

Estwick v Surahio

2023 NY Slip Op 30982(U)

March 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 506228/2014

Judge: Consuelo Mallafre Melendez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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JOAN ESTWICK, as the PROPOSED Administrator
of the Estate of MAUDLYN ROSS, and
JOAN ESTWICK, Individually,

Plaintiff,

-against-

DECISION & ORDER

Index No.: 506228/2014

Mo. Seq.: 10

MUZAFAR SURAHIO and PREFERRED HEALTH
PARTNERS and PREFERRED HEALTH PARTNERS,
As Successor in Interest of the CENTRAL BROOKLYN
MEDICAL GROUP,

Defendants.

----- X

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion: NYSCEF #s 140, 141-150; 152-156; 157.

Defendants Muzafar Surahio, M.D. and Preferred Health Partners (“PHP”) and Preferred Health Partners as Successor in Interest of the Central Brooklyn Medical Group (collectively “Defendants”) move this court for an order 1) dismissing with prejudice all of Plaintiff’s claims for medical malpractice on all dates of treatment prior to January 9, 2012 as to defendant, PHP, pursuant to CPLR § 3211(a)(5) and CPLR § 214-a; 2) dismissing with prejudice all of Plaintiff’s claims for medical malpractice on all dates of treatment prior to January 9, 2012 as to defendant, Dr. Surahio, pursuant to CPLR § 3211(a)(5) and CPLR § 214-a; and 3) partially dismissing the second cause of action for wrongful death with prejudice pursuant to CPLR § 3211(a)(7) and EPTL § 5-4.1 as to the moving defendants, for all treatment dates prior to January 14, 2010. Plaintiff Joan Estwick, as the Administrator of the Estate of Maudlyn Ross and individually, submitted opposition to this motion.

This action was commenced by the filing of a Summons and Complaint on or about July 9, 2014. Defendants argue that claims as to Defendants for dates prior to January 9, 2012 are

time barred by the 2 ½ year statute of limitations pursuant to CPLR § 214-a. As such, claims for medical malpractice for all dates of treatment prior to January 9, 2012 must be dismissed as to the moving Defendants pursuant to CPLR § 3211(a)(5) and CPLR § 214-a. Defendants further argue that the cause of action for medical malpractice must be dismissed in its entirety with prejudice as to defendant Dr. Surahio pursuant to CPLR § 3211(a)(5) and CPLR § 214-a since it is undisputed that the last date of treatment by Dr. Surahio occurred prior to January 9, 2012. Defendants also argue that the wrongful death claim should be partially dismissed for all treatment dates prior to January 14, 2010, since such claims accrued more than 2½ years before the decedent's death and were barred at the time of her death by the statute of limitations. Plaintiff contends that the continuous treatment doctrine tolls the statute of limitations and all claims have been timely commenced against each defendant. In their reply, Defendants argue that they “cannot be held responsible for the continuous treatment of a condition that plaintiff has failed to establish existed during the at-issue period.”

In the instant matter, Dr. Surahio worked as a Primary Care Physician at PHP while treating Ms. Ross. Ms. Ross first presented to Dr. Surahio at PHP, as her primary care physician, on June 6, 2007, with complaints of a nasal drip. Ms. Ross presented to Dr. Surahio at PHP again on August 28, 2007, for a postnasal drip. A consultation with an ear, nose, and throat (“ENT”) doctor was ordered, and Ms. Ross presented to Dr. Sheldon Palgon at PHP on September 27, 2007 for an ENT consult. The notes for the September 27, 2007 visit indicate that Ms. Ross had a thyroid disorder, that she had been on thyroid medication in the past and she was diagnosed with chronic thyroid disease. Ms. Ross next presented to PHP on November 1, 2007 and was seen in the ENT department by Dr. Sheldon Palgon who noted that she had goiter and thyromegaly.

