SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

PART IA PART 16

Index Number : 805159/2012
BARONE, JOHN C.
vs
DELLO RUSSO LASER EYE VISION
Sequence Number : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: JAN 07 2014

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JOHN C. BARONE,

Plaintiff,

Index No. 805159/12
Motion Seq. No.002

-against-

DELLO RUSSO LASER VISION MEDICAL CARE PLLC, LASER EYE PRACTICE OF NEW YORK PLLC and JEFFREY DELLO RUSSO, M.D., and JOSEPH DELLO RUSSO, M.D.,

Defendants.

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SCHLESINGER, J.:

This is a controversy that concerns Lasik surgery on the plaintiff John Barone on May 29, 2008 and its aftermath. At the time of the surgery, Mr. Barone was 28 years old. He contends that he never should have had Lasik surgery and that in fact the surgery was contraindicated because of an underlying corneal disease known as "forme fruste keratoconus". Dr. Harvey Rosenblum examined Mr. Barone on July 9, 2012. In his letter of that day, he concluded by stating that the patient's prognosis for visual recovery in the absence of surgery is poor. Additionally, ophthalmologist Dr. Robert Cykiert, who had reviewed Barone's records, opined in an affirmation that Lasik surgery was contraindicated here based on pre-surgical tests done by the defendants. Dr. Cykiert also stated that Mr. Barone suffered from corneal distortion and that "it is likely that thinning of the cornea will progress and that definitive treatment in the form of a penetrating Keratoplasty in both eyes can be expected ... certainly within the next five years."

Barone commenced this action on June 28, 2012. Originally, when the action was begun, it named three defendants, Dr. Jeffrey Dello Russo, named individually, his

professional corporation Dello Russo Laser Vision Medical Care, PLLC, and Laser Eye Practice of New York, PLLC, apparently a predecessor to the Dello Russo PLLC. Some time thereafter, on May 20, 2013, counsel added a fourth defendant, Dr. Joseph Dello Russo, who is Jeffrey's father and partner. He is also the individual who actually performed plaintiff's bilateral Lasik surgery on May 29, 2008.

However, after this date, as all parties agree and the records confirm, Dr. Joseph Dello Russo never again saw Mr. Barone or gave him any treatment. But his son, Jeffrey, did. It is the duration and substance of that treatment, which moving counsel does not even concede was "treatment", that is the subject matter of the motion now before me.

Dr. Jeffrey Dello Russo and his professional corporation are moving to dismiss the complaint as barred by the statute of limitations, pursuant to CPLR §3211(a)(5)[1]. The factual predicate for this motion and argument is that John Barone's last actual day of treatment with Dr. Jeffrey Dello Russo was on September 22, 2008. Therefore, since CPLR §214-a mandates that a medical malpractice action be commenced within two and a half years of the last treatment, which here would allegedly be March 22, 2011, this action would be barred as it was begun on June 28, 2012 or about 15 months too late.

There is no dispute as to the dates that Mr. Barone went to the defendants' office. Further, there is no dispute as to when certain medical events occurred and that

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[1] Although the motion is not made on behalf of the movant's predecessor corporation, Dello Russo Laser Vision Medical Care, PLLC, counsel alleges (at ¶4) that the entity no longer exists and was not served, and plaintiff does not dispute that point. Thus, that entity is not a viable defendant.

complaints were made soon after relating to those events. Specifically, the initial surgery occurred on May 29, 2008, when Dr. Joseph Dello Russo performed bilateral Lasik surgery. The plaintiff signed a lengthy consent form for this procedure.[2]

On June 10, 2008, Barone had a second procedure done, this time by Dr. Jeffrey Dello Russo, on his left eye to smooth out a flap in that eye. A second consent form was signed by the plaintiff on that day as well. Then on July 20, 2008 and September 22, 2008, the patient returned to the office and saw Jeffrey Dello Russo, complaining of dry eye.

On the September visit, Barone was told to come back in three months. But he did not. It should be noted, as moving counsel does, that at all of these visits, Barone's uncorrected vision was virtually normal, 20/20 in both eyes, according to records for the July 10 and September 22, 2008 visits.

