

Decouite v Chakote

2022 NY Slip Op 32448(U)

January 10, 2022

Supreme Court, Queens County

Docket Number: Index No. 710345/2018

Judge: Peter J. O'Donoghue

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **PETER J. O'DONOGHUE** IAS PART MD
Justice

SHARON C. DECOUITE,

Plaintiff,

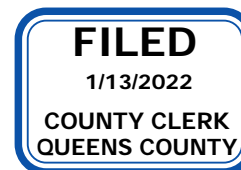
-against-

Index No. : 710345/2018

Motion Date: 11/24/21

Motion Seq. No.: 1

DR. JYOTI CHAKOTE, EMPIRE MEDICAL SERVICES,
DR. KYI W YU, MD, DR. YU'S FAMILY PRACTICE
PLLC, DR. DAVID LIFSCHUTZ, M.D., INTEGRATED
NEUROLOGICAL ASSOCIATES, PLLC,



Defendants.

The following papers numbered as set forth below and read on this motion by Defendants DR. JYOTI CHAKOTE and EMPIRE MEDICAL SERVICES for an Order (1) Pursuant to CPLR § 3126, dismissing this action for failure to comply with the Court's Preliminary Conference order and directions at later court conferences and Defendants' various demands; or, in the alternative, (2) Pursuant to CPLR § 3211(a) (5) and CPLR § 214-a, dismissing with prejudice all of plaintiff's claims against DR. JYOTI CHAKOTE and EMPIRE MEDICAL SERVICES for medical malpractice and failure to obtain informed consent for all dates of treatment prior to January 6, 2016, on the ground that such claims accrued more than 2 ½ years before Plaintiff commenced this action and were barred by the statute of limitations at the time Plaintiff commenced this action; and (3) Pursuant to CPLR § 3126, granting a conditional order dismissing the action if Plaintiff does not provide all outstanding discovery within 30 days pursuant to CPLR 3124; and cross motion by defendants, Dr. David Lifschutz and Integrated Neurological Associates, PLLC for an Order (1) Pursuant to CPLR § 3211(a) (5) and CPLR § 214-a, dismissing with prejudice all of plaintiff's claims against Dr. David Lifschutz and Integrated Neurological Associates, PLLC for medical malpractice and failure to obtain informed consent for all dates of treatment prior to January 6, 2016, on the ground that such claims accrued more than 2 ½ years before Plaintiff commenced this action and were barred by the statute of limitations at the time Plaintiff commenced this action, and that no continuous

treatment exists for the dates of service prior to January 6, 2016; and (2) Pursuant to § 3126, dismissing this action for failure to comply with the Court's Orders and directions at later Court conferences and Defendant's various demands; and (3) Pursuant to CPLR § 3126, granting a conditional order dismissing the action if Plaintiff does not provide all outstanding discovery within 30 days pursuant to CPLR 3124; and (2) Pursuant to CPLR § 3126, granting a conditional order dismissing the action if Plaintiff does not provide all outstanding discovery within 30 days pursuant to CPLR 3124.

PAPERS
NUMBERED

N.M.-Affidavits-Exhibits.....	34-61
N.C.M.-Affidavits-Exhibits.....	61-71
Opposition Papers-Exhibits.....	72-73;74-75;76-80
Reply Papers-Exhibits.....	81; 82-84

Upon the foregoing papers it is ordered that the within motion and cross motion are decided as follows:

The within action was commenced on July 6, 2018. Plaintiff alleges, *inter alia*, that the moving and cross moving defendants failed to timely diagnose and treat plaintiff's right shoulder condition, which she allegedly sustained as a work-related injury on July 29, 2005, resulting in the need for surgery.

The branch of the motion by Defendants DR. JYOTI CHAKOTE and EMPIRE MEDICAL SERVICES for an Order pursuant to CPLR § 3211(a)(5) and CPLR § 214-a, dismissing with prejudice **all** of plaintiff's claims against DR. JYOTI CHAKOTE and EMPIRE MEDICAL SERVICES for medical malpractice and failure to obtain informed consent for **all dates of treatment prior to January 6, 2016**, on the ground that such claims accrued more than 2 ½ years before Plaintiff commenced this action and were barred by the statute of limitations at the time Plaintiff commenced this action is denied.

Plaintiff began treating with defendant Empire Medical Services from August 1, 2005 to September 14, 2010 during which time she was treated by Dr. Vishnu Chakote (hereinafter "Dr. V. Chakote") who is not a named defendant in this action. Plaintiff testified that her worker's compensation case settled in 2010 and upon settlement she "started going elsewhere from Dr. Chakote because he was recommending all these EMGs, so I was done with

that" and "I left altogether after my case was closed". Plaintiff testified that between 2010 and 2015, she would see defendant Dr. Yu, her primary care physician, if she needed medical attention. She stopped treating with Dr. Yu when Dr. Yu closed the office where plaintiff would go for medical attention. On December 1, 2015 plaintiff first treated with defendant Dr. Jyoti Chakote (hereinafter "defendant Dr. J. Chakote"), the spouse of Dr. Vishnu Chakote and continued treating with defendant Dr. J. Chakote until May 24, 2016. Dr. J. Chakote's office notes for an office visit on December 14, 2015 contain a handwritten entry, which although difficult to read in its entirety, reads "MRI of Rt shoulder". The next reference to the right shoulder is contained in Dr. J. Chakote's typed notes for an office visit on January 7, 2016.

