Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D52146
N/mv

_____AD3d_____ Argued - January 31, 2017

MARK C. DILLON, J.P.
SANDRA L. SGROI
SYLVIA O. HINDS-RADIX
JOSEPH J. MALTESE, JJ.

2015-11844 DECISION & ORDER

William Freely, appellant,
v Eric D. Donnenfeld, M.D., et al., respondents.

(Index No. 601780/13)

Todd J. Krouner, Chappaqua, NY (Mayya Mesonzhnik on the brief), for appellant.

Martin Clearwater & Bell LLP, New York, NY (Iryna S. Krauchanka, Steven A. Lavietes, John L.A. Lyddane, and Barbara D. Goldberg of counsel), for respondents.

In an action to recover damages for medical malpractice and lack of informed consent, the plaintiff appeals from an order of the Supreme Court, Nassau County (Feinman, J.), dated November 9, 2015, which granted the defendants' motion for summary judgment dismissing, as time-barred, so much of the complaint as was based upon alleged acts of medical malpractice and lack of informed consent occurring prior to March 9, 2011, and denied his cross motion to strike the defendants' affirmative defense based on the statute of limitations.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the defendants' motion for summary judgment dismissing, as time-barred, so much of the complaint as was based upon alleged acts of medical malpractice and lack of informed consent occurring prior to March 9, 2011, and substituting therefor a provision denying the motion; as so modified, the order is affirmed, with costs to the plaintiff.

The plaintiff sought medical treatment from the defendants, Eric D. Donnenfeld, M.D., and Ophthalmic Consultants of Long Island (hereinafter OCLI), related to a loss of vision in his right eye. Donnenfeld performed surgery on the plaintiff in 2000 and again in 2001. The

plaintiff was subsequently diagnosed with ectasia, a condition affecting the cornea. When he was initially diagnosed, Donnenfeld advised the plaintiff that there was no effective treatment available in the United States, although a new treatment process was being developed that was then being used in other countries.

The plaintiff continued to see the defendants for his condition, and in 2008, Donnenfeld offered the plaintiff an opportunity to receive treatment as part of a national investigative study aimed at securing FDA approval for the treatment. On March 10, 2008, the plaintiff underwent screening for the study at OCLI, but on March 19, 2008, he was informed by an OCLI employee, Anne Bjornson, that he had been excluded from the study by its sponsor. On November 5, 2008, the plaintiff called the office to discuss further treatment options, and Bjornson advised him that his options were to wait for the new treatment process to be approved in the United States or to seek treatment outside the country.

The plaintiff next sought treatment from the defendants on March 9, 2011, and surgery was thereafter performed on his right eye in an effort to repair the cause of the ectasia. The plaintiff subsequently continued to see the defendants for treatment of his right eye until December 2012.

The plaintiff commenced this action by filing a summons and complaint dated July 12, 2013. The defendants moved for summary judgment dismissing, as time-barred, so much of the complaint as was based upon alleged acts of medical malpractice and lack of informed consent occurring prior to March 9, 2011. The plaintiff cross-moved to strike the defendants' affirmative defense based on the statute of limitations. The Supreme Court granted the defendants' motion and denied the plaintiff's cross motion.

The defendants demonstrated, prima facie, that so much of the complaint as was based upon alleged acts of medical malpractice and lack of informed consent occurring prior to March 9, 2011, was barred by the 2½ year statute of limitations (*see* CPLR 214-a; *Raucci v Shinbrot*, 127 AD3d 839, 840; *Peters v Asarian*, 89 AD3d 1073, 1074).

