

Granieri v Maksumov
2020 NY Slip Op 35532(U)
June 15, 2020
Supreme Court, Bronx County
Docket Number: Index No. 31740/18
Judge: Joseph E. Capella
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 23**

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THOMAS GRANIERI and KATHLEEN GRANIERI,

Index #: 31740/18

Plaintiffs,

- against-

DECISION/ORDER
Hon. Joseph E. Capella
Justice of Supreme Court



**ALEKSANDR MAKUMOV, D.O, JOHN DELLABADIA,
M.D., and ST. BARNABAS HOSPITAL,**

Defendants.
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The following papers numbered 1 to 7 read on this motion dated November 22, 2019, and duly submitted on February 7, 2020.

NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
CROSS-MOTION & ANSWERING AFFIDAVIT AND EXHIBITS	2 -4
REPLY AFFIDAVIT AND EXHIBITS	5 - 7

UPON THE FOREGOING CITED PAPERS, IT IS ORDERED THAT THE MOTION AND CROSS-MOTION ARE DENIED AS FOLLOWS:

Defendants, Aleksandr Maksumov, D.O., and John Dellabadia, M.D., seek dismissal of the instant medical malpractice (i.e., failure to diagnose cancer) action, which commenced October 15, 2018, based on their statute of limitations defense. (CPLR 3211(a)(5), § 214-a.) It is well-settled that a medical malpractice action must be commenced within two years and six months of the date of accrual, which is the date the malpractice allegedly takes place. (CPLR § 214-a.) According to the complaint, plaintiff, Thomas Granieri, was as an in-patient and out-patient of co-defendant, St. Barnabas Hospital, from July 2013 through November 2017. The complaint further alleges that diagnostic testing performed in July 2013 and December 2014 showed a tumor, and the defendants' failure to diagnose same is the basis of the lawsuit. The bill of particulars alleges that the period of negligence as to Dr. Maksumov is July 23, 2013, and for Dr.

Dellebadia it is December 9, 2014. Neither the complaint nor the bill of particulars allege that Mr. Granieri was seen by Dr. Maksumov or Dr. Dellabadia after December 2014.

There is little dispute that Mr. Granieri initially presented to the St. Barnabas Emergency Department on July 23, 2013, with complaints of cough, shortness of breath, wheezing and hematuria. Dr. Maksumov alleges that on that day, his only involvement with Mr. Granieri was the “interpretation and report of a July 23, 2013 chest x-ray, and a July 23, 2013 CT scan of the abdomen and pelvis without intravenous contrast.” And Dr. Dellabadia alleges that his only “involvement with Mr. Granieri was interpreting and reporting on a December 9, 2014 chest CT without contrast.” As previously mentioned, the statute of limitations for medical malpractice actions is two years and six months of the date of accrual (i.e., the date the malpractice allegedly takes place). (CPLR § 214-a.) According to Dr. Maksumov and Dr. Dellabadia, the medical records annexed to their motion, the allegations they’ve included in their affidavits and those included in plaintiffs’ complaint and bill of particulars, all demonstrate that Mr. Granieri was last seen by them (i.e., July 23, 2013, and December 9, 2014) more than 2.5 years prior to the Complaint’s filing. And as such, they believe they are entitled to dismissal of this action as being time barred. St. Barnabas joins in the relief sought by Dr. Maksumov and Dr. Dellabadia, but on the chance that the doctors are dismissed from the action and St. Barnabas remains, St. Barnabas also cross-moves to convert its cross-claims against co-defendant doctors to third-party claims.

In January 2018, CPLR § 214-a was amended to address actions that are based on an alleged failure to diagnose cancer or a malignant tumor. Such action may be commenced within two years and six months of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission, provided that such action must be commenced no later than seven years from the negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition. Chapter 1, Section 5 of the Legislative Session Law of 2018 provides that the amendment takes effect immediately (i.e., January 31, 2018), and section 6 provides that it will also apply to acts, omissions, or failures occurring within two years and six months prior to the effective date and not before. Therefore, based on the aforementioned, the recent amendment applies to failure to diagnose cancer or malignant tumor claims that arise as early as July 31, 2015, and after. If it is true that Dr. Maksumov's last involvement with Mr. Granier was on July 23, 2013, and Dr. Dellabadia's was on December 9, 2014, then plaintiffs' claims would still be time barred despite the recent amendment to CPLR § 214-a.

