

**Marcus v Lindsley F. Kimball Research Institute of  
New York Blood Center**

2004 NY Slip Op 30111(U)

October 27, 2004

Supreme Court, New York County

Docket Number: 0011732/2003

Judge: Alice Schlesinger

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PRESENT: ALICE SCHLESINGER  
*Justice*

PART **IA** Part 16

0117327/2003

MARCUS, LARRY  
VS  
LINDSEY F.KIMBALL RESEARCH

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

SEQ 1  
DISMISS ACTION

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

NOV 03 2004

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**  
NEW YORK COUNTY CLERK

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

Dated: OCT 27 2004

*Alice Schlesinger*  
**ALICE SCHLESINGER, S.G.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 16

-----X  
LARRY MARCUS and MICHAEL MARCUS,

Plaintiffs,

Index No. 117327/03

-against-

Motion Seq. No. 001

THE LINDSLEY F. KIMBALL RESEARCH  
INSTITUTE OF THE NEW YORK BLOOD CENTER,  
LEON SUSSMAN, M.D., and EVELYN K. SUSSMAN

Defendants..

-----X  
**SCHLESINGER, J.:**

**FILED**  
NOV 03 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

In the 1980's The Lindsley F. Kimball Research Institute of the New York Blood Center, a not-for-profit corporation, provided genetic screening and related services. Specifically for our purposes, they did DNA testing. On October 28, 1981 Marilyn Marcus underwent genetic testing. Later, on November 29, 1984, Larry Marcus underwent blood testing, and his children Tara and Michael underwent HLA Blood Grouping and DNA testing on March 6, 1985. On April 29, 1985, Dr. Leon Sussman, an employee of the Institute, issued a report excluding Larry as the father of the children.

In the Fall of 2001, Larry Marcus related this information to Tara and Michael. Perhaps he should not have, because the following year, specifically on October 23, 2002, Larry and the children, now adults, received results from Reliagene Technologies, Inc. that Larry was, in fact, their biological father. In other words, the Institute had been wrong.

It is on these facts that Larry Marcus and his son Michael have commenced a lawsuit with a complaint filed October 2, 2003 containing six causes of action. The defendants are the Institute and Dr. Leon Sussman and Evelyn Sussman, both now deceased. The first cause of action sounds in medical malpractice, the second in negligence, the third in fraud, the fourth in fraudulent concealment of negligence and malpractice, the fifth in deceptive

business practices and false advertising, and the sixth in breach of contract and fraudulent inducement. The plaintiffs seek both compensatory and punitive damages.

It was on these facts and this complaint that defendant Blood Center made a pre-answer motion to dismiss the complaint in its entirety pursuant to CPLR §§3211(a)(5) and (a)(7) and CPLR §3016(b).

The defendant argues that the first two causes of action, negligence and malpractice, are barred by the applicable statutes of limitation as they accrued in April of 1985 and were not brought until eighteen years later. Specifically, the medical malpractice statute is two years and six months (CPLR §214-a) and the negligence statute is three years (CPLR §214). While it is true that Michael was a child in 1985, he became 18 on August 25, 1995, having been born in 1977. Pursuant to CPLR §208, the statute was tolled by his infancy only until he attained that age. Therefore, even his claim is eight years too late.

As to the fraud claims, the remaining causes of action three through six, defendant urges that these claims are inextricably related to the negligence claims and further that they simply fail to make out the elements of fraud, which are a representation of a material fact, the falsity of that fact, and scienter. Specifically here they point out that the complaint contains no allegations of any material representations, or any misrepresentations after the delivery of the report in April 1985. In fact, there is nothing to show that the parties had any contact with each other after that date.

Defendant also argues that the fraud claim is deficient as it fails to meet the criteria of CPLR §3016(b) as the plaintiff has put forth no specific facts to show each of the requisite elements. For example, under the third cause of action for fraud in paragraphs 66-68 and 74, the plaintiffs alleged that after defendants delivered the report on April 29, 1985, they knew or had reason to know that the facts contained therein were false and took steps to

conceal that information. But defendant argues in this motion that these contentions are pure conclusions and do not go nearly far enough in showing scienter. Finally, as to the deceptive business practices claim, defendant argues there is no cause of action made out because of a failure to allege that the public at large suffered some injury, and they correctly cite to case law for this proposition.

Plaintiffs' papers in opposition were less than satisfying. Since they never really dealt with anything other than the fraud and concealment causes of action, it could be assumed that plaintiffs are acknowledging the nonviability of the negligence, malpractice, and deceptive business practices causes of action. But even regarding the fraud and concealment claims, there was simply no attempt at amplifying the pleadings, though there was talk of their legal right to do this.

Therefore, at oral argument, which was extensive, I asked how plaintiffs could, in light of the arguments put forth by defendant, show that the actual fraud allegation had substance, and particularly I opined that they had so far failed to do that. It also became clear that there was no opposition to the dismissal of the negligence and malpractice claims on statute of limitation grounds and the deceptive business practices based on failure to state a cause of action, the public aspect of the injury. I offered plaintiffs a further opportunity to submit additional material in support of their claims of fraud, in other words to give substance and specificity to their allegations. Defendant, who had made the motion, would then have the last word.

Counsel for the Marcuses attempted to do this by submitting affidavits from two experts, Allen G. Gelb, a paternity expert and immunohematologist, and Herbert F. Palesky, a medical doctor Board Certified in pathology and blood banking (transfusion medicine). Mr. Gelb opined, with the aid of 50 years of experience in the field, that defendant Blood

Center's "failure to follow basic protocols is grossly irresponsible and reckless". Specifically he identified three "separate grossly negligent errors" that contributed to the improper report.

