SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

RONNI TOMASINI, as EXECUTRIX of the Estate of PETER TOMASINI and RONNI TOMASINI, Individually,	TRIAL/IAS PART 15
	NASSAU COUNTY
Plaintiff,	INDEX NO. 4904/09
- against -	MOTION SUBMISSION DATE: 8/30/10
JOHN RIZZO, M.D., GASTROINTESTINAL ASSOCIATES OF LONG ISLAND, L.L.P. and GASTROINTESTINAL ASSSOCIATES OF LONG ISLAND, P.C.,	**X X X**
Defendants.	MOTION SEQUENCE NO. 1

The following papers read on this motion:

Notice of Motion and Affidavits....................	X
Affirmation in Opposition..............................	X
Reply Affirmation..	X

Relief Requested

The defendants, John Rizzo, M.D., Gastrointestinal Associates of Long Island, L.L.P. and Gastrointestinal Associates of Long Island, P.C., (hereinafter referred to as "Rizzo" and "GA"), move for an order granting summary judgment pursuant to CPLR §3212 and §214(a), (1) dismissing as time-barred all causes of action in plaintiff's complaint pertaining to care and treatment rendered to decedent, Peter Tomasini, prior to September 17, 2006, (2)dismissing plaintiff's claims for loss of consortium and loss of services and (3) for summary judgment pursuant to CPLR §2312 dismissing plaintiff's entire case as and against defendants, Rizzo and GA. The plaintiff submits opposition. The defendants submit a reply affirmation.

Background

The plaintiff initiated this action for medical malpractice, lack of informed consent and wrongful death. The plainiff, Ronni Tomasini, as Executrix of the Estate of Peter Tomasini, and Ronni Tomasini, Individually, as decedent's surviving spouse, alleges that between December 20, 2001 and November 20, 2006, the defendants departed from good and accepted medical practice in failing to, *inter alia,* timely diagnose and treat colon cancer in the decedent, Peter Tomasini.

The decedent first consulted with defendant, Rizzo, of GA, on December 20, 2001, at the referral of decedent's primary care physician, non-party, Dr. Sanford Ratner. A colonoscopy was scheduled and performed on February 22, 2002 at St. Francis Hospital. By the conclusion of the exam, Rizzo provides he had removed polyps from the decedent, and the decedent was advised to return in a year for a further colonoscopy. Rizzo subsequently reviewed the surgical pathology report of February 28, 2002 which revealed that none of the removed polyps were found to be malignant.

The decedent then returned for a second colonoscopy which was performed on July 7, 2003 at St. Francis by the defendant, Rizzo, who found no polyps. Rizzo provides that based on his experience and the gastrointestinal community's guidelines, it was recommended that the decedent undergo a colonoscopy in five years.

Thereafter, the decedent was treated in 2004 by a non-party physician for removal of skin cancer. Sometime in 2006, non-party dermatologist, Dr. Miller, advised the decedent to look into a generic syndrome, Muir-Torre Syndrome, and faxed a pathology report dated October 25, 2006 to GA on November 15, 2006. Dr. Ratner noted that the skin cancer pathology was "suspicious for Muir-Torre syndrome" and recommended genetic counseling.

The decedent then returned for a consultation with non-party, Dr. Dean Pappas, of GA, on November 13, 2006. Dr. Pappas performed a physical examination of the decedent and found that the decedent had dyspeptic symptoms, meaning difficulty or maldigestion or burping or bloating. Dr. Pappas' impression was of "abdominal pain" and his plan was for the decedent to undergo a gastroscopy, which is an examination of the inside of the gullet, stomach and duodenum, (the first part of the small intestine), and to undergo a colonoscopy within a week or two.

