

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **PETER J. O'DONOGHUE** IAS PART 13
Justice

VICTOR PITTARO and SHARI PITTARO,

Plaintiffs,

-against-

JOHN T. HSUEH, M.D.,

Defendant.

Index No.: 7732/06

Motion Date: 3/19/08

Motion Cal. No.: 32

Motion Seq. No.: 001

The following papers numbered 1 to 9 read on this motion by defendant John T. Hsueh, M.D. ("Dr. Hsueh") for an Order pursuant to CPLR §§3211(a)(5) and 3212 granting summary judgment and dismissing all claims against Dr. Hsueh.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Answering Affidavits-Exhibits.....	5-7
Replying Affidavits.....	8-9

Upon the foregoing papers it is ordered that this motion by defendant Dr. Hsueh for an Order pursuant to CPLR §§3211(a)(5) and 3212 granting summary judgment and dismissing all claims against Dr. Hsueh is denied. Question(s) of fact exists, including but not limited to, whether defendant Dr. Hsueh allowed a foreign object to remain in plaintiff's pudendal area after the completion of the cardiac catheterization (see Cavaluzzi v Beyers, 306 AD2d 429 [2nd Dept 2003]) and whether plaintiff Victor Pittaro ("Pittaro") should have reasonably discovered the presence of the "plastic tubing" from the cardiac catheterization in his body prior to the surgery on June 30, 2008, which may require resolution at trial.

In the case at bar, plaintiff Pittaro testified that he had a cardiac catheterization in August of 1998 (see Exhibit E Deposition transcript of plaintiff Pittaro, pp. 19-18 annexed to moving papers). Two days after the catheterization procedure, he was cleaning a wound area in the groin and he felt something. He went into the emergency room at Flushing Hospital (see Exhibit E

Deposition transcript of plaintiff Pittaro, pp. 38-39 annexed to moving papers). Dr. Patel was the emergency room physician who conducted the physical examination of Pittaro. Pittaro explained to Dr. Patel, that a couple of days ago, he had an angiogram procedure which was done by Dr. Hsueh. Pittaro testified that Dr. Patel left the room and returned saying that he spoke with Dr. Hsueh on the telephone. Dr. Patel reported that Dr. Hsueh said what was felt in Pittaro's groin was angio seal which will dissolve on its own (see Exhibit E Deposition transcript of plaintiff Pittaro, pp. 42-44 annexed to moving papers).

In September of 2003, plaintiff underwent a gastric bypass surgery. Plaintiff's weight dropped from 400 to 280 pounds, a total of 175 pounds, within a year after the surgery (see Exhibit E Deposition transcript of plaintiff Pittaro, pp. 11, 12, 17, and 60 annexed to moving papers).

Prior to September of 2004, plaintiff experienced occasional pain in the right groin area. As he was losing weight, he felt "something poking" every time he "bent down for something or to that effect" (see Exhibit E Deposition transcript of plaintiff Pittaro, p. 54 annexed to moving papers). There was conflicting testimony as to when and to whom he complained about the pain (see Exhibit E Deposition transcript of plaintiff Pittaro, pp. 57-59 annexed to moving papers).

In plaintiff's affidavit, he states that "sometime prior to June of 2005, [he] started to feel an object in [his] right groin unlike what [he] had felt before. The groin pain worsened to the degree that [he] sought medical help. It was then [he] decided to return to Dr. Hsueh, because at the time of the cardiac catheterization, [Dr. Hsueh] explained to [plaintiff] that he left behind an angio [seal] which should have dissolved. Now, [plaintiff] was concerned that something that was supposed to have dissolved was still present" (see Exhibit A annexed to opposition papers). On June 28, 2005, Dr. Hsueh conducted a physical examination of Pittaro. In Dr. Hsueh's letter to plaintiff's doctor, Dr. Klein, Dr. Hsueh stated patient made complaints in his pudendal area. "The pudendal area is the area that comes out to the penis. Common people may say it is part of the groin area, but it is different." From Dr. Hsueh's examination, the object was not angio seal (see Exhibit F Deposition transcript of defendant Dr. Hsueh, pp. 91-98 annexed to moving papers). Dr. Hsueh then recommended that plaintiff undergo surgery to remove the object in that area (see Exhibit F Deposition transcript of defendant Dr. Hsueh, p. 105 annexed to moving papers).

"After dinner that same night, [plaintiff] still felt discomfort and decided to go to Flushing Hospital emergency room

to have the staff examine [him] ... The emergency room doctor felt the object and [immediately] ordered an x-ray. After the x-ray was done, the doctor put it up on the light box in [his] examining room and told and showed [him] there was a foreign body in [his] groin ... On June 30, 2005, [Peter Patetsios, M.D. surgically] removed the foreign object" (see Exhibit A annexed to opposition papers). In the operative report, Dr. Patetsios stated that "the catheter was removed" (see Exhibit F annexed to opposition papers).

An action for medical malpractice "must be commenced within two years and six months of the act, omission or failure complained of ... provided, however, 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." (See CPLR 214-a.) Importantly, the statute expressly excludes "chemical compound, fixation device or prosthetic aid or device" from the definition of the term "foreign object" (see Id.).

"[The] legislative history [of CPLR 214-a] and our pre- and poststatute precedents evolved to a statement of a narrow rule: only 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." (See LaBarbera v New York Eye and Ear Infirmary, 91 NY2d 207 [1998].)

Plaintiff commenced this action on April 4, 2006. It is uncontroverted that the action was bought within one year of the discovery of the foreign object. However, defendant Dr. Hsueh contends that the object is not a "foreign object" and that the action must be dismissed as untimely. At the very least, defendant argues that plaintiff discovered facts which would reasonably lead to the discovery of the subject foreign object by November 2004. Therefore, this action should have been started by November 2005, not April 2006.

Defendant Dr. Hsueh met his initial burden of establishing his entitlement to summary judgment dismissing the complaint on the ground that the action, commenced in April 2006, was time-barred (see generally Alvarez v Prospect Hosp., 68 NY2d 320, 508 [1986]). In opposition to the motion, the plaintiff presented sufficient evidence to present a triable issue of fact. "[T]he timeliness of the instant action will ultimately depend upon the date when plaintiff discovered, or should have discovered, the complained-of injuries." (See Bidetti v Salter, 108 AD2d 890

[2nd Dept 1985].) "Although plaintiff allege[s] a discovery date of [June 2005], the determination of a 'discovery date' [of the foreign object or discovery date of facts which would reasonably lead to the discovery of such object] in this case is an issue which can be ascertained primarily, if not exclusively, from plaintiff's knowledge, and should be resolved by the trier of fact." (See Id. at 891.)

Dated: May 7, 2008

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J.S.C.