

Teixeira v Bhalla
2018 NY Slip Op 30825(U)
May 1, 2018
Supreme Court, Suffolk County
Docket Number: 13-4033
Judge: Jerry Garguilo
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SHORT FORM ORDER

COPYINDEX No. 13-4033CAL. No. 17-00862MMSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY**PRESENT:**Hon. JERRY GARGUILO
Justice of the Supreme CourtMOTION DATE 10-11-17
SUBMIT. DATE 1-3-18
Mot. Seq. # 002 - MG; CASEDISP-----X
BERNARDINO TEIXEIRA and MARIA
TEIXEIRA,

Plaintiffs,

- against -

RAHULDEV BHALLA, M.D., and STONY
BROOK UROLOGY, P.C.,Defendants.
-----XMARGOLIN BESUNDER, LLP
Attorney for Plaintiffs
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Islandia, New York 11749SIMMONS JANNACE DELUCA, LLP
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Upon the following papers numbered 1 to 42 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 27 - 40; Replying Affidavits and supporting papers 41 - 42; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendants Rahuldev Bhalla, M.D., and Stony Brook Urology, P.C. for summary judgment dismissing the complaint is granted.

Bernardino Teixeira ("plaintiff") and his wife, Maria Teixeira, commenced this medical malpractice action to recover damages for injuries that plaintiff allegedly sustained as a result of the defendants' Dr. Rahuldev Bhalla and Stony Brook Urology, P.C. ("Stony Brook") negligent performance of a robotic-assisted laparoscopic radical prostatectomy ("RALRP") on the plaintiff in November 2008. The plaintiff alleges, *inter alia*, that the defendants failed to remove a "Hem-O-Lok Clip" ("hemoclip") from his body after the surgical procedure was completed, failed to properly advise and instruct him concerning the diagnosis and treatment of his medical issue, and failed to inform him of the risks associated with the RALRP. The plaintiff's wife, Maria, alleges that as a result of defendants' negligence, she has been deprived of the plaintiff's companionship and services. The plaintiff commenced this action by filing a summons and complaint on February 6, 2013.

The defendants now move for an order dismissing the complaint pursuant to CPLR 3211 (a) (5) and 3212 on the grounds that the plaintiff's action is barred by the relevant statute of limitations, and that they did not deviate from the accepted standard of care. In support of the motion, defendants submit, *inter alia*, copies of the pleadings, the plaintiff's verified bill of particulars, the deposition transcripts of the plaintiff and of the plaintiff's wife, the deposition transcript of Dr. Bhalla, the plaintiff's medical records, and the affirmation of Dr. John Phillips, the defendants' expert. The plaintiff opposes the motion, submitting, *inter alia*, the affirmation of his expert, Dr. Edward Loizides.

At his deposition, the plaintiff testified that sometime in 2008, he was diagnosed with prostate cancer, and his treating physician told him that he would need to undergo a surgical procedure to remove the tumor. The plaintiff was referred to Dr. Bhalla, who was a urologist at Stony Brook. The plaintiff met Dr. Bhalla two times prior to the procedure, and during both visits, the plaintiff's daughter or wife acted as his translator. Dr. Bhalla did not tell the plaintiff or his translators exactly what "would be done during the surgery," but he informed the plaintiff that the robotic procedure was the "more efficient" method to address his diagnosis. Dr. Bhalla also did not tell the plaintiff that he would not be able to have children after the procedure was performed, or that he might experience erectile dysfunction. The plaintiff was not aware whether Dr. Bhalla told his translators what to expect. The plaintiff underwent the procedure on November 20, 2008, and was released from the hospital the following day. Five days later, he returned to Stony Brook's emergency department because he was experiencing bladder pain, which he described as irregular post-surgical pain. Hospital staff administered pain medication to the plaintiff, he underwent some tests, and was sent home. A short time after the emergency department visit, the plaintiff returned to Dr. Bhalla so that he could remove a catheter that was placed in the plaintiff's body during the RALRP. The plaintiff did not visit Dr. Bhalla after the catheter was removed, and continued his regular medical visits with his oncologist. The plaintiff testified that in July 2012, he underwent radiation therapy and surgery to treat his bladder and kidneys. He explained that for two years prior to the treatment in 2012, he had issues performing sexually, had pain in groin area, and had difficulty with urination. According to the plaintiff, his treating physician discovered that a "clip" was left in his bladder during the RALRP, which caused calcification and stones.