Several days thereafter, the decedent apparently developed stomach aches and a low grade fever and was presented to non-party physician, Dr. Ratner, on November 20, 2006. The decedent was then presented to the Emergency Room at St. Francis Hospital on November 20, 2006 and was examined by the Emergency Room physician, non-party, Dr. Miller. Rizzo, at the request of non-party physician, Dr. Ratner, also consulted with the decedent on November 20, 2006 at St. Francis Hospital. Rizzo provides that the decedent advised that Dr. Pappas placed him on Nexium the week before and that he was taking Tylonol for his current complaints of abdominal pain. On or about November 22, 2006, Dr. Miller informed the decedent that a CAT scan revealed the presence of tumors. The decedent had tumors on the right side of his colon, a mass in his colon, and his liver, and had terminal cancer. The decedent was admitted to St. Francis Hospital for two weeks. Thereafter, the decedent began treating with oncologist, non-party, Dr. Donnelly and received chemotherapy from January 2007 until about the time of decedent's death on November 22, 2007.

Expert Opinions Offered

The defendants' expert, a gastroenterologist, affirms that it was not a departure from good and accepted medical practice to instruct the decedent to schedule a colonoscopy on December 20, 2001 and for the actual screening colonoscopy to be performed on February 22, 2002. The defendants' expert provides that the screening colonoscopy that was performed on February 22, 2002 was performed within the applicable standards of care. As none of the polyps in February of 2002 were found to be malignant, defendants' expert opines that it was within the standard of care and good and accepted medical practice to instruct the decedent to undergo a repeat surveillance colonoscopy in a year to ensure there were no new polyps or regrowths.

The defendants' expert affirms that the screening colonoscopy that was performed on July 7, 2003 was performed within the applicable standards of care. As no polyps were found during the July 7, 2003 surveillance colonoscopy, it was not a departure to perform and complete the surveillance colonoscopy without taking random biopsies. Defendants' expert agrees with Rizzo's deposition testimony and opines that the decedent did not have colon cancer at the time of Rizzo's last colonoscopy in 2003. Additionally, defendants' expert affirms that based on various factors including the decedent's known family history at the time, medical history, previous 2002 colonoscopy and subsequent normal colonoscopy in 2003, age, lack of complaints, and physical exam, Rizzo's recommendation that the decedent have a routine screening colonoscopy in five years was appropriate and in accordance with good and accepted medical practice and the gastrointestinal community's guidelines.

Defendants' expert opines that the care and treatment rendered by non-party, Dr. Pappas, of GA, on November 13, 2006, was appropriate and consistent with good and accepted medical practice. Defendants' expert also opines that Rizzo's consult to the decedent on November 20, 2006 at St. Francis Hospital was with good and accepted medical practice.

The plaintiff's expert, an oncologist, provides, *inter alia*, that the pathology report, with respect to the surgical procedure performed on the decedent by a non-party physician on November 22, 2006, an exploratory laparotomy with a right colon resection, revealed cancer at stage IV. The colon cancer, when diagnosed was 12cm in diameter on November 22, 2006, and as so, plaintiff's expert oncologist opines that on July 7, 2003, the tumor was present and should have been fully visible during the colonoscopy on July 7, 2003. Ultimately, plaintiff's expert oncologist concludes that Rizzo's failure to diagnose the tumor in the cecum on July 7, 2003 caused decedent to lose over a 90% chance of survival and ultimately die from this curable disease.

The plaintiff's expert, a gastroenterologist, provides that pathology report from the colonoscopy performed on February 22, 2002 revealed two polyps with mild dysplasia, indicative of precancerous development. Plaintiff's expert gastroenterologist opines that Rizzo departed from good and accepted medical practice by failing to order serial screening colonoscopies for each of the three years following the February 22, 2002 colonosocopy, and had he done so, the adenocaricnoma, (defined as "a malignant neoplasm consisting chiefly of glandular epthelium" in the 20th edition of Stedman's Medical Dictionary), would have been present in each of the three years. Plaintiff's expert gastroenterologist opines that Rizzo's failure to order serial colonoscopies for screening was a proximate cause in delaying decedent's diagnosis of colon cancer, and had Rizzo seen and biopsied the five millimeter polyp removed from the cecal cap in February 2002, the decedent would have been diagnosed with colon cancer in July of 2003, rather than November of 2006, causing a three year and four month delay in diagnosis, causing decedent to lose a substantial chance of survival.

