

**Keenan v North Shore Univ. Hosp. At Glen  
Cove**

2008 NY Slip Op 32243(U)

July 1, 2008

Supreme Court,, Nassau County

Docket Number: 1304-07/

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

**FAITH KEENAN and DAVID KEENAN,  
Plaintiffs,**

**Motion Sequence #001  
Submitted April 9, 2008  
XXX**

**-against-**

**INDEX NO: 11304/07**

**NORTH SHORE UNIVERSITY HOSPITAL  
AT GLEN COVE and MICHAEL B. GRIECO, M.D.,  
Defendants.**

**The following papers were read on these motions:**

<b>Notice of Motion .....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>

**Requested Relief**

Defendants, GLEN COVE HOSPITAL, s/h/a and f/k/a NORTH SHORE UNIVERSITY HOSPITAL AT GLEN COVE (hereinafter referred to as the "HOSPITAL"), and MICHAEL B. GRIECO, M.D. (hereinafter referred to as "Dr. GRIECO"), move for an order pursuant to CPLR §3212 granting it summary judgment dismissing the complaint against them, on the grounds that the applicable statute of limitations has expired and the action is jurisdictionally defective. Plaintiffs, FAITH KEENAN and DAVID KEENAN, oppose the motion, which is determined as follows:

### Background

This is a medical malpractice action. Counsel for the defendants states that plaintiff, FAITH KEENAN (hereinafter referred to as the "plaintiff") was admitted to the HOSPITAL, on June 6, 2001, complaining of right lower quadrant abdominal pain, fever of 101, nausea and vomiting. A CT scan of the abdomen was given and intravenous antibiotics administered, and on June 8, 2001, Dr. GRIECO performed surgical drainage of an intra-abdominal abscess, and the plaintiff was discharged from the HOSPITAL on June 16, 2001. The Discharge Summary (Exhibit "C" to the moving papers) reflects that, during the surgery, "[t]he appendix was not found. The assumption was that this was a perforated appendix". The Discharge Summary notes that plaintiff had an uncomplicated postoperative course. Counsel for defendants states that the records reflect that plaintiff was seen by Dr. GRIECO at his office for follow care, on June 20, 2001 and July 18, 2001, and was feeling well, and thereafter had another CT scan at the HOSPITAL, on August 13, 2001, which showed significant improvement to the right pelvic lesion. (Report annexed to moving papers as Exhibit "E"). Counsel for defendants states that the records reflect that plaintiff failed to keep her next scheduled appointment with Dr. GRIECO, schedule for September 26, 2001, and was never again seen by Dr. GRIECO.

The affidavit of Maryann Ambookan, the Assistant Vice-President for Risk Management at the HOSPITAL, confirms that, since her discharge, on June 16, 2001, plaintiff has not been admitted to the HOSPITAL, and has not been seen or had any outpatient testing since undergoing the CT Scan on August 13, 2001. It is the HOSPITAL's position that the statute of limitations expired as to the HOSPITAL, on February 13, 2004, three (3) years and four (4) months prior to the filing of the complaint herein, and that the

complaint should be dismissed against the HOSPITAL.

An affirmation of Dr. GRIECO (Exhibit "G") states that he was served with the complaint nearly six (6) years after last having any contact with plaintiff and that the statute of limitations for any alleged malpractice against him expire on January 18, 2004. He urges that the action against him and the HOSPITAL be dismissed.

In support of the motion to dismiss, counsel for defendants additionally asserts that the action is jurisdictionally defective because plaintiffs only filed a complaint on June 28, 2007, without a summons, as mandated by CPLR §304. Proof of the filing and service of both a summons and complaint, on June 28, 2007, has been provided by plaintiff's counsel (Exhibits "4", "5", "6" and "7" annexed to the opposition papers) and the Court rejects said allegation by the defendants.

In opposition to the motion, counsel for plaintiff and her husband, who has interposed a derivative claim, asserts that the gravamen of plaintiffs' claim is that Dr. GRIECO concealed the true condition of plaintiff's ruptured appendix at the time of her surgery and discharge from the HOSPITAL in 2001, and that when a treating physician, by misrepresentation or concealment of his malpractice, deprives an injured party of the opportunity to effect a cure, the malpractice action may be commenced within a reasonable time after discovery of the malpractice, citing *Simcuski v Saelill*, 44 NY2d 442, ( C.A. 1978). In essence, counsel for plaintiffs argues that questions of fact remain as to whether the statute of limitations should be tolled in this action and whether Dr. GRIECO should be equitably estopped from asserting said defense.

