

**Omre v Nemon**

2022 NY Slip Op 31268(U)

April 13, 2022

Supreme Court, Kings County

Docket Number: Index No. 500155/2010

Judge: Genine D. Edwards

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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 13th day of April 2022.

PRESENT:

Hon. Genine D. Edwards  
Justice, Supreme Court

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DAVID OMRE,

Plaintiff,

Index. No. 500155/2010

-against-

DECISION/ORDER

BINYOMIN NEMON, DO, FAWZIA ZAWAHIR, MD,  
MEEYAPILLAI K. ZAWAHIR, M.D., P.C., and  
MUHAMMAD TAHIR, MD,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notices of Motions and Affirmations in Support.....	1-2
Affirmations in Opposition.....	3-4
Affirmations in Reply.....	5-6
Memorandum of Law in Support.....	7
Memorandum of Law in Reply.....	8

In this medical malpractice action, defendants Binyomin Nemon, D.O., Fawzia Zawahir, M.D., Meeyapillai K. Zawahir, M.D., P.C.<sup>1</sup>, and Muhammad Tahir, M.D. move, in motion sequence #56, for an order: (1) pursuant to CPLR §3211(a)(5) and §214-a, granting partial summary judgment to the moving defendants due to the expiration of the statute of limitations; alternatively (2) dismissing the complaint in its entirety pursuant to fundamental maxims of the common law that no one shall be permitted to profit by his fraud or to take advantage of his

<sup>1</sup> Defendant Fawzia Zawahir, M.D. owns Meeyapillai K. Zawahir, M.D., P.C.

wrong or to base any claim upon his iniquity; alternatively (3) dismissing the complaint in its entirety as there are no provable damages; alternatively (4) dismissing the complaint in its entirety due to lack of proximate cause and plaintiff's inability to prove a causal connection between the injuries alleged in the bills of particulars to the specific care and treatment rendered by defendants. In motion sequence #57, plaintiff moves for an order pursuant to CPLR 3212 granting plaintiff summary judgment as to liability against all defendants and granting costs and disbursements.

### **Background**

Plaintiff takes Methylphenidate, a controlled substance that treats Attention Deficit Hyperactivity Disorder (ADHD). In 2001, he moved from Missouri to New York. The first New York doctor who prescribed him Methylphenidate was non-party Dr. Thomas Koutelos. Plaintiff refilled that prescription twice in June 2001, once in August 2001, and once in October 2001.

Plaintiff developed an addiction to Methylphenidate between late 2001 and early 2002. In 2002, he filled 21 prescriptions for Methylphenidate, written by six physicians. In 2003, he filled 33 prescriptions for Methylphenidate, written by six physicians. Defendant Dr. Muhammad Tahir wrote three of those prescriptions. By 2004, plaintiff had filled 57 prescriptions for Methylphenidate, written by twelve physicians.

In 2005, plaintiff filled five prescriptions for Methylphenidate from Dr. Tahir, six prescriptions for Methylphenidate from Dr. M. Zawahir, and two prescriptions for Methylphenidate from Dr. F. Zawahir. In 2006, plaintiff filled eleven prescriptions for Methylphenidate from Dr. Tahir, six prescriptions for Methylphenidate from Dr. F. Zawahir, eight prescriptions for Methylphenidate from Dr. Nemon, and one prescription for

Methylphenidate from Dr. M. Zawahir. In 2007, plaintiff filled fourteen prescriptions for Methylphenidate from Dr. Tahir, ten prescriptions for Methylphenidate from Dr. F. Zawahir, and ten prescriptions for Methylphenidate from Dr. Nemon. In 2008, plaintiff filled three prescriptions for Methylphenidate from Dr. Tahir, five prescriptions for Methylphenidate from Dr. F. Zawahir, and five prescriptions for Methylphenidate from Dr. Nemon.

Plaintiff filled most of the prescriptions for Methylphenidate in New York, but some were filled in New Jersey, Missouri (while visiting his parents), California (while working), and Texas.

On or about May 23, 2008, the police department confiscated plaintiff's car, money, and his Methylphenidate pills.

Plaintiff commenced this action on April 9, 2010. A Note of Issue was filed on January 6, 2021. These motions ensued on July 12, 2021.