Applicable Law

"An action for medical malpractice must be commenced within two years and six months of the date of accrual. (CPLR 214-a). A claim accrues on the date the alleged malpractice takes place." (*Massie v. Crawford*, 79 NY2d 516, citing *Nykorchuck v. Henriques*, 79 N.Y.2d 255, 258; *Matter of Daniel J. v. New York City Health & Hospitals Corp.*, 77 N.Y.2d 630). However, "[t]he statute is tolled until after a plaintiff's last treatment ... 'when the course of treatment ... includes the wrongful acts or omissions ... [which] run continuously and is related to the same original condition or complaint." (*Id*, citing *McDermott v. Torre*, 56 N.Y.2d 399, 405, quoting from *Borgia v. City of New York*, 12 N.Y.2d 151, 155).

The Court of Appeals in *Massie v. Crawford*, supra provides that "[w]e have held that 'continuous treatment' involves more than a physician-patient relationship" as "[t]here must be ongoing treatment of a medical condition. The doctrine rests on the premise that the trust and confidence that marks such relationships puts the patient at a disadvantage in questioning the doctor's skill because to sue while undergoing treatment necessarily interrupts the course of treatment. 'It would be absurd', we stated, 'to require a wronged patient to interrupt corrective efforts by serving a summons on the physician under those circumstances." (*Id*, citing *Borgia v. City of New York, supra.)*

"Thus, we have emphasized that continuous treatment 'does not contemplate circumstances where a patient initiates return visits merely to have * * * her condition checked." (*Id*, citing *McDermottt v. Torre*, supra). "Routine examinations of a patient who appears to be in good health or diagnostic examinations, even when conducted over a period of time, are not "a course of treatment". (*Id*, citing *Charalambakis v. City of New York*, 46 N.Y.2d 785; *Nykorchuck v. Henriques, supra; Davis v. City of New York*, 38 N.Y.2d 257).

The continuous treatment doctrine, when applicable, tolls the running of the statute of limitations until the end of the course of treatment for a particular medical condition. (*Nykorchuck v. Henriques, supra*). "Essential to the application of continuous treatment doctrine" ... "is that there has been some course of treatment established with respect to the condition that gives rise to the lawsuit." (*Id.*) "[N]either the mere 'continuing relation between physician and patient' nor 'the continuing nature of a 'diagnosis' is sufficient to satisfy the requirements of the doctrine. In the absence of continuing efforts by a doctor to treat a particular condition, none of the policy reasons underlying the continuous treatment doctrine justify the patient's delay in bringing suit." *(Id* quoting *McDermott v. Torre, supra.*)

The Court of Appeals held that "[t]he continuous treatment doctrine contains three principal elements. The first is that the plaintiff continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant time period."(*Gomez v. Katz*, 61 A.D.3d 108, citing *Nykorchuck v. Henriques, supra*; *Stahl v. Snud*, 210 A.D.2d 770; *Polizzano v. Weiner*, 179 A.D.21d 803.) "The term 'course of treatment speaks to affirmative and ongoing conduct by the physician such as surgery, therapy, or the prescription of medications. A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll" (*Gomez v. Katz, supra*).

The second element is that " the course of treatment provided by the physician [was] for the same conditions or complaints underlying the plaintiff's medical malpractice claim."(*Gomez v. Katz, supra*). Continuous treatment doctrine was inapplicable where the patient's routine examinations were not related to the disease caused by the intrauterine devise,(IUD), installed by the physician,(*Id*

citing *Massie v. Crawford, supra)*. Contacts by telephone and mail nearly two years after the alleged malpractice were insufficient to constitute medical services. *(Id* citing *Davis v. City of New York*, 47 A.D.2d 539). A patient's subsequent visits to the gynecologist for routine examinations, as opposed to therapy to correct a medical condition, did not serve as a basis for applying the "continuous treatment" exception to toll the statute of limitiations on a medical malpractice claim against the gynecologist who inserted an intrauterine device (IUD) which allegdedly caused patient's pelvic inflammatory disease (PID). *(Massie v. Crawford, supra).*

The third element 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 th[e] last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past." (*Gomez v. Katz, supra*). Discharge by a physician does not preclude the application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for a condition related to the earlier treatment. (*Gomez v. Katz, supra*).

