David Michaud v. Jack Hauser, M.D. et al.

CV095030873S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN

2013 Conn. Super. LEXIS 1977

September 5, 2013, Decided
September 5, 2013, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-Defendants were not entitled to summary judgment in a medical malpractice case, because issues of fact existed regarding when the patient should have reasonably discovered the actionable harm, at the time of the patient's heart attack or when a physician's assistant told the patient that his heart attack would likely have been prevented by certain diagnostic procedures and treatment options.

OUTCOME: Defendant's motion for summary judgment denied.

JUDGES: [*1] Robin L. Wilson, J.

OPINION BY: Robin L. Wilson

OPINION

MEMORANDUM OF DECISION RE MOTION FOR SUMMARY JUDGMENT (#126)

FACTS

On July 27, 2009, the plaintiff, David Michaud, commenced the instant action against the defendants, Jack Hauser and HeartCare Associates of Connecticut, LLC (HeartCare) for medical malpractice. Subsequently, the plaintiff filed an amended complaint on July 23, 2012, alleging the following facts.[1] On November 8, 2006, after complaining of chest pain and fatigue, the plaintiff's primary care physician referred him to Hauser, who was a cardiologist employed by HeartCare. Between November 20, 2006 and January 31, 2007, Hauser, along with other agents of HeartCare, performed various tests and studies on the plaintiff for his chest pain and fatigue. On February 25, 2007, the plaintiff suffered an acute

anteroseptal myocardial infarction, caused by the total occlusion of the proximal left anterior descending coronary artery. As a result, the plaintiff required an emergency cardiac catheterization and coronary artery stent. The plaintiff alleges that his injuries were caused by, *inter alia*, the defendants' failure to (a) properly diagnose the plaintiff's symptoms of ischemic heart disease; (b) [*2] recognize the change in the plaintiff's cardiac status; (c) rule out cardiac ischemia when another diagnosis was suspected; (d) appropriately treat the heart disease by performing a cardiac catherization, an angioplasty, and a stent placement; and (e) recognize that a delay in performing cardiac interventions could result in cardiac injury and/or death.

1 On November 30, 2009, Jack Hauser filed for bankruptcy and an automatic stay was placed in effect. After the bankruptcy court allowed the plaintiffs to seek recovery against the defendant's insurance policy, this court terminated the stay on February 15, 2012.

On June 26, 2013, the defendants filed the instant motion for summary judgment accompanied by, *inter alia*, a memorandum in support, various medical records, and the plaintiff's petition for an extension of time.[2] In response, the plaintiff filed an objection to the motion on July 29, 2013, accompanied by, the plaintiff's affidavit and deposition testimony of Hauser and the plaintiff. The defendants filed a reply, along with Hauser's affidavit, to the plaintiff's objection on August 7, 2013. This matter was heard at the short calendar on August 12, 2013.

2 The defendants filed a "corrected [*3] motion for summary judgment" on August 1, 2013, which includes exhibits and case law that was not included in the original motion for summary judgment dated June 26, 2013.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Internal quotation marks omitted.) *Grenier v. Commissioner of Transportation, 306 Conn. 523, 534-35, 51 A.3d 367 (2012)*. "Summary judgment may be granted where the claim is barred by the statute of limitations." *Doty v. Mucci, 238 Conn. 800, 806, 679 A.2d 945 (1996)*. It is appropriate on statute of limitation grounds when the "material facts concerning the statute of limitations [are] not in dispute . . ." *Burns v. Hartford Hospital, 192 Conn. 451, 452, 472 A.2d 1257 (1984)*. "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles [*4] of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Anastasia v. General Casualty Co. of Wisconsin, 307 Conn. 706, 711, 59 A.3d 207 (2013)*, quoting *DiPietro v. Farmington Sports Arena, LLC, 306 Conn. 107, 116, 49 A.3d 951 (2012)*.

The defendants move for summary judgment on the ground that the plaintiff's complaint is barred by the two-year statute of limitations for a medical malpractice suit as provided by *General Statutes §52-584*. Specifically, the defendants argue that the statute of limitations began to run on February 25, 2007, the day that the plaintiff suffered his heart attack. Thus, the defendant contends that the plaintiff was required to bring his medical malpractice claim on or before February 25, 2009. The plaintiff argues that the determination of the date of actionable harm is fact specific and, thus, a question for the jury. The plaintiff claims that the statute of limitations began to run on May 3, 2007, the date that a physician's assistant told him his heart attack would [*5] likely have been prevented by certain diagnostic procedures and treatment options, rather than the actual date of the heart attack and, which date, the plaintiff claims he discovered actionable harm.

