SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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WALTER JAY BUCKLEY,

Plaintiff,

- v -

JACQUELINE I. FULOP, D.M.D., P.C., individually and doing business as JACQUIESMILES, and JACQUELINE ILONA FULOP-GOODLING, D.M.D., individually and doing business as JACQUIESMILES,

Defendants.

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INDEX NO. 805102/2017

MOTION DATE 04/29/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISS.

In this action to recover damages for dental malpractice, the defendants move to dismiss the complaint on the ground that the plaintiff filed the note of issue subsequent to the deadline set forth in the court's final discovery order. Alternatively, they move pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the action is time-barred. The plaintiff opposes the action. The motion is denied.

By so-ordered stipulation dated August 2, 2021, the court extended the time for the plaintiff to serve and file the note of issue and certificate of readiness from July 30, 2021 until October 29, 2021. The plaintiff, however, waited until December 17, 2021 to serve and file the note of issue and certificate of readiness. The decision of whether to extend the note of issue filing deadline is dedicated to the provident exercise of the court's discretion (*see Oliver v Town of Hempstead*, 68 AD3d 1079, 1080-1081 [2d Dept 2009]). The court deems the late-filed note of issue to be an application to extend the note of issue filing deadline until December 17, 2021,

and grants the application (*see* CPLR 2004 [application for extension of time may be granted even where application is made after expiration of deadline]). Although an action may be dismissed where a court providently denies an application to extend the note of issue filing deadline (*see White v City of New York*, 187 AD3d 457, 457 [1st Dept 2020]), the court notes that it has not refused to grant any such motion, and that the plaintiff, by submitting his own affidavit, an expert affirmation, and his attorney's affirmation, has established both the merits of his claim and that the late filing was due to excusable law office failure (*see* CPLR 2005; *Storchevoy v Blinderman*, 303 AD2d 672, 673 [2d Dept 2003]; *cf. White v City of New York*, 187 AD3d at 157-158 [plaintiff made no showing of merits or good cause, such as law office failure]). Moreover, inasmuch as the defendants do not claim that any discovery was outstanding, and the plaintiff's delay was only six weeks, there would be no prejudice to the defendants if the court extended the plaintiff's time to serve and file the note of issue (*see Tolkoff v Goldstein*, 185 AD3d 1085, 1088 [2d Dept 2020]). In addition, as the plaintiff correctly points out, "[a] court may not dismiss an action based on neglect to prosecute unless the statutory preconditions to dismissal, as articulated in CPLR 3216, are met" (*Patel v MBG Dev., Inc*., 41 AD3d 682, 682 [2d Dept 2007]). Since the defendants have not served a demand that the plaintiff resume prosecution within 90 days, the court is without authority to dismiss the complaint based on his delay in filing the note of issue. Hence, the court denies that branch of the defendants' motion seeking dismissal of the complaint based on the plaintiff's late filing of the note of issue.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega*

v Restani Constr. Corp., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc*., 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (s*ee id*.; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc*., 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (s*ee Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

On a summary judgment motion seeking to dismiss a cause of action 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, based on an alleged departure from good and accepted practice, 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]). As with claims alleging a departure from good and accepted practice, claims alleging lack of informed consent are subject to the continuous treatment doctrine (*see Murray v Charap*, 150 AD3d at 753).

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]).

The crux of the plaintiff's claim is that the defendants departed from good and accepted practice in employing the Invisalign orthodontic care protocol, causing him to sustain continual mouth and gum pain, and further causing him to require extraction of the anterior mandibular teeth designated as #25 and #26, thereafter subjecting him to grafts and the necessity of dental implants and a bridge. The plaintiff asserted that use of this protocol was contraindicated and that the defendants, after realizing that the method was failing, should have suspended that

treatment and instead performed other procedures that would have minimized the possibility that the plaintiff would require treatment over the next several years.

As explained by the plaintiff's expert orthodontist, Invisalign employs clear plastic appliances, rather than using a full arch and visible wiring hardware. The expert asserted that the defendant failed properly to evaluate the bone of the plaintiff's mandibular anterior before implementing an improper Invisalign treatment plan. The expert further averred that the defendants failed to recognize that the improperly constructed "ClinCheck" orthodontic devices that they approved would and did cause an improper 2 mm -2.5 mm buccal movement of the apical aspect of the plaintiff's mandibular anterior teeth, thus causing the need for extraction, the eventual loss of teeth #25 and #26, and need fur surgical grafting and prosthetic placement of a bridge in the subject area. The expert also opined that the defendants failed to provide the plaintiff with required disclosure that the Invisalign Treatment Plan would and did cause the adverse buccal movement of the apical aspect of mandibular anterior teeth.

