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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

PART IA PART 16

Index Number : 117464/2009
BARRERA, CYNTHIA C.
vs.
STEWART, ALLAN S.
SEQUENCE NUMBER : 002
SEVER ACTION

FILED
FEB 06 2013
COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with motion sequence 003.

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

Dated: January 25, 2013 JAN 25 2013

Alice Schlesinger, J.S.C.

ALICE SCHLESINGER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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CYNTHIA C. BARRERA AND LISANDRO PEREZ,

Plaintiffs,

Index No. 117464/09
Mot. Seq. Nos. 001 & 002

-against-

ALLAN S. STEWART, M.D., MONA FLORES, M.D., BENJAMIN ZALTA, M.D., CHRISTINA HILL, M.D., THE NEW YORK PRESBYTERIAN HOSPITAL and MEDTRONIC, INC.,

Defendants.

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SCHLESINGER, J.:

The issue presented here is whether the extension of the statute of limitations provided in CPLR § 214-c, for the commencement of an action to recover damages for personal injury "caused by the latent effects of exposure to any substance," applies when the injury is caused when the metallic tip of a medical device breaks off during surgery and remains in the patient's body.

Defendant Medtronic, Inc. has moved to dismiss all claims against it here, asserting that the metallic tip does not qualify as a "substance" and adding that, at most, plaintiff had three years from her discovery of the metallic tip during a May 2008 X-ray to act, making the 2012 joinder of Medtronic untimely. Plaintiffs oppose, asserting that the statute should be broadly construed to carry out its remedial purpose of preserving claims for injured plaintiffs. According to plaintiffs, the statute renders their claims timely because they interposed their claims within a few months of December 2011, when they were first able to confirm, after reasonable diligence, that Medtronic was the manufacturer of the device that had caused the plaintiff injury.

Background Facts

The following facts alleged in plaintiffs' opposition papers, and the referenced exhibits attached to those papers, are essentially undisputed.

On January 10, 2008, plaintiff Cynthia Barrera underwent an operation at defendant The New York and Presbyterian Hospital (NYPH) to treat an atrial septal defect, a hole in the wall that separates the two chambers of the heart. The open heart surgery was performed by defendant Dr. Allan S. Stewart, assisted by defendant Dr. Mona Flores. Apparently unbeknownst to anyone at the time, the metallic tip of one of the medical instruments broke off during the surgery and remained in Ms. Barrera's chest cavity. Defendants Dr. Benjamin Zalta and Dr. Christina Hill reviewed X-rays taken of Ms. Barrera before her discharge from the hospital, and neither physician observed any type of metallic object in the patient's chest cavity, nor anything of an unusual nature.

About four months later, on May 9, 2008, Ms. Barrera was rushed to the Emergency Room at Methodist Hospital with severe chest pains. Following a chest X-ray, the radiologist at Methodist confirmed the presence of a metallic foreign body that had not been seen on X-rays taken years earlier. Specifically, the doctor made the following findings (Exh 1):

> There is a 6 mm metallic density along the right heart border seen about the PA lateral views. This likely represents an aspirated foreign body within the right lower lobe bronchus. Clinical correlation is recommended. This was not present on CT scan of the chest dated 9/15/06 ....

In an effort to precisely identify the metallic object, Ms. Barrera returned the following week to the defendant hospital where her surgery had been performed and

underwent a CT scan on May 14, 2008. The scan confirmed the presence of a metallic object, but the object was not identified beyond the following description included in the report by the radiologist (Exh 2):

> A 6 mm metallic object is seen adjacent and anterior to the right inferior pulmonary vein at its junction with the left atrium. This may represent a retained radiopaque foreign body.

According to plaintiff's counsel, and as stated by the plaintiff at her deposition (Exh 3 at pp 128-32), plaintiff's doctors determined that it was too dangerous to remove the object due to its location in the chest cavity, so the object remains in the plaintiff's body today. (Aff in Opp, ¶¶ 15-16). Counsel further alleges (at ¶¶ 18-22) that while the experts he retained deduced from plaintiff's history and the various reports that the object had been introduced into the plaintiff's body during the surgery, they were unable to precisely determine what the object was.

Plaintiffs then timely commenced a medical malpractice action against the various physicians and NYPH on December 14, 2009, about two years after the open heart surgery had been performed and seventeen months after the presence of the metallic object had been confirmed. The essence of the claim set forth in the original Complaint was that the defendants had departed from accepted medical practice by leaving a foreign object in plaintiff's body and failing to detect it, despite post-operative testing. (Exh A, Medtronic Motion to Dismiss).

