Rich v Lavelle
2021 NY Slip Op 32715(U)
December 21, 2021
Supreme Court, Tioga County
Docket Number: Index No. 46341
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 27th day of September, 2021, conducted by virtual oral argument.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

SHANNON RICH,

Plaintiff,

-against-

WILLIAM F. LAVELLE, M.D. and UPSTATE ORTHOPEDICS, LLP,

Defendants.

DECISION AND ORDER

Index No. 46341
RJI No.:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to consider the motion made by Defendants William F. Lavelle, M.D. ("Dr. Lavelle") and Upstate Orthopedics, LLP seeking partial Summary Judgment dismissing the Complaint of Plaintiff Shannon Rich, with respect to claims relating to care and treatment provided to Plaintiff by Defendants prior to July 23, 2013; and dismissal of Plaintiff's claims for fraud and reckless conduct. The motion has been opposed by Plaintiff, except that in her opposition papers, Plaintiff agreed to dismissal of the claims for fraud and reckless conduct. The parties appeared before the Court for oral argument on September 27, 2021 which was conducted virtually by Microsoft Teams. After due deliberation, this constitutes the Decision and Order of this Court.

BACKGROUND FACTS

Plaintiff came under the care of Dr. Lavelle in 2012 for a scoliosis condition and underwent spinal fusion surgery on September 19, 2012, which included the placement of several bilateral pedicle screws. She treated with Dr. Lavelle from April 2012 thru June 9, 2013, and then again from October 24, 2014 through September 22, 2015, undergoing a second surgical procedure on November 5, 2014 to remove the pedicle screws at L1-L4. Plaintiff commenced this medical malpractice action on January 29, 2016 and Defendants served an Answer and a demand for a Bill of Particulars on June 24, 2016. Plaintiff's Bill of Particulars dated August 31, 2017 alleged that Defendants committed acts of malpractice from September 2012 through September 2015. Plaintiff was deposed on October 2, 2018 and Dr. Lavelle was deposed on February 2, 2019, but Dr. Lavelle's deposition was not completed at that time. Subsequently, Defendants made a motion to amend their Answer to include an affirmative defense of the Statute of Limitations. The Court issued a Decision and Order dated September 16, 2020, granting the motion to amend, but also directing that Dr. Lavelle should appear for completion of his deposition. Defendants served an Amended Answer on October 19, 2020. Dr. Lavelle's deposition was completed on February 23, 2021. Plaintiff also appeared for a second deposition on May 27, 2021, due to the fact that a new affirmative defense was raised in the Amended Answer.

In August 2021, Defendants filed the current motion for partial Summary Judgment. Defendants argue that the Statute of Limitations in a medical malpractice claim is 2 ½ years, and since Plaintiff's Complaint was filed on January 29, 2016, any claims related to treatment earlier than July 29, 2013 (2 ½ years prior to January 29, 2016) are time barred.

In opposition, Plaintiff argues that the "continuous treatment" doctrine applies, thereby extending the time for her to file a Complaint. Plaintiff contends that she continued under the care of Dr. Lavelle from September 2012 until September 22, 2015, making her Complaint and allegations of medical malpractice timely filed. Therefore, the issue before the Court is whether the "continuous treatment" doctrine applies, or, alternatively, whether there was a break in treatment.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York,* 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it

is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

A medical malpractice claim "must be commenced within 2 ½ years from the relevant act or the 'last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the challenged act, omission or failure' " *Lohnas v. Luzi*, 30 NY3d 752, 755 (2018) (internal bracket omitted) (quoting CPLR 214-a). A defendant seeking summary judgment on the ground of the Statute of Limitations bears the burden of proof of showing that plaintiff commenced the action more than 2 ½ years after the alleged negligent act or omission giving rise the malpractice claim. *Waring v. Kingston Diagnostic Radiology Ctr.*, 13 AD3d 1024, 1025 (3rd Dept. 2004), *citing White v. Murphy*, 277 AD2d 852 (3rd Dept. 2000); *see*, *Flint v. Zielinski*, 130 AD3d 1460 (4th Dept. 2015). If a defendant makes that *prima facie* showing, "the burden shifts to the plaintiff to establish that he or she received continuous treatment in order to avail himself or herself of the tolling provision of CPLR 214-a." *White v. Murphy*, 277 AD2d at 853-854 *citing Massie v. Crawford*, 78 NY2d 516, 519 (1991); *see Nykorchuck v. Henriques*, 78 NY2d 255 (1991); *Shultis v. Patel*, 163 AD3d 1342 (3rd Dept. 2018); *Waring v. Kingston Diagnostic Radiology*, 13 AD3d at 1025. The rationale of the continuous treatment doctrine is that maintaining the doctor/patient relationship fosters additional efforts to treat the condition and obtain the best possible result, rather than interrupting treatment by a lawsuit. *Lohnas v. Luzi*, 30 NY3d at 756; *McDermott v. Torre*, 56 NY2d 399 (1982).

