

Manning v Winegarden
2024 NY Slip Op 35370(U)
November 20, 2024
Supreme Court, Queens County
Docket Number: Index No. 720563/2020
Judge: Tracy Catapano-Fox
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 QUEENS

-----X

PERCENIA MANNING,

Plaintiff,

-against-

ROBERT WINEGARDEN, D.M.D., ROBERT F.
WINEGARDEN, D.D.S., P.C., TATYANA BERMAN,
D.D.S., TATYANA BERMAN DENTAL P.C.,
ALEXANDER ROCK, D.D.S., SHERWIN BENLEVI,
D.D.S., SHERWIN BENLEVI, D.D.S., P.C., and
TOOTHSAVERS DENTAL SERVICES, P.C.,

Defendants.
-----X

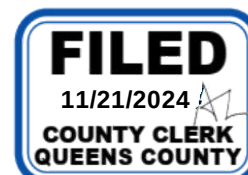
Index No. 720563/2020

Part MDP

Motion Date: November 6, 2024

Calendar No. 20

Sequence No. 3



The following papers numbered EF-70 to EF-115 read on this motion by plaintiff for discovery, and this cross-motion by defendants SHERWIN BENLEVI, D.D.S. and SHERWIN BENLEVI D.D.S., P.C. to dismiss plaintiff's Complaint pursuant to CPLR §3211(a)(5), §3212, and §214-a or alternatively for summary judgment pursuant to CPLR §3212(b), and this cross-motion by plaintiff for summary judgment.

Papers
Numbered

Notice of Motion, Affidavit, Exhibits.....EF70-EF72
Correspondence.....EF73-EF74
Notice of Cross-Motion, Affirmation, Exhibits.....EF75-EF105
Reply Affirmation and Cross-Motion.....EF106-EF110
Affirmation in Opposition.....EF111-EF112
Correspondence.....EF114-EF115

Upon the foregoing papers, and after court conference, it is ordered these motions are determined as follows:

Plaintiff's motion for discovery is granted, solely to the extent the parties are directed to appear for a discovery conference on Tuesday, December 10, 2024 at 9:30am in Courtroom 48. Defendants Sherwin Benlevi D.D.S. and Sherwin Benlevi, D.D.S., P.C.'s cross-motion to dismiss plaintiff's Complaint as time-barred pursuant to CPLR §3211(a)(5) and §214-a is denied.

Defendants' cross-motion for summary judgment pursuant to CPLR §3212 is denied. Plaintiff's cross-motion for summary judgment is also denied.

Plaintiff commenced this dental malpractice action arising out of dental work plaintiff underwent with defendants beginning on or about April 11, 2016 and continuing up until March 2019. Plaintiff filed the Summons and Verified Complaint on November 2, 2020, and issue was joined by moving defendants via the filing of their Verified Answer on January 8, 2021.

Plaintiff makes the discovery motion to compel defendants to provide discovery responses. It is noted that plaintiff presented non-certified medical records in support of her motion, but failed to present argument or caselaw to support her arguments. Defendants oppose plaintiff's discovery motion and argue it should be denied as frivolous.

Defendants cross-move for dismissal of plaintiff's Complaint, arguing the action is time-barred pursuant to the applicable statute of limitations. They argue Dr. Benlevi rendered treatment to plaintiff in 2016, but she did not commence this action until 2020 and therefore it is time-barred by the applicable two year-and-six-months statute of limitations. Defendants further argue they are entitled to summary judgment because based upon Dr. Benlevi's affirmation of merit, plaintiff cannot maintain this action due to her failure to produce the subject medical records. Dr. Benlevi affirmed he worked on a part-time basis at defendant Toothsavers' practice from June 2014 until May 2016. Dr. Benlevi further affirmed he had no recollection of treating plaintiff while at Toothsavers, but knows he did not treat her at his private practice. Dr. Benlevi further affirmed as plaintiff has not produced any medical records, he cannot confirm or deny whether he treated her and argues that without any records, no expert can give opinions with respect to any alleged malpractice or alleged injuries. Defendants also presented plaintiff's Certificate of Merit by dentist Michael Chesner. Dr. Chesner attested to reviewing plaintiff's dental history and opined defendants departed from accepted standards of care, proximately caused plaintiff's injuries, and acted with gross negligence. They argue Dr. Chesner cannot support the merits of plaintiff's malpractice claim, as Dr. Chesner did not review plaintiff's dental records.

