

Remarche v City of New York

2023 NY Slip Op 34960(U)

April 21, 2023

Supreme Court, Queens County

Docket Number: Index No. 721497/19

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

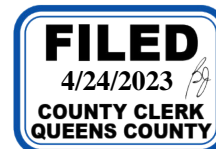
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Rene Remarche,

Plaintiff,

- against -

Index
Number: 721497/19

Motion
Date: 3/6/23



The City of New York City Health &
Hospitals - Elmhurst Hospital,

Motion Seq. No.: 4

Defendants.
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The following papers numbered E128-E148 read on this motion by plaintiff for an order to renew their motion for summary judgment denied by the Court in an order issued on April 1, 2022; and cross-motion by defendant for an order to preclude plaintiff from offering evidence regarding alleged failure to diagnose a retained foreign object and denying plaintiff's motion.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	E128-137
Notice of Cross-Motion-Affirmation-Exhibits.....	E138-144
Affirmation in Opposition-Exhibits.....	E145-146
Reply.....	E147
Reply.....	E148

Upon the foregoing papers it is ordered that the motion by plaintiff for an order to renew their motion for summary judgment denied by the Court in an order issued on April 1, 2022; and cross-motion by defendant for an order to preclude plaintiff from offering evidence regarding the alleged failure to diagnose a retained foreign object and denying plaintiff's motion are decided as follows:

Motion by plaintiff to renew his prior motion for summary judgment, which motion was denied pursuant to the order of this Court issued on April 1, 2022, is denied.

This Court denied plaintiff's motion for summary judgment in its prior order upon grounds which include:

"The expert affirmations submitted by plaintiff in confirmation of the size and nature of the ET tube placed in plaintiff on April 9, 1989, and which was surgically removed from plaintiff at Maimonides Hospital on June 24, 2019, and the expert

affirmations submitted by HHC, confirming that the ET tube placed in plaintiff on April 9, 1989, was not the same ET tube which was surgically removed from plaintiff at Maimonides Hospital on June 24, 2019, raise a question of fact regarding the ET tube."

Counsel for plaintiff in his instant motion to renew avers that 'We have learned from Defense counsel privately during a recent phone call...that Dr. Dinner has recanted this averment, and he now believes the tube he examined in our office in the summer of 2022, the one removed from Mr. Remache, is in fact a #5 ET tube'.

Counsel argues that "[t]his reversal by Dr. Dinner now obviates the rationale employed by this court in finding a question of fact, and denying Plaintiff's motion for summary judgment" and constitute new evidence so as to support renewal. Counsel's argument is without merit.

Plaintiff submits an attorney affirmation claiming some portions of defendants' expert affirmation still hold true, and other portions are untrue. Plaintiff has failed to submit evidence in admissible form regarding Dr. Dinner's expert opinion or recanting of any portion thereof. On this record there has been no submission of a corrected affirmation by Dr. Dinner opposing the plaintiff's theory of liability, or detailing what portions Dinner has recanted, or what positions he still holds.

In the order issued by the Court on April 1, 2022, the Court stated, inter alia, that:

"Both the affirmation of defendant's medical expert and the affirmation and affidavit of plaintiff's medical experts articulate objective medical findings and rationale for their respective conclusions, which do not support granting summary judgment to either side, on this record."

As noted by the Court, defendant's own experts raise material questions of fact, including that they disagree as to whether and how the subject ET tube got from the plaintiff's lungs to his stomach. Therefore plaintiff did not demonstrate his entitlement to summary judgment.

An application to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew and, for that reason, were not made known to the court (See Pahl Equip. Corp. v. Kassis, 182 AD2d 22 [1st Dept 1992] lv to app dismissed in part and denied in part 80 NY2d 1005, reargument denied 81 NY 2d 782 [1993]; Foley v. Roche, 68 AD2d 558 [1st Dept 1979]). That may be somewhat accurate here, but the proof submitted to support renewal is not in admissible form sufficient to grant the motion.