On the other hand, plaintiffs' may be able to avoid dismissal if they are able to demonstrate that this action was brought within two years and six months of the last treatment where there has been continuous treatment for the same illness or condition. (*Borgia v City*, 12 NY2d 151 [1962].) While the continuous treatment doctrine effectively tolls the statute of limitations, its application in this action will prove

challenging to plaintiffs. The doctrine requires that there be a continuous course of treatment for the same condition that the physician who allegedly committed the act of malpractice actually treated. (*McDermott v Torre*, 56 NY2d 399 [1982].) However, there is appellate authority that has softened the aforementioned “same condition” rule and found continuous treatment where the conditions are sufficiently related and located in the same body part. (*Devadas v Niksarli*, 120 AD3d 1000 [1st Dept 2014]; *Chestnut v Bobb-McKoy*, 94 AD3d 659 [1st Dept 2012].) The continuous treatment doctrine also requires that there be some expectation by both patient and doctor that the treatment for the particular condition will continue. (*Young v NYC Health & Hosp.*, 91 NY3d 291 [1998].) But *Chestnut v Bobb-McKoy* softened this rule somewhat by finding that continued treatment of symptoms that are traceable to a particular condition that was misdiagnosed may trigger the toll. And *McDermott v Torre* softened the mutual expectations requirement by finding that there may be continuing treatment when a patient, despite being instructed that he does not need further attention, soon returns to the doctor because of continued pain in the area where medical attention was first sought. Complicating the entire analysis even further is whether plaintiffs can impute the treatment by one defendant-doctor to another in order to establish a pattern of continuous treatment (*Ganapolskaya v V.I.P. Medical*, 221 AD2d 59 [1st Dept 1996]).

In opposition, plaintiffs argue that the instant motion and cross-motion are premature in that discovery has not been completed, and they believe there are facts that

are presently unavailable to oppose dismissal. (CPLR 3211(d).) Defendants argue that plaintiffs are merely hoping that discovery will uncover evidence to establish some viability to their continuous treatment claim. (*Leonard v Gateway*, 68 AD3d 408 [1st Dept 2009].) It is true that a blanket or unsubstantiated assertion that discovery is necessary in order to oppose a dismissal motion is itself not a sufficient basis to deny the motion. (*Kennerly v Campbell*, 133 AD2d 669 [2nd Dept 1987].) However, according to plaintiffs' counsel, they are not in possession of the complete medical chart, and “[h]aving the chart in its entirety will be absolutely vital to our office to gain a complete understanding of all care rendered to plaintiff Thomas Granieri at [St. Barnabas].” And in furtherance of their continuous treatment claim, it does appear that Mr. Granieri continued to return to St. Barnabas in order to receive treatment for what may qualify as sufficiently related conditions. Mr. Granieri presented to St. Barnabas on July 23, 2013, complaining of shortness of breath and wheezing, and returned again on September 18, 2013, complaining of shortness of breath, chest pain and coughs. He presented once again on September 27, 2014, complaining of chest pain, shortness of breath and cough, and was seen on December 2, 2014, for a pulmonary consult.

On December 9, 2014, he underwent a CT scan of the chest, and on January 20, 2015, he had a pulmonary follow-up. On May 19, 2015, he presented again with shortness of breath, cough, fever and chest pain. On November 29, 2017, he presented with complaints of wheezing and left arm swelling, and was admitted for malignancy

work-up and underwent another chest CT scan. On December 1, 2017, he underwent a CT-guided biopsy of a left manubrium osseous lesion. Plaintiffs argue that Mr. Granieri was treated at St. Barnabas over a period of five years, with initial presentation in July 2013 and continued symptoms/complaints/treatment through February 2018, for a developing cancer that was not diagnosed until early 2018. They believe that a complete chart will reveal a continuous treatment fact pattern, as will a deposition of the doctors. Plaintiffs take issue with the “bare bone” affidavits submitted by the doctors in that they do not allow any probing into what, if any, conversations or other communications these physicians had with other St. Barnabas physicians during the relevant five year period.

Based on the aforementioned, the Court is satisfied that plaintiffs have substantiated their need for further discovery to oppose dismissal, and the instant motion and cross-motion are denied without prejudice to renew once discovery is complete. Plaintiffs are directed to serve a copy of this decision/order with notice of entry by first class mail upon all sides within 20 days of receipt of copy of same. This constitutes the decision/order of this court.

6/15/20

Dated

Hon.

Joseph E. Capella, J.S.C.