Plaintiff opposes defendants' cross-motion for dismissal and summary judgment and cross-moves for summary judgment. Plaintiff argues defendants failed to demonstrate dismissal of the Complaint as time-barred is warranted, as the continuous treatment doctrine applies to toll the statute of limitations. Plaintiff argues Dr. Benlevi purposely did not use his own name to order plaintiff medical records because he was part of the "dentistry's collusion." Plaintiff further argues beginning on April 11, 2016, she began treatment with defendant Dr. Berman until March 2019 and that treatment constituted a continuous course of treatment with Dr. Benlevi for which she timely commenced this action. Plaintiff also presented the Certificate of Merit of Dr. Chesner, the pleadings, and medical records and argues the evidence demonstrates there is no genuine dispute as to any material fact and she is entitled to judgment as a matter of law.

Defendants oppose plaintiff's cross-motion for summary judgment and argue plaintiff failed to establish a prima facie case, as plaintiff failed to present medical records or expert testimony to establish malpractice. Defendants further argue the expired statute of limitations requires a dismissal of plaintiff's claims.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolio & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (*See Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

A medical malpractice action must be commenced “within two years and six months of the act, omission, or failure complained of, or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission, or failure.” (*See Haddad, supra*; *see also CPLR §214-a.*) The continuous treatment doctrine “tolls the statute of limitations 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.” (*Cohen v. Gold*, 165 A.D.3d 879, 882 [2d Dept. 2018].)

Plaintiff’s motion to compel discovery is granted, solely to the extent the parties are directed to appear for a discovery conference on Tuesday, December 10, 2024 at 9:30am in Courtroom 48 to resolve outstanding discovery issues.

Defendants’ cross-motion to dismiss plaintiff’s Complaint is denied, as defendants failed to demonstrate the Complaint should be dismissed as time-barred. Defendants failed to present competent, admissible evidence, such as medical records or an affidavit of merit, demonstrating the statute of limitations has expired. Defendants merely present a self-serving affidavit by defendant Dr. Benlevi articulating he only treated plaintiff at Toothsavers in 2016 and did not treat her at his private facility. (*See Verette v. Zia*, 44 A.D.3d 747 [2d Dept. 2007][holding a self-serving affidavit, standing alone, could not raise an issue of triable fact].) However, plaintiff’s Verified Complaint states plaintiff received continuous treatment by Dr. Benlevi until 2019 which was within the applicable two-and one-half year statute of limitations. As defendants failed to present dental records or affidavits from other members of Toothsavers during plaintiff’s care, Dr. Benlevi’s self-serving affidavit is insufficient to establish dismissal is warranted.

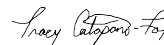
Defendants’ cross-motion for summary judgment is denied, as they failed to present competent, admissible evidence in support of their motion. Defendants failed to present an expert affirmation, affidavits from other dental professionals with personal knowledge of plaintiff’s treatment performed at Toothsavers, or medical records demonstrating they did not depart from accepted standards of care or proximately cause or contribute to plaintiff’s injuries. Therefore, defendants failed to establish a prima facie entitlement to judgment as a matter of law.

Plaintiff’s cross-motion for summary judgment is denied, as she failed to establish a prima facie entitlement to judgment as a matter of law. Plaintiff failed to present competent, admissible evidence in support of her motion, as she presented uncertified medical records that are inadmissible to establish a prima facie case. Additionally, plaintiff’s affidavit by Dr. Chesner failed to identify specific departures by defendants in their care and treatment of plaintiff, and how any alleged departures caused or contributed to plaintiff’s injuries. While Dr. Chesner’s affidavit was sufficient to permit the litigation to proceed as an affirmation of merit, it was insufficient to establish entitlement to judgment as a matter of law. Therefore, plaintiff failed to establish a prima facie entitlement to summary judgment.

Accordingly, plaintiff's motion for discovery is granted, solely to the extent the parties are directed to appear for a discovery conference on Tuesday, December 10, 2024 at 9:30am in Courtroom 48. Defendants Sherwin Benlevi D.D.S. and Sherwin Benlevi, D.D.S., P.C.'s cross-motion to dismiss plaintiff's Complaint as time-barred pursuant to CPLR §3211(a)(5) and §214-a is denied. Defendants' cross-motion for summary judgment pursuant to CPLR §3212 is denied. Plaintiff's cross-motion for summary judgment is also denied.

This constitutes the decision and Order of the Court.

Dated: November 20, 2024



Hon. Tracy Catapano-Fox, J.S.C.