In opposition, however, the plaintiff raised a triable issue of fact as to whether the limitations period was tolled by the continuous treatment doctrine (*see* CPLR 214-a; *Gomez v Katz*, 61 AD3d 108, 111). "Under the continuous treatment doctrine, the 2½ year period does not begin to run until the end of the course of 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'" (*Gomez v Katz*, 61 AD3d at 111, quoting *Nykorchuck v Henriques*, 78 NY2d 255, 258). The doctrine "applies when further treatment is explicitly anticipated by both physician and patient," which is generally "manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, . . . for the purpose of administering ongoing corrective efforts for the same or a related condition" (*Petito v Roberts*, 113 AD3d 743, 744; *see Gomez v Katz*, 61 AD3d at 112, 114). Further "[i]ncluded within the scope of 'continuous treatment' is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment" (*McDermott v Torre*, 56 NY2d 399, 406).

In the present case, Donnenfeld testified at his deposition that when he discussed treatment options with the plaintiff, he advised the plaintiff that a new treatment process was available outside the United States and that he was cautiously optimistic that, at some time in the foreseeable future, he could offer it to the plaintiff in New York. The plaintiff, who was aware that the treatment process was the subject of a study aimed at obtaining FDA approval, testified at his deposition that he was waiting for the new treatment process to become available. After being told, in November 2008, that his only options were to wait for the new treatment or seek treatment outside the country, the plaintiff returned to the defendants for treatment of the same condition on March 9, 2011, and, in fact, received treatment for the same condition from the defendants continuing until December 2012. Under these circumstances, there are questions of fact as to whether further treatment was explicitly anticipated by both the defendants and the plaintiff after 2008, and whether, under the particular circumstances of this case, the March 9, 2011, visit constituted a timely return visit (*see Gomez v Katz*, 61 AD3d 108; *see also Devadas v Niksarli*, 120 AD3d 1000).

Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing, as time-barred, so much of the complaint as was based upon alleged acts of medical malpractice and lack of informed consent occurring prior to March 9, 2011, and, for the same reasons, properly denied the plaintiff's cross motion to strike the defendants' affirmative defense based on the statute of limitations.

DILLON, J.P., SGROI, HINDS-RADIX and MALTESE, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D52145
N/mv

_____AD3d_____ Submitted - January 31, 2017

MARK C. DILLON, J.P.
SANDRA L. SGROI
SYLVIA O. HINDS-RADIX
JOSEPH J. MALTESE, JJ.

2015-02667 DECISION & ORDER
2015-02668
2015-02669
2015-05334
2015-05910

William Freely, appellant,
v Eric D. Donnenfeld, M.D., et al., respondents.

(Index No. 601780/13)

Todd J. Krouner, Chappaqua, NY (Jessica Yanefski of counsel; Mayya Mesonzhnik on the brief), for appellant.

Martin Clearwater & Bell LLP, New York, NY (Iryna S. Krauchanka, Steven A. Lavietes, and Barbara D. Goldberg of counsel), for respondents.

In an action to recover damages for medical malpractice and lack of informed consent, the plaintiff appeals (1) from an order of the Supreme Court, Nassau County (Feinman, J.), dated January 13, 2015, which denied his motion for leave to amend the complaint, (2) from an order of the same court, dated January 16, 2015, which, inter alia, denied his motion to compel nonparties to comply with a subpoena duces tecum, (3) from an order of the same court, dated February 6, 2015, which denied, as academic, his motion to compel the defendants to produce original records for forensic analysis, (4) from an order of the same court, dated March 16, 2015, which denied, as academic, his motion to compel disclosure from the defendants, and (5), as limited by his brief, from so much of an order of the same court, entered March 17, 2015, as, upon denying the defendants' motion for a protective order striking portions of his notice to admit, granted leave to renew that motion, and denied, with leave to renew, his cross motion to deem admitted the facts stated in the

notice to admit.

