

**Lollman v Pfeiff**

2021 NY Slip Op 33572(U)

June 2, 2021

Supreme Court, Madison County

Docket Number: Index No. EF2019-1517

Judge: Donald F. Cerio, Jr.

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FILED IN  
MADISON COUNTY CLERK'S OFFICE

Thursday, June 3, 2021 10:18 AM

STATE OF NEW YORK  
COUNTY OF MADISON SUPREME COURT

KATHLEEN LOLLMAN and WILLIAM LOLLMAN,

**DECISION AND ORDER**

Plaintiffs,

-against-

Index No. EF2019-1517

JAMES PFEIFF, M.D., individually and as agent, officer, and/or employee of Women's Health Associates, Women's Health Associates of Oneida, Oneida Healthcare, Oneida Healthcare Corporation, Oneida Health Systems, Inc. and/or Oneida Health Ventures, Inc.; HAZEM QALLA, M.D., individually and as agent, officer, and/or employee of Women's Health Associates, Women's Health Associates of Oneida, Oneida Healthcare, Oneida Healthcare Corporation, Oneida Health Systems, Inc. and/or Oneida Health Ventures, Inc.; WOMEN'S HEALTH ASSOCIATES, by and through its agents, officers and/or employees; WOMEN'S HEALTH ASSOCIATES OF ONEIDA, by and through its agents, officers and/or employees; ONEIDA HEALTHCARE, by and through its agents, officers and/or employees; ONEIDA HEALTHCARE CORPORATION, by and through its agents, officers and/or employees; ONEIDA HEALTH SYSTEM, INC., by and through its agents, officers and/or employees; and ONEIDA HEALTH VENTURES, INC., by and through its agents, officers and or employees,

Defendants.

The above-entitled action has come before this court upon the December 30, 2020, Notice of Motion on behalf of Defendants James Pfeiff, M.D., Oneida Health Systems, Inc., d/b/a Oneida Healthcare, Oneida Healthcare Corporation, Oneida Medical Services, PLLC, d/b/a Women's Health Associates, and Oneida Health Ventures, Inc., seeking dismissal of the plaintiffs' complaint as having been untimely commenced. Accompanying the Notice of Motion is the December 30, 2020, Memorandum of Law; the December 30, 2020, Attorney Affidavit of Anthony J. DePerna, Esq., and; the December 29, 2020, Affidavit of James Pfeiff, M.D.

Defendant Hazem Qalla, M.D., also filed a Notice of Motion dated January 4, 2021, seeking dismissal of the plaintiffs' complaint along with any cross-claims against him. Accompanying the Notice of Motion was the January 4, 2021, Memorandum of Law; the December 29, 2020, Affirmation of Richard N. Waldman, M.D., and; the January 4, 2021, Affirmation of Sarah Murnane Kelly, Esq.

Plaintiffs subsequently filed a Notice of Cross-Motion dated March 5, 2021, seeking summary judgment with respect to liability and the scheduling of an inquest to determine damages. Plaintiffs also opposed the relief sought by Defendants Pfeiff, et al., with respect to dismissal. Accompanying the Notice of Motion was the Attorney Affirmation of J. Patrick Lannon dated March 5, 2021; the March 5, 2021, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment; Plaintiffs' Statement of Undisputed Material Facts dated March 5, 2021; Plaintiffs' Response to Defendants' Statements of Fact Contained Within Their Respective Attorney Affidavits, dated March 5, 2021, and; the Plaintiffs' March 5, 2021, Expert Affidavit.

Counsel for Defendants Pfeiff, et al., thereafter submitted the April 7, 2021, Affidavit of Marc Eigg, M.D., and the April 13, 2021, Affidavit in Reply of Mark L. Dunn, Esq. Counsel submitted an amended affidavit of Attorney Dunn dated April 15, 2021, which served to correct a typographical error as contained in his April 13, 2021, affidavit. Counsel further submitted the April 15, 2021, Reply to Plaintiffs' Statement of Alleged Undisputed Facts under cover dated April 15, 2021.<sup>1</sup>

Plaintiffs responded to the above by the April 14, 2021, Attorney Affirmation in Reply of Attorney Lannon which included an unredacted version of the plaintiffs' expert affidavit as previously submitted on or about March 5, 2021.<sup>2</sup>

This matter was submitted at the court's April 16, 2021, motion term for consideration.

Initially, this court would note that the motion for summary judgment filed on behalf of Defendant Qalla is moot given the parties' execution of a stipulation of discontinuance with

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<sup>1</sup>Defendants Pfeiff's, et al, counsel, in his April 15, 2021, cover letter, objected to the plaintiffs' filing of a cross-motion which was submitted beyond the time frame ordered by this court within it's previously issued Scheduling Order. Additionally, counsel objected to the submission of the plaintiffs' expert witness affidavit as the physician's name was redacted.