First, was the use of Larry's blood sample in doing the comparison because his blood sample, having been taken in November 1984, was old by the time the blood was taken from his children in March 1985. The comparison indicated Larry did not have the B50 Antigen which Michael did have. Gelb believes it probably faded from age.

Second, was the use of this sole index of paternity to reach a conclusion despite other markers present which showed remarkable similarities. In light of these differences, it was error not to have done further testing and checking of protocols. Third, since there was no documentation showing that the same reagent panels were used, the only acceptable method to test multiple blood samples, Gelb opined that this lack of quality control signifies that it was probable that different reagents were used.

Dr. Polesky in his affidavit elaborates on the first and third points made by Dr. Gelb. He also believed, with a reasonable degree of scientific certainty, that the failure to draw a new blood sample from Larry in March 1985 was a gross violation of accepted standards, which the New York Blood Center must have been aware of since they were leaders in this field. He explained the science behind this and why HLA testing is only accurate if the white blood cells used are still living. He also believed that different reagents were used, given the divergent results obtained from the Lab Tech regarding HLA-B50 in 2003.

Plaintiffs' legal argument consisted of reliance on various commercial cases involving accounting companies sued for fraud. There fraud was interpreted in several of these cases as consistent with reckless conduct. Finally, in a sur-reply letter to the Court, defense counsel maintains that the additional submission still insufficiently established fraud, even at this early stage of the proceedings. Defendant urges the Court to dismiss the complaint

in its entirety, characterizing the case as "simple" and pointing out that further discovery would not help the plaintiffs as both Sussmans have died and the entire file from the Blood Center has already been turned over.

While not necessarily concurring with the defendant's description of this case, I do concur with the remedy they seek.

This is not a fraud case or, at least, the plaintiffs have been unable to show that legally it is. All of the claims under these causes of action arise from exactly the facts that form the predicate for the negligence and malpractice claims, claims that are clearly time-barred.

The affidavits supplied by Gelb and Palensky discuss sloppy practice or worse, but say nothing to suggest deception and/or concealment of that deception. In *McClung v. State of New York*, 204 AD2d 999 (4<sup>th</sup> Dept 1994), where the consequences to the plaintiff of a failure to timely diagnose a melanoma were arguably more serious than the instant case, the court did not allow Mr. McClung to assert a claim of fraud in addition to medical malpractice and negligence, the latter two being barred by the Statute of Limitations. In that case, in 1983 the plaintiff's dermatologist had performed a biopsy of a suspicious spot beneath the ear. The specimen was sent to a State University Hospital for a pathological examination to rule out a malignant melanoma. In a report initialed by three physicians, two of whom were Board Certified pathologists, the specimen was described as a non-cancerous growth requiring no further treatment. Yet six years later, when McClung sought treatment for this spot which had begun to rapidly grow, a biopsy revealed the presence of cancer. The original slides were then re-examined and a melanoma was seen to be present. An expert for the plaintiff, similar to our case, opined that "no two Board Certified pathologists could have erroneously examined these slides, ruled out malignant melanoma and concurred in

a diagnosis of 'granulomatous inflammation'."

This was not fraud, the appellate court said, because "the conduct of Upstate alleged to be fraudulent, i.e. physicians having initialed the report without having reviewed the slides, is not separate and apart from the malpractice itself; it is one of the acts or omissions constituting Upstate's malpractice." (204 AD2d at 999). The same could be said of the allegations here.

With regard to the accounting cases, a special breed of litigation where creditors cannot look to insolvent debtors for relief and are barred by rules of privity from looking to the debtors' accounting firms [*Ultramares Corp. v. Touche*, 255 N.Y.170, (1931)], the courts have entertained claims of fraud where reckless practices or worse have been specifically pled. Thus, in *Foothill Capital Corporation v. Grant Thornton, LLP*, 276 AD2d 437 (First Dept 2000), the court found the audit reports issued by the defendant for its client, Aid Auto Stores Inc., to have materially overstated the inventory, understated the accounts payable, and overstated the fixed assets and that the claims of gross negligence and recklessness were sufficiently particularized to satisfy CPLR 3016(b).

Similarly, in *Ambassador Factors v. Kandel & Company*, 215 AD2d 305, 308 (First Dept 1995), the Court discussed at length the more stringent pleading requirements of CPLR 3016(b) stating that 'the circumstances constituting the wrong shall be stated in detail.' Those elements of fraud are a material misstatement, known by the perpetrator to be false, made with an intent to deceive. In *Kandel*, there was such a claim of gross negligence that a fact finder could draw the inference that a fraud had been perpetrated, as opposed to an honest blunder.

Here, there is no showing that defendant's misstatement was anything but an honest blunder. In plaintiff's original papers and in their supplemental submission, nothing is put

forth to show that the defendant knowingly misrepresented the results in 1985 and it intended to conceal the truth. Why would they do this? I cannot fathom an answer. Nor presumably can plaintiffs. In the accounting cases, when the creditor/plaintiff can show specific instances of failing to report known or obvious financial details of their client, or of affirmatively reporting facts they know or have reason to know are false to benefit their clients in securing funds, the courts are prepared to infer a motive to deceive. But none of that can be said to exist here. Additionally, after 1985, there was no contact whatsoever between the parties and therefore no concealment claim can be made out.

Certainly the mistake made by the defendant Blood Center was unfortunate and certainly it is understandable that the communication of the erroneous findings caused pain to the plaintiffs. But the allegations are time-barred vis-a-vis the first two causes of action and insufficiently made out in the last four.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed ; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 27, 2004

OCT 27 2004

*Alice Schlesinger*  
\_\_\_\_\_  
J.S.C.  
ALICE SCHLESINGER

**FILED**  
NOV 03 2004  
NEW YORK  
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