### Discussion

#### ***Defendants' Motion***

“A party moving pursuant to CPLR 3211(a)(5) to dismiss a complaint as barred by the applicable statute of limitations must establish, prima facie, that the period in which to commence the action has expired.” *Murray v. Charap*, 150 A.D.3d 752, 54 N.Y.S.3d 28 (2d Dept. 2017). “The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period.” *Id.*

Here, defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the action commenced more than two years and six months after the

alleged malpractice occurred. *See Javaid v. Jajoo*, 127 A.D.3d 1027, 9 N.Y.S.3d 79 (2d Dept. 2015). However, in opposition, plaintiff raised a triable issue of fact on whether the continuous treatment doctrine tolled the statute of limitations. *Id.* “The continuous treatment rule applies to the period if prescriptions are . . . issued by the doctor where there is a ‘continuing relationship’ with the patient.” *Murray*, 150 A.D.3d 752 quoting *Forte v. Weiner*, 214 A.D.2d 397, 624 N.Y.S.2d 596 (2d Dept. 1995); *See Chvetsova v. Family Smile Dental*, 202 A.D.3d 657, 163 N.Y.S.3d 98 (2d Dept. 2022); *Melli v. Long Island Vitreo-Retinal Consultant, P.C.*, 172 A.D.3d 849, 99 N.Y.S.3d 414 (2d Dept. 2019). The defendants’ and plaintiff’s submissions indicate that defendants continued to prescribe plaintiff medicine to treat his ADHD during the relevant period.

With respect to the remaining branches of defendants’ motion, they do not meet any of the grounds under CPLR §3211. However, it appears that those branches are requesting summary judgment, pursuant to CPLR §3212. In a medical malpractice matter, a summary judgment motion must be supported by an expert affirmation from a physician. In this instance, defendants failed to shoulder their burden since they have not proffered any supporting affirmations evidencing “[an] absence of any departure from good and accepted medical practice or that any departure was not the proximate cause of the alleged injuries.” *Post v. County of Suffolk*, 80 A.D.3d 682, 915 N.Y.S.2d 124 (2d Dept. 2011) quoting *Thurston v. Interfaith Med. Ctr.*, 66 A.D.3d 999, 887 N.Y.S.2d 655 (2d Dept. 2009). Since defendants failed to meet their prima facie burden, it is unnecessary to determine whether the opposing papers were sufficient to raise a triable issue of fact. *See Lancia v. Good Samaritan Hospital*, 201 A.D.3d 913, 162 N.Y.S.3d 120 (2d Dept. 2022).

***Plaintiff's Motion***

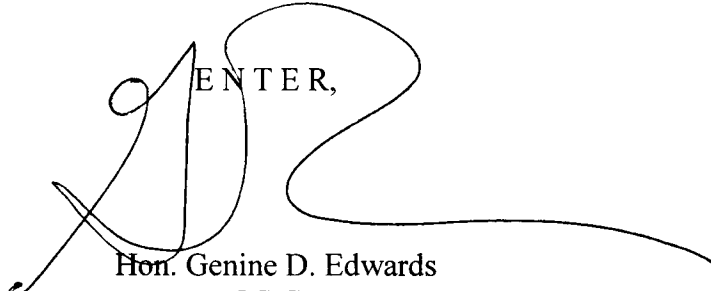
At the outset, plaintiff made the same motion in June 2019, which was denied after oral argument. “Successive motions for summary judgment are disfavored.” *Old Crompond Road, LLC v. County of Westchester*, 201 A.D.3d 806, 162 N.Y.S.3d 71 (2d Dept. 2022). Notwithstanding that fact, to obtain summary judgment, plaintiff has the burden to proffer evidence that the doctors departed from good and accepted medical practice and that those departures were a proximate cause of plaintiff’s injuries. *Bowe v. Brooklyn United Methodist Church Home*, 150 A.D.3d 1067, 56 N.Y.S.3d 180 (2d Dept. 2017); *Bey v. Neuman*, 100 A.D.3d 581, 953 N.Y.S.2d 266 (2d Dept. 2012). Plaintiff also missed the mark. Plaintiff’s experts’ opinion that defendants alleged departures caused plaintiff’s alleged injuries were conclusory and speculative, obviating judgment as a matter of law. *Id.*

Accordingly, it is

**ORDERED** that defendants’ motion is denied in its entirety; and it is further

**ORDERED** that plaintiff’s motion is denied in its entirety.

This constitutes the Decision and Order of this Court.

ENTER,  
  
Hon. Genine D. Edwards  
J.S.C.