Rodriguez v Bagloo
2022 NY Slip Op 31087(U)
March 31, 2022
Supreme Court, New York County
Docket Number: Index No. 805381/2020
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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ADA RODRIGUEZ,

Plaintiff,

- v -

MELISSA BAGLOO, M.D., AMANDA POWERS, M.D., NEW YORK-PRESBYTERIAN HOSPITAL, THE UNIVERSITY HOSPITAL OF COLUMBIA AND CORNELL, MOUNT SINAI MORNINGSIDE, as Successor in Interest to MOUNT SINAI ST. LUKE'S, MOUNT SINAI WEST, as Successor in Interest to ST. LUKE'S ROOSEVELT HOSPITAL, MOUNT SINAI HEALTH SYSTEM, as Successor in Interest to ST. LUKE'S ROOSEVELT HOSPITAL CENTER, UNIVERSITY HOSPITAL OF COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS & SURGEONS, DOMINGO NUNEZ, M.D., and NYU LANGONE RADIOLOGY-NRAD

Defendants.

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INDEX NO. 805381/2020

MOTION DATE 02/02/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendants Domingo Nunez, M.D., Mount Sinai Morningside (Morningside), as successor in interest to Mount Sinai St. Luke's, and Mount Sinai West (West), as successor in interest to St. Luke's-Roosevelt Hospital, together move pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against them as time-barred. The plaintiff does not oppose the motion. The motion is deemed to be a motion for summary judgment dismissing the complaint on that ground, and the motion is granted.

The plaintiff alleged in her complaint that, on September 6, 2011, the movants' codefendants Melissa Bagloo, M.D., and Amanda Powers, M.D., performed a laparoscopic surgical removal of a gastric lap band, and that they "failed to remove the entire lap band." The

plaintiff further asserted that, on May 14, 2012, Nunez performed a hernia repair operation, and that he "should have known of the presence of the foreign object in plaintiff's abdomen." As to Morningside and West, the complaint asserts that, subsequent to the 2011 surgical procedure, those entities performed various medical and radiological and diagnostic examinations on the plaintiff, but also failed to discover the lap band in her abdomen, which was ultimately discovered by other health care providers on November 21, 2019.

The plaintiff commenced this action on November 23, 2020. Morningside and West served their answer on December 22, 2020, while Nunez served his answer on April 5, 2021. Both answers asserted, as an affirmative defense, that the action was time-barred

In the first instance, the movants are seeking relief pursuant to CPLR 3211(a)(5). Reliance on that statute, however, is improper. CPLR 3211(e) provides that

> "At any time *before service of the responsive pleading* is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading"

(emphasis added). Thus,

> "[a] motion to dismiss the complaint based on a ground listed in CPLR 3211(a) . . . must be made before answering (*see* CPLR 3211[e]: Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:21). A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading (*id*.). Summary judgment is, therefore, a post answer device (*id*.). Any of the grounds on which a CPLR 3211 motion could have been made here . . . can he used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (CPLR 3211[e]: Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:20). Having preserved the affirmative defense in their answer, defendants were not also entitled to serve a pre-answer motion to dismiss, which is a procedural irregularity. Defendants [are] required to move for summary judgment on the [CPLR 3211(a)] issue inasmuch as they had served their answer"

(*Lusitano Enters., Inc. v Horton Bros., Inc.*, 2018 NY Slip Op 32011[U], *3-4, 2018 NY Misc LEXIS 3587, *5-6, [Sup Ct, Suffolk County, Aug. 14, 2018]; *see Higgins v Goyer*, 2018 NY Slip Op 33520[U], *2, 2018 NY Misc LEXIS 9607, *3 [Sup Ct, Rensselaer County, Nov. 1, 2018]; *see*

also McLearn v Cowen & Co., 60 NY2d 686, 689 [1983]; *Rich v Lefkovits*, 56 NY2d 276, 282 [1982] ["we answer in the affirmative the question . . . concerning whether defendant may move after answer for summary judgment on his jurisdictional defense"]).

Consequently, to the extent that the movants seek relief pursuant to CPLR 3211(a)(5), the relief that they seek at this juncture is available only via a motion for summary judgment pursuant to CPLR 3212. Nonetheless, since the plaintiff did not oppose the motion, and thus did not refute any of the movants' factual allegations, there are no disputed issues of fact. Hence, the court deems the motion to be a motion for summary judgment dismissing the complaint as time-barred, without the need for providing additional notice to the parties pursuant to CPLR 3211(c) (*see Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; *see also Mic Prop. & Cas. Ins. Corp. v Custom Craftsman of Brooklyn, Inc*., 269 AD2d 333, 334 [1st Dept 2000]).