Defendants claim they are entitled to summary judgment with respect to treatment that occurred before July 29, 2013, including the surgery performed on September 19, 2012. Defendants have established a *prima facie* case for summary judgment by virtue of the fact that Plaintiff commenced this action on January 29, 2016, and any treatment before July 29, 2013 would be more than 2 ½ years prior to the date of commencement. The burden is then shifted to Plaintiff to raise a triable issue of fact regarding a continuous course of treatment which would toll the running of the statute of limitations. *Waring v. Kingston Diagnostic Radiology Ctr.*, 13 AD3d 1024; *Flint v. Zielinski*, 130 AD3d 1460.

Application of the continuous treatment doctrine requires a plaintiff to show: 1) the patient sought and obtained a course of treatment from the defendant; 2) that the treatment was

for the same condition upon which the malpractice claim is based; and 3) the treatment is continuous. *Hillary v. Gerstein*, 178 AD3d 674, 675 (2nd Dept. 2019) *citing Gomez v. Katz*, 61 AD3d 108, 111-112 (2nd Dept. 2009). The last element is the pertinent consideration on this motion.

It is undisputed that Plaintiff was treated by Defendants roughly monthly or every other month from the surgery in September 2012 until June 2013. Subsequent to June 2013, Plaintiff treated with other doctors and did not return to Upstate Orthopedics until October 2014, more than 16 months after her visit in June 2013. Defendants characterize that as a cessation of treatment in June 2013, and then a "re-commencement", or resumption, of treatment in October 2014. If the Court determines that treatment had concluded in June 2013, then a subsequent return to Dr. Lavelle would be a resumption of treatment rather than continuous treatment; and tolling would not be applicable. *See, Aulita v. Chang,* 44 AD3d 1206 (3rd Dept. 2007); *Fox v. Glens Falls Hosp.*, 129 AD2d 955 (3rd Dept. 1987).

The foundation of the continuous treatment doctrine is not just the existence of a doctor patient relationship, but an ongoing relationship of trust and confidence between the doctor and patient. *Massie v. Crawford*, 78 NY2d 516; *Gomez v. Katz*, 61 AD3d 108. "In determining whether a question of fact exists as to the applicability of the continuous treatment doctrine, the plaintiff's version of the facts must be accepted as true" *Clifford v. Kates*, 169 AD3d 1375, 1377 (4th Dept. 2019) *citing Scribner v. Harvey*, 245 AD2d 1120, 1121 (4th Dept 1997); *see, Rizk v. Cohen*, 73 NY2d 98, 104 (1989) ("determination as to whether continuous treatment exists [] must focus on the patient.")

Following the surgery on September 19, 2012, Plaintiff returned to Dr. Lavelle's office on October 11, 2012, and was seen by Dr. Niranjan Kavadi, a clinical fellow practicing under the supervision of Dr. Lavelle. Plaintiff was noted to be making good progress and she was released to return to regular work with restrictions on bending, twisting and heavy lifting. At her third post-surgical visit on December 6, 2012, Dr. Kavadi's notes indicate that Plaintiff's back pain was worse, which Dr. Kavadi felt may be due to being off narcotic medication; the patient declined a physical therapy referral at that time. Plaintiff returned to the office in February and March 2013. Then, at a visit on May 23, 2013, she complained of right thigh pain and numbness, which she reported was getting worse. She also noted that she had started physical therapy but it was harming more than helping. She also complained of pain in her hip and Dr. Kavadi recommended an x-ray of her hip. She was started on an anti-inflammatory and told to

come back in 4 to 6 weeks. The record reveals that Plaintiff called the office on June 7, 2013 and told Dr. Kavadi that the new medication was not helping. Plaintiff wanted an MRI, but that could not be performed because of the stainless steel hardware implanted during surgery. Dr. Kavadi did not recommend a CT scan because he believe it would not add much information, and although a myelogram was an option, Dr. Kavadi noted it was a painful procedure. Therefore, according to the note following the June 7, 2013 telephone call, "[a]fter understanding all the options and possibilities, she wants to ride it out till the next visit. When she sees us next time, we can discuss more about it."