Plaintiff Cynthia Barrera testified during her deposition that when she returned to see her surgeon defendant Dr. Stewart after Methodist Hospital had confirmed the presence of the metallic object, the doctor referred her to Dr. Bachetta because he

himself could not identify the object. She further testified that Dr. Bachetta concluded based on the test results and plaintiff's history that the object had probably been left in plaintiff's chest cavity during the surgery, but he could not identify the object precisely. (Exh 3, pp 122-28).

On May 20, 2011, three years after tests had confirmed the presence of the metallic object in plaintiff's chest cavity, and about seventeen months after this action had been commenced, plaintiff's counsel deposed defendant Dr. Stewart, who had performed the open heart surgery. Dr. Stewart testified that in his opinion, with a reasonable degree of medical certainty based on information he had learned within the preceding two months, the metallic object was part of a medical instrument used during the plaintiff's surgery (Exh 4, EBT transcript, pp 18-19):

> There was in the past we used a metal tip what's called [a] floppy sucker, meaning that we would put for minimally invasive cases a tubing in through a stab wound in the skin that would drain any blood that was surrounding the heart during the operation. When that – that has a coil at the end of it and then a small metallic ball that's at the end of that – that tip, and if – as it's been described to me in the past two months, we – we changed from using that particular sucker to one that's entirely made out of plastic. I inquired why. The Chairman of Surgery, Craig Smith, had mentioned that he had a case where there was a retained object and it turned out to be that little ball, and it – the likelihood is to me since it's a 6 millimeter round, metallic object, which is consistent with what that is, that it came loose when it was pulled out.

In addition to providing an extremely detailed explanation of the use of the instrument, Dr. Stewart indicated that a floppy sucker, technically known as a pericardial sump, would not be reused and would be discarded after the operation and that no one would think to inspect it for the metallic tip as no one had known that it could be dislodged. (Exh 4, pp 30-31).

Plaintiff's counsel then undertook an investigation to confirm the manufacturer of the particular pericardial sump used during the surgery. In addition to his own research, plaintiff's counsel served defense counsel with a Notice to Produce for Discovery & Inspection within three days of Dr. Stewart's deposition, on May 23, 2011. There, plaintiff demanded that the defendants identify the maker of the device described by Dr. Stewart and produce purchase orders by the hospital for the year preceding plaintiff's surgery, as well as reports of all incidents of a retained foreign object from a pericardial sump, including the one purportedly described by Dr. Smith in his discussions with Dr. Stewart (Exh 9). After some follow up, plaintiff's counsel finally learned at a court conference on December 7, 2011 that Medtronic, Inc. had manufactured the pericardial sump used during the plaintiff's surgery, and defense counsel produced eleven purchase orders with the Model number for the device (Exh 11).

About sixty days later, on February 16, 2012, plaintiff filed an Amended Complaint adding Medtronic as a party defendant and asserting claims based on products liability. Medtronic moved to dismiss the claims as time-barred, claiming that the three-year period for commencing a personal injury action based on products liability ran at the latest from Methodist Hospital's discovery of the foreign object in the plaintiff's chest on May 9, 2008 through May 9, 2011, making the February 16, 2012 Amended Complaint untimely. In opposition, plaintiffs' counsel asserts that the time to sue runs from December 7, 2011, when he first learned the identity of the metallic object and the manufacturer of the pericardial sump, as no technical, scientific or medical knowledge or information was available to identify the object sooner. Measured from the December 7, 2011 date, the February 16, 2012 Amended Complaint is timely.

Discussion

The relevant statutory provisions here are subdivisions 2 and 4 of CPLR §214-c. Whereas CPLR §214 provides for a three-year statute of limitations in general personal injury actions, including those based on products liability, CPLR §214-c provides an extension of time in certain cases; namely, in cases involving "the latent effects of exposure to any substance" when the injury or its cause is not immediately discovered. Subdivision 2 of CPLR §214-c sets forth the general rule that the three-year period in those cases runs from the date when the plaintiff actually discovered, or should have discovered, the injury, whichever is earlier. Specifically, that provision states that:

> Notwithstanding the provisions of section 214, the three-year period within which an action to recover damages for personal injury ... ***caused by the latent effects of exposure to any substance*** or combination of substances, in any form, upon or within the body ... must be commenced shall be computed from the date of the discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier. (Emphasis added).

