[* 1]

SHORT FORM ORDER

INDEX No. 08-33833
CAL. No. 10-02159MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-31-11 (#005, #006 & #007)
MOTION DATE 6-16-11 (#008)
MOTION DATE 7-19-11 (#009)
ADJ. DATE 8-9-11
Mot. Seq. # 005 - MG # 008 - MD
006 - MD # 009 - XMD
007 - MG; CASEDISP

----------X

JAMES D. KELLY AND SUSAN KELLY,

Plaintiffs,

- against -

KIMBERLY FENTON, M.D., MARY ANDRIOLA, M.D, SALMA SYED, M.D., ROBERT SEMLEAR, MD., FRANK DARRAS, MD., SOUTHAMPTON HOSPITAL NORMAN PFLASTER, MD., and DANIEL SLONIEWSKY, MD.

Defendants.

----------X

DANKNER & MILSTEIN, P.C.
Attorney for Plaintiffs
41 East 57th Street
New York, New York 10022

KELLY, RODE & KELLY, LLP
Attorney for Defendant Fenton, Syed and Sloniewsky
330 Old Country Road, Suite 305
Mineola, New York 11501

FUREY, KERLEY, WALSH, MATERA and CINQUEMANI, P.C.
Attorney for Defendant Andriola
2174 Jackson Avenue
Seaford, New York 11783

Upon the following papers numbered 1 to 35 read on these motions for summary judgment, discovery and to cross motion for leave to amend pleadings ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4, 5 - 9, 10 - 13, 14 - 18 ; Notice of Cross Motion and supporting papers 19 - 21 ; Answering Affidavits and supporting papers 22 - 29 ; Replying Affidavits and supporting papers 30 - 31, 32 - 33, 34 - 35; Other joint exhibits A - WWWW ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions and cross motion are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (005) by defendants Kimberly Fenton, M.D., Salma Syed, D.O., sued herein as Salma Syed, M.D., and Daniel Sloniewsky, M.D. for summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that the motion (006) by defendant Mary Andriola, M.D. for an order dismissing the complaint is denied as academic; and it is further

ORDERED that the motion (007) by defendant Frank Darras, M.D. for summary judgment dismissing the complaint as asserted against him is granted; and it is further

ORDERED that the motion (008) by plaintiffs for an order directing NYU Medical Center to provide certain discovery is denied; and it is further

ORDERED that the cross motion (009) by plaintiffs for leave to amend the pleadings is denied.

In this medical malpractice action, plaintiffs James D. Kelly and Susan Kelly, seek damages, individually and derivatively, for alleged departures in accepted medical practice by defendants in their care and treatment of plaintiff James D. Kelly ("the recipient plaintiff") during the period from March 3, 2007 through June 6, 2008. The recipient plaintiff received a kidney transplant at non-party Stony Brook University Hospital ("Stony Brook") on March 30, 2007. Plaintiffs allege, *inter alia*, that defendant Frank Darras, M.D. departed from accepted medical standards in the recipient plaintiff's care in accepting a diseased kidney for transplant. Plaintiffs further allege, *inter alia*, that defendants Kimberly Fenton, M.D., Mary Andriola, M.D., Salma Syed, D.O., sued herein as Salma Syed, M.D., and Daniel Sloniewsky, M.D., who were the physicians caring for a pediatric patient ("the donor") whose organs were donated for transplantation, departed from accepted medical standards when they failed to diagnose cancer in the donor while he was a patient at non-party Stony Brook University Hospital ("Stony Brook") from March 13, 2007 through March 30, 2007.

By order dated June 18, 2009 (Cohen, J.), the Court directed that this action, Action #1, would be tried jointly with six related actions.[1] By order dated March 24, 2009 (Cohen, J.), the Court granted summary judgment dismissing the complaint as asserted against Southampton Hospital. By order dated April 20, 2010, the Court so-ordered a stipulation discontinuing the action as asserted against defendants Robert Semlear, M.D. and Norman Pflaster, M.D. By stipulation dated July 27, 2011, the action was discontinued as against Mary Andriola, M.D. with prejudice, rendering the instant motion by Andriola as academic. By order dated October 26, 2010 (Cohen, J.), the Court directed the parties to submit a single set of joint exhibits for all summary judgment motions, consisting of, *inter alia*, the pleadings, bills of particulars, deposition testimonies of the parties, the donor's medical records from Southampton Hospital and Stony Brook University Medical Center, the recipient's medical records from Stony Brook, and the New York Organ Donor Network ("NYODN") donor packet.