Movant Empire Medical Services has established its *prima facie* entitlement to judgment as a matter of law with respect to treatment rendered prior to January 6, 2016 specifically from August 1, 2005 to September 14, 2010. Plaintiff, in opposition, argues that the statute of limitations is tolled by the application of the continuous treatment doctrine in light of the fact that plaintiff returned to Empire Medical Services for treatment on December 1, 2015 which continued through May, 2016. The Court finds that the continuous treatment doctrine does not apply to toll the statute of limitations with respect to the dates of treatment from August 1, 2005 to September 14, 2010. "Under the continuous treatment doctrine, "the time in which to bring a malpractice action is stayed 'when the course of treatment which includes the wrongful acts or [***9] omissions has run continuously and is related to the same original condition or complaint' " (*McDermott v Torre*, 56 NY2d 399, 405, quoting *Borgia v City of New York*, supra, 12 NY2d, at 155)... One of the elements of continuous treatment is that **"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"** (emphasis added) (see *Allende v. New York City Health & Hosps. Corp.*, 90 N.Y.2d 333 [CANY 1997]). "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 [**165] treatment necessarily interrupts the course of treatment itself (see *Massie v Crawford*, 78 NY2d 516, 519, 583 NE2d 935, 577 NYS2d 223 [1991]; see also *Coyne v Bersani*, 61 NY2d 939, 940, 463 NE2d 371, 474 NYS2d 970 [1984];

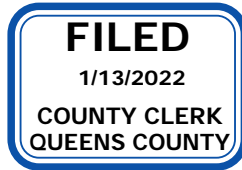
Siegel v Kranis, 29 AD2d 477, 480, 288 NYS2d 831 [1968]). Plaintiff's testimony clearly establishes that in 2010 plaintiff terminated her relationship with moving defendant with no intention of returning and that any trust and confidence which may have existed no longer existed.

Movants Dr. Jyoti Chakote and Empire Medical Services have established their *prima facie* entitlement to judgment as a matter of law with respect to treatment rendered prior to January 6, 2016 by Dr. J. Chakote at Empire Medical Services specifically December 1, 2015 and December 14, 2015. Plaintiff, in opposition, submits plaintiff's deposition testimony wherein she testified that when she met with Dr. J. Chakote in December, 2015 she complained about her arm and that she wanted blood work done and a check-up. Dr. J. Chakote's office notes for an office visit on December 1, 2015 do not reference an arm complaint. Her office notes for an office visit on December 14, 2015 contain a handwritten entry, which although difficult to read in its entirety, reads "MRI of Rt shoulder". The next reference to the right shoulder is contained in Dr. J. Chakote's typed notes for an office visit on January 7, 2016: "limited rt shoulder mvt, specially abduction"; "Unsp rotatr-cuff tear/ruptr of unsp shoulder, not: as above, get mri of rt shoulder". The Court finds that the continuous treatment doctrine applies with respect to the December 14, 2015 office visit; and that a question of fact exists as to the issue of the applicability of the continuous treatment doctrine with respect to the December 1, 2015 office visit.

The branch of the cross motion by defendants Dr. David Lifschutz and Integrated Neurological Associates, PLLC for an Order (1) Pursuant to CPLR § 3211(a)(5) and CPLR § 214-a, dismissing with prejudice all of plaintiff's claims against Dr. David Lifschutz and Integrated Neurological Associates, PLLC for medical malpractice and failure to obtain informed consent for all dates of treatment prior to January 6, 2016, on the ground that such claims accrued more than 2 ½ years before Plaintiff commenced this action and were barred by the statute of limitations at the time Plaintiff commenced this action, and that no continuous treatment exists for the dates of service prior to January 6, 2016 is denied. Defendant Dr. Lifschutz testified that during plaintiff's first office visit (07/24/2014) which was a consultation she listed her physical complaints which included right shoulder pain. He further testified that following this consultation he implemented a Plan of Action. Clearly this plan of action was based on plaintiff's complaints including right shoulder pain. Dr. Lifschutz treated plaintiff until 07/07/2016. The action against these defendants is timely.

The branches of the motion and cross motion for an Order pursuant to CPLR § 3126, dismissing this action for failure to comply with the Court's Preliminary Conference order and directions at later court conferences and Defendants' various demands are denied with leave to renew orally at the next telephone conference to be held on 04/20/2022 pursuant to the following directives: Within 30 days of service of a copy of the within order with Notice of Entry, plaintiff shall serve movants and cross movants with original UNREDACTED authorizations corresponding to the documentation e-filed as exhibits to plaintiff's opposition to movants' and cross movants' motions; as well as an affidavit from plaintiff with respect to her inability to provide the demanded worker's compensation documentation and any other demanded discovery and the reasons why. Plaintiff's counsel's representations, written or oral, are not sufficient to comply with this Order.

Dated: January 10, 2022



.....
Peter J. O'Donoghue, J.S.C.