Subdivision 4 addresses the situation where the substance that ***caused*** the injury is not discovered until some time after the injury itself has been discovered. In those cases, the statute gives the plaintiff an additional year to act, with certain very explicit provisos. Specifically, subdivision 4 of CPLR §214-c states that:

> Notwithstanding the provisions of subdivision two ... of this section, where the discovery of the ***cause*** of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the ***cause*** of the injury; ***provided, however***, if any such action is commenced or claim filed after the period

> in which it would otherwise have been authorized pursuant to subdivision two ... of this section the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized ***and that he has otherwise satisfied the requirements of subdivision two ... of this section.*** (Emphasis added).

As indicated earlier, Medtronic asserts that CPLR §214-c has no application here whatsoever because the metallic tip does not qualify as a "substance," which would be required for the application of either subdivision 2 or 4. Rather, the applicable provision, Medtronic asserts, is CPLR §214(5), which simply requires that an action seeking damages for personal injury be commenced within three years of the injury. When measured from the May 9, 2008 X-ray when the metallic tip was discovered as the cause of the plaintiff's pain, the three-year statute of limitations expired on May 9, 2011 and the February 16, 2012 Amended Complaint is untimely, defendant asserts.

Plaintiffs assert that subdivision 4 of CPLR §214-c applies. They submit that the "cause of the injury" was not discovered until December 7, 2011 when counsel learned from counsel for the medical defendants that Medtronic was the manufacturer of the allegedly defective pericardial sump, the tip of which had broken off in plaintiff's chest during the surgery. Plaintiffs then seek to apply the above-quoted terms of subdivision 4 as follows: since the cause of the injury was discovered in December 2011, less than five years after the injury was discovered in 2008, plaintiffs had one year from discovery of the cause to sue, which they did by serving Medtronic in February 2012.

However, since that date is beyond the period allowed by subdivision 2, plaintiffs acknowledge that they are also required to show that information sufficient to ascertain

the cause of the injury could not have been discovered sooner. As proof of this point, counsel points not only to alleged consultations with unidentified experts, but he also points to the EBT testimony of Dr. Stewart that neither he, nor his colleague, could identify the metallic object until he learned from Dr. Smith that the pericardial sumps used by the hospital were defective in that the metal tip could break off.

The threshold issue that must be addressed to determine whether either subdivision in CPLR §214-c applies is whether the metallic tip from the pericardial sump that was left in the plaintiff's chest can qualify as a "substance" within the meaning of the statute. This Court agrees with Medtronic that the metallic tip does not so qualify as a "substance."

A review of the legislative history indicates that the law was intended to apply to toxic substances or materials that cause injuries which are not immediately apparent or discoverable. Indeed, the title of the bill that became law in 1986 is "TOXIC TORTS — STATUTE OF LIMITATIONS," and the preamble describes the law as an act to amend the CPLR "in relation to statute of limitations and liability for damages caused by the latent effects of exposure to certain substances or materials ...." McKinney's Session Laws, Ch. 682, 1986. Similarly, the Memorandum of the Office of Court Administration emphasizes the focus on toxic substances, stating that the purpose of the law is "to establish a new statute of limitations running from the point of discovery for damages caused by the latent effects of exposure to certain toxic substances or materials." Session Laws, p 3392.

The most detailed discussion of the law's intent to address toxic torts was included in the July 30,1986 Memorandum of Governor Mario M. Cuomo. McKinney's Session Laws, p 3182. There the Governor stated as follows:

> This measure, commonly referred to as the "Toxic Torts" bill, remedies a fundamental injustice in the laws of our State which has deprived persons suffering from exposure to toxic or harmful substances from having an opportunity to present their case in court. That injustice results from an archaic rule which commences the three year time period for suit on the date that an exposure occurs. The rule fails to recognize that the adverse effects of many of these toxic substances do not manifest themselves until many years after the exposure takes place. In such cases, a person is barred from court before he or she is aware of any injury.
>
> This bill ... repeals that archaic rule and replaces it with a fair and simple rule which permits a person to discover his or her injury before the statutory time period for suit begins to run. In enacting this law, New York joins more than 40 other states which have legislatively or judicially created a statute of limitations discovery rule.
>
> Most importantly, this measure remedies the injustices suffered by all of the currently known categories of victims of exposure to toxic or harmful substances. These include persons who have suffered serious injuries as a result of exposure to diethylstilbestrol (DES), tungsten-carbide, asbestos, chlordane or polyvinyl chloride and have been deprived of access to the courts because their claims were time barred. This bill revives their claims for a one year period and enables them to have their day in court.

