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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 105528/2008
TORRES, JOSE
VS.
CHO, HYUN TAIK
SEQUENCE NUMBER : 004
DISMISS

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

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion to dismiss by defendant Hyun Taik Cho, M.D., is denied in accordance with the accompanying memorandum decision, the original of which is attached to motion sequence 003.

FILED
MAY 05 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAY 04 2011

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

----------X

JOSE TORRES and ISABEL TORRES,

Plaintiffs,

-against-

Index No. 105528/08
Motion Seq. Nos. 003 & 004

HYUN TAIK CHO, M.D., ST. VINCENT'S CATHOLIC MEDICAL CENTER, and BETH ISRAEL MEDICAL CENTER,

Defendants.

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SCHLESINGER, J.:

The events that occurred on January 17, 1997 are not in dispute here. However, the legal significance of those events, very particularly one such event, is very much in dispute, and its resolution is determinative of whether this action may or may not continue.

On January 8, 1997, plaintiff Jose Torres went to see the defendant otolaryngologist Dr. Hyun Taik Cho with complaints of frontal sinus headaches, lightheadedness and left eye pressure. A CT Scan of the paranasal sinus revealed an osteoma (a benign tumor or new piece of bone usually growing on another piece of bone, typically in the skull) in the left frontal sinus. Dr. Cho recommended an osteoplastic flap and removal of the osteoma.

On January 17, 1997, Mr. Torres was admitted to defendant Beth Israel Medical Center under Dr. Cho's service for this procedure. Dr. Cho explained to the patient before the procedure that a fat graft would be performed, with fat taken from his abdomen. Dr. Cho performed the procedure with the aid of residents, anesthesiologists and nurses.

Although there seems to be no discussion of the graft in the operative report dictated by resident Dr. Feldman, in Dr. Cho's deposition in this action taken on July 28, 2009, he explained (at p 67) the reason for the fat graft as it relates to a cyst-like swelling known as mucocele:

> fat graft is used to minimize the reoccurring mucocele because there was no space after you remove all the tissue. If there's no space between in the hollow area, the incidence of mucocele developing is less. It's not non-existent but it's less.

With regard to how the fat was removed, Dr. Cho explained (at p 68) that it was "just a small incision on the left side, not to confuse the appendectomy wound. We usually make on the left side, low abdomen, just open the skin and remove some fat tissue." He did not recall specifically who had removed the fat, but he stated (at p 68) that "while I'm finishing up on the head, the resident goes down here, low abdomen, and opens the skin which is very simple procedure, and takes some fat and just close it."

With regard to drainage of the abdominal incision. Dr. Cho said (at p 71): "I don't recall it. My own customary (sic), I don't usually put drain in the side of fat harvesting, it's not necessary, but I don't recall if this patient had a drain". When he was asked if he was referring to a Penrose type drain, he said "Yes". Finally, when asked if sutures were used to close the abdomen, and if so how many, Dr. Cho answered (at p 68) "Yes. One suture you can usually".

Mr. Torres was discharged on January 19, 1997 and saw Dr. Cho three days later. The healing was going well and continued to go well during his post-operative visits through March 4, 1997.

The next contact between the two was in 1999 when Mr. Torres complained of numbness in his forehead. Later, in October 2002, the plaintiff reported to the doctor that he had had a recent CT scan which showed a possibly recurring mucocele. Dr. Cho told his patient to come in, but that did not happen until April 2007. At that time, an MRI

showed complete opacafication of the left frontal sinus, prompting a second surgery by Dr. Cho on May 7, 2007, this time at defendant St. Vincent's Catholic Medical Center.

This post-operative course was not nearly as unremarkable as the first, and by October of that year the plaintiff reported pain in the left eye orbit and an MRI reported positive findings. Dr. Cho recommended revision surgery and/or a second opinion. Mr. Torres chose the latter course and soon after saw Dr. Raj Shrivastava who recommended another frontal sinus surgery and a cranioplasty.

Thereafter, on November 16, 2007, Torres was admitted to non-party St. Luke's Roosevelt Hospital for a procedure by Dr. Shrivastava that again included the use of abdominal fat to fill in portions of the frontal sinus. The plaintiff testified at his deposition that when this surgeon told him of the need for a graft, he suggested that Dr. Shrivastava take fat from the 1997 site.

What was discovered during this surgery, while Mr. Torres was under anesthesia, is the subject of these two motions for summary judgment by defendants Beth Israel Medical Center and Dr. Cho. Specifically, two fragments of yellow plastic tubing were discovered. Pursuant to the operating room record and pathology report, this tubing measured 1.0 x 0.7 x 0.1 cm and 4.0 x 1.0 x 0.1 cm.

