



Ferreira v. Maimonides Medical Center

11 Misc.3d 1075(A) (2006) | Cited 0 times | New York Supreme Court | January 26, 2006

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This opinion is uncorrected and will not be published in the printed Official Reports.

The defendant moves this Court seeking an order pursuant to CPLR§§3211(a)(5) and 214-a dismissing this action as time barred and for such other and further relief as to this Court seems just and proper.

The plaintiff cross-moves seeking an order:

- 1) compelling compliance with the Preliminary Conference Order;
- 2) setting a date certain for the EBT of the defendant Maimonides Hospital;
- 3) costs and sanctions; and
- 4) such other and further relief as to this court seems just and proper.

Now, upon the foregoing papers and upon hearing oral argument on January 12, 2006 and due deliberation had thereon the motion is Granted and the Complaint is Dismissed.

Plaintiff in this medical malpractice action alleges that the defendant failed to diagnose and treat a stroke between January 25, 2001 and January 29, 2001. The instant action was commenced by the filing of a summons and complaint on or about October 26, 2004.

In his Bill of Particulars the plaintiff specifically states that the alleged negligence occurred between January 25, 2001 and January 29, 2001.

The act or omission of which the plaintiff complains is the failure to prevent the stroke and/or its progression to the point of Jose Arias' incapacitation from the stroke. After January 29, 2001 the patient's stroke and the treatment for it was over and there was nothing further that could have been done for him. Jose Arias remained at Maimonides Medical Center for the next two years and eight months solely because he lacked insurance coverage that would enable transfer to a long term care facility and during that time he was receiving only custodial care. The hospital did not provide continuous treatment of the injury or illness that forms the basis of the plaintiff's lawsuit. Rather, the only continuous aspect of the patient's circumstances was that the hospital provided custodial care.



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An action for medical malpractice must be commenced within two years and six months of the date of the accrual. See, CPLR §214-a; see also, *Massie v. Crawford*, 78 NY2d 516, 519. A claim occurs on the date of the alleged malpractice unless the continuous treatment toll applies. See, *Massie v. Crawford*, *supra*. The plaintiff's bill of particulars delineates the dates of negligence herein as January 25, 2001 through January 29, 2001.

Inasmuch as the instant plaintiff's summons and complaint were filed on October 26, 2004, three years and nine months after the alleged malpractice occurred, the instant action is untimely unless the plaintiff establishes a course of continuous treatment. This he is unable to do. The hospital herein attempted to transfer the plaintiff to a nursing home on January 30, 2001 for supportive care as an "alternative level of care" patient in April, 2001. Had he been insured, he would have been transferred as early as January 30, 2001 and the hospital would have ceased treating Mr. Arias at that time. Only because he was uninsured did Mr. Arias remain at Maimonides for the next two years and eight months and the only "continuous" aspect of Mr. Arias' treatment was the continuing nature of the diagnosis. See, *Ganess v. City of New York*, 207 AD2d 765; *affirm'd* 85 NY2d 733.

Inasmuch as the treatment of Jose Arias for continuous treatment purposes ceased on January 29, 2001, the date after which he was no longer receiving treatment for a stroke; April 3, 2001, the date on which the medical records indicate that he was an "alternative level of care" patient or July, 2001 the date after which he was no longer receiving treatment from the physicians about whose treatment he complains herein, the commencement of the action was untimely.

Plaintiff further argues that the action is timely in that he has established "insanity" for purposes of tolling the statute of limitations. Said argument is also unavailing. The appointment of a guardian does not conclusively establish an individual's entitlement to tolling the statute of limitations due to insanity. See, *Vaynman v. Maimonides Medical Center*, 4 AD3d 414, 415-416; *In the Matter of William F. Butler v. Town of Ramapo*, 242 AD2d 570. The standard for appointing a guardian is lower than that for tolling the statute of limitations based upon insanity. See, NY Mental Hygiene Law §81.15.

The Court of Appeals has held that the toll for insanity is only available to "individuals who are unable to protect their legal rights because of an over-all inability to function in society."

McCarthy v. Volkswagon of America, 55 NY2d 543, 548.

In addition, the plaintiff must establish not only that Mr. Arias was insane within this framework, but that he was continuously in such a state from the time that his alleged causes of action arose until the statute of limitations expired. *Rosenfeld v. Schlecker*, 5 AD3d 461. The plaintiff has failed to meet this burden. The affirmation of Dr. Robert Shaiman is insufficient to establish Jose Arias' insanity. Nor does it establish that Mr. Arias was continuously insane for the entire period during which he failed to commence the instant action. Moreover, Dr. Shaiman's opinion was based upon



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only one visit with Jose Arias.

Lastly, Mr. Arias obtained representation. He has not demonstrated why the plaintiff could not have obtained such representation earlier and within the applicable statute of limitations period.

In light of the foregoing, the plaintiff's cross-motion is in all respects denied as moot.

This constitutes the Decision and Order of this Court.