The Court of Appeals discussed the legislative history and the statute's focus on the latent effects of toxic substances at length in *Matter of New York County DES Litig. (Wetherill) v Eli Lilly & Co.*, 89 NY2d 506 (1997). The plaintiff in *Wetherill* had a precancerous condition in her cervix and reproductive difficulties, ultimately attributed to the fact that her mother had taken DES. The Court framed the issue as "whether an 'injury' is discovered withing the meaning of CPLR §214-c(2) when the symptoms become apparent or instead when the connection between those symptoms and the injured's exposure to a toxic substance is recognized." 89 NY2d at 509. The Court

acknowledged that the Legislature's goal in adopting CPLR §214-c was to "provide relief to injured New Yorkers whose claims would otherwise be dismissed for untimeliness simply because they were unaware of the latent injuries until after the limitations period had expired." 89 NY2d at 513-14, quoting Sponsor's Mem in Support of L. 1986. Ch 682, 1986 NY Legis Ann, at 287. Recognizing that oftentimes it is difficult to make a scientific connection between the symptom of an injury and the etiology or cause of that injury, the Court held that the statute of limitations began to run with the plaintiff's "discovery of the manifestations or symptoms of the latent disease that the harmful substance produced" and not the "subjective understanding of the etiology" of the condition. Id at 514-515.

The facts of the instant case have no similarity whatsoever to those in *Wetherill* to justify the application of 214-c. Here, rather than having latent injuries caused by exposure to a toxic substance, the plaintiff here learned from an X-ray taken within a few months of her surgery that a metallic object left in her chest during the surgery was causing her pain. Not only had the symptoms manifested themselves fairly promptly, but she learned fairly promptly that the cause was the foreign object that had been left in her chest during the surgery. Plaintiff also knew that the injury was caused by presence of that object itself, and not from any toxic effect. The only thing she did not know was the precise medical instrument from which the object had broken off, which *Wetherill* suggests is not needed for the statute of limitations to begin to run.

The recent case of *Giordano v Market America, Inc.*,15 NY3d 590 (2010), lends further support to the proposition that 214-c was not intended to apply to a case such as this. There, the Court was responding to various questions posed by the United

States Court of Appeals for the Second Circuit. In response to a direct question, the Court clearly and unequivocally held that "the provisions of CPLR §214-c(4) are limited to actions for injuries caused by the latent effects of exposure to a substance.'" 15 NY3d at 594. After reviewing the legislative history and its decision in *Wetherill,* the Court declared that "the whole point of CPLR §214-c was to deal with substance exposure cases," which in the case before it was the drug Ephedra. Significantly, the Court also noted that the statute was not intended to apply simply because the cause of the injury was not readily identifiable, noting that, for example, it would not "benefit a plaintiff injured by a hit and run driver or an unidentified falling object." 15 NY3d at 598.

This decision was wholly consistent with an earlier one in which the Court of Appeals declined to apply CPLR §214-c to a keyboard that had caused the plaintiff to suffer from repetitive stress syndrome. Thus, in *Blanco v American Telephone and Telegraph Company, et al., v Business Machines Corporation,* 90 NY2d 757 (1997), the Court considered the focus in the legislative history on the word "toxic" and the plain meaning of the word "substance" in the statute to hold that 214-c did not apply because a keyboard did not qualify as a toxic substance.

The various Appellate Divisions have followed suit. For example, in *Casson v City of NY,* 269 AD2d 285 (2000), the First Department held that sound was not a "substance" within the meaning of CPLR 214-c. And the Second Department held in *Patterson v City of NY,* 289 AD2d 213 (2001), *lv denied* 98 NY2d 614 (2002), that compressed air was not a "substance" within the meaning of CPLR §214-c.

Noteworthy also is the fact that a separate statute, CPLR §214-a, extends the statute of limitations in medical malpractice actions involving the "discovery of a foreign

object." That statute was promulgated in 1975, eleven years before 214-c was enacted. Clearly the Legislature was aware when it enacted 214-c of the distinction between an "object" and a "substance," yet it chose to include only the term "substance" in 214-c, implicitly excluding "foreign objects" from the reach of the extension granted for commencing personal injury actions involving "the latent effects of exposure to any substance." See McKinney's Statutes, §240.

In this regard, plaintiffs' reliance on *Flanagan v Mount Eden Gen. Hosp.*, 24 NY2d 427 (1969) is misplaced. That case, a medical malpractice case, involved a foreign object (surgical clamps) left in the patient's body during surgery. Not only does *Flanagan* have no application to products liability cases, but it ultimately led to the passage of CPLR §214-a, and has no application to 214-c.