What should be noted at this point is that during the ten years between these two surgeries, 1997 and 2007, the plaintiff had regularly been complaining of abdominal problems. Those complaints form the basis for the moving defendants' CPLR §3212 motions for summary judgment dismissing the 1997 action. In support of Beth Israel's motion, Dr. Charles Goldberg, a gastroenterologist who has reviewed all the records and depositions, opines in his affidavit (at ¶5) that "any gastrointestinal complaints that plaintiff

Jose Torres may have made subsequent to the January 17, 1997 fat graft and the discovery/removal of the foreign object during the November 16, 2007 procedure performed at St. Luke's Roosevelt Hospital were entirely unrelated to the presence of plastic tubing being left in his abdomen." (See Beth Israel's motion, Exh A). However, Dr. Goldberg's opinion is sharply contested by plaintiff's expert, a board certified internist, who in a lengthy affirmation distinguishes between generalized complaints of gastric problems that Torres experienced and specific ones described as "stabbing pains," which the expert says were caused by the tubing left behind and which the plaintiff states ceased after the tubing was removed in 2007 by Dr. Shrivastava.

This clear difference of opinion with regard to the kind of complaints made by Mr. Torres and their predicates is enough here to show the existence of triable issues as to whether the tubing left in the plaintiff's abdomen for ten years caused him pain and suffering. Accordingly, defendants' request for summary judgment must be denied.

However, what remains is the much more interesting and, one could say, intriguing question raised by defendants' motions to dismiss the action as time-barred pursuant to CPLR §3211(a), subd. 5. CPLR §214-a requires that an action for medical malpractice be commenced within two years and six months of the allegedly negligent act or omission, except that "where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within a year of the date of such discovery..." Defendants assert that this action is time-barred because it should have been commenced within 2½ years of the 1997 surgery when the tubing was placed in Mr. Torres during the first surgery. In support of their assertion that the "foreign object" exception does not apply here, defendants point to the final sentence in the statute, which reads:

> For the purpose of this section the term foreign object" shall not include a chemical compound, fixation device or prosthetic aid or device.

Here, the discovery of the tubing occurred on November 16, 2007, and the action was commenced within a year of that date, on April 18, 2008. If the defense is correct that the foreign object exception does not apply because the drain is a "fixation device," then the action is time-barred. If they are not correct and the tubing drain does constitute a "foreign object," the action is timely and will continue.

The obviously key question, then, is what is a "fixation device." If one were to check a medical dictionary for a definition of "surgical fixation devices" one would learn that they are "Devices used to hold tissue structures together for repair, reconstruction or to close wounds. They may consist of adsorbable or non-adsorbable, natural or synthetic materials. They include tissue adhesives, skin tape, sutures, buttons, staples, clips, screws, etc., each designed to conform to various tissue geometries." http://www.reference.md/files.

According to plaintiff's expert: "A fixation device is designed to support some other structure and has a future value after the perioperative period." Thus, he opines, since the tubing left in Mr. Torres does not meet this definition, it constitutes a "foreign object" within the meaning of the tolling provision (Aff. at p 9). But as moving counsel correctly points out, it is for the Court to characterize the object. I will attempt to do this by reviewing and discussing the history of the tolling rule relating to the discovery of "foreign objects."

Up until 1969, there was no rule or exception to the 2½ year statute of limitations period in medical malpractice cases involving foreign objects. Then, in April of that year, the Court of Appeals in *Flanagan v. Mount Eden General Hospital*, 24 NY2d 427, changed that situation in a 4-3 decision. There, Judge Kenneth Keating, writing for the majority and citing the 1930 opinion *Conklin v. Droper*, 229 App. Div. 227, *aff'd* 254 NY 620,

acknowledged that up until that point the Court had held that in a foreign object medical malpractice case, the statute of limitations would begin to run from the commission of the allegedly negligent act; i.e., leaving the foreign object behind. In this regard, he noted that no other jurisdiction had a contrary rule.

But the Court went on to criticize that rule:

> It is clear now that a fundamental difference exists, for the purpose of the Statute of Limitations, between negligent medical treatment and medication cases and cases involving negligent malpractice of physicians or hospitals in which a foreign object is left in a patient's body.

24 NY2d at 430. The Court then discussed (at p 431) that its new rule allowing the statute of limitations to run from the discovery of the foreign object would eliminate frivolous claims. Judge Keating added that a claim under the discovery rule would not raise questions about the plaintiffs' credibility, nor rest on professional diagnostic judgment or discretion, because it "rests solely on the presence of a foreign object within [the plaintiff's body]." (*Flanagan* concerned a clamp left in the plaintiff's abdomen).

