

Clifford v Kates 2017 NY Slip Op 50541(U) (Sup. Ct. 2017)

Daniel J. Doyle, J.

The Plaintiff commenced this medical malpractice action by the filing of a summons and complaint on December 16, 2013 alleging negligence arising out of a total right hip replacement surgery on July 9, 2008, in an operation by Defendant Dr. Stephen L Kates. Plaintiff's theory of liability against Defendants Highland Hospital and University of Rochester is vicarious liability for the acts and omissions of Dr. Kates; indeed no other practitioner who treated with the Plaintiff was individually named nor does it appear that Plaintiff alleges any independent act of negligence committed by anyone other than Dr. Kates.

Prior to 1995, Highland Hospital established a resident orthopedic clinic located at Highland Hospital. The purpose of the clinic was to provide care for patients who may not otherwise have the financial means to receive care . The resident clinic operated one day a week and was staffed by private attending physicians who had privileges, by faculty members at the University of Rochester, and by resident physicians who would rotate through the clinic and work under the supervision of the private attendings and faculty members.

On September 19, 2007, Plaintiff met with Dr. Kates at the clinic. During this visit, Dr. Kates advised Plaintiff she had significant osteoarthritis and needed a total right hip replacement. Dr. Kates performed the total right hip replacement surgery at Highland Hospital on July 9, 2008. On July 30, 2008, Dr. Kates saw the Plaintiff at the clinic for a post-operative visit. During this visit, Plaintiff complained of pain starting in her hip and lower back, which extended down to her right foot.

From the time of Plaintiff's initial consultation on September 19, 2007 through August 31, 2008, Dr. Kates was a private physician with privileges at Highland Hospital; on September 1, 2008, Dr. Kates became a full time employee of the University of Rochester. After September 1, 2008, the following visits occurred:

September 17, 2008 - Saw Dr. Kates and private physician Dr. Gingras at the clinic, complained of continued pain.

November 12, 2008 - Saw private physician Dr. Klotz at the Clinic, complained of continued pain

November 18, 2008 - Saw Dr. Bukata at Strong Hospital complaining of continued pain and leg length discrepancy.

December 17, 2008 - Saw private physician Dr. Riegler complaining of continued pain.

- January 14, 2009 - Underwent a bone length study of private physician Dr. Marquardt, who provided services at the clinic. Also saw Dr. Kates who reviewed her bone length study and rendered the opinion most of Plaintiff's pain was sciatica in nature.
- January 27, 2009 - Saw Dr. Huang at Highland Hospital for a consultation regarding her right leg pain. Dr. Huang gave the opinion is was most likely caused by a sciatica never injury and right foot drop.

After her last visit to the clinic on January 14, 2009, the Plaintiff does not go back to the clinic again until January 26, 2011. During her absence from the clinic, Plaintiff continued to treat with her primary care physician, Dr. Dickinson, at Highland Family Medicine.

As early as September 2008, Plaintiff testified in her deposition that she actively began looking for another doctor because she didn't "believe Dr. Kates anymore." She testified she made appointments at a couple of different facilities, including Rochester General Hospital and Canandaigua Orthopedics, but that ultimately every specialist she talked to responded that she "needed a revision but nobody wanted to touch... [her]." In recounting her January 2009 visit, she thought Dr. Kates "was crazy in the head" because he advised her that contrary to what she thought, it was her left leg that was longer and not her right leg.

During her two year absence from the clinic Plaintiff executed two HIPAA releases on May 9, 2010, directed to Strong Health Department of Orthopaedics and Rehabilitation and to the University of Rochester Orthopaedic Associates of Rochester. These releases were sent to the recipients together with a cover letter dated on May 24, 2010 from Plaintiff's attorneys. The releases authorized the release of information to Plaintiff's attorneys. In these releases, in box 10 entitled "Reason for release of information," the choice "Other" is checked, and the reason given is "Litigation." In box 11, the date of expiration for the HIPAA authorization was "end of litigation."

On November 8, 2010, Plaintiff executed a third release directed at Dr. Kates, which was sent with a cover letter from Plaintiff's counsel dated November 15, 2010. The releases authorized the release of information to Plaintiff's attorneys. In this release, in box 10 entitled "Reason for release of information," the choice "Other" is checked, and the reason given is "Litigation."