On February 25, 2008, Ms. Ross was seen again in the ENT department by Dr. Sheldon Palgon. In their affirmation, Plaintiff's expert states "Dr. Palgon's notes reflect that Ms. Ross had a fine needle biopsy (FNA Bx) and that she should have a repeat biopsy in six months." Dr. Palgon's notes from that visit also indicate that Ms. Ross had "chronic lymphocytic thyroiditis." Ms. Ross presented to Dr. Surahio at PHP on April 18, 2008 for a chronic cough. The patient saw Dr. Surahio for foot pain on July 16, 2008 at which time Dr. Surahio ordered follow-up blood tests, including for her thyroid. Ms. Ross again presented to Dr. Surahio for chronic cough on August 15, 2008, about which Dr. Surahio testified that he did not examine her thyroid because he was not concerned about her thyroid.

On July 23, 2009 and again on March 22, 2010, Dr. Surahio at PHP examined Ms. Ross's neck, and noted each time that her throat appeared normal. Ms. Ross presented to Dr. Surahio at PHP again on April 14, 2010. The medical note from that date indicates that upon physical exam Dr. Surahio found that Ms. Ross's neck/thyroid were "supple without adenopathy or enlarged thyroid." Dr. Surahio testified that it is possible the computer automatically inputted information. Ms. Ross presented to Dr. Surahio at PHP on December 13, 2010, due to a concern of an unexplained acute weight loss. Following an examination, Dr. Surahio noted that Ms. Ross had an enlarged thyroid gland. Dr. Surahio ordered ultrasounds and bloodwork and Ms. Ross underwent an ultrasound of her thyroid on January 6, 2011. The results of the ultrasound indicated that there were "bilateral complex masses in the thyroid and that Ms. Ross's thyroid was enlarged" and Dr. Surahio recommended that the patient undergo nuclear medicine testing. Dr. Surahio testified that although he left a referral at the front desk of his office for Ms. Ross have a thyroid scan, unfortunately, Ms. Ross did not receive the referral.

The notes from the May 19, 2011 visit state that Ms. Ross's neck was found to be supple and that her thyroid is "symmetrical without thyromegaly, masses or palpable nodules."

However, Dr. Surahio testified that he did not examine Ms. Ross's neck on that day and that he did not recall discussing with her if she had the thyroid scan done. Dr. Surahio stopped working at PHP in September 2011. On October 21, 2011, Ms. Ross presented to PHP and was seen by physician assistant, Maria Garcia. Ms. Ross underwent a physical exam, and no problems or issues were noted. Ms. Ross again presented to PHP on February 29, 2012 and was seen by Dr. Warren Goins. Ms. Ross again underwent a physical exam, and no issues or problems were noted.

Ms. Ross next received treatments at New York Methodist Hospital between April 24, 2012, and May 1, 2012. PHP's records indicate that Defendant PHP was provided with the records for that treatment. These hospital records state that Ms. Ross's elevated thyroglobulin "could represent the presence of thyroid malignancy but it cannot be completely understood until the final pathology report." During Ms. Ross's visit to PHP on May 17, 2012, she was again noted to have chronic thyroid disease. On May 17, 2012, Dr. Goins of PHP referred Ms. Ross to a Dr. Jatin Shah for a second opinion. According to Plaintiff's expert, Dr. Jatin Shah is a neck surgeon and is affiliated with Memorial Sloan Kettering Cancer Center. Ms. Ross died on July 14, 2012 due to thyroid cancer.

Pursuant to CPLR 214-a, "[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of." *Gomez v. Katz*, 61 AD3d 108, 111 [2d Dept. 2009]; see generally *Davis v. City of New York*, 38 NY2d 257, 259 [1975]. However, under the continuous treatment doctrine, the statute of limitations does not begin to run until the end of the course of treatment so long as "(1) the

patient continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period; (2) the course of treatment was for the same conditions or complaints underlying the plaintiff's medical malpractice claim; and (3) the treatment is continuous.” *Weinstein v. Gewirtz*, 208 AD3d 717, 719 [2d Dept. 2022], citing *Wright v. Southampton Hosp.*, 187 AD3d 1242, 1244 [2d Dept. 2020], quoting *Mello v. Long Is. Vitreo-Retinal Consultant, P.C.*, 172 AD3d 849, 850 [2d Dept. 2019].