A follow up appointment was scheduled for July 17, 2013, but the patient cancelled the appointment and the medical record shows that she indicated she would call back when she was ready. According to Plaintiff's testimony, she felt there was nothing she could do but live with it, and based upon her discussions with Dr. Kavadi, she understood it could take years for the fusion to heal. Therefore, Plaintiff testified she and the doctor had agreed to give it more time to heal, and not conduct additional studies. This understanding was confirmed by Dr. Kavadi in his deposition, when he stated that the healing process after this type of surgery was a multi-year process, and after discussing the options and possibilities, the patient chose to ride it out rather than obtain an invasive study. Dr. Kavadi testified that this was a reasonable decision by Plaintiff. According to Plaintiff, the fact that she did not return for treatment after May 2013 was anticipated in the recovery process, until enough healing time had elapsed. Plaintiff also points to the deposition of Jessica Keller, a member of Dr. Lavelle's administrative staff, who explained that the cancellation of the July 11, 2013 appointment specified that the patient would call back when ready, but did not indicate that the patient was discontinuing care with Dr. Lavelle.

When there is an extended period of time where a patient is not seen or treated by a doctor, a question may arise as to whether treatment is continuing. The running of the Statute of Limitations does not begin until treatment is concluded. *See, Goldschmidt v. Cortland Regional Med. Ctr., Inc.*, 190 AD3d 1212 (3rd Dept. 2021); *Hauss v. Community Care Physicians, P.C.*, 119 AD3d 1037 (3rd Dept. 2014). Even where the patient is not seen in the office, if the doctor and patient "intend the relationship to continue and the patient continues to rely on the doctor for care and treatment, the requirement for continuous care and treatment for the purpose of the Statute of Limitations is satisfied" *Stilloe v. Contini*, 190 AD2d 419, 422 (3rd Dept. 1993), *citing Richardson v. Orentreich*, 64 NY2d 896, 899 (1985); *see, Rizk v. Cohen*, 73 NY2d 98. If the actions of the physician and patient show that they both agreed that any additional treatment

would be undertaken by another doctor, then the continuous treatment doctrine does not apply. *See, Shultis v. Patel*, 163 AD3d 1342. A key component in analyzing continuous treatment is whether the doctor and patient anticipated a further return for treatment. *See, Goldschmidt v. Cortland Regional Med. Ctr.*, 190 AD3d 1212; *Waring v. Kingston Diagnostic Radiology Ctr.*, 13 AD3d 1024. Although a gap in treatment can, in appropriate cases, preclude application of the continuous treatment doctrine, in this case, Plaintiff has raised a triable issue of fact as to whether the gap was agreed upon to allow for further healing, or manifested an intention to cease care with Dr. Lavelle.

Defendants also argue that Plaintiff sought treatment for this condition with other physicians in 2014, and that fact independently, or coupled with other evidence, demonstrates that she no longer had a relationship of trust and confidence with Dr. Lavelle, and thus, the continuous treatment doctrine should not apply. On March 31, 2014, Plaintiff saw Dr. Michael Eisman with complaints of right hip burning pain radiating down her leg. Plaintiff testified that it was for a possible pinched nerve in her back, and not necessarily related to her scoliosis. Per the history in the medical report, the patient has had unrelenting paint in the right lower back radiating to her right hip and down her right leg. Dr. Eisman made some treatment recommendations, which Plaintiff declined. The office note from that visit further states that Dr. Eisman's office would send for her records from her orthopedic doctor and she would be seen in 6 weeks. However, Plaintiff subsequently cancelled that visit, because she had not gotten new x-rays yet. Plaintiff called Dr. Eisman's office on 9/4/2014 about ongoing pain, but there was no evaluation or treatment recommendation at that time. On September 29, 2014, Plaintiff again called Dr. Eisman's office seeking a referral to a neurosurgeon.

