Pinkney v New York City Health & Hosps. Corp.
2022 NY Slip Op 30640(U)
March 2, 2022
Supreme Court, New York County
Docket Number: Index No. 452840/2015
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA EDWARDS — *Justice* — PART 10M

THELMA PINKNEY,

Plaintiff,

- v -

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and its Employee, DR. SARAH MOORE,

Defendants.

INDEX NO. 452840/2015

MOTION DATE 05/20/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and the oral argument held before the court on February 10, 2022, the court denies Defendants The New York City Health and Hospitals Corporation's ("HHC") and its Employee, Dr. Sarah Moore's ("Moore") (collectively, "Defendants") motion for dismissal, or in the alternative, summary judgment and denies Plaintiff Thelma Pinkney's ("Plaintiff") cross-motion for summary judgment.

Plaintiff brought this medical malpractice and lack of informed consent action against Defendants and alleged in substance that they departed from good and accepted medical practice in their care and treatment of Plaintiff by negligently prescribing her chlorthalidone on April 23, 2013, which caused Plaintiff to suffer a transient drop in her sodium level, a cardiac event and a seizure requiring hospitalization at Bellevue Hospital from May 1, 2013 to May 6, 2013 and a continuous course of treatment for these conditions. Plaintiff, who was employed at Bellevue Hospital, had been treated at Bellevue and its clinics for many years. Her primary care physician,

Dr. Esther Butler, monitored Plaintiff's numerous conditions, including hypertension, hyperlipidemia, chronic back, knee, neck and hand/wrist pain, headaches and GERD.

In 2010, Plaintiff was prescribed lisinopril/hydrochlorothiazide (a diuretic) at Bellevue clinic. In 2011 Plaintiff was hospitalized at Brookdale Hospital for nausea, vomiting and diarrhea and she was diagnosed with hyponatremia (low sodium) caused by the hydrochlorothiazide medication. In March 2011, Plaintiff followed-up with the Bellevue clinic and Dr. Butler changed Plaintiff's high blood pressure medications and discontinued use of lisinopril/hydrochlorothiazide. Plaintiff continued to follow-up with the clinic and from February 2013 to March 2013 Dr. Butler monitored Plaintiff's high blood pressure and adjusted her medication accordingly. On April 4, 2013, Plaintiff's blood pressure was elevated and her sodium levels were low. Again, Dr. Butler adjusted Plaintiff's medication without prescribing hydrochlorothiazide or any other thiazide diuretic.

On April 23, 2013, Plaintiff was treated by Defendant Moore at the clinic for the first time. Plaintiff's blood pressure was still high so Defendant Moore changed Plaintiff's medication and prescribed chlorthalidone in addition to metoprolol and carvedilol. On May 1, 2013, Plaintiff went to the emergency room at Bellevue complaining of indigestion, headaches, vomiting, diarrhea and hemotysis. Plaintiff was admitted and suffered a seizure which caused her to be unresponsive and required intubation. Plaintiff was discharged on May 5, 2013 and told to follow-up with Dr. Butler at the clinic. Plaintiff followed-up with Dr. Butler at the clinic for years. Dr, Butler ordered a cardiac stress test, which was conducted on July 22, 2013, additional lab work and monitored Plaintiff's hypertension, sodium level and medications.

Plaintiff filed a notice of claim on June 14, 2013 and a summons and complaint on October 31, 2013, while *pro se*.

Defendants now move for dismissal of Plaintiff's complaint and argue that it was untimely since it was filed beyond the expiration of the statute of limitations period, pursuant to CPLR 3211(a)(5), and for summary judgment dismissal. Defendants argue in substance that Plaintiff alleged a continuous course of treatment from April 23, 2013 to May 6, 2013, which required Plaintiff to file her complaint against Defendants within one year and ninety days, or by August 5, 2014. Defendants contend that since Plaintiff failed to file her complaint until October 31, 2014, the complaint was untimely. Defendants further argue in substance that Plaintiff's subsequent treatment was not for the same conditions alleged in this action, but for routine follow-up visits for her long-term chronic medical conditions, including hypertension, depression, and chronic back, knee and neck pain. Defendants argue that even if Plaintiff is given continuous treatment until her stress test on July 22, 2013, then her complaint was still beyond the expiration of the statute of limitations. In the alternative, Defendants argue that they are entitled to summary judgment dismissal as a matter of law.

Plaintiff cross-moves for summary judgment in Plaintiff's favor. Plaintiff alleges in substance that Defendants departed from good and accepted medical practice including when Defendant Moore abruptly prescribed the diuretic chlorthalidone to Plaintiff without consulting with Dr. Butler and without reviewing Plaintiff's medical history of her previous adverse reaction and hospitalization from taking hydrochlorothiazide. Plaintiff argues in substance that she filed her summons and complaint prior to the expiration of the statute of limitations because it was tolled by the continuous course of treatment doctrine. Plaintiff further argues that her subsequent visits to the clinic until at least July 20, 2016, were related to monitoring and treating Plaintiff's hypertension and involved diagnostic tests, lab tests and repeated adjustments of her prescription medications to account for the hyponatremia and other adverse conditions caused

when Defendant Moore negligently prescribed chlorthalidone to Plaintiff. Plaintiff further argues in substance that the medical records for Plaintiff's subsequent visit to the clinic on September 15, 2014 included Dr. Butler's notes about Plaintiff's allergic reaction to chlorthalidone and that she would have symptoms of severe hyponatremia if it was prescribed again. In October 2015, Plaintiff was evaluated for having both abnormally low and high sodium levels. On July 20, 2016, Plaintiff had complaints of chronic, intermittent neck pain caused by her seizure and on January 28, 2018, Plaintiff complained of lower back and leg pain caused by her hospitalization for hyponatremia.