Thus, in 1969 the Court of Appeals declared in *Flanagan* that "where a foreign object has negligently been left behind in the patient's body, the Statute of Limitations will not begin to run until the patient could have reasonably discovered the malpractice." 24 NY2d at 431. This rule continued to control until 1975 when the legislature enacted the above-quoted CPLR §214-a, which defined the Statute of Limitations in foreign object cases as one year from the date of discovery with an exclusion for "fixation devices."

Despite the legislative modification of *Flanagan,* I have discussed the case because its rationale lives on in the many judicial decisions tackling this issue, and the courts

continue to cite it when interpreting the law. For example, in *Cooper v. Edinbergh*, 75 AD2d 757, 758 (1st Dep't 1980), the court found that certain permanent indissoluble suture material intentionally left in the patient was not a "*Flanagan* foreign object." Further, that court, in attempting to discern the legislative intent of CPLR §214-a, specifically held that the sutures employed by the defendant surgeon constituted a "fixation device" excluded from the tolling rule because they were designed to hold the surgical closure in place.

The moving defendants here do not support their statute of limitations argument with any factual or opinion evidence. Rather, they rely solely on case law for the argument that the plastic tubing is not a foreign object entitled to the benefits of the tolling provision, but instead constitutes a fixation device intentionally placed in the plaintiff's abdomen by one of the defendants. Defense counsel describes plaintiff's characterization of the tubing or drain as a "foreign object" as being "entirely misguided."

For legal support defense counsel relies on the following decisions: *Flanagan, supra; Rockefeller v Moront*, 81 NY2d 560 (1993); *Rodriguez v Manhattan Medical Group, P.C.*, 77 NY2d 217 (1996); *LaBarbera v. New York Eye and Ear Infirmary*, 230 AD2d 303 (1st Dep't 1997), *aff'd* 91 NY2d 207 (1998); *Newman v. Keuhnelian*, 248 AD2d 258 (1st Dep't 1998), *lv denied* 92 NY2d 804; *Vinciguerra v Jameson*, 208 AD2d 1136 (3rd Dep't1994); and *Delaney v. Champlain Valley Physicians Hospital Medical Center*, 232 AD2d 840 (3rd Dep't 1996). All these cases, with the exception of *Delaney*, deal with the timeliness of the actions. All, not surprisingly, support defendants' argument that the objects left behind were fixation devices excluded from the tolling provision, rather than foreign objects. But also in all of them, the objects had been purposely placed with the intention of having them remain in the patient's body, although in some cases only for a few days.

Therefore, in *Vinciguerra*, one of the earlier appellate cases which cited to the then recently decided decision by the Court of Appeals in *Rockefeller v. Moront*, the object was hemoclips, small metallic devices used to control bleeding during surgery. Plaintiff alleged that the clips had been negligently placed and left on the ureter. Since the court found that the hemoclips were intended to remain in the plaintiff's body after the surgery, the clips did not constitute foreign objects under CPLR §214-a and the plaintiff was not entitled to the benefit of the tolling provision. The plaintiff there did not even try to distinguish the case from *Rockefeller*.

In *Rockefeller*, at the very beginning of the decision, the court found that the object, a misplaced suture, was "not 'a foreign object' within the rule of *Flanagan v. Mount Eden Gen. Hospital*." 81 NY2d at 562. The case involved a suture that had been improperly placed on the plaintiff's vas deferens when he was four years old and undergoing a hernia operation. Seventeen years later when an investigation was undertaken as to why his semen contained no sperm, thereby making him sterile, an exploratory surgery revealed this misplaced suture. The court then said (at p 564) that:

> In determining whether an object which remains in the patient constitutes a "foreign object," courts should consider the nature of the materials implanted in a patient, as well as their intended function. Objects such as surgical clamps, scalpels and sponges are introduced into the patient's body to serve a temporary medical function for the duration of the surgery, but are normally intended to be removed after the procedure's completion.

Then, in citing to one of their earlier decisions, *Rodriguez, supra*, the court, again citing to the *Flanagan* rationale, explained that in allegations of negligent installation of a "fixation device" such as sutures there and an IUD in *Rodriguez,* the task of characterizing the

object becomes much more difficult than in a situation where at the completion of an operation, an object is obviously forgotten. 81 NY2d at 565. The former involves situations of medical judgment and standards of care common to garden variety medical malpractice cases, as opposed to the latter situation which does not involve these considerations since the object was simply forgotten. Additionally, in the true foreign object situations, there is a clear chain of causation. These considerations, according to the court, provide a major justification for the more liberal "discovery" rule for timely commencing an action relating to a foreign object that was first established and explained in *Flanagan*.

The two First Department cases cited by the moving defendants, *LaBarbera* and *Newman,* also merit discussion. *LaBarbera* involved a silastic stent inserted in a patient's nose during surgery to provide "temporary support." 230 AD2d at 304. The stent was supposed to be removed from the nose along with packing material after a period of ten days. At that time, the packing material was in fact removed, but the stent was not.