<u>Plaintiff's causes of action prior to September 17, 2006</u>

The defendant has made a *prima facie* showing that all causes of action in plaintiff's complaint pertaining to care and treatment rendered to the decedent prior to September 17, 2006 are time-barred. Plaintiff initiated this action on or about March 17, 2009. Therefore, any claims for medical malpractice prior to September 17, 2006 are time-barred as they were not brought within two years and six months of the date of accrual. (CPLR 214-a). The only date of contact that falls within two years and six months of the date accrual is the contact the decedent had with non-party, Dr. Pappas, of GA, on November 13, 2006, and the contact the decedent had with defendant, Rizzo, at St. Francis Hospital on November 20, 2006.

The defendant has made a *prima facie* showing that decedent's contact with the defendants on November 13, 2006 and November 20, 2006 do not constitute "continuous treatment" under the doctrine to toll the statute. The defendants have established that there was no course of treatment with the decedent with respect to the condition that gave rise to the lawsuit herein from July 7, 2003 to November 13, 2006. Upon the record herein, it is undisputed that no one from GA, including Rizzo, saw the decedent from July 7, 2003 until November 15, 2006, some forty (40) months latter. The Court of Appeals in *Gomez v. Katz, supra,* stated that while the gap thereto of 24 months between office visits "extends to almost the outer reaches of continuous law, it did not exceed the limits of decisional authority" which has not drawn a bright line between treatment as to deemed "continuous". However, "[t]he term 'course of treatment speaks to affirmative and ongoing conduct by the physician such as surgery, therapy, or the prescription of medications. A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll." *(Gomez v. Katz, supra).*

Here, the defendants have established that in the forty (40) month gap between office visits, there has been no treatment whatsoever by the defendants to the decedent. There were no scheduled appointments in the forty (40) month gap, and no complaints were presented to the defendant in the forty (40) month gap.

It is undisputed upon the record herein that after the decedent contacted a dermatologist, sometime in 2006, who advised the decedent to look into a genetic syndrome, Muir-Torre Syndrome, who faxed a pathology report to GA on or about November 15, 2006 noting that the skin cancer pathology was "suspicious for Muir-Torre Syndrome" the decedent contacted GA and scheduled an

appointment. That appointment was scheduled and held on November 13, 2006. Shortly thereafter, the decedent's primary care physician requested Rizzo to consult the decedent at St. Francis Hospital, whereby Rizzo consulted with the decedent on November 22, 2006 at St. Francis Hospital. The Court in *O'Donnell v. Siegel*, 49 A.D.3d 415, concluded that a decedent's return to the gastroenterologist some five years latter constituted a "renewal" rather than a "continuation" of the physician patient relationship."(*Id*, citing *McDermott v. Torre, supra: Young v. New York City Health & Hospitals Corp.*, 91 N.Y.2d 291). The gastroenterologist "treated the decedent as he appeared" and did not discuss a "course of treatment", whereby there was no evidence that "further treatment" was explicitly anticipated by both physician and patient. (*Id).* Here, the decedent's return with the GA on November 13, 2006, forty (40) months latter, constituted a "renewal" and not a "continuation" of the physician patient relationship. Rizzo's contact with the decedent at St. Francis Hospital, at the request of the decedent's primary care physician, constituted, if anything, a "referral" and not a "continuation" of the physician patient relationship. More importantly, the defendant, Rizzo, "treated the decedent as he appeared" and not in furtherance of a "course of treatment."

The Court of Appeals has emphasized that continuous treatment "does not contemplate circumstances where a patient initiates return visits merely to have ... her condition checked." (*McDermott v. Torre, supra*). There must be more than a physician-patient relationship, there must be *ongoing treatment* of the medical condition, as the doctrine of continuous treatment rests on the premise that the patient is at a disadvantage in questioning the doctor's skill because to sue while undergoing treatment "interrupts" the course of treatment. (*Massie v. Crawford, supra)*. Here, there was no ongoing treatment of the medical condition, and therefore, the policy that underlines the tolling of the statute does not apply as there would have been no "interruption" of any course of treatment, or corrective efforts that would have undermined the decedent's treatment.