Plaintiffs' arguments to the contrary are unavailing. While it is true, as plaintiffs note, that the statute is remedial in nature and thus should be broadly construed to effectuate the purpose of preserving suit for certain injured plaintiffs, one cannot overlook the plain meaning of the phrase "latent effects of exposure to [a] substance." Plaintiff correctly notes that the *Giordano* court held that the term "latent" does not require an extended period of time and that the statute itself broadly defines "exposure" to include "contact." Nevertheless, one cannot ignore the natural and obvious meaning of the term "substance" and the significance attributed to it by the Legislature and the courts. McKinney's Statutes, §§92 and 94.

Plaintiffs' reliance on Webster's New World Dictionary, to argue that the metallic tip of the pericardial sump is a "substance," is misplaced as it ignores the context of the word in the statute and the very explicit legislative history. Also misplaced is counsel's

attempt to equate this case with *Martin v Edwards Labs,* 60 NY2d 417 (1983). That case not only pre-dated 214-c, but it involved a different type of injury, one caused when an implanted artificial heart valve released Teflon particles into the patient's bloodstream that caused injury. Those facts are not at all akin to the facts here, where the injury was caused by the mere presence of the metallic foreign object in the patient's chest and not by a substance it emitted.

Even assuming that the metallic tip of the pericardial sump could be viewed as a "substance," plaintiffs' claim is still time-barred as counsel has failed to satisfy the other conditions in subdivision 4 of CPLR §214-c. First, as defendant Medtronic correctly argues, plaintiffs discovered the "cause" of the injury in May 2008 when Methodist Hospital found via an X-ray that plaintiff's chest pains were caused by the presence of a metallic object in her chest cavity. No merit exists to plaintiffs' claim that it did not know the "cause" of the injury until it learned that Medtronic was the manufacturer of the pericardial sump from which the metallic object had broken. As discussed above, the Court of Appeals in *Wetherill* rejected the notion that the statute does not begin to run until the plaintiff identifies the precise etiological source of the injury; it is enough to discover that the "plaintiff's symptoms were attributable to an injury inflicted by an outside force." *Wetherill*, 89 NY2d at 512-13; *see also,* Alexander, Vincent C., *Practice Commentary* C214-c:2, McKinney's Cons. L., p 407.

Even if plaintiffs were to bypass all these hurdles, the claim would still be time-barred as plaintiffs have failed to satisfy the final element of subdivision 4, which requires the plaintiffs to allege and prove that "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered,

identified or determined prior to the expiration of the period within which the action or claim would have been authorized." Without permission from the Court, plaintiffs served a Second Amended Complaint on Medtronic on February 5, 2012 with allegations along these lines. The allegations there, were they accepted, would still fail to satisfy the statute.

Plaintiffs assert that no information whatsoever about the identity of the metallic object was available until May 20, 2011 when they deposed Dr. Stewart, and the identification of Medtronic as the manufacturer of the particular device did not occur until December of 2011. But the X-ray that revealed the presence of the metallic object occurred on May 9, 2008. Had plaintiffs proceeded more expeditiously with discovery in this case, they would have learned of the Medtronic connection with sufficient time to sue the manufacturer. What is more, the statute was not intended to apply to situations where the information is discerned through ordinary discovery devices. Rather, it was intended to apply to situations where relevant technical, scientific or medical information was discerned by experts or practitioners in the relevant field. *See, Giordano, supra.*

Therefore, plaintiffs' attempt to apply CPLR §214-c to the facts of this case fails on all fronts. While the Legislature should perhaps consider promulgating a statute to address a situation such as the one presented here, CPLR §214-c as written cannot be stretched to apply to the plaintiffs in this case.

Accordingly, it is hereby

ORDERED that the motion by defendant Medtronic, Inc. to dismiss all claims against it is granted, and the Clerk is directed to sever and dismiss those claims with prejudice; and it is further

ORDERED that Medtronic's motion, in the alternative, to sever, the claims against it for a separate trial is denied as moot; and it is further

ORDERED that counsel for the remaining parties shall appear on Wednesday, March 14, 2013 to arrange for the completion of all outstanding discovery. To the extent that counsel can proceed with discovery in the interim, they are urged to do so.

Dated: January 25, 2013

JAN 25 2013

J.S.C.

ALICE SCHLESINGER

FILED

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