

**Brown v Onesti**

2016 NY Slip Op 30807(U)

April 28, 2016

Supreme Court, Kings County

Docket Number: 510835/14

Judge: Gloria M. Dabiri

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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18<sup>th</sup> day of April, 2016.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

-----X  
HARRY BROWN,

Plaintiff,

- against -

Index No. 510835/14

STEPHEN T. ONESTI, M.D.,

Defendant.  
-----X

The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Other Papers \_\_\_\_\_

\_\_\_\_\_ 1-6 \_\_\_\_\_  
\_\_\_\_\_ 7-8 \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

By amended Notice of Motion (MS#4) plaintiff Harry Brown seeks summary judgment in his favor (CPLR 3212) on his claims against the defendant Stephen T. Onesti, M.D.

By notice of motion (MS#5) defendant Stephen T. Onesti, M.D. seeks summary judgment (CPLR 3212) dismissing the complaint due to the expiration of the applicable statute of limitations (CPLR 214-a; 214[5]).

By so ordered stipulation of July 2015, plaintiff's claims against co-defendants East Brooklyn Medical Group and Jacques C. Antoine, M.D. were discontinued.

## BACKGROUND

Plaintiff commenced this action with the filing of a summons and complaint on November 14, 2014 alleging medical malpractice and negligence by Dr. Stephen T. Onesti in connection with the surgical implant of a spinal cord stimulator in plaintiff's back, on February 27, 2009, for the treatment of chronic pain. Plaintiff was released from the hospital that day and was not seen by Dr. Onesti thereafter.

In support of his motion (MS#4), plaintiff argues that the implanted neuro-stimulation device was "under the exclusive control of Dr. Onesti," who, therefore, was responsible for the infection and injury plaintiff sustained when the device exploded in 2013. Plaintiff avers that in 2012 he received a letter from Medtronic (the manufacturer or distributor of the device) advising him that, because the device contains a battery, periodic monitoring is important and that, if he had not done so recently, he should visit the doctor who manages his therapy. Plaintiff avers that he reached out to Dr. Onesti several times in 2010, 2012 and 2013, but that Dr. Onesti did not return his calls or messages.

In opposition to plaintiff's motion and in support of his cross-motion, Dr. Onesti argues that the complaint must be dismissed as plaintiff commenced the action after expiration of the two and one-half year statute of limitations applicable to medical malpractice claims [CPLR 214-a], and that plaintiff is not entitled to the "foreign object toll."<sup>1</sup> Moreover, the defendant points out, the plaintiff's motion for summary judgment is not supported by an expert's affidavit.

Dr. Onesti also provides the affirmation of Dr. George DiGiacinto, a neurological surgeon. Dr. DiGiacinto avers that he is trained in the placement of spinal cord stimulators and well-versed in the related literature. Having reviewed the Bill of Particulars and

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<sup>1</sup> Raised by defendant in its answer, CPLR 3211(e).

plaintiff's medical records from Downstate, he opines that Dr. Onesti did not place a "foreign object" in plaintiff's body. Rather, the device had been placed in plaintiff's "body as a result of good and sound medical and surgical practice."

#### DISCUSSION

The statute of limitations for actions sounding in medical malpractice is two and one-half years from the date of the complained of act or omission (CPLR 214-a). Where the action is based upon the "discovery" of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery, or of the date of discovery of such facts which would reasonably lead to such discovery (CPLR 214-a). For statute of limitation purposes a "foreign object" does not include a "fixation device or prosthetic aid or device" (*id.*). A fixation device is medical paraphernalia "placed in the patient with the intention that [it] will remain to serve some continuing treatment purpose" (*Rockefeller v Moront*, 81 NY2d 560, 564 [1993]; *see also Rodriguez v Manhattan Med. Group*, 77 NY2d 217 [1990] [intrauterine birth control device left in patient for four years was not a foreign object]; *see also LaBarbera v New York Eye and Ear Infirmary*, 230 AD2d 303 [1st Dept 1997]; *Mitchell v Abitol*, 130 AD2d 633 [2d Dept 1987]). Here, the spinal cord stimulator was placed in the plaintiff's body with the intention that it remain to serve pain relief, a continuing treatment purpose [*Rockefeller v Moront*, 81 NY2d 560, [1993]]. Thus, plaintiff is not entitled to the foreign object toll of the two and one-half year statute of limitations for medical malpractice claims.

Conduct constitutes medical malpractice, rather than ordinary negligence, when it "constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician (*Bleiler v Bodnar*, 65 NY 2d 65, 72 [1985]). When "the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but

the [physician's] failure in fulfilling a different duty, then the claim sounds in ordinary negligence" (*Tracy v Vassar Brothers Hospital*, 130 Ad3d 713, 715 [2d Dept 2015]).

Here, the complaint alleges, inter alia, that Dr. Onesti implanted a device into plaintiff that was not medically necessary, that he failed to monitor the implanted device, that he owned a legal duty to plaintiff because he had undertaken plaintiff's care and treatment, and that he failed to act in accordance with the medical device's labeling instructions.

The claimed conduct by Dr. Onesti in implanting the stimulator, failing to monitor it, failing to remove it and failing to address the manufacturer's recommendations, alleged in the complaint, relate to medical treatment rather than ordinary negligence (*Glasgow v Chou*, 33 AD3d 959 [2d Dept 2006]). The resolution of these issues involve matters of medical science or art and require special knowledge or skills not ordinarily possessed by lay persons (*Id.*). Therefore, plaintiff's claims are time-barred (CPLR 214-a). Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment (MS#4) is denied; and it is further

ORDERED that the defendant Stephen T. Onesti's motion for summary judgment (MS#5) is granted and the complaint is dismissed.

ENTER,  
J. S. C.

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