In opposition to the motion, plaintiff's affidavit asserts that, in June 2001, she was admitted to the HOSPITAL with a "possible appendicitis". She claims that, when pain

medication was not effective, she was informed that she needed exploratory surgery. She states that, on June 6, 2001, laparoscopic exploratory surgery was performed by Dr. GRIECO, which was converted to full open surgery. She contends that, after the surgery, Dr. GRIECO advised her that a sac of blood and pus was found and removed, but that her appendix was "obliterated due to a rupture and abscess", that no appendix was found and it would no longer be a problem to her. Although plaintiff acknowledges that she saw Dr. GRIECO on two (2) followup visits at his office and had a CT Scan on August 13, 2001, she states that she was told that "everything was fine" and no further appointments were necessary. She denies missing any further appointments scheduled by Dr. GRIECO.

Plaintiff relates that, over the years, she had intermittent soreness in the lower right portion of her abdomen but believed she had no appendix. However, in June 2006, the pain in her lower right abdomen increased in severity and she collapsed at work and was taken to North Shore University Hospital in Manhasset (hereinafter referred to as "NSUH"). At NSUH she was given a CT Scan in which the radiologist noted, "[b]y history, patient is post appendicitis" and found that "[g]iven the patients past history of prior appendectomy, the differential diagnosis includes perforated Meckel's diverticulum, hydrosalpinx and pelvic inflammatory disease, as well as stump appendicitis". Plaintiff states that after a course of antibiotics, on August 8, 2006, Dr. George DeNoto performed a laparoscopic appendectomy and removed her appendix. She claims that since the surgery she has experienced no pain, but believes that because of the failure to remove the infected appendix has affected her child bearing abilities. She states that, despite two (2) In Vitro Fertilizations, she has been unable to conceive another child. No medical evidence with respect to this assertion is annexed. It is plaintiff's position that Dr. GRIECO misled her

and concealed her true condition from her, that the infected appendix remained in her body, and if she had known, she would not have suffered five (5) years of intermittent pain, could have taken steps to mitigate the infection, and would have been successful in having another child.

Counsel for plaintiffs states that he has consulted with a board certified abdominal surgeon who has advised that the original operation performed by Dr. GRIECO, in June 2001, was appropriate and in accordance with good medical practice, but his failure to observe the patient for at least ninety (90) days following her discharge, and his failure to re-examine plaintiff and re-operate on her to determine whether the seriously infected appendix had been obliterated or was still present, was a departure from good medical practice. No affirmation or sworn affidavit from said expert has been annexed. Counsel asserts that Dr. GRIECO's failure to advise the patient of the necessity of a re-operation to remove the appendix to prevent subsequent abscesses, was a further departure which caused plaintiff continuing pain and suffering until surgery by Dr. DeNoto in August 2006, some five (5) years after her initial operation.

### The Law

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact". *Sheppard-Mobley v King*, 10 AD3d 70, 778 NYS2d 98 (2<sup>nd</sup> Dept. 2004), (*aff'd*. 4 NY2d 627, 792 NYS2d 894, 825 NE2d 1089 [ C.A. 2005]), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 797 NYS2d 403, 830 NE2d 301 ( C.A. 2005) and *Winegrad v New York Univ. Med. Ctr.*,

64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985). "Failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers". *Sheppard-Mobley v King, supra; Winegrad v New York Univ. Med. Ctr., supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 (C.A.1980).

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damages (citations omitted)". *Ramsay v Good Samaritan Hosp.*, 24 AD3d 645, 808 NYS2d 374 (2<sup>nd</sup> Dept. 2005); *see also, DiMitre v Monsour*, 302 AD2d 420, 754 NYS2d 674 (2<sup>nd</sup> Dept. 2003); *Holbrook v United Hospital Medical Center*, 248 AD2d 358, 669 NYS2d 631 (2<sup>nd</sup> Dept. 1998). "In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician [and/or hospital were] negligent". *Taylor v Nyack Hospital*, 18 AD3d 537, 795 NYS2d 317 (2<sup>nd</sup> Dept. 2005) citing *Alvarez v Prospect Hospital, supra*. Thus, a moving defendant doctor or hospital has "the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was injured thereby." *Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 (2<sup>nd</sup> Dept. Misrepresentation), citing *Winegrad v New York Univ. Med. Ctr., supra*.

