

Michelino v Sithian

2021 NY Slip Op 33920(U)

June 21, 2021

Supreme Court, Richmond County

Docket Number: Index No. 152096-2019

Judge: Judith N. McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

IAS PART 6

MARY MICHELINO and RONALD MICHELINO,

ORDER

Plaintiffs,

- against -

Index Number: 152096-2019

Hon. Justice
Judith N. McMahon

NEDUNCHEZIAN SITHIAN, M.D. and STATEN
ISLAND SURGICAL ASSOCIATES, P.C.,

Defendants.

x

Defendants Nedunchezian Sithian, M.D. & Staten Island Surgical Associates, P.C.'s motion to dismiss all dates of treatment prior to March 5, 2017, as barred by the statute of limitations and not part of a continuous course of treatment, is denied as detailed herein.

This medical malpractice action was commenced by the filing a Summons and Complaint on September 5, 2019. Issue was joined by service of the Verified Answer on October 22, 2019. Plaintiffs herein allege that Defendants Dr. Sithian and Staten Island Surgical Associates, P.C., failed to diagnose breast cancer of the right breast from February 8, 2001 through December 4, 2017. As a result, Plaintiffs allege that Mrs. Michelino was deprived of the opportunity to have a better outcome and also claim lack of informed consent.

“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.” *NY CPLR 214-a*.

Defendants have moved to dismiss all dates of treatment prior to March 5, 2017, which is two and a half years prior to the filing of the Summons and Complaint, as barred by the statute of limitations.

“The underlying premise of the continuous treatment doctrine is that the doctor-patient relationship is marked by continuing trust and confidence and that the patient should not be put to the disadvantage of questioning the doctor's skill in the midst of treatment, since the commencement of litigation during ongoing treatment necessarily interrupts the course of treatment itself. A defendant who seeks dismissal of a complaint on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to commence an action has expired.” *Wright v. Southampton Hosp.*, 187 A.D.3d 1242, 131 N.Y.S.3d 216 (N.Y.A.D. 2nd Dept. 2020).

“The term ‘course of treatment’ speaks to affirmative and ongoing conduct by the physician such as surgery, therapy, or the prescription of medications. A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll. Similarly, continuing efforts to arrive at a diagnosis fall short of a course of treatment, as does a physician's failure to properly diagnose a condition that prevents treatment altogether.” *Gomez v. Katz*, 61 A.D.3d 108, 874 N.Y.S.2d 161 (N.Y.A.D. 2nd Dept. 2009).

“Although routine follow up testing does not support the application of the continuous treatment toll, the monitoring of an abnormal condition may be sufficient to do so. Thus, an agreement between physician and patient to continue observation of suspicious breast tissue may constitute sufficient monitoring to support a finding of continuous treatment.” *Cherise v. Braff*, 50 A.D.3d 724, 855 N.Y.S.2d 233 (N.Y.A.D. 2nd Dept. 2008).

Defendants argue that the Plaintiff merely presented to Dr. Sithian for yearly checkups going back as far as 2008, and thus the continuous treatment toll does not apply.

Plaintiff opposes, arguing that “The Statute of Limitations may begin to run once a hospital or physician considers the patient's treatment to be completed and does not request the patient to return for further examination.” *McDermott v. Torre*, 56 N.Y.2d 399, 437 N.E.2d 1108 (1982).

Plaintiff Mary Michelino was initially referred to Defendant's care by Plaintiff's OB-GYN, Dr. Molson, for the purpose of assessing palpable masses which had been detected in the upper portion of her right breast for cancer and possible surgery to remove these masses. Dr. Sithian's notes regarding the visit included the notation, “...Patient is advised to continue her self examination, GYN follow up and return to this office in 6 months.”

At her examination before trial, conducted on November 6, 2020, Plaintiff Mary Michelino testified as follows:

Q. What do you remember about your second visit, if anything, with Dr. Sithian?

A. A physical examination. Everything feels as is, the same, repeat.

Q. When you say "repeat," what do you mean?

A. He said six months, if he said a year, that is what I did. I don't recall exactly.

Q. If he would tell you to come back in X amounts of month or a year, then you would do whatever he instructed you; is that correct?

A. That's correct.

Almost all of Dr. Sithian's notes documenting Plaintiff's 24 visits include language instructing Plaintiff to return to Dr. Sithian for further evaluation and/or a recommendation for "appropriate therapy".

There are questions of fact as to whether Plaintiff's visits to Dr. Sithian were part of a course of treatment to continue to monitor Plaintiff's abnormal condition. There are also questions of fact as to whether Dr. Sithian or Plaintiff believed that the heightened monitoring due to Plaintiff's complaints to be complete and that further visits were merely routine.

ORDERED that Defendants Nedunchezian Sithian, M.D. & Staten Island Surgical Associates, P.C.'s motion to dismiss all dates of treatment prior to March 5, 2017, as barred by the statute of limitations is denied; and it is further

ORDERED that all parties shall appear for a court conference, to be conducted via Microsoft Teams, on July 21, 2021, at 3 PM.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: June 21, 2021

So Ordered.

ENTER:

J.S.C

**Hon. Judith N. McMahon
J.S.C.**