On a motion for summary judgment dismissing a complaint as time-barred, "a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made," the burden shifts to the plaintiff to raise triable issue fact as to "whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP,* 138 AD3d 1085, 1085-1086 [2d Dept 2016]; *see Murray v Charap*, 150 AD3d 752 [2d Dept 2017]; *Williams v New York City Health & Hosps. Corp*., 84 AD3d 1358 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051 [2d Dept 2011]). The statute of limitations applicable to actions to recover for medical malpractice against a private health-care provider is 2½ years, measured from "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act omission or failure" (CPLR 214-a). Likewise, the statute of limitations applicable to a cause of action sounding in lack of informed consent is

2½ years from the date of the alleged failure to provide the patient with information concerning the risks and benefits of a particular treatment or procedure (*see Wilson v Southampton Urgent Med-Care, P.C.*, 112 AD3d 499 [1st Dept 2013]).

The "continuous treatment" provision of CPLR 214-a posits that the limitations period "does not begin to run until the end of the course of treatment 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] [internal quotation marks omitted] [emphasis added]; *see Massie v Crawford*, 78 NY2d 516, 519 [1991]; *McDermott v Torre*, 56 NY2d 399, 405 [1982]; *Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *Jajoute v New York City Health & Hosps. Corp.*, 242 AD2d 674, 676 [1st Dept 1997]).

Although CPLR 214-a provides that "where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery, or the date of discovery of facts, which would lead to such discovery, whichever is earlier," the plaintiff does not assert that any of the movants were responsible for leaving the subject foreign object in her abdomen. The movants correctly argue that this date-of-discovery rule applies only to health care providers who negligently placed or left the foreign object inside a patient's body, and not to providers who allegedly failed to discover the foreign body later on (*see Leace v Kohlroser*, 151 AD3d 707, 709-710 [2d Dept 2017]). The failure to recognize the presence of a foreign object, or even a fixation device that was intended to be implanted or installed and later removed, and to advise the plaintiff of such, "'is most logically classified as one involving misdiagnosis—a category for which the benefits of the "foreign object" discovery rule have routinely been denied'" (*Walton v Strong Mem. Hosp.*, 25 NY3d 554, 567 [2015], quoting *Rodriguez v Manhattan Med. Group*, 77 NY2d 217, 222-223, [1990]; *see Leace v Kohlroser*, 151 AD3d at 709-710 [declining to apply date-of-discovery rule to a physician's failure to discover a endoscopic capsule camera that was meant to be swallowed and excreted, but nonetheless remained in the plaintiff's intestinal tract]).

With respect to Nunez, the movants established that he only performed one surgical procedure upon the plaintiff, that he performed it in 2012, and that he did not see or treat the plaintiff thereafter. The limitations period with respect to any claim against him based upon an alleged misdiagnosis thus began to run on May 14, 2012, when he performed the procedure, and lapsed on November 14, 2014. The movants thus established, prima facie, that this action, commenced six years later, is time-barred as to Nunez. Because the plaintiff did not oppose the motion, she failed to raise a triable issue of fact in opposition to that showing, and summary judgment must be awarded to Nunez dismissing the complaint insofar as asserted against him.

With respect to Morningside and West, the movants established their prima facie entitlement to judgment as a matter of law with the affidavit of Karen Gilles, whose duties as a supervisor include preserving, maintaining, storing, and searching for medical records of patients who had presented to Mount Sinai-affiliated hospitals, including Morningside and West. Based on her search, review, and analysis of a vast database of patient records, she concluded that the plaintiff presented to Mount Sinai-affiliated hospitals on four occasions---May 2, 2012, May 14, 2012, May 23, 2012, and March 13, 2017. She asserted that "there is no record that the plaintiff was treated or presented to the Hospital or any other Mt. Sinai affiliated hospital at any time after March 13, 2017." Thus, to the extent that the plaintiff might have had a failure-to-diagnose claim against Morningside and West, the limitations period applicable to such a claim would have lapsed on September 13, 2019. Hence, her commencement of this action on November 23, 2020 rendered it time-barred as to Morningside and West. Inasmuch as Morningside and West established, prima facie, that they were entitled to judgment as a matter of law, and the plaintiff, by failing to oppose the motion, failed to raise a triable issue of fact, summary judgment must be awarded to Morningside and West dismissing the complaint insofar as asserted against them.

Accordingly, it is

ORDERED that the motion of the defendants Domingo Nunez, M.D., Mount Sinai Morningside, as successor in interest to Mount Sinai St. Luke's, and Mount Sinai West, as successor in interest to St. Luke's-Roosevelt Hospital, pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against them as time-barred is deemed to be a motion pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them as time-barred, the motion is granted, without opposition, and the complaint is dismissed insofar as asserted against the defendants Domingo Nunez, M.D., Mount Sinai Morningside, as successor in interest to Mount Sinai St. Luke's, and Mount Sinai West, as successor in interest to St. Luke's-Roosevelt Hospital; and it is further,

ORDERED that the action against the defendants Domingo Nunez, M.D., Mount Sinai Morningside, as successor in interest to Mount Sinai St. Luke's, and Mount Sinai West, as successor in interest to St. Luke's-Roosevelt Hospital, is severed; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Domingo Nunez, M.D., Mount Sinai Morningside, as successor in interest to Mount Sinai St. Luke's, and Mount Sinai West, as successor in interest to St. Luke's-Roosevelt Hospital.

This constitutes the Decision and Order of the court.

3/31/2022
DATE

JOHN J. KELLEY, J.S.C.

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