<sup>2</sup>The aspects of the expert affidavit which remained unredacted pertained to biographical information not necessary to the determination of the present motion. Defendant Pfeiff's, et al, counsel was provided the opportunity to submit a further reply addressing the plaintiffs' medical expert. However, by letter dated May 19, 2021, counsel informed the court that no further reply would be submitted. However, it is acknowledged and understood that counsel does not concede with respect to the accuracy of any of the plaintiffs' submitted Statement of Undisputed Facts.

respect to the pending action against Defendant Qalla.<sup>3</sup> As such, no written decision will issue with respect to this motion.

With respect to the remaining matter before this court, essentially, the issue now presented is whether the commencement of the present action against Defendant Pfeiff, et al., was beyond the statute of limitations pertaining to a medical malpractice action. Here, the plaintiff had undergone an exploratory laparotomy on August 18, 2014, under the supervision of Defendant Pfeiff (Pfeiff) and Dr. DelPino (DelPino). During the surgery Pfeiff and DelPino had, individually, inserted two Penrose drains to provide for drainage of fluid from within the body of the plaintiff during the course of surgery. On August 25, 2014, one of the two Penrose drains had been removed by Pfeiff. The second Penrose drain, however, remained in place after Pfeiff had advanced the drain approximately two centimeters. On August 26, 2014, Pfeiff, during his examination of the plaintiff, found that this second Penrose drain was not present. Though no nursing records indicated that the second Penrose drain had been removed by the nursing staff, Pfeiff assumed that the drain had been removed when the dressing had been changed by the nurses and otherwise found the site to be unremarkable and healing. Apparently no inquiry was made by Pfeiff with regard to the removal of the drain upon his assumption that it had been removed during the change of the dressing. No further medical action was undertaken with respect to this drain and the plaintiff was subsequently discharged from the hospital on August 29, 2014.

Subsequently, the plaintiff had experienced on-going abdominal discomfort resulting in her seeking further medical care from various providers. On November 9, 2018, the plaintiff presented at the Oneida Healthcare Emergency Department again complaining of abdominal pain. A CT scan of her abdomen revealed the presence of an object within her pelvis. Subsequent laparoscopic surgery performed on November 23, 2018, resulted in the removal of a Penrose drain of approximately ten centimeters in length from the abdomen of the plaintiff. As is relevant to this particular drain, Pfeiff, during the course of his deposition, testified as follows:

Q: Doctor, at any time after surgery, had you given any thought at all to what happened to the Penrose drain that had been placed in the deep pelvic area?

A: Um...no.

Q: Other than the assumption - - I'm sorry. Other than the assumption that you had made at one time that perhaps the nurses might have pulled it out when they removed the gauze pad?

A: That's correct.

Q: Did there come a time when you realized or that you were told that the - that there

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<sup>3</sup>The parties filed the executed Stipulation of Discontinuance as to Defendant Qalla on May 14, 2021.

was found in the deep right pelvis area a Penrose drain?

A: Yeah, four years later. (P. 57, thereof).

As a result of the discovery of the Penrose drain within the abdomen of the plaintiff on November 23, 2018, the present action was commenced by the filing of the summons and complaint on May 23, 2019.

Pfeiff now moves for dismissal of the plaintiffs' complaint upon the ground that commencement of this action occurred beyond the two and one half year statute of limitations for the commencement of medical malpractice actions (CPLR 214-a). However, 214-a provides for the commencement of an action upon the latent discovery of a foreign object within the body of the plaintiff beyond the two and one-half year limitation. Under such circumstances, an action may be timely commenced after the expiration of the two and one-half year statute of limitations if the action is commenced within one year after the discovery of the "foreign object" or within one year after facts had become known which would have reasonably lead to the discovery of the foreign object, whichever is earlier.

The meaning of what a "foreign object" is, within this provision, defined by identifying what it is not. More precisely, the statute states that, "[T]he term 'foreign object' shall not include a chemical compound, fixation device or prosthetic aid or device." Here, the defendants assert that the Penrose drain is a fixation device, rather than a foreign object, and, as such, that the plaintiffs' filing in 2019 is untimely given that the act of negligence, from which the malpractice arises, occurred in 2014. Consequently, defendants seek dismissal of the present action.

The plaintiffs, on the other hand, assert that the Penrose drain is a foreign object, was discovered in 2018, and the action, commenced in 2019, only seven months after it's discovery, was timely filed in conformity with CPLR 214-a.