Dr. Bhalla testified that he had performed hundreds of RALRP procedures prior to the plaintiff's procedure. When he met the plaintiff, he explained the procedure and possible side effects, including infection and impotence, and provided the plaintiff with alternative treatment methods. After obtaining the plaintiff's written consent, Dr. Bhalla proceeded to perform the RALRP on the plaintiff. He recalled that he placed hemoclips on the plaintiff's neurovascular bundle to stop bleeding, but he could not recall the number of hemoclips that he used. Dr. Bhalla had not experienced any equipment failure with the hemoclips that he used in prior procedures, and the hemoclips were "meant to be left in the patient." He also performed a urethral bladder reanastomosis by reconnecting the bladder to the urethra after the cancer specimen was removed. Dr. Bhalla did not place any surgical clips near the plaintiff's urethra or bladder during the reanastomosis, and at the time of the RALRP, he was not aware that a hemoclip could migrate from where it was placed. Dr. Bhalla testified that he would have observed a loose hemoclip during the procedure. He further testified that hemoclips were not visible on x-ray images or MRI.

Dr. John Phillips, a physician licensed to practice medicine in the State of New York and board certified in urology, provided an affirmation in support of defendants' motion. According to Dr. Phillips, he was familiar with the standards of practice in the field of urology, including RALRP procedures. He stated that one method of ligation used in laparoscopic procedures was the hemoclip. "It is a polymer clip that is locked in place on a vessel during a laparoscopic procedure with an applicator to stop bleeding. The [hemoclip] is a locking clip that is applied during surgery and is intended to remain in the patient, much like the sutures they replace. [Hemoclips] are not removed once applied to a vessel or structure during a laparoscopy, such as RAL[R]P." Based partly upon his review of the plaintiff's medical records and Dr. Bhalla's notes, Dr. Phillips stated that there was no indication that the hemoclips malfunctioned, were misplaced, loose, or inadvertently dropped. CAT scans taken of the plaintiff during his emergency visit to Stony Brook indicated that the hemoclips were properly applied. He noted that although the plaintiff's treating physician found a hemoclip "halfway into the anastomosis" in 2012, it was his opinion that the hemoclip migrated into the bladder. He further opined, within a reasonable degree of medical certainty, that the hemoclip placed in the plaintiff's body was a fixation device that was intended to remain inside of the plaintiff, and that defendants did not depart from accepted medical practice in their care and treatment of the plaintiff.

Pursuant to CPLR 214-a, an action sounding in medical malpractice must be commenced within 2 ½ years of either the act or omission complained of, or the last treatment where there has been continuous treatment for the same condition which gave rise to the act or omission (*Gray v Wyckoff Hgts. Med. Ctr.*, 155 AD3d 616, 617, 62 NYS3d 540, 541 [2d Dept 2017]; see *Glamm v Allen*, 57 NY2d 87, 453 NYS2d 674 [1982]; *Barella v Richmond Mem. Hosp.*, 88 AD2d 379, 453 NYS2d 444 [2d Dept 1982]). CPLR 214-a further provides 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 one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. The statute provides that a fixation device is not a foreign object" (*Leace v Kohlroser*, 151 AD3d 707, 709, 55 NYS3d 434, 436-437 [2d Dept 2017] [citation and quotation marks omitted]).

On a motion for summary judgment on the ground that a complaint was barred by the applicable statute of limitations, the moving party must establish, prima facie, that the time in which to commence the action has expired (see *Xiu Jian Sun v Wuhua Jing*, 136 AD3d 613, 614, 24 NYS3d 395, 396 [2d Dept 2016]; *Ross v Jamaica Hosp. Medical Center*, 122 AD3d 607, 996 NYS2d 118 [2d Dept 2014]; *Baptiste v Harding-Marin*, 88 AD3d 752, 753, 930 NYS2d 670 [2d Dept 2011]; *LaRocca v DeRicco*, 39 AD3d 486, 486-487, 833 NYS2d 213 [2d Dept 2007]). The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (see *Xiu Jian Sun v Wuhua Jing*, 136 AD3d 613, 614, 24 NYS3d 395; *Ross v Jamaica Hosp. Medical Center*, 122 AD3d 607; *Rakusin v Miano*, 84 AD3d 1051, 1052, 923 NYS2d 334 [2d Dept 2011]; *Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405, 840 NYS2d 417 [2d Dept 2001]; see also *Massie v Crawford*, 78 NY2d 516, 519, 577 NYS2d 223, [1991]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Dray v Staten Is. Univ. Hosp.*, __AD3d__, 2018 WL 1613917, at *3 [2d Dept 2018]).

The defendants have made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the action was not commenced until after the expiration of the two-year-and-six-month statute of limitations applicable to medical malpractice actions (*see* CPLR 214-a; *Cox v Kingsboro Med. Group*, 88 NY2d 904, 906, 646 NYS2d 659, [1996]; *Udell v Naghavi*, 82 AD3d 960, 962 [2d Dept 2011]). Whether measured from November 20, 2008, the date on which the plaintiff underwent the RALRP, or from November 25, 2008, the date of the plaintiff's final visit with Dr. Bhalla, more than four years passed prior to the plaintiff filing this action on February 6, 2013. Accordingly, inasmuch as the defendants met their burden, the plaintiff was obligated to raise a triable issue of fact in opposition to defeat the motion (*see Xiu Jian Sun v Wuhua Jing*, 136 AD3d 613, 614, 24 NYS3d 395).