The plaintiff, in opposition to the motion, has failed to raise a triable issue of fact to invoke the doctrine of continuous treatment and toll the statute of limitations. Plaintiff's action herein, essentially, alleges that the defendants failed to diagnose the decedent with colon cancer, more specifically, in February of 2002 and July 7, 2003. As such claims are time-barred, plaintiff must demonstrate that the decedent was under continuous treatment from the defendants from February of 2002 and/or July 7, 2003 to November 13, 2006 in order to bridge the gap and toll the statute of limitations.

Plaintiff's opposition states that the colonoscopy of July 7, 2003 and the examination of November 13, 2006 constitutes "continuous care" as it relates to the same condition. However, there is no dispute here that there was no care of treatment, whatsoever, in the forty (40) month gap, no complaints made to the defendants in this forty(40) month gap, and no appointments were held in this forty(40) month gap. The plaintiff does not dispute that "no further treatment was contemplated" as Rizzo recommended that the decedent undergo a colonoscopy in five years. Rather, plaintiff argues that the decedent essentially had no reason to go back to Rizzo or GA as Rizzo recommended that the decedent undergo a colonoscopy in five years.

It has been established 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 th[e] last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past." (*Gomez v. Katz, supra*). The Court in *O'Donnell v. Siegel*, supra, found that "[e]ven if the colonoscopy, performed in 1988, constituted a course of treatment, it was negative and the parties did not contemplate further treatment, as evidenced by the lack of instruction by Dr. Siegel that the decedent come back for a follow-up" and while plaintiff argued that the decedent "had no reason to think he should return to the doctor sooner than he did", continuous

treatment did not apply as the decedent received no treatment in the time-period between visits.

Here, no further treatment was contemplated and no further treatment was rendered, as evidenced by the lack of instruction by Rizzo that the decedent come back for a follow-up prior to five years. Further, while plaintiff argues that the decedent had no reason to think that he should return to GA sooner, the decedent did not receive any treatment in the time-period between the July 7, 2003 and November 13, 2006 visits. Routine periodic health examinations do not satisfy the doctrine's requirements of continuous treatment of the condition upon which the allegations of medical malpractice are predicated. (*Id*, citing *Young v. New York City Health & Hospitals Corp., supra*).

Additionally, plaintiff's reference to a letter forwarded by GA sometime in 2008, after decedent's death, as it related to the scheduling of a colonoscopy, does not raise an issue of fact. Contacts by telephone and mail nearly two years after the alleged malpractice were insufficient to constitute medical services. *(Gomez v. Katz, supra)*. Here, the contact by mail nearly five years after the alleged malpractice is insufficient to constitute medical services.

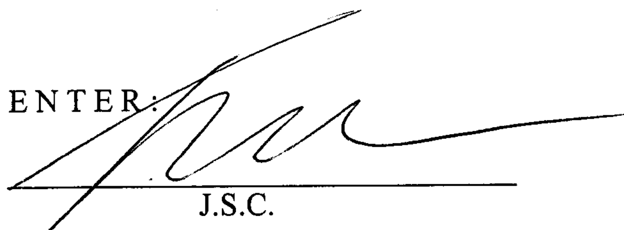
<u>Plaintiff's causes of action as they pertain to treatment with GA on November 13, 2006 and Rizzo on November 22, 2006</u>

Any and all claims for medical malpractice, with respect to treatment rendered by GA and Rizzo on November 13, 2006 and November 22, 2006, were commenced within two years and six months of the date of accrual, and therefore, they are timely. (CPLR 214-a).

The defendants have made a *prima facie* showing that care and treatment rendered on November 13, 2006 and November 22, 2006 was appropriate and consistent with good and accepted medical practice. The plaintiff, in opposition, does not raise an issue of fact. The plaintiff does not argue, and plaintiff's experts do not set forth, that the defendants departed from good and accepted practice or proximately caused decedent's claimed injuries in relation to decedent's visit with GA on November 13, 2006 and decedent's visit with Rizzo on November 22, 2006.

<u>Conclusion</u>

In light of the foregoing, the defendants' motion for summary judgment is granted in its entirety, and therefore, the plaintiff's complaint is hereby dismissed.



ENTER:

J.S.C.

Dated: September 30, 2010
cc: Krentsel & Guzman, LLP
Keller, O'Reilly & Watson, P.C.

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OCT 06 2010
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