

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14  
Justice

	x	Index	
ANA DIAZ, et al.		Number <u>25423</u>	1998
- against -		Motion	
		Date <u>May 14,</u>	2002
N.Y.S.A. - I.L.A. MEDICAL CENTER OF NEW YORK, INC., et al.		Motion	
	x	Cal. Number <u>13</u>	

The following papers numbered 1 to 22 read on this motion by defendants Ephraim Ovitch, M.D. s/h/a Ephraim M. Ovitsch, M.D., (hereinafter "Ovitch") and Diagnostic Radiology Associates, P.C., (hereinafter "Diagnostic Radiology") for summary judgment; and a cross motion by defendant N.Y.S.A.- I.L.A. Medical Center of New York, Inc. (hereinafter "NYSA-ILA") for partial summary judgment dismissing the complaint insofar as it relates to treatment prior to May 19, 1996.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1 - 5
Notice of Cross Motion - Affidavits - Exhibits ...	6 - 9
Answering Affidavits - Exhibits .....	10 - 17
Reply Affidavits .....	18 - 22

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

In this medical malpractice action, plaintiffs allege that defendants failed to timely diagnose and treat plaintiff Ana Diaz's breast cancer. A cause of action for medical malpractice requires proof that there was a deviation or departure from accepted standards of medical practice and that such departure was a proximate cause of injury. (Rodney v North Shore Univ. Hosp., 286 AD2d 382; Lyons v McCauley, 252 AD2d 516; Prete v Rafla-Demetrious, 224 AD2d 674; Georgetti v United Hosp. Med. Ctr., 204 AD2d 271.)

The evidence submitted by movants is sufficient to establish, prima facie, that defendant Ovitch was not negligent in treating plaintiff Ana Diaz and is entitled to judgment as a matter of law, thereby shifting the burden to plaintiff to submit evidence in admissible form demonstrating the existence of a triable issue of fact. (See, Alvarez v Prospect Hosp., 68 NY2d 320; Holbrook v United Hosp. Med. Ctr., 248 AD2d 358; Payne v Selesnick, 236 AD2d 529; Jederlinic v Arya, 209 AD2d 586.) To meet their burden, plaintiffs were required to come forward with

expert medical opinion evidence rebutting defendant Ovitsh's prima facie showing and demonstrating the merit of their cause of action. (See, Alvarez v Prospect Hosp., supra; Fiore v Galang, 64 NY2d 999; Jederlinic v Arya, supra; see also, Mosberg v Elahi, 80 NY2d 941.)

Although plaintiffs have submitted the affidavit of a medical expert in opposition to the motion as it relates to defendant Ovitsh, one of the primary factors relied upon by that expert in forming an opinion is not supported by the evidence in this case. Specifically, there is no evidence that plaintiff Ana Diaz complained of pain in her breast at the time of her June 2, 1997 examination by defendant Ovitsh at the clinic operated by defendant NYSA-ILA or at any previous visit to the clinic. Rather, she first complained of pain in the breast during an examination by defendant Hanan on December 26, 1997, almost seven months after she was seen by defendant Ovitsh. Thus, the conclusion that defendant Ovitsh was negligent for failing to take some particular action based upon this symptom is without probative value. Accordingly, the motion is granted to the extent that defendant Ovitsh is awarded summary judgment dismissing the complaint as alleged against him. (See, Alvarez v Prospect Hosp., supra; Holbrook v United Hosp. Med. Ctr., supra.)

In all other respects, the motion is denied. The evidence offered in support of the summary judgment application on behalf of defendant Diagnostic Radiology is not sufficient to establish its entitlement to judgment as a matter of law. (See, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851; see also, Alvarez v Prospect Hosp., supra.) Movants have submitted the affidavit of a radiologist who states therein that the physicians at Diagnostic Radiology did not depart from good and accepted medical practice in their reading and interpretation of the films of the mammograms performed at Diagnostic Radiology. However, the expert does not give any opinion as to whether, under all of the circumstances presented, it was a departure from accepted standards of medical practice for the radiologist who reviewed the June 1997 mammogram films to fail to recommend that a sonogram be performed on Ana Diaz, and as to whether such departure was a proximate cause of the injuries sustained. The failure to address this allegation of malpractice precludes summary relief. (CPLR 3212[b]; see, Berkey v Emma, 291 AD2d 517; Drago v King, 283 AD2d 603.)

