

Pinto v Mount Sinai Health Sys. Inc.
2022 NY Slip Op 32505(U)
July 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 515130/2015
Judge: Bernard J. Graham
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

MARINETTE PINTO,

Index No.: 515130/2015

Plaintiff,

DECISION/ORDER

-against-

Hon. Bernard J. Graham
Supreme Court Justice

MOUNT SINAI HEALTH SYSTEMS, INC. and
"JOHN DOES" 1-10 and "JANE DOES" 1-10,
Intended to be those physicians, nurses, or other medical
Personnel, employed by or working for Defendant MOUNT
SINAI HEALTH SYSTEMS, INC., whose identities are
Presently unknown, who rendered medical care to Plaintiff,
While a patient receiving medical care and treatment at
MOUNT SINAI BETH ISRAEL MEDICAL CENTER,
And NYU HOSPITALS CENTER and "JOHN DOES"
1-10 and "JANE DOES" 1-10, intended to be those
Physicians, nurses or other medical personnel, employed
By or working for Defendant NYU HOSPITALS CENTER,
Whose identities are presently unknown,

Defendants

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: dismiss plaintiff's complaint as time-barred, pursuant to CPLR §3211(a)(5)

Papers	NYSCEF Doc. #
Notice of Motion and Affidavits Annexed.....	<u>154-167</u>
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	<u>169-172</u>
Replying Affidavits.....	<u>174-176</u>
Exhibits.....	_____
Other:	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant, NYU Hospitals Center ("NYU") has moved (seq. 9), pursuant to CPLR §3211(a)(5), for an Order awarding a dismissal of plaintiff's complaint upon the grounds that the causes of action that are set forth in plaintiff's complaint as against the defendants are time-barred by the applicable Statute of Limitations.

Counsel for the plaintiff, Marinette Pinto (“plaintiff”), opposes the relief sought by defendants in its motion, arguing that the treatment provided to the plaintiff by NYU was continuous, as the plaintiff continued to suffer from Crohn’s disease, which was allegedly misdiagnosed as appendicitis, and as such, plaintiff’s complaint is not barred by the Statute of Limitations.

Background:

The within action sounding in medical malpractice was commenced by the filing of a Summons and Complaint with the Clerk of this Court, on or about September 17, 2015. Issue was joined, on or about November 24, 2015, by the service of the Verified Answer of defendant NYU.

The plaintiff has alleged claims of medical malpractice as against NYU for the time period beginning September 30, 2012 and continuing through October 2, 2014.

In June of 2018 this action against NYU was consolidated with a subsequently filed action against former defendants Mt. Sinai Beth Israel (“Mt. Sinai”), who were discontinued with prejudice on May 6, 2019.

A deposition of the plaintiff was held on April 7, 2021 and completed on April 27, 2021.

Argument of the instant motion was heard remotely via Microsoft Teams on February 3, 2022 before the undersigned.

Facts:

Plaintiff, then 21 years old, first presented to NYU on September 30, 2012, complaining of severe abdominal pain and cramping, as well as nausea and vomiting. Following an extensive

work-up, which included imaging and other diagnostic studies indicative of non-perforated appendicitis, the plaintiff was admitted to NYU with a diagnosis of acute appendicitis. An appendectomy was performed on October 1, 2012, and plaintiff was discharged home the following day (October 2, 2012).

On October 10, 2012, plaintiff returned to the NYU emergency department with complaints of intermittent abdominal pain. Following various diagnostic testing it was determined that plaintiff likely had irritable bowel disease, for which she was already seeing a gastroenterologist, and was discharged with instructions to follow up with the NYU surgeon who performed the appendectomy and her gastroenterologist.

Plaintiff returned to NYU on October 12, 2012 and was seen by a surgical PA who had assisted the NYU surgeon in the performance of the October 1, 2012 appendectomy. At this visit, plaintiff was experiencing lower quadrant abdominal pain, and indicated that she was being evaluated by her gastroenterologist for suspected inflammatory bowel disease, and that an EGD and colonoscopy had been scheduled with that gastroenterologist. The record indicates that the plaintiff was instructed to follow up with the NYU surgeon "as needed." (See Defendant's Exhibit "J," p. 14). In addition, plaintiff was given a copy of the September 30, 2012 abdominal CT, along with copies of the October 1, 2012 operative and pathology reports "for her gastroenterologist to review." (See Defendants Exhibit "J", p. 15).

On February 8, 2013, plaintiff presented to Mt. Sinai for a colonoscopy. Based upon the findings from the colonoscopy, the plaintiff underwent a laparoscopic ileocolic resection surgical procedure at Mt. Sinai on March 7, 2013.

The following year, on August 13, 2014, plaintiff presented to David P. Hudesman, M.D. at his NYU office, and after examination, a colonoscopy was scheduled for October 2, 2014. The

October 2, 2014 colonoscopy at NYU was the first time plaintiff received treatment from NYU since October 12, 2012, when plaintiff had a follow-up visit after the appendectomy.