However, John Barone did return and saw Dr. Dello Russo on two further occasions, August 13, 2010 and January 7, 2011. It is the way in which one characterizes these visits, in light of relevant case law, that determines whether one or both of these visits were a part of a continuing course of treatment with the earlier visits. If it was a continuing course of treatment for the same condition earlier addressed, then

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[2]On December 4, 2013, this Court held oral argument on motions brought by both Dr. Joseph Dello Russo and Dr. Jeffrey Dello Russo. On the record of that day, I granted Joseph's motion to dismiss on statute of limitations grounds, as it was clear that the action against him was untimely. I pointed out that May 29, 2008 was the only time Joseph saw and treated the plaintiff and since the action against him was not begun until May 20, 2013, it was well past the two and one-half years allowed by the CPLR. However, as to Jeffrey's motion, I described it as "much more complicated". Therefore, I took that motion, meaning the motion now being decided, on submission.

by either date, this action would be timely. But if the actual last treatment date was September 22, 2008, it would not be.[3]

Moving counsel, with some case support, takes a somewhat narrow view of what makes treatment continuous or related to treatment provided previously. He argues that the visits of 2010 and 2011 cannot be considered "continuous" to the earlier treatment of 2008 as there was not ongoing treatment for the same medical condition. Counsel argues that when Barone left defendants' care in September 2008, it was clear that he was satisfied with the outcome of his Lasik surgery, and by choosing not to return as directed, no further treatment was anticipated by either the doctor or the patient. In August 2010, when he came back to the office, he "resumed" treatment after reporting that he noted a "regression" of vision in his right eye. But counsel urges the "resumption" of treatment is not a "continuation" of it. Finally, such "resumption" is not sufficient to toll the statute pursuant to the exception provided in §214-a for continuous treatment.

After the August 13, 2010 visit, on September 2, 2010, Dr. Jeffrey Dello Russo suspected an "accommodative spasm", where a patient has difficulty adjusting his focus from distance to near vision. The doctor referred Barone to Dr. Mark Steele, who saw him on September 24, 2010. In Dr. Steele's report sent to the defendant, his findings described a complaint of blurry vision in the right eye. The patient's uncorrected vision

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[3]If the August 13, 2010 date is used, the plaintiff would have had until February 13, 2013, to commence an action. If the final visit date of January 7, 2011 is used, he would have had until July 7, 2013 to commence suit. However, if the date of September 22, 2008 is used, as urged by the defendant, plaintiff would only have had until March 22, 2011 to commence an action. The action here was commenced on June 28, 2012.

was 20/30+ in the right eye and 20/25 in the left. Dr. Steele did not believe Barone had evidence of accommodative spasm. He referred the patient back to Dr. Dello Russo for "consideration of refractive surgery."

The final visit was on January 7, 2011, wherein the Mr. Barone and Dr. Dello Russo discussed the possibility of further surgery. No decisions were made, and Mr. Barone never came back to that office.

Plaintiff's counsel opposes the motion to dismiss. In the opposition, he includes an affidavit from John Barone, an affirmation from Board Certified Ophthalmologist Dr. Robert Cykiert, and a July 9, 2012 report of Mr. Barone's examination by Dr. Harvey Rosenblum of that date. Dr. Cykiert opines that based upon all of the patient's records, there was continuous treatment by Dr. Dello Russo of John Barone from May 29, 2008 through January 7, 2011.

Counsel for Mr. Barone argues that there was continuous treatment here, despite the lengthy gap between Mr. Barone's visit in September 2008 and his next visit in August 2010. He says that Keratoconus or post-Lasik ectasia, pursuant to the reports by Doctors Rosenblum and Cykiert, is a progressive condition that may well not produce symptoms for one to two years after the surgery. He points to what the plaintiff says were the same symptoms he experienced before the initial visit with the defendants in May 2008 and about two years later, toward the end of 2010 when he once more saw Dr. Dello Russo. These symptoms included poor uncorrected vision, headaches, dry eyes, itching burning eyes and eye-strain while using a computer (¶2 and ¶17 in Barone affidavit, Exh A to Opposition). Therefore, counsel urges "it would

be a manifest injustice if the plaintiff's time to sue began to run before the onset of any symptoms" (¶27, Aff in Opp).