ORDERED that the appeal from the order dated January 16, 2015, is dismissed as abandoned; and it is further,

ORDERED that the order dated January 13, 2015, is affirmed; and it is further,

ORDERED that the order dated February 6, 2015, is reversed, on the law, and the plaintiff's motion to compel the defendants to produce original records for forensic analysis is denied on the merits; and it is further,

ORDERED that the order dated March 16, 2015, is reversed, on the law, and the plaintiff's motion to compel disclosure from the defendants is denied on the merits; and it is further,

ORDERED that the order entered March 17, 2015, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

The plaintiff received treatment, including surgery, from the defendants, related to a loss of vision in his right eye. After the surgery, the plaintiff was diagnosed with ectasia, a condition affecting the cornea. The plaintiff thereafter commenced this action, alleging medical malpractice and lack of informed consent. Following discovery, the plaintiff moved for leave to amend the complaint to add causes of action alleging fraud and breach of fiduciary duty. The Supreme Court denied that motion. The plaintiff further moved to compel the defendants to produce original records for forensic analysis, and for further disclosure from the defendants. The court, interpreting that discovery as pertaining to the proposed fraud cause of action, denied those motions as academic.

With respect to a notice to admit served by the plaintiff, the defendants moved pursuant to CPLR 3103 for a protective order striking portions of the notice to admit, and the plaintiff cross-moved to deem the facts stated therein admitted. The Supreme Court denied the defendants' motion with leave to renew upon proper papers, and also denied the plaintiff's cross motion with leave to renew.

The Supreme Court did not improvidently exercise its discretion in denying the plaintiff's motion for leave to amend the complaint to add causes of action alleging fraud and breach of fiduciary duty. In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025[b]; *Marcum, LLP v Silva*, 117 AD3d 917). Here, the plaintiff's proposed causes of action were palpably insufficient or patently devoid of merit. The allegations of fraud set forth in the proposed amended complaint amounted only to allegations that the defendants concealed their alleged malpractice. This is insufficient to give rise to a cause of action sounding in fraud separate and different from the malpractice cause of action (*see Simcuski v Saeli*, 44 NY2d 442, 452). Further, the proposed cause of action alleging breach of fiduciary duty was duplicative

of the medical malpractice cause of action (*cf. Baker v Inamdar*, 99 AD3d 742, 744).

The Supreme Court improperly denied, as academic, the plaintiff's motions to compel the defendants to produce original records for forensic analysis and to compel other disclosure. The court concluded that those motions were academic in light of its denial of leave to amend the complaint to add a cause of action alleging fraud. Contrary to the court's conclusion, the discovery sought by the plaintiff in these motions did not relate exclusively to the proposed fraud cause of action. Nevertheless, the motions lacked merit. As to the motion to produce original records for forensic analysis, the plaintiff failed to establish that the proposed testing was not destructive, and failed to adequately indicate the extent to which the testing would alter or destroy the original records (*see Mattern v Hornell Brewing Co., Inc.*, 84 AD3d 1323, 1325; *Castro v Alden Leeds, Inc.*, 116 AD2d 549, 550). Moreover, the plaintiff failed to establish adequate justification for the testing (*see Mattern v Hornell Brewing Co., Inc.*, 84 AD3d at 1325; *Castro v Alden Leeds, Inc.*, 116 AD2d at 550). As to the motion to compel disclosure, the defendants could not be compelled to produce records, documents, or information that were not in their possession (*see Gottfried v Maizel*, 68 AD3d 1060; *Argo v Queens Surface Corp.*, 58 AD3d 656).

The Supreme Court did not improvidently exercise its discretion in granting the defendants leave to renew, on proper papers, their motion for a protective order striking portions of the plaintiff's notice to admit (*cf. Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.*, 84 AD3d 1153; *Wider v Heller*, 24 AD3d 433, 434), and in, consequently, also denying, with leave to renew, the plaintiff's cross motion to deem admitted the facts stated therein.

The plaintiff raises no argument in his brief with respect to his appeal from the order dated January 16, 2015. Accordingly, the appeal from that order must be dismissed as abandoned (*see Roman v Emigrant Sav. Bank-Brooklyn/Queens*, 111 AD3d 692, 695; *Delijani v Delijani*, 100 AD3d 951, 952).

In light of our determination, we need not reach the parties' remaining contentions.

DILLON, J.P., SGROI, HINDS-RADIX and MALTESE, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court