A physician's failure to properly diagnose a condition that prevents treatment altogether does not toll the statute of limitations under this doctrine. *Gomez v. Katz*, 61 AD3d at 112; see *Young v. New York City Health & Hosps. Corp.*, 91 NY2d 291, 297 [1998]; *Nykorchuck v. Henriques*, 78 NY2d 255, 259 [1991]; *McDermott v. Torre*, 56 NY2d 399, 406 [1982]. However, where a defendant doctor failed to make a correct diagnosis as to a patient's underlying condition, and “the defendant treated the plaintiff continuously over the relevant time period for symptoms that are ultimately traced to that condition” the continuous treatment doctrine is applicable. *Weinstein v. Gewirtz*, 208 AD3d at 719, quoting *Cohen v. Gold*, 165 AD3d 879, 882 [2d Dept. 2018].

Pursuant to EPTL § 5-4.1 an action to recover damages based on a claim of wrongful death must be commenced within two years after the decedent's death. If a decedent would have had a valid claim of negligence at the time of their death, a wrongful death claim may be brought within the period allotted by the statute of limitations. See *Perez v. Baez*, 185 AD3d 1062, 1064 [2d Dept. 2020]; *Venditti v. St. Catherine of Siena Med. Ctr.*, 98 AD3d 1035, 1036 [2d Dept. 2012]; *Norum v. Landau*, 22 AD3d 650 [2d Dept. 2005]; *Murphy v. Jacoby*, 250 A.D.2d 826 [2d Dept. 1998].

As stated above, Defendants argue in their reply, that because Plaintiff's expert did not opine that Ms. Ross had cancer at any point prior to January 9, 2012, "defendants cannot be held responsible for the continuous treatment of a condition that Plaintiff has failed to establish existed during the at-issue period." The court does not accept this argument. As discussed herewith, Plaintiff, through her submissions and her expert's affirmation, established that the defendant treated the plaintiff continuously over the relevant time period for symptoms that are ultimately traced to the condition underlying the claims.

The records indicate that in 2007 an ENT noted that Ms. Ross had goiter and thyromegaly. Plaintiff's expert, a physician board certified in the field of internal medicine opines that goiter and thyromegaly indicate an enlargement of the thyroid and that the patient should have testing done to ensure that the patient does not have thyroid cancer. Regarding Ms. Ross's February 25, 2008 visit with Dr. Surahio at PHP, Plaintiff's expert opines that chronic lymphocytic thyroiditis is an autoimmune disease that is correlated with thyroid cancer.

Again, Ms. Ross presented to Dr. Surahio at PHP on April 18, 2008 and August 15, 2008 complaining of a chronic cough. Plaintiff's expert further opines that although a cough is not a symptom of thyroid cancer, difficulty swallowing, and hoarseness are. Between these two dates, on July 16, 2008 the patient presented to Dr. Surahio for foot pain, but on that date Dr. Surahio ordered a blood tests, including a blood test for her thyroid. On July 23, 2009 and again on March 22, 2010, Dr. Surahio's medical note indicates that upon physical exam, he noted that Ms. Ross's throat appeared normal. Dr. Surahio's medical note from April 14, 2010 indicates that upon physical exam Dr. Surahio found that Ms. Ross's neck/thyroid were "supple without adenopathy or enlarged thyroid," however, Dr. Surahio testified that it is possible the computer automatically inputted information.