General Statutes §52-584 provides, in relevant part: "No action to recover damages for injury to the person . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . ." "When applying *§52-584* to determine whether an action was timely commenced, this court has held that an injury occurs when a party suffers some form of actionable harm . . . Actionable harm occurs when the plaintiff discovers . . . that he or she has been injured and that the defendant's conduct caused such

injury . . . The statute begins to run when the plaintiff discovers some form of actionable harm, not the fullest manifestation thereof . . . The focus is on the plaintiff's knowledge of facts, rather than on discovery of applicable legal theories." (Internal quotation marks omitted.) [*6] *Wojtkiewicz v. Middlesex Hospital, 141 Conn.App. 282, 287, 60 A.3d 1028*; cert. denied; *308 Conn. 949, 67 A.3d 291 (2013).*

In other words, "actionable harm does not occur until the plaintiff discovers an injury *and* causation . . . *[Section] 52-584* does not begin to run until a plaintiff has knowledge or in the exercise of reasonable care should have had knowledge of sufficient facts to bring a cause of action against a defendant, which, in tum, requires that a plaintiff is or should have been aware that he or she has an injury *that was caused by the negligence of the defendant*." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Lagassey v. State, 268 Conn. 723, 743-44, 846 A.2d 831 (2004).* "[T]he determination of when a plaintiff in the exercise of reasonable care should have discovered 'actionable harm' is ordinarily a question reserved for the trier of fact." *Lagassey v. State, 268 Conn. 723, 749, 846 A.2d 831 (2004).*

In *Catz v. Rubenstein, 201 Conn. 39, 40, 513 A.2d 98 (1986),* the plaintiff was told by the defendant in August 1979, that a breast lump was benign. In January 1980, the plaintiff discovered another lump, and after being seen by the defendant, [*7] she was told that it was not serious. *Id., 40-41*. In April 1980, however, the lump had grown larger, and the defendant ordered a mammogram, which indicated a malignancy. *Id., 41*. The plaintiff, conceding that she was aware that she had cancer in May 1980, brought a malpractice action on June 11, 1982, claiming that the defendant's misdiagnosis of the first lump contributed to her eventual cancer. *Id.* She claimed that the action was timely because she had been led to believe that the second growth was not related to the first, and that she did not discover that the first lump was related to her eventual cancer until April 1982, when she saw another physician. *Id., 41-42*. Thus, the plaintiff maintained that she did not sustain an injury until April 1982, the date that she discovered that the defendant had misdiagnosed her first growth. The trial court granted the defendant's motion for summary judgment on the ground that the statute began to run in May 1980, when the plaintiff found out that she had cancer. *Id., 42*. On appeal, however, the Supreme Court reversed, concluding that there was an issue of material fact as to the time that the plaintiff *should have discovered* a causal relationship [*8] between the defendant's omission and the metastasis of her cancer. *Id., 43-44*.

Similarly, in the present case, although it is undisputed that the plaintiff suffered a heart attack on February 25, 2007, the statute of limitations does not begin to run until there is no issue of fact that he discovered or should have discovered a causal relationship between his heart attack and the defendants' alleged malpractice. While the plaintiff's heart attack undisputably occurred on February 25, 2007, he claims that he did not actually discover the cause of his injury until May 3, 2007, when he was told by a physician's assistant that his heart attack would likely have been prevented by certain diagnostic procedures and treatment options. (Pl.'s Ex. A.) Thus, the issue is whether the plaintiff, in the exercise of reasonable care, should have discovered the actionable harm on February 25, 2007, the date of his heart attack.

The defendants argue that a reasonable person should have known that the defendants committed malpractice after suffering a heart attack because he had previously complained of chest pains and fatigue. The plaintiff disputes that suffering a heart attack automatically places him [*9] on notice of the defendants' alleged medical malpractice. Rather, the plaintiff argues that he did not discover, and could not have reasonably discovered, the defendants' alleged malpractice until he was told by a physician's assistant that his heart attack would likely have been prevented by certain diagnostic procedures and treatment options.

Notably, the defendants have not submitted any evidence that suffering a heart attack should automatically place the plaintiff on notice of the defendants' alleged breach of care. Furthermore, "[i]n deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." *Patel v. Flexo Converters U.S.A., Inc., 309 Conn. 52, 57, 68 A.3d 1162 (2013).* Therefore, based on the parties' submissions and arguments, a genuine issue of material fact exists as to when the date of actionable harm occurred.

The cases cited by the defendants are unavailing. In *Wojtkiewicz v. Middlesex Hospital, supra, 141 Conn.App. 283*, the plaintiff was an unattended patient who became dizzy and fell from a hospital bed after she had been

placed in an upright position on the bed by hospital staff. In affirming the [*10] trial court's granting of summary judgment, the court held that the plaintiff's action was not filed within the two years statute of limitations because the plaintiff was aware of, and thus, discovered her injuries when she fell from her hospital bed. *Id., 287*. In that case, the hospital's alleged negligent conduct was the obvious and immediate cause of the fall because, *inter alia*, the hospital bed did not have sidebars. *Id., 283*. Thus, the plaintiff could have reasonably discovered that her injuries were causally related to the hospital's alleged negligent conduct, without any medical opinion. In the present case, however, the plaintiff could not as easily discover that his heart attack was directly caused by the defendants' alleged malpractice. In fact, the evidence only shows that the plaintiff visited the defendants' facility because he experienced chest pains and fatigue. (Defs.' Aff.) There is no evidence that the plaintiff was specifically concerned about a potential heart attack and the defendants have not submitted any evidence to show that the only possible symptom of chest pains and fatigue is an imminent heart attack. Thus, a jury must determine whether suffering a heart [*11] attack should necessarily place the plaintiff on notice of the defendant's alleged malpractice.