In support of Plaintiff's motion for summary judgment, Plaintiff submits the expert affirmation of Dr. Ira Mehlman who opined in substance with a reasonable degree of medical certainty that Defendants departed from the relevant standards of care by prescribing and/or administering to Plaintiff thiazide diuretics, including chlorthalidone, to treat her hypertension which caused Plaintiff's severe hyponatremia and her complications during her hospitalization.

In opposition to Plaintiff's cross-motion for summary judgment, Defendants submitted the expert affirmation of Dr. John O'Grady. Defendants argue in substance that Plaintiff failed to demonstrate Defendants' departure or proximate cause for Plaintiff's alleged injuries and that Plaintiff failed to establish a continuous course of treatment, so her claims are time-barred.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light

most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]. It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the

defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

In a medical malpractice case, generally the statute of limitations begins to run when a cause of action accrues, which is the date of the original alleged negligent "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; *see Wally G. v New York City Health & Hosps. Corp.*, 27 NY3d 672, 674 [2016]; *Borgia v New York*, 12 NY2d 151, 155 [1962]). The statute of limitations in this matter expires one year and ninety days after the happening of the event upon which the claim is based, which may be different than the date that the claim actually accrued (*see* General Municipal Law § 50-e[5]; *Pierson v City of New York*, 56 NY2d 950, 954 [1982]; *Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 65 [2009]).

The continuous treatment doctrine's tolling of the statute of limitations and the time for which to file a notice of claim was created to relieve a patient from being forced to choose between whether to file a timely summons and complaint or notice of claim against a physician or health care facility to promptly pursue a medical malpractice action which would undermine the continuing trust in the physician-patient relationship or whether to silently accept continued corrective medical treatment from the offending physician or hospital and risk that the claim will be time-barred (*see Rizk v Cohen*, 73 NY2d 98, 104 [1989]; *Borgia*, 12 NY2d at 155).

Once the defendant establishes, prima facie, that the action is time-barred by the applicable statute of limitations, the burden shifts to the plaintiff to demonstrate that the continuous course of treatment doctrine applies. Therefore, "the plaintiff is required to demonstrate that there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice" (*Stewart v Cohen*, 82 AD3d 874, 876 [2d Dept 2011]).

The continuous treatment doctrine involves more than a physician-patient relationship (*McDermott v Torre*, 56 NY2d 399, 405 [1982]). A patient's continuing general relationship with

a physician, or routine, periodic health examinations will not satisfy the doctrine's requirement of continuous treatment of the condition upon which the allegations of medical malpractice are predicated (*Massie v Crawford*, 78 NY2d 516, 519 [1991]).

A patient's treatment "does not necessarily terminate upon a patient's last visit if further care or monitoring of the condition is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments which characterized the treatment in the past" (*Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998] [internal quotation marks and citation omitted]).

Here, the court finds that Defendants established, prima facie, that the action was commenced on October 31, 2013, and that all claims for medical malpractice arising from Defendants' alleged acts or omissions that occurred more than one year and ninety days prior to this date are barred by the applicable statute of limitations. Therefore, the burden shifts to Plaintiff to demonstrate that there was a course of treatment, that it was continuous, and that it involved the same alleged condition or complaint involved in Plaintiff's malpractice action.

The court determines that material questions of fact remain to be determined by a trier of fact as to whether the continuous course of treatment doctrine applies and serves to toll the applicable statute of limitations. Such questions include, but are not necessarily limited to, the nature and purpose of Plaintiff's doctors' visits subsequent to her hospitalization; the extent to which Plaintiff's subsequent doctors' visits amounted to a continuous course of treatment for the same conditions that she allegedly suffered as a result of Defendants' alleged negligence/malpractice or whether they were merely follow-up, routine visits to monitor her long-standing, pre-existing, chronic medical conditions; and whether the monitoring and

treatment of Plaintiff's hypertension, sodium levels, headaches, pain, heart and adjustment of medications amounted to a continuous course of treatment.

Additionally, the court finds that Plaintiff failed to establish her entitlement to judgment in her favor as a matter of law and the absence of material factual issues in dispute because of the remaining questions regarding the continuous course of treatment doctrine and whether her claims are time-barred. However, even if Plaintiff met her initial burden, then the court finds that material questions of fact remain to be determined by the trier of fact, including whether Defendants departed from good and accepted medical practice and whether the alleged malpractice was the proximate cause of Plaintiff's alleged injuries.

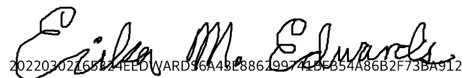
Therefore, the court denies both Defendants' motion for dismissal and summary judgment and Plaintiff's cross-motion for summary judgment.

The court has considered all additional arguments not specifically discussed herein and the court denies all requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court denies Defendants The New York City Health and Hospitals Corporation's and its Employee, Dr. Sarah Moore's motion for dismissal, or in the alternative, summary judgment, and denies Plaintiff Thelma Pinkney's cross-motion for summary judgment.

This constitutes the decision and order of the court.



3/2/2022					
DATE			ERIKA EDWARDS, J.S.C.		
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