

SCAW

SHORT FORM ORDER

mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

MARK ROSENTHAL,

Plaintiff(s),

MOTION DATE: 9/3/08

INDEX No.:292/08

-against-

MOTION SEQUENCE NO:1

X X X

CAL. NO.:

STEPHEN M. WIRTH and STEPHEN M. WIRTH, P.T.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-4
Answering Affidavits.....	5-7
Replying Affidavits.....	8-10
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3211(a)5., dismissing plaintiff 's complaint is granted upon the grounds that plaintiff failed to timely commence this action.

This is an action to recover money damages for personal injuries sustained as the result of physical therapy malpractice. Plaintiff alleges that he was injured when defendants utilized inappropriate physical therapy treatments.

Defendants herein move to dismiss claiming that the instant case is time barred pursuant to CPLR 214-a. In support of this motion, defendants submit a sworn affidavit, the plaintiff's medical treatment records and billing statements. Defendants maintain that plaintiff began physical therapy treatment at this office on or about September 24, 2004 for an injured right rotator cuff. According to defendants, plaintiff last received treatment on April 21, 2005 and that plaintiff discharged himself from treatment on May 5, 2005.

Plaintiff, in his opposition, admits that treatment began on September 24, 2004 but alleges that these treatments were extremely aggressive and reruptured his rotator cuff. As a result, plaintiff had to undergo major surgery on March 17, 2005 but continued to receive treatments from defendants through August 25, 2005. Plaintiff argues that the instant action was

timely commenced on January 7, 2008 pursuant to CPLR 214-a as his last date of treatment was August 25, 2005. In support of this, plaintiff has submitted a sworn affidavit and the report of his treating orthopedic surgeon dated October 30, 2007 with an addendum dated December 24, 2007.

An action for medical malpractice must be commenced within two years and six months of the act pursuant to CPLR 214-a and it is well settled that this provision is applicable to malpractice claims against physical therapists (Wahler v Lockport Physical Therapy, 275 AD2d 906). However, CPLR 214-a also addresses continuous treatment and under the continuous treatment doctrine, "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, the 'accrual' comes only at the end of the treatment" (Borgia v City of New York, 12 NY2d 151).

In the case at bar, plaintiff failed to show that he received continuing treatment beyond April 21, 2005. The medical treatment records indicate that plaintiff's last appointment was April 21, 2005 and the discharge summary dated May 5, 2005 states that plaintiff discharged himself after six visits. The billing record dated August 22, 2008 further evidences that plaintiff received treatment from September 24, 2004 through April 21, 2005. Plaintiff in his attempt to show continuing treatment merely states in his sworn affidavit that "following the surgery of March 17, 2005, I had care, treatment and contacts in person and by phone with defendants up to, and including August 25, 2005 regarding a protocol for treatment of my right rotator cuff." There is no indication in the affidavit as to specific dates, the nature and substance of alleged conversations or contacts, the physical therapists or office personnel that plaintiff had spoken to, and the substance of treatment rendered to plaintiff from April 21, 2005 through August 25, 2005 (Ganess by Ganess v City of New York, 85 NY2d 733; see also Flego v Vilasi, 154 AD2d 434; Sherry v Queens Kidney Center, 117 AD2d 663). Thus, plaintiff's vague and conclusory assertions are insufficient to establish that plaintiff received continuing physical therapy treatments from defendants through August 25, 2005 (Ganess by Ganess v City of New York, supra).

Accordingly, the motion by defendants for an order pursuant to CPLR 3211(a)5. dismissing plaintiff's action is granted.

OCT 22 2008
Dated: _____

ENTERED
OCT 27 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Wahler

J.S.C.