The last time the Plaintiff saw Dr. Kates was at the clinic on January 26, 2011. Plaintiff admitted she "flipped out" at Dr. Kates during that visit, indicating she was unhappy with his care and treatment. The Plaintiff went back to the clinic 4 times after her last visit with Dr. Kates, but [*2]at no point did she go and see Dr. Kates:

July 6, 2011 - Saw Dr. Bukata at the clinic complaining of right hip and pelvis pain.

July 27, 2011 - Saw private physician Dr. Dellaporta at the Clinic complaining of right groin pain.

August 3, 2011 - Saw private physician Dr. Riegler at the Clinic complaining of right hip pain. She underwent a second bone length study and was referred back to Dr. Kates. Plaintiff never followed up with Dr. Kates.

November 30, 2011 - Saw private physician Dr. Riegler complaining of right hip pain.

Dr. Kates, Highland, and University of Rochester have moved for summary judgment, Both sets of Defendants argue that the action should be dismissed on statute of limitations grounds based upon the Plaintiff's failure to timely commence the action. Dr. Kates also moved for summary judgment on standard of care.

A.The summary judgment standard

A party seeking summary judgment pursuant to CPLR 3212 must make a prima facie showing of entitlement to judgment as a matter of law and submit sufficient evidence to demonstrate the absence of any material issue of fact (Iselin & Co. Inc v Mann Judd Landau 71 NY2d 420 [1988]). The Court must view the evidence presented in the light most favorable to the nonmoving party (Russo v YMCA of Greater Buffalo, 12 AD3d 1089 [4th Dept 2004]). Further, a moving defendant must affirmatively demonstrate the merits of its defense and cannot meet its burden in moving for summary judgment by pointing to gaps in plaintiff's proof (George Larkin Trucking Co. v Lisbon Tire Mart, Inc., 185 AD2d 614 [4th Dept 1992]). If the proponent demonstrates entitlement to summary judgment, the opposing party must then demonstrate, generally by admissible evidence, the existence of an issue of fact requiring a trial (Zuckerman v City of New York 49 NY2d 851 [1985]).

B.The applicable statute of limitations period and the Defendants' burden in establishing entitlement to judgment as a matter of law

The applicable statute of limitations period for a medical malpractice action is 2 and ½ years and accrues "from the act, omission or failure complained of, or the last treatment where there is continuous treatment for the same illness" (CPLR 214-a). On a motion

for summary, the initial burden is on the defendant to show that the alleged malpractice took place more than 2½ years before the commencement of the action (*Massie v Crawford*, 78 NY2d 516, 519 [1991]). When that burden is met, the burden then shifts to the plaintiff to establish the applicability of the continuous treatment doctrine (see *Perrino v Maguire*, 60 AD3d 1477, 1478 [4th Dept 2009]). If the plaintiff can then demonstrate that received continuous treatment for the same original condition or complaint, the statute of limitations period is tolled until after the plaintiff's last treatment (*Massie v Crawford*, 78 NY2d at 519).

Applying the foregoing principles, the Court concludes that defendants sustained their burden on the motion of establishing their entitlement to judgment as a matter of law on the basis of the 2 and ½-year statute of limitations of CPLR 214-a (*Simons v Bassett Health Care*, 73 AAD3d 1252, 1254 [3d Dept 2010]; *Perrino v Maguire*, 6 AD3d at 1476). Plaintiff's complaint [*3]stems from the total right hip replacement surgery performed by Dr. Kates on July 9, 2008. The Plaintiff ultimately commenced this action on December 16, 2013 — well outside the statute of limitations period.

C.The continuous treatment doctrine and its application in this case

The Court of Appeals has held that "continuous treatment" involves more than a physician-patient relationship (*McDermott v. Torre*, 56 NY2d 399, 405 [1982]). There must be ongoing treatment of a medical condition to toll the statute of limitations and the Court of Appeals opined that "it would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician" (*Borgia v City of New York*, 12 NY2d 151, 156 [1962]). A patient is not entitled to the benefit of the toll in the absence of continuing efforts by a doctor to treat a particular condition because the policy reasons underlying the continuous treatment doctrine do not justify the patient's delay in bringing suit in such circumstances (*Nykorchuck v. Henriques*, 78 NY2d 255, 259 [1991]).