The expert averred that the defendants

> "did not know how much buccal bone Mr. Buckley had in his mandibular anterior and it was a departure from standard practice for Dr. Fulop not to know that fact before proceeding to orthodontically move the teeth in the mandibular anterior. . . [S]he indicates that she did not need to know how much buccal bone was in . . . Buckley's mandibular anterior before commencing treatment. Furthermore, it is clear that Dr. Fulop did not even take steps to determine the amount of bone Mr. Buckley had in his mandibular anterior before creating a treatment plan for the movement of those teeth. In fact, Dr. Fulop indicates . . . that she does not know how much buccal bone would be present for a typical Patient and does not recall whether she learned that in her orthodontics program. A doctor should know how much buccal bone a typical patient has, and how much Patient Buckley had, before proceeding with treatment."

Upon review of x-ray scans, the expert concluded that it

> "reflect[ed] a complete resorption of the apical aspect of tooth #25, rendering it hopeless and requiring immediate removal of that tooth, in the hope that the discontinuance of the ClinCheck treatment plan, may salvage the adjacent mandibular anterior teeth, including tooth #26. Although Dr. Fulop's and her office were professionally required to inform Patient Buckley of the dire state of his mandibular anterior, they instead failed to disclose his condition and 'splinted' the subject teeth with a 'wire' appliance. According to Mr. Buckley, . . . Fulop's

> office informed him that the splinting of these teeth would be required for some time to 'heal the bone.' In my review of Dr. Fulop's records, it disclosed a 4/8/14 note with a directive to . . . Buckley that he should refrain from eating hard food to allow for the 'bone to heal.' This note reflects the negligent and improper analysis of the plight of his mandibular anterior and the fact that the time of that note, tooth #25 was already hopeless and the continued 'splinting' through a 'wire' would in no way address the negligent 2 - 2.5 millimeter movement of the apical aspect of teeth #25 and #26."

The expert concluded that the defendants departed from good practice by employing, and thereafter failing to suspend, an orthodontic protocol permitting buccal movement of the apical portion of teeth #25 and #26 that, in turn, resulted in eventual bone loss and eventual root amputation of tooth #25 by Dr. Anthony M. Polimeni in January 2016 and tooth #26 in March 2016. The expert further opined that the defendants were required to disclose the risks of the Invisalign protocol before the commencement of treatment and, when the treatment ultimately failed, to disclose that fact to the plaintiff. The expert concluded that the defendants did not satisfy this obligation and, thus, failed to obtain the plaintiff's fully informed consent to the procedure.

The defendants submitted records purporting to show that the plaintiff's last date of treatment was April 17, 2014, and argued that, as a consequence, the commencement of this action on March 13, 2017 rendered the action time-barred. They thus established their prima facie entitlement to judgment as a matter of law. The plaintiff, however, raised a triable issue of fact as to whether his date of last treatment involving the adjustment of the wire appliance was in December 2015, thus making this action timely commenced.

In his affidavit, the plaintiff expressly asserted that he visited the defendants' Manhattan office continuously after April 17, 2014, through and including December 2015. Specifically, he stated that, from the date that the subject wire appliance was installed in the spring of 2014, he visited the defendants' Manhattan office every six to eight weeks to address issues arising from its placement, conferring with associate dentists employed by the defendants, including a Dr. Chris, and "was assured at each visit that I should stay the course and obtain a repair/

replacement of the wire and that the bone would eventually heal." He asserted that he did not completely terminate his relationship with the defendants until February 2016, as he continued to trust the defendants to correct any problems arising from the Invisalign treatment, and deemed them to be his orthodontists in connection with that procedure. He averred that his visits up until April 17, 2014 were to the defendants' Syosset, New York, office, and that the records relied upon by the defendants were limited to his visits there. The plaintiff also challenged the completeness of the defendants' records by submitting a portion of his own insurance records, showing that he visited the defendants on May 12, 2014.

