

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

367

CA 08-00185

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

---

MATTHEW PERRINO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FRANCIS T. MAGUIRE, DDS, DEFENDANT,  
AND JEFFREY R. KUNTZ, DDS, DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

---

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

---

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered January 2, 2008 in a dental malpractice action. The order granted the motion of defendant Jeffrey R. Kuntz, DDS for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: On September 22, 2004, plaintiff commenced this dental malpractice action alleging, inter alia, that Jeffrey R. Kuntz, DDS (defendant) failed to monitor, diagnose and treat plaintiff "for conditions related to a keratocyst in [his] mouth." Defendant moved for partial summary judgment dismissing as time-barred those parts of the complaint concerning his alleged negligent acts or omissions prior to March 22, 2002 (see CPLR 214-a). We conclude that Supreme Court properly granted the motion.

Defendant met his initial burden by establishing that more than 2½ years elapsed between the date of the acts or omissions in question and the commencement of the action (see *id.*; *Schreiber v Zimmer*, 17 AD3d 342, 343), and plaintiff failed to raise a triable issue of fact whether the statute of limitations was tolled by the continuous treatment doctrine (see *Massie v Crawford*, 78 NY2d 516, 519-520, *rearg denied* 79 NY2d 978; *Nailor v Oberoi*, 237 AD2d 898). Although plaintiff was treated by defendant for general dental purposes during the period in which the recurrent keratocyst remained undiagnosed, plaintiff failed to raise a triable issue of fact whether defendant engaged in a course of treatment for that condition (see *Nykorchuck v Henriques*, 78 NY2d 255, 259; *DeMarco v Santo*, 43 AD3d 1285; *Leifer v Parikh*, 292 AD2d 426, 427-428). Even assuming, arguendo, that

defendant was aware of plaintiff's original keratocyst, we conclude that his awareness of that condition does not, by itself, establish that he engaged in a course of treatment for the recurrent keratocyst (see *Nykorchuck*, 78 NY2d at 258-259; *DeMarco*, 43 AD3d 1285).

Entered: March 27, 2009

JoAnn M. Wahl  
Clerk of the Court