The cross motion by defendant NYSA-ILA for partial summary judgment is granted to the extent that all claims of malpractice against it based upon conduct which occurred prior to May 19, 1996 are dismissed. Even assuming, arguendo, that the acts or omissions of NYSA-ILA prior to that date were negligent, defendant NYSA-ILA has demonstrated that the two-and-one-half year limitation period for bringing a medical malpractice cause of action bars any such claims since this action was commenced on November 19, 1998. (CPLR 214-a.) Thus, the burden shifted to plaintiffs to demonstrate the applicability of the continuous treatment doctrine to toll the Statute of Limitations. (See, Cox v Kingsboro Med. Group, 88 NY2d 904; Massie v Crawford, 78 NY2d

516; Elkin v Goodman, 285 AD2d 484; Robertson v Bozza and Karafiol, 242 AD2d 613.) Plaintiffs have not met this burden.

The continuous treatment doctrine tolls the time in which to bring a malpractice action until after a plaintiff's last treatment "'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'". (McDermott v Torre, 56 NY2d 399, 405, quoting from Borgia v City of New York, 12 NY2d 151, 155.) A patient's continuing general relationship with a physician or clinic, or routine periodic examinations, will not satisfy the doctrine's requirement of a course of treatment for the condition upon which the claim of malpractice is based. (See, Massie v Crawford, *supra*; McDermott v Torre, *supra*; Robertson v Bozza and Karafiol, *supra*.)

Plaintiffs contend that the February 5, 1996 visit by plaintiff Ana Diaz to the NYSA-ILA clinic was the beginning of a continuous course of treatment for the purposes of the continuous treatment doctrine. However, there is no evidence that plaintiff reported any complaints about her breast to the examining physician or that she was advised of any breast condition or abnormality following the examination. As plaintiffs admit, the examining physician on that date did not make a recommendation for a mammogram, sonogram or other diagnostic testing, and did not initiate any treatment, but merely advised plaintiff to return for a routine follow-up breast examination in one year. In effect, plaintiffs allege no more than a failure to establish a course of treatment for Ana Diaz's breast condition, an omission that does not amount to a "course of treatment". (See, Young v New York City Health & Hosps. Corp., 91 NY2d 291; Nykorchuck v Henriques, 78 NY2d 255.) The record demonstrates that between the February 5, 1996 examination and her next clinic visit in June 1996, no treatment relating to plaintiff Ana Diaz's breast condition was expressly contemplated by the examining physician or by Ana Diaz. Thus, the services performed on February 5, 1996 were discrete and complete, not part of a course of treatment. (See, Young v New York City Health & Hosps. Corp., *supra*; Robertson v Bozza and Karafiol, *supra*.) The return visit by plaintiff to the NYSA-ILA clinic in June 1996, even if related to her breast condition, at best constitutes an examination undertaken at the request of the patient to ascertain the state of her condition. Such an examination is expressly exempted by statute from inclusion as continuous treatment for the purpose of CPLR 214-a. (See, Robertson v Bozza and Karafiol, *supra*.)

Inasmuch as plaintiffs have failed to raise a triable issue of fact as to the existence of any ongoing care or the contemplation of further treatment for an existing condition, or even as to plaintiff Ana Diaz's awareness of a condition warranting further treatment, plaintiffs may not benefit from the continuous treatment doctrine's toll for any alleged acts of malpractice prior to May 19, 1996. (See, Young v New York City Health & Hosps. Corp., *supra* .)

Dated: August 15, 2002

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J.S.C.

