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

**PRESENT:** DEBRA A. JAMES *Justice* **PART 59**

LISA WELTER,

Plaintiff,

- v -

MICHAEL FEIGENBAUM,

Defendant.

Index No.: 127969/02

Motion Date: 07/27/12

Motion Seq. No.: 009

Motion Cal. No.:

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion -Affidavits -Exhibits | 1 |
| Notice of Cross Motion/Answering Affidavits- Exhibits | 2 |
| Replying Affidavits - Exhibits | 3 |



**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers,

Defendant moves, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the complaint or, in the alternative, for an order precluding plaintiff's expert from offering an expert opinion as to the causation of plaintiff's genital herpes or, directing a hearing to resolve this issue, pursuant to Frye v United States, 293 F 1013 (1923) (*Frye* hearing).

Plaintiff alleges that she suffered personal injuries resulting from having contracted the sexually transmitted disease Herpes Simplex Virus II (also referred to herein as HSV-2), which was negligently transmitted to her by defendant, when he engaged her in unprotected sexual relations in 2002, when he knew or

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

**Check One:** ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

**Check if appropriate:** ☐ DO NOT POST ☐ REFERENCE

should have known that he had HSV-2, and breached his duty to inform her of his status. The complaint alleges five causes of action: (1) battery; (2) negligent transmission of a sexual disease; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; and (5) fraud.

It is defendant's position that the complaint should be dismissed in its entirety because there is no evidence that, at the time that the parties engaged in unprotected sexual activity, defendant knew or should have known that he was infected with HSV-2.

Defendant's motion is granted and the complaint is dismissed.

In order to recover damages for battery, plaintiff must prove that "there was bodily contact, that the contact was [non-consensual], and that the defendant intended to make the contact." Laurie Marie M. v Jeffrey T.M., 159 AD2d 52, 55 (2d Dept 1990), affd 77 NY2d 981 (1991). With respect to the element of consent, the tort of battery differs from the abolished tort of seduction, which did not involve consent but was defined as a man's wrongful inducement of a woman to surrender to his sexual desires. See Coopersmith v Gold, 172 AD2d 982 (3d Dept 1991). In the case at bar, plaintiff admitted that she consented to have sexual contact with defendant, but asserts that she did not consent to acquire a sexually transmitted disease. While

plaintiff's urging is tantamount to an argument about applying the concept of "informed consent" to her battery claim, this court finds no precedent for the application of the doctrine of informed consent as it relates to a battery claim outside of the context of medical malpractice. See Public Health Law § 2805(d); Shack v Holland, 89 Misc29 78 (Kings Co Supreme Court 1976). In order to maintain a cause of action for battery, plaintiff must provide evidence that the sexual contact with defendant, as opposed to the consequences of such contact, was not consensual, which, by her own admission, she has failed to do. Hence, plaintiff's cause of action for battery is dismissed.

The courts of this State have long recognized a cause of action for both intentional and negligent transmission of sexually transmitted diseases. See White v Nellis, 31 NY 405 (1865); Matter of Plaza v Estate of Wisser, 211 AD2d 111 (1st Dept 1995). As in any negligence action, the plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff that was breached and that defendant's actions proximately caused the condition alleged. A duty to disclose has been held to exist where the defendant knew or should have known that he or she had a communicable disease. *Id.* at 119.

In support of his motion, defendant submits the affirmation of his expert witness-- Andrew Stein, M.D. (Stein), a board certified physician in infectious disease and internal

medicine. Among the records upon which Stein bases his opinions are the transcripts of the deposition testimony of the parties; the medical records for plaintiff from New York University Emergency Department and her admission there from September 29 through October 2, 2002; the narrative report dated October 25, 2010 from Dr. Michael Shirazi, the physician expert retained by plaintiff; the letter dated July 26, 2005 from Dr. Alan Pollock, an internist and infectious disease doctor who treated defendant from September 1, 1999 through October 21, 2009, and medical record entries for his patient the defendant that he made between and including April 30, 2003 and October 21, 2009.

As stated by Dr. Stein, plaintiff admits that

> she engaged in unprotected sexual intercourse with at least six men by the time she had sex with defendant...she had unprotected sexual intercourse with (defendant) in or around May 2002, then reconciled with an ex boyfriend, with whom she had unprotected sexual intercourse in the summer of 2002 at least once, maybe twice....(and had unprotected sexual intercourse with defendant) in September 2002, then in the latter part of September 2002 had the outbreak (of HSV-2).

