

DECISION/ORDER

Plaintiff alleges that he was injured by defendant as the result of defendant having sexual relations with plaintiff's wife, a nonparty. Defendant was the wife's psychiatrist and allegedly had a sexually transmitted disease, Herpes Simplex Disease ("herpes"), at the time he engaged in sexual relations with plaintiff's wife who, in turn, contracted the disease and passed it on to plaintiff. Plaintiff alleges that defendant was aware he had herpes when he engaged in sexual relations with plaintiff's wife, who he knew was married, and that he had a duty to disclose his condition and/or take steps to prevent transmission of the disease. The instant action asserts claims sounding in intentional infliction of emotional distress, negligence, fraud, misrepresentation, gross negligence and malpractice.

Defendant moves (1) to dismiss the cause of action for intentional infliction of emotional distress as untimely and the remaining causes of action for failure to state a cause of action; (2) for a stay of discovery. Motion is determined, as follows:

Motion insofar as it seeks to dismiss the first cause of action for intentional infliction of emotional distress is denied.

Defendant contends the first cause of action is untimely on the basis that the complaint alleges plaintiff's wife discovered the condition in April, 2007 and the action was not commenced until October 19, 2009, in excess of the one year statute of limitations for an intentional tort (see, CPLR 215; Yong Wen Mo, 17 AD3d 356). The date of discovery by plaintiff's wife, however, is not controlling. As the tort is alleged to have been committed against plaintiff, the question is when did plaintiff learn he had contracted herpes (see, *Schultes v. Kane*, 50 AD3d 1277). The complaint here only alleges that plaintiff discovered his wife contracted the disease sometime in 2008.¹ Accordingly, the complaint, on its face, does not demonstrate that the claim is untimely.²

Motion insofar as it seeks to dismiss the third cause of action for fraud is granted.

To the extent there were any representations by defendant, they were made to plaintiff's wife, not plaintiff. Accordingly, plaintiff could not have relied on such representations. Likewise, in the absence of a relationship between plaintiff and defendant, there could be no reliance on defendant's alleged failure to disclose his sexual relationship with plaintiff's wife or his medical condition.³

Motion insofar as it seeks to dismiss the second cause of action for negligent infliction of emotional distress, the fourth cause of action for negligence and the fifth cause of action for gross negligence is denied.

Public Health Law section 2307 makes it a misdemeanor for a person, knowing himself to be infected with an infectious sexually transmitted disease, to have sexual intercourse with another. A violation of the foregoing has been held to constitute negligence per se (*Maharam v. Maharam*, 123 AD2d 165, 171). By a parity of reasoning, the failure by one member of a sexual union to inform the other of having a known sexually transmitted disease has been held to state a cause of action for gross negligence (*id* at 171). At issue now is whether to extend a duty of reasonable care to plaintiff, as the spouse of a married person allegedly infected by defendant, in the circumstances at bar. Defendant disputes the existence of such a duty. The issue appears to one of first impression in New York.

Whether there is a duty is an issue of law for the Court. Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty (*Tenuto v. Lederele Laboratories, Div. of American Cyanide Co.*, 90 NY2d 606, 612). Foreseeability alone does not determine the existence of a duty, but merely the scope of the duty once it is determined to exist (*Hamilton v. Beretta U.S.A Corp.*, 96 NY2d 222, 232). A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others. This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another (*id* at 232). Extension of the duty in the circumstances at bar to the spouse of a person infected by another, however, presents neither concern.

The extension here to a spouse is to a narrowly defined class of persons, not a broader undefined community at large. There is also nothing unfair about extending such a duty of care to a spouse of the infected person. The alleged tortfeasor is in the best position in both instances to prevent the transmission of a venereal disease. Further, the potential for harm to the married person who becomes infected and the spouse of the married person who thereafter becomes infected is the same. "If one negligently exposes a married person to a sexually transmissible disease without informing that person of his exposure, it is reasonable to anticipate that the disease may be transmitted to the married person's spouse" (*Mussivand v. David*, 45 Ohio St. 314, 321-322, 544 NE2d 265 [Supreme Court of Ohio]).⁴ The duty to warn a sexual partner or otherwise take precautions to prevent the transmission of a known venereal disease, therefore, should be extended in the circumstances at bar to the spouse as well.

Motion insofar as it seeks to dismiss the fifth cause of action for negligent misrepresentation is granted for the reasons stated above with respect to the third cause of action.

Motion insofar as it seeks to dismiss the sixth cause of action for negligence per se is granted.

While a violation of Public Health Law section 2307 has been found to constitute negligence per se (*Maharam*, *supra* at 171), there is no statutory requirement that any warning or action be taken with respect to a sexual partner's other known or suspected sexual partners. Presently, the only comparable New York statute deals with tuberculosis, not venereal or contagious diseases in general (see, Public Health Law section 2222 and State Sanitary Code, 10 NYCRR section 2.27). Accordingly, while there may be common law negligence, as discussed above, there is no basis to find negligence per se. The extension of a statutory duty beyond one's immediate sexual partner, as in the circumstances at bar, is a matter for the legislature to address (*cf.* *Tenuto*, *supra*).

Motion insofar as it seeks to dismiss the eighth cause of action for malpractice is granted.

The doctor-patient relationship that is the basis for a malpractice claim was between defendant and plaintiff's wife, not plaintiff (*Ellis v. Peter*, 211 AD2d 353, 356). Plaintiff has failed to demonstrate a basis for expanding the doctor-patient relationship to include plaintiff.

Motion insofar as it seeks to stay discovery is denied, as moot. Discovery shall proceed on the causes of action that remain. Any issues as to discovery shall be addressed at a Preliminary Conference to be scheduled by the Court.

1. See, e.g. Complaint, pars. 103-105.

2. Contrary to plaintiff's view, defendant did not waive this defense. By stipulation, plaintiff extended defendant's time to move to dismiss and this motion was timely made within the agreed time. Further, by stipulation, the only defenses that were waived were "jurisdictional".

3. The absence of a relationship distinguishes *Maharam v. Maharam*, 123 AD2d 165, on which plaintiff relies. While that Court found a cause of action for fraud to be stated based on a failure to disclose, the failure to disclose occurred between sexual partners who were married. The Court stated that the marital relationship gave rise to a duty to speak and the allegation

that the husband failed to disclose his condition stated a cause of action for constructive, if not actual, fraud.

4. *Mussivand* held, on a similar fact pattern to the case at bar, that a person with a sexually transmitted disease could be liable to the spouse of a married person if they failed to inform the married person of their disease and the spouse contracted the disease as well. Defendant attempts to distinguish *Mussivand* as decided based on an Ohio statute. This distinction is without merit. Although the Court did find a duty based on an Ohio statute, that was not the sole basis for the decision. The Court also found a common law duty. *Mussivand*, however, may be dissimilar to New York jurisprudence insofar to the extent it can be read as predicated on the existence of a common law duty solely on the foreseeability of injury. n