Cross-motion by defendant for an order to preclude plaintiff from offering evidence regarding defendants' alleged failure to diagnose a retained foreign object as those claims are barred by the statute of limitations, is denied.

The Court notes that the cross-motion to preclude plaintiff from offering evidence regarding the alleged failure to diagnose a retained foreign object as those claims are barred by the statute of limitations, is a disingenuous attempt by HHC to present once more to the Court the same cross-motion to dismiss on a statute of limitations basis as was made by HHC under sequence number 1, which cross motion was denied by this Court in the order issued on May 7, 2021. The Court does not look favorably on this.

The Court directs HHC's attention to the order issued on May 7, 2021, and in particular to the portions of that order wherein the Court states:

"...HHC's counsel contends that the action must be dismissed as untimely because it was commenced long after the expiration of the one year and 90-day statute of limitations on medical malpractice actions against HHC, pursuant to §§7401 of the Unconsolidated Laws and 50-i of the General Municipal Law. Counsel argues that since plaintiff's cause of action accrued, at the latest, on April 20, 1989, plaintiff was required to serve a notice of claim within 90 days thereafter, or no later than July 20, 1989, pursuant to General Municipal Law §50-e, and to commence an action no later than July 20, 1990. Therefore, argues counsel, the notice of claim that was served on July 12, 2019 and the action that was commenced on December 26, 2019, 30 years after the action accrued, are untimely and the action must be dismissed. Counsel also contends that the foreign object exception to the statute of limitations under CPLR 214-a is inapplicable to the facts of this case because the endotracheal tube that was inserted into plaintiff was not a medical device placed for the temporary duration of a surgical procedure. Counsel's contentions are without merit."

Further "...if the tube at issue were not to be considered a foreign object under CPLR 214-a, since plaintiff was 7 years old on the date his cause of action for medical malpractice accrued, the statute of limitations would have extended 10 years, to April 20, 1999 (see CPLR 208), still making the case untimely, only not by 30 years. In any event, the viability of plaintiff's action depends upon whether the section of endotracheal tube that remained in his stomach was a foreign object so that the statute of limitations commenced on the date of its discovery. This Court holds that it was."

CPLR 214-a provides, in relevant portion, "An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the

same illness, injury or condition which gave rise to the said act, omission or failure; provided, however, that: (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 facts which would reasonably lead to such discovery, whichever is earlier ... For the purpose of this section the term 'foreign object' shall not include a chemical compound, fixation device or prosthetic aid or device."

Finally "...the endotracheal tube placed down plaintiff's throat was not a permanent or semi-permanent attachment for the purpose of continuing treatment. It was introduced into the plaintiff's body to serve a temporary medical function for the duration of his treatment and was intended to be removed after the treatment's completion. It was placed down his throat to ventilate and stabilize him only for a short period during the course of his brief hospital stay and intended to be removed. Moreover, it was not affixed to his body. Indeed, the undisputed medical evidence on this record is that he extubated himself - he pulled the tube out of his mouth himself, unfortunately, causing a section of it to detach in him and settle into his stomach, not to be discovered until decades later. Moreover, HHC's counsel's unmeritorious argument that the endotracheal tube was not a foreign object because it was not placed during the course of any type of surgery but only to treat him when he presented to the emergency room is not only non-sequitur, but underscores the fact that the tube was neither a permanent installation nor related to a course of continuing treatment. Therefore, the section of endotracheal tube that was discovered in plaintiff's stomach by physicians at Maimonides Medical Center on June 25, 2019 was not a fixation device, but was a foreign object within the meaning of CPLR 214-a. Consequently, since the action was commenced on December 26, 2019, less than one year after its discovery, the action is timely".

Accordingly, the motion by plaintiff for an order to renew his motion for summary judgment denied by the Court in an order issued on April 1, 2022, is denied; the cross-motion by defendant for an order to preclude plaintiff from offering evidence regarding the alleged failure to diagnose a retained foreign object as those claims are barred by the statute of limitations is also denied.

Dated: April 21, 2023



KEVIN J. KERRIGAN, J.S.C.