Dr. Stein opines that there is no documentation as to plaintiff's HSV-2 status before her first diagnosis on September 30, 2002 (ROSHAN, DANIEL F MD), i.e. as of the time she had unprotected sexual intercourse with the ex boyfriend in summer 2002 and defendant in September 2002, or prior to that time. He avers that her negative PAP smears during such periods do not rule out that she carried HSV-2 before her September 30, 2002 diagnosis. He states that though the first documented evidence

of plaintiff's symptoms appear in her physician's records dated September 25, 2002, she may have been infected prior to that time because

> (M)any people remain asymptomatic or have unrecognized infection, thus facilitating transmission because the need for precaution is not obvious or easily recognized. Overwhelmingly the disease is asymptomatic - up to 90% of people who have herpes are not aware... (that) they have the infection.
>
> ***Herpes that may lay dormant for years can become an outbreak when triggered by stress, illness, poor nutrition, menstruation, or vigorous sex.

Dr. Stein notes that Dr. Shirazi opined that the incubation period, or period between herpes transmission and the start of herpes symptoms, is twelve weeks, and that according to that opinion, plaintiff "acquired the infection within 12 weeks of her symptoms" or between the end of June 2002 through September 2002.

The laboratory report dated March 29, 2010 for defendant that was ordered by Shirazi[1] shows that defendant tested

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[1]In his answer, defendant states as an affirmative defense that "(i)n the event Feigenbaum was infected with genital herpes at the time he had sexual intercourse with plaintiff, he had no knowledge that he was so infected and he was asymptomatic", thus putting his physical condition in issue. Michael Shirazi, a board certified physician in internal medicine, designated by plaintiff in connection with a physical examination of defendant sought by plaintiff pursuant to CPLR § 3121, drew a blood sample from defendant, which Shirazi sent to a virology lab for herpes testing. In his unsworn narrative report made pursuant to CPLR § 3121(b), Shirazi concluded that:

> Mr. Feigenbaum's serology was positive for antibody for HSV-1 and HSV-2 by Western blot. This test is considered the Gold Standard when testing a person while asymptomatic for HSV-1 or HSV-2. This result firmly establishes that Michael Feigenbaum has both HSV-1 and HSV-2.

positive for the antibody to HSV-1 and HSV-2, which is evidence of past infection with both HSV-1 and HSV-2.

With regard to that laboratory report, Stein opines that

> The fact that Feigenbaum tested positive for HSV-2 on 3/29/10 eight (8) years after their sexual encounter - is of no scientific or medical relevance to the allegations in this case. In fact, if one were so permitted to speculate under these facts, then given Feigenbaum's lack of ever having an outbreak or single symptom prior to his encounter with Welter, then it may be more likely that Feigenbaum contracted the HSV-2 from Welter.

Stein concludes, that

> Given this timeline, it is impossible to discern which sexual partner (if it were either of them) from June through September 2002 may have transmitted the virus to (plaintiff).

Stein points out that there is no evidence that defendant was having an HSV-1 outbreak, which usually occurs around the mouth or facial region, such as the lips, during any of his encounters with plaintiff, and Stein emphasizes that plaintiff does not carry a diagnosis of HSV-1. He concludes that the only way to prove that plaintiff contracted HSV-2 from defendant would be if there was some proof that (1) defendant was positive for HSV-2 on the dates of his sexual intercourse with plaintiff, (2) the ex boyfriend was negative for HSV-2 on the dates of his sexual intercourse with plaintiff, and (3) plaintiff was negative for HSV-2 prior to any of these encounters. Within a reasonable degree of medical certainty, Dr. Stein states that given there is nothing probative on any of these facts, no view of the evidence

would indicate that defendant knowingly transmitted the virus.

Stein's opinion is not contradicted by Shirazi. Upon careful scrutiny, Shirazi's narrative report shows that he does not conclude that defendant had genital herpes at the time that the parties engaged in unprotected sex; instead, Shirazi states only that *if* defendant had genital herpes at the time he and plaintiff had sexual intercourse, in a relationship lasting over an eight-month period, there is an 8% possibility that he could have infected plaintiff. However, there is no dispute that the sexual relationship between plaintiff and defendant, all tolled, took place for the month of May 2002 and over a two day period in September 2002, which based upon Shirazi's reasoning, would reduce the possibility of her contracting HSV-2 from defendant. Lastly, Shirazi opines that plaintiff "likely" acquired genital herpes within the 12 weeks prior to her diagnosis, but he does not opine that the source of the infection was defendant.

> Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since [she] has failed to prove that the negligence of the defendant caused the injury. Even when there is no requirement for the plaintiff to exclude every other possible cause other than the defendant's breach of duty, the record must render the other possible causes sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence, not upon speculation [internal citations and quotation marks omitted].

Montas v JJC Construction Corp., 92 AD3d 559, 560 (1st Dept 2012); McNally v Sabban, 32 AD3d 340 (1st Dept 2006); J.E. v Beth Israel Hospital, 295 AD2d 281 (1st Dept 2002).

In the face of the sworn lay and expert testimony and the records provided by defendant, plaintiff has raised no issue of fact as to either whether defendant was negligent or whether, even assuming arguendo that he was, such negligence was a substantial factor in bringing about plaintiff's injuries.

Nor more persuasive is plaintiff's argument that defendant's prior case of genital warts should have alerted him to the possibility that he was also infected with genital herpes. Such argument finds no medical or other support in the narrative report of Shirazi, plaintiff's expert. Stein's affirmation completely rebuts such assertion, by establishing that genital warts and genital herpes are very different viral conditions, stating that "The Human Papillomavirus causes genital warts. The Herpes Simplex II virus causes genital herpes." He opines that there is no cause and effect relationship between defendant's genital warts diagnosed and treated by chemical destruction in 2001 [see Invoice of Dr. Alvin E. Friedman-Klein with entry "6/11/01 Destruct warts, penile, exten..." and Health Insurance Claim Form dated June 10, 2002 with entry "DIAGNOSIS VIRAL WARTS"] and the HSV-2 condition with which plaintiff was diagnosed in 2002, and with which defendant was diagnosed eight

years after his genital warts condition had resolved.

Based on all of the preceding, plaintiff's cause of action for intentional transmission of a sexually transmitted disease is dismissed.

> In order to sustain a cause of action for the intentional infliction of emotional distress, a plaintiff must prove: (I) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress. Liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community [internal quotation marks and citations omitted]."

Cohn-Frankel v United Synagogue of Conservative Judaism, 246 AD2d 332, 332 (1st Dept 1998).

"Unlike other intentional torts, intentional infliction of emotional distress does not proscribe specific conduct ... but imposes liability based on after-the-fact judgments about the actor's behavior." Howell v New York Post Company, Inc., 81 NY2d 115, 122 (1993).

In the instant matter, as discussed above, there is no evidence that defendant knew, or should have known, that he was asymptomatic for genital herpes.[2] Therefore, his having sexual intercourse with plaintiff does not rise to the level of

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[2]It is ironic that plaintiff admits to having unprotected sex without informing her partners of her medical status, after her diagnosis of HSV-2, the conduct of which she complains about defendant, but without the requisite proof that he knew or should have known that he was asymptomatic.

outrageous conduct.

As a result of the foregoing, plaintiff's cause of action for the intentional infliction of emotional distress is dismissed.

Similarly, plaintiff's cause of action for negligent infliction of emotional distress is also dismissed, since plaintiff has failed to establish that defendant knew, or should have known, that he had genital herpes prior to having sex with plaintiff. Indeed, plaintiff has failed to establish that defendant was even infected with genital herpes at the time that they had their relationship, since he was only tested and diagnosed with HSV-2 eight years after the fact. A negligence claim cannot be sustained on mere speculation. See Affenito v PJC 90th Street LLC, 5 AD3d 243 (1st Dept 2004).

Lastly, plaintiff's cause of action for fraud is likewise dismissed.

In order to make out a prima facie claim of fraud, in the context of a sexually transmitted disease, there must be an actual awareness of infection. See Matter of Plaza v Estate of Wisser, 211 AD2d 111, *supra*. Plaintiff has offered no evidence, in either admissible or inadmissible form, that substantiates her allegation that defendant knew, or should have known, about the possibility that he was infected with genital herpes. In fact, there is no evidence that defendant had genital herpes or

experienced any symptoms of that disease in 2002 or prior to his encounters with plaintiff, so there was no misrepresentation for him to make in that regard.

Therefore, based on the above, plaintiff's cause of action for fraud is dismissed.

Defendant's alternate requests for relief are hereby rendered moot.

Accordingly, it is hereby

ORDERED that defendants' motion is granted and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment as aforesaid.

This is the decision and order of the court.

**Dated:** January 11, 2013

***ENTER:***

J.S.C.

**DEBRA A. JAMES**