr.

Marcus Goncalves, and that, notwithstanding the fact that the plaintiff last appeared at the Clinic on July 28, 2025, he called it on September 9, 2015 concerning problems with filling his prescriptions for diabetes medications that had previously been prescribed, and that Dr. Goncalves responded to that inquiry. The plaintiff further asserts that Clinic physician Dr. Felicia Mendelsohn Curanaj continued to prescribe diabetes testing strips from January 20, 2015 through January 8, 2016, and that July 23, 2016 was the last date on which he filled several prescriptions written by Dr. Goncalves. In addition, the plaintiff testified at his EBT that he was seen in the Weill Cornell emergency room sometime in November 2015 for headaches, although the hospital records submitted by the parties do not contain any charts referable to that alleged visit, and the plaintiff makes no specific allegation, and provides no other evidence, that the visit was in any way related to his ongoing treatment for diabetes.

The continued use of medications previously prescribed by a physician, and the refill of those prescriptions thereafter, do not, by themselves, constitute continuous treatment within the meaning of CPLR 214-a (*see Berndardo v Ayerest Labs*., 99 AD2d 430 431 [1st Dept 1984]; *see also Parrott v Rand*, 126 AD2d 621, 621 [2d Dept 1987]; *Bikowicz v Nedco Pharmacy*, 114 AD2d 708, 709 [3d Dept 1985]). Where, as here, "the only reason offered for extending the period of limitations is an outstanding prescription for the drug, with no evidence of an appointment for future treatment," the continuous treatment doctrine is inapplicable (*Cooper v Kaplan*, 163 AD2d 215, 216 [1st Dept 1990]; *cf. Sanchez v Orozco*, 178 AD2d 391, 393 [1st Dept 1991] [ongoing prescription of medication on numerous occasions, coupled with continued contact between patient and physician for diagnostic and treatment purposes, constituted continuous treatment]). Nor do isolated telephone calls between the plaintiff and a physician serve to extend or toll the limitations period. Rather, the continuous treatment doctrine may only be invoked where such calls evinced the plaintiff's intent to utilize the physician's services in the future or follow his or her advice, or there is continued contact for substantive, rather than ministerial, reasons (*see Davis v City of New York*, 38 NY2d 257, 260 [1975]).

Inasmuch as there is no evidence linking the plaintiff's alleged visit to the NYPH emergency room in November 2015 with his treatment for diabetes, that visit cannot serve to extend or toll the limitations period. The continuous treatment doctrine is applicable only "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'" (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991], quoting *McDermott v Torre*, 56 NY2d 399, 405 [1982]).

In light of the foregoing, the plaintiff's commencement of the action on April 17, 2018 renders is untimely as to NYPH.

Accordingly, it is

ORDERED that the motion of The New York and Presbyterian Hospital, incorrectly sued herein as New York Presbyterian Hospital/Weill Cornell Medical Center, a part of the New York Presbyterian Healthcare System, to dismiss the complaint insofar as asserted against it is granted; and it is further,

ORDERED that the complaint is dismissed insofar as asserted against The New York and Presbyterian Hospital, incorrectly sued herein as New York Presbyterian Hospital/Weill Cornell Medical Center, a part of the New York Presbyterian Healthcare System.

This constitutes the Decision and Order of the court.

10/14/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
	[X]	**GRANTED**	[ ]	**DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**			[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**			[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**