Plaintiff's expert opines that the note for Ms. Ross's December 13, 2010 visit regarding an enlarged thyroid gland reflects a chronic thyroid nodule and that unusual weight loss is a symptom of thyroid cancer spreading to other organs. Regarding the January 6, 2011 ultrasound on Ms. Ross's thyroid, Plaintiff's expert opines that a recommendation that Ms. Ross undergo nuclear testing in addition to an enlarged thyroid with complex masses and her acute weight loss, are significant indicators of thyroid cancer. Plaintiff's expert explains that "[n]uclear medicine testing is most often recommended to help doctors find tumors and see how much cancer has spread in the body." On May 19, 2011, Dr. Surhio's medical notes indicate that upon physical exam, Ms. Ross's neck was found to be supple and that her thyroid is "symmetrical without thyromegaly, masses or palpable nodules." However, Dr. Surahio testified that he did not examine Ms. Ross's neck on that day and that he did not recall discussing with her if she had the thyroid scan done. He further testified, again, that the computer may have imputed this information.

On October 21, 2011, Ms. Ross presented to PHP and was seen by Maria Garcia, P.A., at which time Ms. Ross underwent a physical exam and no problems or issues were noted. On February 29, 2012 Ms. Ross again presented to PHP and was seen by Dr. Goins at which time Ms. Ross underwent a physical exam and no problems or issues were noted. According to Plaintiff's expert, the New York Methodist Hospital records show that on May 1, 2012, when Ms. Ross was discharged, "there were clear indications that she had thyroid cancer" but that, as the hospital records state, it could not "be completely understood until the final pathology report."

Plaintiff's expert, through their affirmation based on a review of the evidence, established that while Ms. Ross was treated for a thyroid condition continuously from 2007 until May 17,

2012, the symptoms that Ms. Ross sought and received treatment for throughout the relevant period were consistent with and ultimately traced to thyroid cancer, the condition underlying the medical malpractice claims in this case. Accordingly, plaintiff has established that the continuous treatment doctrine is applicable to this case thereby tolling the statute of limitations. As such, the statute of limitations began to run on the last date of treatment that Ms. Ross received from any doctor at PHP, which was May 17, 2012. This action was therefore timely commenced on or about July 9, 2014, within the 2½ year period provided by the statute of limitations.

It is well settled that “[t]he continuous treatment doctrine may be applied to a physician who has left a medical group, by imputing to him or her the continued treatment provided by subsequently-treating physicians in that group.” *Mule v. Peloro*, 60 AD3d 649, 650 [2d Dept. 2009], quoting *Solomonik v. Elahi*, 282 AD2d 734, 735 [2d Dept. 2001]; see *Watkins v. Fromm*, 108 AD2d 233, 240-242 [1985]; *Cohen v. Gold*, 165 AD3d at 883. Here, the last date that Dr. Surahio treated Ms. Ross was prior to January 9, 2012. In fact, he left PHP in September 2011. However, the continuous treatment doctrine tolled the statute of limitations, and Ms. Ross continued to seek and receive treatment by Maria Garcia, P.A. and Dr. Goins at PHP, the same medical practice where she received treatment from Dr. Surahio. Therefore, the continued treatment by Maria Garcia, P.A. and Dr. Goins at PHP may be imputed to Dr. Surahio.

Since the continuous treatment doctrine tolled the statute of limitations in this case, Plaintiff’s decedent had a viable claim of negligence/medical malpractice at the time of her death. See *Perez v. Baez*, 185 AD3d at 1064; *Venditti v. St. Catherine of Siena Med. Ctr.*, 98 AD3d at 1036; *Norum v. Landau*, 22 AD3d at 651; *Murphy v. Jacoby*, 250 A.D.2d 826. Plaintiff

brought the wrongful death claim within two years of the death of Ms. Ross, and therefore, the action for wrongful death was timely commenced as against all defendants. See EPTL § 5-4.1.

As indicated above the medical malpractice claims and the wrongful death claim were timely commenced and therefore Defendants' motion to dismiss is DENIED in its entirety.

This constitutes the decision and order of the court.

Dated: Brooklyn, NY
March 27, 2023

ENTER.



Hon. Consuelo Mallafre Melendez,
J.S.C.