Similarly, an important distinction exists between the facts in the present case and those in *London v. Yale New Haven Hospital, Superior Court, judicial district of New Haven, Docket No. CV-09-5028881 (October 27, 2010, Wilson J.) (50 Conn. L. Rptr. 787, 2010 Conn. Super. LEXIS 2819*). In that case, the plaintiff underwent hip replacement surgery for her right hip on October 12, 2006. *Id., 788, 2010 Conn. Super. LEXIS 2819*. A second surgery was performed on October 13, 2006, after she was informed that a misplaced piece of the replacement hip needed to be removed. *Id*. As a result of the surgery, her right leg was longer than her left leg. *Id*. Nevertheless, the plaintiff argued that the continuous treatment doctrine applied and she did not discover the alleged malpractice until February 2009. *Id., 789, 2010 Conn. Super. LEXIS 2819*. In granting the defendants' motion for summary judgment, the court concluded that the continuous treatment doctrine did not apply, so the statute of limitations began to run in October 2006, which expired in October 2008. *Id*. Notably, the plaintiff's right leg was longer than her left leg immediately after the surgery and the defendant doctor had apologized [*12] after informing the plaintiff that a second surgery was necessary to correct a mistake that had been made during the first surgery. *Id., 788, 2010 Conn. Super. LEXIS 2819*. Unlike *London*, the defendants in the present case did not apologize for causing the plaintiff's heart attack and there were no obvious clues that his heart attack was directly caused by the defendants' alleged malpractice. Thus, while the plaintiff did not need to obtain a medical opinion to discover the alleged malpractice in *London*, in the present case, the plaintiff's heart attack does not necessarily create a causal relationship with the defendants' alleged malpractice.

In *Burns v. Hartford Hospital, supra, 192 Conn. 452*, the plaintiff was treated by the defendants for injuries that resulted from an automobile accident. After the plaintiff began to complain of soreness in one of his legs, the defendants determined that the leg had become infected due to the previous treatment, which was disclosed to the plaintiff on November 10, 1975. *Id., 452-53*. Subsequently, the plaintiff commenced an action against the defendants on November 1, 1978. *Id., 453*. The trial court granted the defendants' motion for summary judgment, concluding that the statute [*13] of limitations had begun to run on November 10, 1975, the date on which the plaintiff had been told that his injury was caused by contaminated intravenous tubes. *Id., 454*. The Supreme Court affirmed this decision because "[t]he injury that the plaintiff attributes to the hospital's negligence . . . was inflicted and discovered in November 1975. *Id., 459-60*. Thus, the "ruling in *Burns* rested on when the plaintiff discovered the injury, not when he *should have* discovered the injury." (Emphasis added.) *Lagassey v. State, supra, 268 Conn. 741*.

Unlike the facts in *Burns*, the issue in the present case is when the plaintiff should have reasonably discovered the cause of his injury. "[T]he term injury is synonymous with legal injury or actionable harm. Actionable harm occurs when the plaintiff discovers, or in the exercise of reasonable care, should have discovered the essential elements of a cause of action." (Internal quotation marks omitted.) *Jackson v. Tohan, 113 Conn.App. 782, 787, 967 A.2d 634*, cert. denied; *292 Conn. 908, 973 A.2d 104 (2009)*. Here, it is clear that the date of the actionable harm is a genuine issue at dispute in the present case. Moreover, our Supreme Court has expressly [*14] held that "the point at which a plaintiff discovered or in the exercise of reasonable care should have discovered an injury is generally a question of fact . . ." *Lagassey v. State, supra, 268 Conn. 739*. Accordingly, the date that the plaintiff should have

reasonably discovered the actionable harm is a genuine issue of material fact that should properly be left to a finder of fact.

Finally, the court must address the defendants' contention that the ninety-day extension does not render this action timely. *General Statutes §52-190a(b)* allows the plaintiff to petition for an automatic ninety-day extension of the statute of limitations.[3] In the present case, the plaintiff filed his petition for a ninety-day extension of the statute of limitations on May 1, 2009. The plaintiff expressly stated in the petition that it does not concede that the existence of his claim would have been discoverable prior to May 3, 2007. Moreover, as previously discussed, the date of actionable harm is a question of fact that should be determined by a fact finder. Therefore, if the jury determines that the date of actionable harm began on May 3, 2007, then the plaintiff timely commenced this suit within the ninety-day [*15] extension period by filing the complaint on July 27, 2009.

3 Specifically, *General Statutes §52-190a(b)* provides, in relevant part: "Upon petition to the clerk of the court where the civil action will be filed to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry . . ."

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is denied.

Wilson, J.