Meanwhile, on or about September 11, 2014 Plaintiff telephoned Dr. Lavelle's office because she now wanted to obtain a myelogram. She was given an appointment for September 25, 2014 but ended up cancelling the appointment, later testifying that she was still apprehensive about having the myelogram performed due to her understanding that it is painful. Further, she had recently obtained employment at a doctor's office and did not want to take time off from work. There is indication in the September 11, 2014 note that she was finding a new doctor, but that implies that her doctor remained as Dr. Lavelle at least until September 2014.

In fact, at Plaintiff's new employment, she came to know of Dr. Barry Pollack, a neurosurgeon, who examined her on October 13, 2014 and ordered a CT scan of her lumbar spine, which was done on October 14, 2014. That scan revealed a misplaced pedicle screw,

which could be causing her pain. Even before going to Dr. Pollack, Plaintiff was aware that he would not undertake to treat her scoliosis condition because he did not treat that condition in his practice.

Plaintiff then sent an email to Dr. Lavelle informing him of the CT scan results, and Dr. Lavelle replied that it would be helpful for him to review the CT scan and a follow up appointment was scheduled. Thereafter, Dr. Lavelle performed a second surgery on November 5, 2014 to remove pedicle screws.

"Whether or not a patient's consultation with a new physician constitutes a severance of continuous treatment with an earlier physician depends upon the reasons underlying the new consultation." *Gomez v. Katz*, 61 AD3d at 115. In this case, Plaintiff explained that she contacted her primary care doctor's office and was given an appointment with Dr. Eisman. The reason for her visit was because of the burning pain into her right thigh and leg. Ultimately, she only had one visit with Dr. Eisman and did not follow up. She also testified that she was working in Dr. Pollack's office and thought maybe Dr. Pollack would have some idea of what was causing her ongoing pain, which Dr. Pollack would communicate to Dr. Lavelle. She also testified that she viewed Dr. Pollack as a second opinion, but that Dr. Lavelle was her surgeon, and would still be in charge of her treatment. These facts are distinguishable from *Shultis v. Patel*, where the evidence was that both doctor and patient believed that any continuing treatment would be from another doctor. In fact, in this case, it does not appear that Dr. Lavelle even knew of the visit to Dr. Pollack until after the fact, so it could not have had any bearing on his view of the ongoing treatment relationship. Plaintiff has indicated her belief that Dr. Lavelle was still her doctor for the scoliosis condition.

Plaintiff's testimony and evidence concerning her understanding that healing from the surgery could take years, and that she was going to give it more time, together with her explanations that despite seeing other doctors she continued to consider Dr. Lavelle as her physician, create a triable issue of fact with respect to continuous treatment. The Court cannot conclude as a matter of law that the doctor patient relationship had terminated such that the continuous treatment doctrine does not apply.

CONCLUSION

Based on all the foregoing, it is hereby

ORDERED, that Defendants' motion for partial Summary Judgment dismissing claims related to treatment prior to July 23, 2012 is DENIED; the motion to dismiss the claims of fraud and reckless conduct have not been opposed by Plaintiff and dismissal of those claims is GRANTED.

The Court will transmit the original signed Decision and Order to the County Clerk's Office for filing. The original motion papers (including opposing papers and reply) have already been filed. The Court's transmittal does not eliminate the requirement of service of the Decision and Order with Notice of Entry to commence the statutory time period for appeals as of right. (CPLR 5513[a]).

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: December 21, 2021
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers have been previously filed in the County Clerk's Office and have been considered by the Court on this motion:

1) Defendants' Notice of Motion dated August 11, 2021, with Attorney Affirmation of Kevin T. Hunt, Esq., dated August 11, 2021 with attached Exhibits, Statement of Material Facts, and supporting Memorandum of Law dated August 11, 2021;
2) Attorney Affirmation of Raymond Schlather, Esq., dated September 20, 2021, with Exhibits "1" – "4", in opposition to Defendants' Motion for Summary Judgment, Plaintiff's Response to Statement of Material Facts, and Memorandum of Law dated September 20, 2021;
3) Attorney Affirmation of Kevin T. Hunt, Esq., dated September 23, 2021, in further support of Defendants' Motion for Summary Judgment, and Memorandum of Law dated September 23, 2021.