The plaintiff contends that the hemoclip that was discovered in his bladder in July 2012, was a foreign object within the meaning on CPLR 214-a; thus, the statute of limitations was tolled. He argues that the hemoclip was not intended to be left in his bladder after the procedure. In support of his opposition, the plaintiff submits, *inter alia*, the affirmation of Dr. Edward Loizides, a physician licensed to practice medicine in the State of New York and board certified in urology. Dr. Loizides stated that Dr. Bhalla used the hemoclip to divide prosthetic pedicles from the neurovascular bundles during the RALRP procedure. He further stated that a hemoclip should not be used as a clamp to control bleeding "in close proximity to the bladder" or in the vicinity of the vesicourethral anastomosis during a prostatectomy. If the clips were used, "all such clips should be removed" before commencing the anastomosis. He stated that it was a departure from accepted urological standards to leave a hemoclip "in a patient's bladder or in the tissues of the anastomosis." He opined within a reasonable degree of medical certainty that defendants' act of leaving the hemoclip in proximity to the bladder was departure from good and accepted medical standards.

It is well settled that an intentionally implanted device is not a "foreign object" within the meaning of CPLR 214-a (*see LaBarbera v New York Eye & Ear Infirmary*, 91 NY2d 207, 212-213, 668 NYS2d 546 [1998]; *Rockefeller v Moront*, 81 NY2d 560, 564-565, 601 NYS2d 86 [1993]; *Lombardi v DeLuca*, 71 NY2d 838, 527 NYS2d 757 [1988]; *Provenzano v Becall*, 138 AD2d 585, 585, 526 NYS2d 167 [2d Dept 1988]). 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 (*Walton v Strong Mem. Hosp.*, 25 NY3d 554, 568, 14 NYS3d 757 [2015]). Thus, an item that is placed in the patient with the intention that it will remain to serve some continuing treatment purpose constitutes a fixation device, and not a foreign object (*see Rockefeller v Moront*, 81 NY2d 560, 563-564, 601 NYS2d 86). Consequently, a claim of negligence based on the ground that a "fixation device was improperly installed or affixed during performance of an operation does not fall within the rationale of the foreign object exception" of CPLR 214-a (*Rockefeller v Moront*, 81 NY2d 560, 563-564, 601 NYS2d 86).

The plaintiff has failed to raise an issue of fact with respect to the tolling of the statute of limitations. Dr. Phillips stated that the hemoclip was intentionally placed on the plaintiff's neurovascular bundle to stop bleeding in the plaintiff, and that the hemoclip was meant to remain inside of the plaintiff where it was placed when the procedure was completed. Dr. Loizides failed to contradict

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Dr. Phillips' statements. Dr. Loizides merely stated in a general manner that the hemoclip was not meant to be left in the bladder. He failed to affirmatively state that hemoclips must be removed from a patient when the RALRP was completed. Furthermore, Dr. Phillips opined that the hemoclip likely migrated from the neurovascular bundle into the bladder, and Dr. Loizides failed to contradict that statement. As previously indicated, a fixation device that was improperly installed or affixed does not transform into a foreign object (*see Rockefeller v Moront*, 81 NY2d 560, 601 NYS2d 86). "[O]nly in circumstances where a foreign object is negligently 'left' in the patient's body without any intended continuing treatment purpose will the discovery rule be available to delay the running of the Statute of Limitations" (*Rockefeller v Moront*, 81 NY2d 560, 566, 601 NYS2d 86; *Jacobs v University of Rochester*, 103 AD3d 1205, 1206, 959 NYS2d 345, 346 [4th Dept 2013]). Therefore, even if Dr. Bhalla had improperly affixed the hemoclip, the record established that it was intentionally placed and left inside of the plaintiff for a continuing treatment purpose (*see LaBarbera v New York Eye & Ear Infirmary*, 91 NY2d 207, 212-213, 668 NYS2d 546 [1998]). Accordingly, inasmuch as defendants established that the hemoclip was a fixation device that was intentionally placed inside of the plaintiff by Dr. Bhalla, the hemoclip that was later found in the plaintiff's bladder was not a foreign object within the meaning of CPLR 214-a; thus, the statute of limitations operate to bar the complaint. The defendant's motion, therefore, is granted.

Dated: May 1st, 2018


 HON. JERRY GARGUILO
 J.S.C.

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