The plaintiff also pointed out that the defendants' records included an April 17, 2014 note, indicating that the defendants "removed attachments bonded lower permanent retainer." As the plaintiff's expert periodontist explained in his affirmation, the April 17, 2014 entry described an aspect of the treatment called "splinting," which is employed in an effort to "stabilize teeth after orthodontic movement," and involved a continued and periodic repair of a wire used to accomplish the splinting of the subject mandibular anterior teeth #25 and #26 that the plaintiff eventually lost. As the expert developed the issue,

> "[i]n reviewing Mr. Buckley's affidavit, he states among other things that "1) he continued to visit the dentist at Dr. Fulop's office for the "repair/replacement" of what he describes as a 'wire'; 2) that the 'wire' would address his continued 'mobility' in his mandibular anterior and that such wiring would promote the 'bone to heal.' Mr. Buckley indicates that he continued to trust the alleged assertions of dentist at Dr. Fulop's office, that he should 'stay the course' with the 'wiring' to address the 'mobility' and promote the 'bone to heal.' I have reviewed the x-rays of the offices of Dr. Fulop, Dr. Shaskan and Dr. Polimeni, and observe a 'wiring' of the mandibular anterior present from the spring of 2014 through and including the corrective treatment implemented by Drs. Polimeni and Rubinstein in 2016. It is my opinion that the 'wiring' of the mandibular anterior was placed by Dr. Fulop's office and is reflected in the office note (4/17/14) 'removed attachments bonded lower permanent retainer,' which according to the Fulop record is part of the rendered treatment."

The expert continued that the records reflect that neither Dr. Shaskan nor Dr. Polimeni installed any wiring or performed any splinting in 2016. Hence, the expert's explanation supports the plaintiff's contention that he had to return to treat with the defendants to address the wiring

apparatus until at least December 2015, after which he terminated the dentist/patient relationship with the defendants and began treatment with Drs. Shaskan and Polimeni.

The plaintiff commenced this action on March 13, 2017 and, thus, the action would be timely if the plaintiff's last treatment with the defendants occurred on September 13, 2014 or thereafter. The plaintiff raised a triable issue of fact with both his affidavit and his expert's affirmation as to whether he continuously treated with the defendants in connection with the same teeth and conditions on any date after September 13, 2014.

The court notes, moreover, that the Appellate Division, First Department, has not adopted the bright-line rule articulated by the Appellate Division, Second Department in decisions such as *Sherry v Queens Kidney Ctr*. (117 AD2d 663, 664 [2d Dept 1986]), to the effect that, even where treatment is sought for the same condition over a long period of time, "that treatment is not considered continuous when the interval between treatments exceeds the period of limitation." Rather, in those situations where the later complaints are indeed related to the earlier complaints, examinations, and treatment, the First Department has articulated a more nuanced rule that takes account of a "plaintiff's belief" that he or she "was under the active treatment of defendant at all times, so long as" the treatments did not "result in an appreciable improvement" in his or her condition (*Devadas v Niksarli*, 120 AD3d 1000, 1006 [1st Dept 2014]). Even where a "plaintiff pursued no treatment for over 30 months after" the initial, allegedly negligent surgical treatment (*id*. at 1005),

> "[i]n determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he [or she] sought such treatment (*see Rizk v Cohen*, 73 NY2d 98, 104 [1989]). Further, this Court has suggested that a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician (*Ramirez v Friedman*, 287 AD2d 376, 377 [1st Dept 2001]). Plaintiff's testimony that he considered defendant to be his '[doctor] for life,' and that the efficacy of the [treatment] was guaranteed, was a sufficient basis for the jury to conclude that such a relationship existed"

(*id*.at 1006). Where such a situation obtains,

> "[c]ases such as *Clayton v Memorial Hosp. for Cancer & Allied Diseases* (58 AD3d 548 [1st Dept 2009]) are inapplicable . . . , to the extent they reiterate that 'continuous treatment exists "when further treatment 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 that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past"' (58 AD3d at 549, quoting *Richardson v Orentreich*, 64 NY2d at 898-899)"

(*id*. at 1007).

Applying the First Department's articulation of the law, as this court must (*see D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]), even if there were a large gap between April 17, 2014 and his next treatment date, the fact that the plaintiff considered the defendants to be his regular treating orthodontists during that gap would be sufficient to invoke the continuous treatment doctrine.

In light of the foregoing, that branch of the defendants' motion seeking summary judgment dismissing the claim as time-barred must be denied.

Accordingly, it is

ORDERED that the defendants' motion is denied.

This constitutes the Decision and Order of the court.

6/27/2022
DATE

JOHN J. KELLEY, J.S.C.

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