In *Newman,* during prostate surgery a "Foley" catheter was inserted into plaintiff's bladder through his penis "with the purpose of fixing the position of the urethra so that it would not close or collapse." 248 AD2d at 259. After the surgery, the catheter slid out, which was apparent to medical personnel. However, a piece of the catheter broke off, leaving the balloon portion of the catheter behind undetected.

In both cases, the Appellate Division found that the actions, commenced more than 2½ years after the surgeries, were time-barred because neither object constituted a "foreign object" within the meaning of the statute. Instead, they were fixation devices excluded from the tolling provisions of CPLR §214-a. The rationale in both cases was the

same; that is, "that a fixation device is intentionally implanted, even if negligently left inside, whereas a foreign object is negligently left inside the patient during surgery and its continued presence serves no medical purpose." *Newman*, 248 AD2d at 433, *citing Rockefeller, LaBarbera, and Delaney.*

This rule precisely defines the situation where, as here, a drain or rubber tubing is used to remove excess fluid from a patient during and immediately after surgery. Once it performs such a function, the drain serves no medical purpose. It is certainly not there to close up or keep secure or provide support to a part of the body such as clamps or sutures or a stent would do. In other words act, it does not act like a true "fixation device".

Such was the holding in the only case cited by the plaintiff here in opposition to the defendants' motions, *Carmona v. Lutheran Medical Center*, 238 AD2d 535 (2nd Dep't1997), a case that is completely on all fours with the case now before this Court. There, a surgical drain was placed in the plaintiff's body to collect and remove excess bile and blood leakage during a gall bladder removal surgery. The drain was discovered and removed nine years later, after multiple complaints had been made by the patient.

That court, seemingly without much difficulty, found the drain to be a "foreign object" entitled to the §214-a tolling. Certainly, the drain had been intentionally placed in the patient's body, but rather than focusing on that fact, the court instead likened the drain to surgical clamps, scalpels and sponges, stating: "surgical drains have a temporary medical function and, as the appellant admitted, are intended to be removed from the patient's body shortly after surgery." 238 AD2d at 535, citing *Rockefeller, supra.* Then in the next sentence the court stated:

> Moreover, the application of the narrowly construed rule regarding the discovery of "foreign objects" pursuant to CPLR 214-a is justified in the instant action, as there is no danger of false or frivolous claims, assessment of the appellant's professional judgment or discretion is not necessary to establish negligence, and there is no causal break between the appellant's negligence and the plaintiff's injuries.

238 AD2d at 535 -36, citing *Flanagan*, *supra,* where this rationale was first explained.

Thus, after reviewing all the cases discussed, it is clear to this Court that the brief *Carmona* decision is not only consistent with the circumstances of this case, but also with the reasoning inherent in *Flanagan* and in the later enacted CPLR section.

As was stated by the *Rockefeller* court, when determining whether an object is or is not a foreign object, a court must consider both the nature of the materials implanted as well as their intended function. Therefore, the fact that a defendant here intended to insert a plastic drain in Mr. Torres' body during surgery is not ultimately determinative of this issue. Nor does it make the object a fixation device. As the *Carmona* court held, the drain had a very temporary function to remove unwanted fluids and was "intended to be removed from the patient's body shortly after surgery," but it was not. *Id.* at 535. Instead, it was forgotten or left behind.

Finally, the nature of the object itself here and in *Carmona* — the plastic tubing acting as a drain — had none of the attributes of a fixation device. It was not a stent giving support to a nose, nor a catheter giving support to the urethra. It was not a clamp or clips or sutures meant to fix something in place or close it up. It had a simple, temporary function. It was a foreign object, negligently forgotten but discovered ten years later at the same abdominal site where it had originally been placed.

Therefore, the plaintiff here is entitled to the tolling referred to in CPLR §214-a and the Statute of Limitations does not begin to run until the drain was discovered in 2007. That being the case, the defendants' motion for dismissal of this 2008 action as time-barred is denied. As discussed earlier in this decision, the CPLR §3212 summary judgment aspect of the motion dealing with causation is also denied as issues of fact, as expounded by the competing expert statements, exist.

Accordingly, it is hereby

ORDERED that the motion by defendant Beth Israel Medical Center to dismiss (seq. no. 003) is in all respects denied; and it is further

ORDERED that the motion by defendant Hyun Taik Cho, M.D. to dismiss (seq. no. 004) is in all respects denied; and it is further

ORDERED that counsel shall appear in Room 222 on July 6, 2011 at 9:30 a.m. for a pre-trial conference prepared to discuss their settlement positions and to select a firm trial date.

Dated: May 4, 2011

MAY 04 2011

FILED

MAY 05 2011

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J.S.C.

ALICE SCHLESINGER