Finally, counsel for plaintiff argues that defendants should be estopped from arguing that the action is time-barred because there is evidence that defendants withheld pre-surgical test results until well after this action was commenced. In this regard, he cites *Simcuski v. Saeli*, 44 NY2d 442 (1978), a medical malpractice case wherein the defendant surgeon appeared to have deliberately withheld material information of his patient's true condition, causing her to postpone critical treatment because she relied on this misinformation.

In that regard, Mr. Barone states in his affidavit that prior to surgery, he was never told that Lasik surgery was contraindicated or that he suffered from any corneal deficits. He states that he first learned of the pre-surgical testing results during pre-trial discovery in this action. Further, he asserts that his subsequent treating physician, Dr. Rahmin Mostafavi, did not receive a copy of the May 29, 2008 studies of his right eye with all of Mr. Barone's other records when he requested them. (¶'s 4,5, 20 & 21 of Barone Affidavit). In other words, the May 29, 2008 studies were not included or were left out of the records sent to Dr. Mostafavi.

Before discussing the applicable law as to whether the 2010 and 2011 visits constituted continuous treatment, it would be beneficial to elaborate on the opinions expressed by Dr. Cykiert, who is a board certified ophthalmologist. He has been in private practice since 1981 and states that he specializes "in anterior segment surgery of the eye including LASIK Laser Vision Correction" (¶2).

Dr. Cykiert reviewed the tests results from May 29, 2008. He found abnormalities as to both eyes and stated (¶16) that:

> the patient was suffering from corneal disease – *form fruste* keratoconus, a dormant, sub-clinical condition – which is a well known, generally accepted contraindication to doing LASIK, because of the risk, among others, of developing corneal ectasia, a progressive thinning, warping and irregular bulging of the cornea, with attendant progressive severe visual problems.

Dr. Cykiert next comments that despite the testing concerns, the initial results from the surgery were good through the September 22, 2008 visit. But he continues by explaining that this "was to be expected" and "is fully consistent with the medical literature in this area in that it usually takes 1-2 years before the patient begins to experience symptoms" (¶18-19).

This doctor then points out that Dr. Dello Russo's studies of August 13, 2010, September 2, 2010 and October 8, 2010 "showed a high degree of irregular corneal astigmatism, with progressively worsening corneal topographies, consistent with the complication of post-LASIK ectasia" (¶22).

Dr. Cykiert then opines as to three issues: first, that the defendants should have known by the fall of 2010 that Mr. Barone was suffering from post-Lasik ectasia but did not tell the patient; second, that Dr. Jeffrey Dello Russo committed malpractice by performing a contraindicated Lasik surgery; and finally, and relevant to this motion, that there was continuous treatment of the patient by the defendant doctor from May 29, 2008 through January 7, 2011. (¶'s 23, 27 and 28). This last opinion relies on the fact

that Mr. Barone's complaints in 2010-2011 were related to similar complaints he had made in 2008 and that the cause of these complaints was the same in the two periods, "the patient's refractive error"; also, "the same body part was being examined and treated throughout, namely the corneas" (¶28).

Discussion

First of all, I do not accept defense counsel's criticism of the use of an expert by the plaintiff in his opposition. Dr. Cykiert's analysis and opinions, while certainly not determinative on the issue of continuous treatment, were helpful in explaining Mr. Barone's symptoms and complaints.

Further, there was nothing unusual about such a submission. For example, in *Porubic v. Oberlander*, 274 AD2d 316 (1st Dep't 2000), the court, in finding that the doctrine of continuous treatment might be available to the plaintiff, relied in part on the "competent proof presented by plaintiff, including an affirmation by her expert oncologist/hematologist..."

In another opinion in this area, also from the First Department, *Chestnut v. Bobb-McKoy*, 94 AD3d 659 (2012), the court in finding the likelihood of continuous treatment beginning on May 17, 2005, relied in part on a medical opinion submitted by an expert who discussed the symptoms experienced by the patient of lung cancer several years before death and the commencement of the action.

Earlier on, I suggested that defense counsel held a narrow view of the doctrine of continuous treatment, which distinguished between continuity of treatment and its resumption. In this regard, *Sherry v. Queens Kidney Center*, 117 AD2d 663 (2nd Dep't

1986), was cited by moving counsel. This decision, finding that continuous treatment did not exist, relied on gaps of years between visits by the plaintiff to the defendant. For example, there was a hiatus in treatment between 1969 and 1972 office visits. The Second Department said in conclusion that: "The fact that he [the decedent)] allowed almost three years to elapse between examinations leads us to conclude that the June 3, 1972 office visit constituted a resumption of treatment rather than a continuation thereof." 117 AD2d at 665.