This court, upon having given due consideration to the submissions and arguments of counsel, finds the Penrose drain, under these circumstances, to be a foreign object rather than a fixation device. As such, the discovery of the Penrose drain within the body of the plaintiff in November 2018 and the commencement of the action in May of 2019, is timely and satisfies the statute of limitations for a medical malpractice action. The defendants' motion to dismiss is therefore denied.

This court concludes that the findings in *Carmona v. Lutheran Medical Center*, 238 AD2d 535, 2<sup>nd</sup> Dpt. 1997, are not distinguishable from the present circumstances. In *Carmona* a surgical drain had been placed within the plaintiff's body during the course of gall bladder surgery for the purpose of draining excess bile and blood. However, the drain had not been removed prior to the plaintiff's departure from the hospital and was discovered nine years later after a history of chest and abdominal pains. As the Court held there, "Like surgical clamps, scalpels, and sponges, surgical drains have a temporary medical function and, ..., are intended to be removed from the

patient's body shortly after surgery." (*Id at 535*). Significantly, the Court went on to hold that:

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. (*Id at 535-536*).

Nothing less may be said of the present circumstances. The Penrose drain was not to be permanently affixed such that it was to remain beyond its intended utility. The drain, not unlike other surgical instruments and devices, was to be removed shortly after its intended purpose, which was to drain purulent material from the abscess or potential site of infection from within the body of the plaintiff, had been accomplished. Once the intended purpose had been satisfied the drain would no longer be of any surgical or medical utility. Having served its purpose, the drain would be removed from the patient's body rather than retained therein for any medical purpose. The most that may be said of the Penrose drain was that it was a "surgical aid" which was not intended, at any time, to be a fixation device. "Fundamentally, if the facts are as alleged, plaintiff...left the hospital after an operation with therapeutically useless and potentially dangerous surgical paraphernalia lodged in [her] body." (*See Walton v. Strong Memorial Memorial Hospital, 25 NY3d 554, 573-574 [2015]*).

Therefore, as the Penrose drain is a foreign object, the discovery exception as contained within CPLR 214-a applies and the commencement of the action by the plaintiffs was, in all respects, timely and comported with the statutory proscriptions. Therefore, the defendants' motion to dismiss is denied.

Looking now to the plaintiffs' cross motion, this court had informally advised respective counsel that this motion should have been filed in conformity with this court's previously issued Scheduling Order as a dispositive motion rather than a cross-motion. However, as defendants' counsel had been provided additional time in which to respond to the cross-motion, and had done so, this court further informed counsel that the matter would be considered on its merits. That being said, upon this court having concluded that the Penrose drain is a foreign object, the plaintiffs' motion seeking to find liability on the part of Pfeiff is *si igitur hoc, quod*. Absent negligence on the part of Pfeiff the Penrose drain would not have remained within the body of the plaintiff.

Therefore, upon having given due consideration to the submission and argument of counsel, and upon this court's review of relevant statutory and decisional law of the State of New York, it is

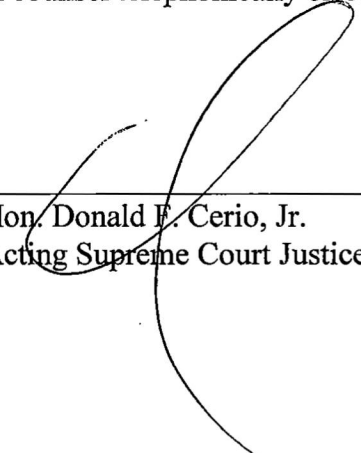
ORDERED, that the motion of Defendants Pfeiff, et al., seeking dismissal of the plaintiffs' complaint as being untimely is denied; and it is

ORDERED, that the plaintiffs' motion seeking a finding of liability is granted and an inquest will be undertaken to ascertain damages; and it is<sup>4</sup>

ORDERED, that a conference shall be conducted with counsel telephonically on June 11, 2021, at 1:30 PM; such to be initiated by chambers.

Enter.

DATED: June 2, 2021  
Wampsville, New York

  
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Hon. Donald F. Cerio, Jr.  
Acting Supreme Court Justice

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<sup>4</sup>This court takes note of the fact that, even if this court were to dismiss the plaintiffs' cross-motion as being in both form and filing improper and inconsistent with the court's Scheduling Order, the relief sought by Defendant Pfeiff would be denied. This court would have considered the responsive submissions by the plaintiffs in opposition to Defendant Pfeiff's motion to dismiss with respect to statute of limitations and would have undertaken the same analysis and reached the same conclusion with respect to the Penrose drain being a foreign object. As such, Defendant Pfeiff's motion to dismiss would have achieved no different result.