Pursuant to CPLR §214(a,) an action for medical malpractice must be commenced within two years and six months of the acts, omissions or failure complained of. Where a

complaint alleges that a physician intentionally concealed alleged malpractice from the patient and falsely assured her of effective treatment and, as a result, she did not discover her injury until after the applicable statute of limitations had expired, the principles of equitable estoppel are applicable. *Simcuski v Saeli, supra*.

The doctrine of equitable estoppel may bar a defendant physician from asserting the Statute of Limitations as an affirmative defense to the plaintiff's cause of action to recover damages . . . where there are evidentiary facts which show purposeful concealment and misrepresentation of the facts and consequence of malpractice . . . , justifiable reliance upon the defendant's intentional misrepresentation which prevented the plaintiff from discovering the malpractice or induced him or her to refrain from bringing suit. . . . The doctrine of equitable estoppel will not apply if the plaintiff possesses "timely knowledge" sufficient to place him or her under a duty to make inquiry and ascertain the relevant facts prior to the expiration of the applicable Statute of Limitations . . .

*McGivor v Di Benedetto*, 121 AD2d 519, 503 NYS2d 836 (2<sup>nd</sup> Dept. 1986).

### Discussion

After a careful reading of the submissions herein, the Court finds that the plaintiff has failed to rebut or refute the arguments advanced by the HOSPITAL setting forth its entitlement to dismissal of the complaint on the ground that the action against the HOSPITAL was brought well beyond the expiration of the applicable 2 ½ year statute of limitations and that the HOSPITAL is entitled to summary judgment dismissing the complaint against it.

With respect to Dr. GRIECO, the Court has carefully reviewed the plaintiffs' complaint which alleges three (3) causes of action—the first sounding in negligence, the second sounding in informed consent, and the third claiming loss of consortium on behalf of the husband. Nowhere in the complaint is it stated that the defendant doctor

fraudulently concealed the plaintiff's true medical condition from her or acted fraudulently in any way. It is the judgment of the Court that the plaintiffs have failed to allege fraud or set forth any language that would permit the trier of fact to extend the statute of limitations on the basis of equitable estoppel or to establish a cause of action for fraud. The plaintiff has failed to demonstrate any act of malpractice about which Dr. GRIECO knowingly made any misrepresentations to plaintiff. The allegations that the defendant doctor failed to advise her about the need for re-examination and removal of the appendix to prevent subsequent abscesses, are simply allegations of malpractice and negligent failures on the part of Dr. GRIECO for which the statute of limitations has passed, as opposed to allegations of fraud or fraudulent concealment that would form the basis for a tolling of the statute of limitations. *Cf., Eagleston v Mt. Sinai Medical Center*, 144 AD2d 427, 533 NYS2d 992 (2<sup>nd</sup> Dept. 1988). There is no evidence in the record that Dr. GRIECO knew that he failed to remove plaintiff's appendix, or that he intentionally concealed an act of malpractice or knowingly misrepresented to plaintiff about her condition.

The case of *Simcuski v Saeli*, *supra*, cited by plaintiff, can be distinguished from the case at bar because in said case, the Court found that the complaint set forth a cause of action based on intentional fraud as well as a cause of action for negligence for medical malpractice. In *Simouski*, the defendant doctor performed a surgical excision of a node from plaintiff's neck and allegedly injured a spinal accessory nerve on her neck and of her cervical plexus. When plaintiff complained to her doctor of numbness in the right side of her face and neck and difficulty with her right arm, the physician, allegedly aware of the negligent manner in which he had performed the surgery and that plaintiff had suffered a


potentially permanent injury, willfully and falsely told her that her problems were transient and would disappear if she continued physiotherapy. The complaint alleged that the doctor intentionally withheld information from plaintiff as to the true nature of her injury and deprived her of the opportunity for a cure. In the case at bar, the complaint is insufficient to set forth a cause of action for intentional fraud, and the evidence submitted in opposition to the motion is insufficient to overcome defendants' motion for summary judgment. The Court finds that Dr. GRIECO is entitled to summary judgment dismissing the complaint against him as the statute of limitations has long expired.

Based on the foregoing, it is hereby

**ORDERED**, that defendants' motion for an order granting summary judgment dismissing the complaint against the HOSPITAL and against Dr. GRIECO is granted and the action is dismissed.

This constitutes the decision and order of the Court.

Dated: July 1, 2008

  
WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**

JUL 07 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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