Parties' Contentions:

Here, this Court is presented with the issue as to whether the continuous treatment doctrine applies to the claims based upon the defendant NYU's alleged failure to diagnose the plaintiff's Crohn's disease on October 12, 2012.

In support of the Motion to Dismiss on behalf of NYU, counsel for this defendant argues that the claims against NYU are time-barred, as they were commenced following the expiration of the 2 ½ year statute of limitations for medical malpractice actions. Defendant asserts that following the post-operative visit on October 12, 2012, the plaintiff received no further treatment from NYU until she presented for a colonoscopy two years later in October 2014. Defendant further argues that the treatment related to the purported misdiagnosis of appendicitis ended on October 12, 2012 (which was the last date plaintiff received any treatment related to the appendectomy at NYU), and the statute of limitations for said treatment expired on April 12, 2015 (four months prior to the commencement of the action on September 17, 2015).¹

Plaintiff, by their attorneys, opposes the relief sought in the motion by arguing that the two-year gap between the plaintiff's treatments at NYU (from October 2012 to August 2014) did not terminate treatment, and that each of her visits over the course of her treatment were for the same or related illness or injury, continuing after the alleged acts of malpractice. Plaintiff asserts that the course of treatment for plaintiff's Crohn's disease, which is the condition giving rise to

¹ Defendant, in their papers, asserted that the plaintiff was required to initiate this action no later than April 15, 2013, and that the commencement of the action against NYU on September 17, 2015, was over two years after the expiration of the applicable statute of limitations and is therefore time-barred. However, this seems to be an error, as April 15, 2013 is only six months following the October 12, 2012 follow-up visit.

the lawsuit, continued up until her last visit to NYU on August 17, 2015, which was one month prior to the commencement of plaintiff's lawsuit, and as such, the continuous treatment doctrine applies, and the action is timely.

Discussion:

As this action sounds in medical malpractice, the action must have been commenced within two years and six months of the alleged act or omission, or last treatment where there is continuous treatment for the same illness, injury, or condition which gave rise to the alleged act or omission. CPLR §214-a.

"A defendant who seeks dismissal of a complaint pursuant to CPLR §3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired." LaRocca v DeRicco, 39 AD3d 486 [2d Dept 2007]; quoting Gravel v Cicola, 297 AD2d 620 [2d Dept 2002].

This Court finds that the defendant has presented sufficient evidence to meet this burden, in the form of hospital records establishing that plaintiff concluded her treatment related to the appendectomy on October 12, 2012 and did not return to NYU until October 2, 2014 for a colonoscopy related to her Crohn's disease. Defendant further asserts that the continuous treatment doctrine does not apply because the treatment in 2014 was for a different condition, allegations of a defendant's "failure to timely diagnose and establish a course of treatment for [the plaintiff's] condition [are] omissions that do not amount to a 'course of treatment.'" Baptiste v Harding-Marin, 88 AD3d 752 [2d Dept 2011].

To establish that the doctrine of continuous treatment applies, 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.” Baptiste v Harding-Marin, 88 AD3d 752 [2d Dept 2011]. The “further treatment must be explicitly anticipated by both the physician and patient, as demonstrated by a regularly-scheduled appointment for the near future, which was agreed upon at the last visit and conforms to the periodic appointments relating to the treatment in the immediate past.” Kaufmann v Fulop, 47 AD3d 682, 684 [2d Dept 2008].

In opposition, plaintiff’s counsel asserts that, despite a gap of two years,² plaintiff continued to treat with NYU for the same underlying complaints, which were misdiagnosed in 2012, and that her last day of treatment regarding these complaints was August 17, 2015. Based upon the assertions made by plaintiff’s counsel, this Court finds that plaintiff has raised a question of fact with regard to the application of the continuous treatment doctrine, specifically whether the treatment of plaintiff’s Crohn’s disease in 2014 can be considered treatment for “the same condition or complaint underlying the claim of malpractice.” Baptiste v Harding-Marin, 88 AD3d 752. The record does reflect that plaintiff had abdominal pain prior to and following the appendectomy, was receiving treatment from a gastroenterologist for abdominal pain, and returned to NYU for a colonoscopy due to continued abdominal pain. However, there is insufficient evidence in the record to reach a determination as a matter of law as to whether the appendectomy (and related treatment) and the Crohn’s disease can be considered treatment for the same underlying complaint of plaintiff’s severe abdominal pain. The Court further considered that there has been limited discovery to date, which discovery may be dispositive of the underlying issue regarding the application of the continuous treatment doctrine.

² The Court of Appeals has held that “a gap in treatment longer than the statute of limitations is not per se dispositive of defendant’s claim that the statute has run.” Lohnas v Luzi, 30 NY3d 752 [2018]. As such, the two-year gap in treatment has no bearing on the underlying issue of fact regarding the nature of the treatment rendered.


Conclusion:

Accordingly, defendant's motion to dismiss, pursuant to CPLR §3211(a)(5), is denied with leave to renew upon the completion of discovery and the submission of affirmations from medical experts for the respective parties.

This shall constitute the decision and order of this Court.

Dated: July 11, 2022
Brooklyn, NY

ENTER


Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM