SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 27

Present: HON. WILLIAM R. LaMARCA
Justice

MARK DESTEFANO,

Plaintiff,

-against-

MICHAEL VERINI, DDS, DANIEL GAMBELLA, DDS, ALVIN KATZ, DDS each individually and d/b/a DENTAL HEALTH SERVICES, PC,

Defendants.

Motion Sequence # 001
Submitted April 16, 2004

INDEX NO: 7842/03

The following papers were read on this motion:

Notice of Motion.....1
Plaintiff's Affirmation in Opposition.....2
Co-Defendants Affirmation in Opposition.....3
Reply Affirmation.....4

Defendant, DANIEL GAMBELLA, D.D.S., moves for an order pursuant to CPLR § 3212 dismissing all claims of malpractice against him as time barred and dismissing the cause of action sounding in informed consent. The plaintiff and co-defendants oppose the motion which is determined as follows:

This action arises out of alleged dental malpractice while plaintiff was a patient at DENTAL HEALTH SERVICES, P.C., where defendant GAMBELLA was employed.

DR.GAMBELLA states that the records reflect that he treated plaintiff between January 28, 1999 and July 3, 2000, and that all treatment dates were outside the two and one-half (2 ½) year statute of limitations for dental malpractice pursuant to CPLR § 214-a and that the action should be dismissed against him as time barred.

In opposition to the motion, counsel for plaintiff points out that DR. GAMBELLA provided treatment to plaintiff on sixteen (16) out of a total of thirty one (31) visits to DENTAL HEALTH SERVICES, P.C., as part of a continuous course of treatment that occurred between January 28, 1990 until July 3, 2001. During that time, the records reflects treatment of tooth # 30, including a failed root canal, extraction and restoration of # 30 with a three (3) unit bridge incorporating teeth # 28, 29, and 30, with additional treatments on the three (3) unit bridge continuing until April 27,2001. Plaintiff states that CPLR § 214-1 directs that an action for dental malpractice must be commenced withing two years and six months of the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure . It is his position that the continuous treatment doctrine is applicable to toll the Statute of Limitations for a dental malpractice action against dentists alleged to have committed malpractice with a group practice if it is established that the plaintiff was considered a patient of the group and was treated by the group as such, and remained under the care of dentists in the group for the same injury, illness or condition, citing *Watkins v. Fromm, M.D.*, 108 AD2d 233m 488 NYS2d 768 (2nd Dept. 1985). He asserts that subsequent treatment by members of a medical group is imputed to physicians departed from the group for Statute of Limitations purposes provided it is established that the patient was treated as a group patient and the subsequent

treatment was for the original condition and/or complication of same. *Pollicino v. Roemer and Feather-Stonhaugh P.C.*, 260 AD2d 52, 699 NYS2d 238 (3rd Dept.1999). Plaintiff urges that he is entitled to discovery to substantiate his claim that his course of treatment continued into the applicable statutory period. (See, *Perez v. Beth Israel Medical Center,* 290 AD2d 303, 736 NYS2d 331 [1st Dept. 2002)] CPLR 214-a). Plaintiff states that based upon the facts presented, there is sufficient evidence to hold that the continuous treatment doctrine is applicable as a matter of law and that questions of fact exist as to whether said doctrine is applicable to the defendant GAMBELLA so as to warrant additional discovery and a denial of the motion for summary judgment. The Court agrees.

The standards of summary judgment are well settled. CPLR Rule 3212 directs that " ...the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact". In viewing motions for summary judgment, the focus of the Court's concern is issue finding, not issue determination, and affidavits should be scrutinized carefully, in a light most favorable to the party opposing the motion. *Judice v. D'Angelo*, 272 AD2d 583, 709 NYS2d 427 (2nd Dept 2000); *Robinson v. Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983); *Steven v. Parker*, 99 AD2d 649, 472 NYS2d 225 (4th Dept. 1984).

> To grant Summary Judgment it must clearly appear that no material and triable issue of fact is presented... This drastic remedy should not be granted where there is any doubt as to the existence of such issues... or where the issue is "arguable"...

Silman v. Twentieth Century Fox Film Corp., 3 NY2d 395, 165 NYS2d 498, 144 NE2d 387 (C.A. 1957, citations omitted). Thus, a court may grant summary judgment where there is no genuine issue of material fact, and the moving party is, therefore, entitled to judgment

as a matter of law. (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 1986). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]).

The movant has failed to demonstrated that he is entitled to judgment as a matter of law and questions of fact remain to warrant denial of summary judgment. The case of *Conway v. Nassau County Medical Center*, 298 AD2d 423, 748 NYS2d 390 (2 nd Dept. 2002), cited by DR. GAMBELLA, can be readily distinguished as it concerned treatment of a patient at two (2) separate hospitals and found no continuing relationship in the course of care. Based upon the foregoing, it is hereby

ORDERED, that the movant's motion for summary judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 1, 2004

WILLIAM R. LaMARCA, J.S.C.

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