The hallmark of the continuing treatment doctrine lies in a patient's "continuing trust and confidence" in the physician (*Coyne v Bersani*, 61 NY2d 939, 939 [1984]). Should the record demonstrate that a plaintiff lost faith in the physician, the continuing treatment toll will not apply because it cannot be said that plaintiff continued "to have had the continuing trust and confidence in her health care providers that underlies the continuous treatment doctrine" (*Conway v Nassau Med. Ctr.*, 298 AD2d 423, 424 [2d Dept 2002]).

In this case, Plaintiff definitively established that there was continuous treatment from July 9, 2008 (the date of the total right hip replacement surgery) through the January 14, 2009 appointment with Dr. Kates. At the January 14, 2009 appointment, Plaintiff testified that she thought Dr. Kates was "crazy." In addition, Plaintiff stated that as early as September 2008, she was actively looking for other doctors because she didn't believe Dr. Kates anymore." Though Plaintiff alleges her symptoms persisted, she does

not go back to Dr. Kates or to the clinic for a period of 2 years.[FN1] This gap in treatment, coupled with the Plaintiff's opinions of Dr. Kates and her active search for a new doctor, is indicative that she did not intend "the uninterrupted reliance upon... [Dr. Kates']... observation, directions, concern, and responsibility for overseeing... [her].. progress (Allende v New York City Health and Hosps. Corp., 90 NY2d 333, 339 [1997] (finding that plaintiff failed to establish continuous treatment where plaintiff "did not have faith any more in that hospital" and sought treatment from another hospital)).

Ultimately, the breaking point for the continuous treatment toll comes with service of the three HIPAA releases directed at the Defendants, which indicated the purpose of the release was for "Litigation" and that the duration for two of the releases was "the conclusions of litigation." Those releases, which were sent via cover letter from Plaintiff's law firm and sent during the 2 year gap discussed above, signaled the end of the "continuing trust and confidence" in Dr. Kates [*4](Coyne v Bersani, 61 NY2d at 939).

Courts have held that when a plaintiff informs the defendant doctor that she is intending on initiating legal process, the continuous treatment toll ends. In Boyle v Fox, 51 AD3d 1243, 1245 [3d Dept 2008] the Court declined to extend toll where plaintiff informed defendant she intended on initiating legal action with respect to her treatment. And again in O'Connor v State, 15 AD3d 827, 828 [3d Dept 2005] the Court declined to extend toll when plaintiff filed notice of claim since such an act "sufficiently memorializes the end of confidence in his course of treatment."In Schloss v Albany Medical Center, 278 AD2d 614, 615 [3d Dept 2000] the Court declined to extend toll where there was evidence in record that plaintiff, believing she was the victim of medical malpractice, consulted with two attorneys after being treated by defendants.

Thus, though Plaintiff had established continuous treatment through January 14, 2009, she did not establish that treatment continued after that date. The Plaintiff's expressions of dissatisfaction with her condition and treatment and with Dr. Kates, her attempting to get the advice of other doctors, the gap in treatment, and the service of the HIPAA releases effectively ended any continuous treatment. The two year gap in treatment is best understood not as a continuous treatment, but rather as a resumption in treatment (Barrella v Richmond Mem. Hosp., 88 AD2d 379, 385 [2d Dept 1982]). A resumption in treatment is qualitatively different from continuous treatment and cannot serve as a substitute for continuous treatment (see Alvarez v New York City Health and Hosps. Corp., 257 AD2d 516, 517 [1st Dept 1999]; Diller v Munchmeyer, 130 AD2d 868, 869 [3d Dept 1987]). As the tolling time ended after the January 14, 2009 visit, Plaintiff's commencement of the action on December 13, 2013 was untimely.

Based upon the foregoing, the Defendants have met their burden in establishing that this action is barred by the statute of limitations (CPLR 214-a) and the Plaintiff is unable to meet her burden of establishing sufficient tolling time under the continuous treatment doctrine, it is hereby

ORDERED that the Defendant's motion and cross-motion seeking dismissal on statute of limitations grounds are hereby GRANTED and the Plaintiff's complaint is dismissed.

Dated: April 19, 2017

The Honorable Daniel J. Doyle