I find here that the moving defendants, by using the September 2008 visit as the last one continuing the treatment for the Lasik surgery, have made a showing in the first instance that the statute of limitations of 2 ½ years would bar this action. However, I also find that plaintiff's opposition succeeds in showing that factual issues exist as to whether that is the date that should be used. In other words, enough has been shown by plaintiff to put in issue whether subsequent visits by Mr. Barone in August 2010 and January 2011 were also part of that same treatment. Thus, I am not accepting the September 2008 visit as the last one in a course of treatment.

In *Gomez v Katz*, 61 AD3d 108 (2nd Dep't 2009), a case also about Lasik surgery, the trial and appellate courts made similar findings that, despite a gap of 24 months in visits to Dr. Katz, there was a question raised as to whether that last visit continued the earlier treatment because on the last visit, the plaintiff, like Barone, made complaints similar to the ones she had made earlier in regard to her deteriorating vision. In *Gomez (supra)*, defense counsel, similar to our case, argued that the latest, final visit was "at best, a 'renewal' of treatment, not encompassed by the continuous treatment

doctrine" (p 115). Also similar to our case, in between visits to the defendants, Gomez saw another eye doctor. However, neither fact – the gap or the visit to another doctor – was dispositive. What was significant, however, to the court's finding that issues of fact existed as to whether the last visit of May 10, 2002 constituted continuous treatment, was the fact that the plaintiff's complaint of symptoms was similar to her earlier complaints. That is precisely what Barone states happened here.

Finally, two recent First Department cases support my finding here. The first, *Gehbauer v. Baker*, 292 AD2d 255 (2002), concerned alleged malpractice during a surgical procedure. The surgery occurred on April 26, 1996. In two May 1996 post-surgical visits, the plaintiff made three specific complaints to her doctor, the defendant. He said that these were normal complaints and would resolve. However, over two years later, in June 1998, Ms. Gehbauer made another visit to Dr. Baker with the same specific complaints. This scenario sufficed to create an issue as to whether the 1998 visit was related to the patient's original condition. Thus, the action was allowed to proceed.

In *Rudolph v. Lynn*, 16 AD3d 261 (1st Dep't 2005), a dental malpractice case, crowns were initially placed in June and July of 1998. The defendant also treated plaintiff in January 1999 by replacing some of the crowns. In November 2000, the patient returned after having seen another dentist and complained that the crowns were too big. The defendants then replaced them for an additional charge. The action was commenced in January 2003, and the defendant moved to dismiss all claims relating to pre-January 1999 treatment, i.e., the 1998 crowns, as barred by the statute of limitations.

The trial court found that the gap of 22 months between January 1999 and November 2000 was too great and "broke any claim of continuity of treatment". But the appellate court reversed this finding and instead made its own finding that, despite the 22 month gap, there was a continuous course of treatment as the visits all related to the attempted installation of satisfactory crowns.

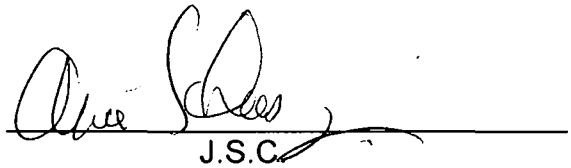
Here, Mr. Barone states that his complaints in 2010 and 2011 were the same as his earlier ones, which were the basis of his agreeing to the Lasik surgery. Certainly there is enough here to conclude that the plaintiff should be given an opportunity to prove that, from the beginning to the end of his relationship with Dr. Dello Russo, all the treatment he sought and received concerned his desire to resolve the various complaints he had about his vision and his eyes.

Accordingly, it is hereby

ORDERED that the motion to dismiss the action as against defendants Laser Eye Practice of New York PLLC and Jeffrey Dello Russo, M.D. is denied. Counsel shall appear for a discovery conference on Wednesday, February 5, 2014 as previously scheduled.

Dated: January 7, 2014

JAN 07 2014



J.S.C.

ALICE SCHLESINGER