---

[1] The six related actions are as follows:
Kelly v New York Organ Donor Network, Index No. 12211/09, Action #2
Trueba v Diflo, Index No. 49098/09, Action #3
Lee v Fenton, Index No. 38346/09, Action #4
Lee v New York Organ Donor Network, Index No. 38345/09, Action #5
Shierts v New York Organ Donor Network, Index No. 12212/09, Action #6
Shierts v Fenton, Index No. 45614/08, Action #7

The record reveals that the recipient plaintiff received a kidney transplant from the donor, who had died of bacterial meningitis on March 30, 2007 at Stony Brook. Defendant Frank Darras, M.D. performed the transplant procedure at Stony Brook on March 31, 2007.[2] The donor had been ill since March 3, 2007. He was treated at Southampton Hospital intermittently. During his last admission at Southampton Hospital, a lumbar puncture revealed no bacteria in the cerebral spinal fluid despite symptoms appearing to be bacterial meningitis, such as severe headaches, vomiting and fainting. His doctors prescribed antibiotics and antiviral medications. His final diagnosis at Southampton Hospital was viral meningitis or encephalitis.

The donor was transferred to Stony Brook on March 13, 2007. Another spinal tap was performed, and, again revealed no bacteria in the cerebral spinal fluid. Further lab tests revealed no viral pathogens either. His attending physician, Dr. Fenton, a pediatric intensivist, diagnosed the donor with presumed, partially treated bacterial meningitis. By March 14, 2007, the donor became unresponsive and required assisted ventilation. The donor's Stony Brook medical record revealed that, on March 29, 2007, he had lost all cerebral autoregulation despite maximal medical management and had not improved after a lumbar drain was placed to reduce the intracerebral pressure. Dr. Fenton advised the donor's parents, who agreed that no resuscitation should be initiated. In addition, the parents requested organ donation. Dr. Fenton called NYODN, and gave the basic demographic information, as well as her diagnosis of presumed partially treated bacterial meningitis. On March 30, 2007, the NYODN staff placed calls to multiple transplant centers to place four of the donor's organs. Later that evening, NYODN organ placement coordinator David O'Hara offered the donor's right kidney to a transplant coordinator at Stony Brook. After reviewing the donor chart provided by NYODN, Dr. Darras accepted the donor's right kidney for the recipient plaintiff. The NYODN chart included Southampton Hospital medical records which revealed a diagnosis of viral meningitis.

The recipient plaintiff testified that he had end stage renal disease, and had been on kidney dialysis since 2000. He initially met with non-party Wayne Waltzer, M.D., a transplant surgeon at Stony Brook in January, 2000, to discuss options for transplantation. The record reveals that Dr. Waltzer discussed at length with the recipient plaintiff the risks of transplantation, including rejection, infection, hemorrhage, cancer and the possible transmission of diseases such as AIDS and hepatitis. At that time, Dr. Waltzer felt that the recipient plaintiff was a candidate for renal transplantation and placed him on the recipient waiting list. The recipient plaintiff was reevaluated in March of 2007 by Dr. Darras, also a transplant surgeon at Stony Brook, who indicated that the recipient plaintiff was still a good transplant candidate and that he would remain on the active transplant list. The recipient plaintiff received a call that a kidney was available on March 30, 2007. The transplant surgery took place on March 31, 2007. The record reveals that the transplant surgery was a success, the plaintiff recipient's post-operative recovery was uneventful, and he was discharged from the hospital on April 4, 2007.

---

[2] The donor's parents authorized the donation of four organs. In addition one of the kidneys that was donated to the recipient plaintiff in the instant action, the donor's pancreas was donated to Jodie Lynn Shierts, the other kidney was donated to Gerard Trueba, and the donor's liver was donated to Kitman Lee.

On May 3, 2007, an autopsy of the donor's brain revealed that he died of a rare form of T-cell lymphoma in his leptomeninges. The recipient plaintiff stated that he was notified that he had been exposed to cancer due to the donor's cause of death, and was encouraged by Dr. Darras to have the kidney removed. After the transplant nephrectomy was performed by Dr. Darras on May 18, 2007, the recipient plaintiff resumed kidney dialysis three times per week, and was discharged on May 21, 2007. The recipient plaintiff did not see Dr. Darras again after his staples were removed. A biopsy of the diseased kidney revealed anaplastic large cell lymphoma. He was readmitted to Stony Brook on May 25, 2007 for the insertion of an intravenous port to deliver prophylactic chemotherapy which began on May 26, 2007 and continued for approximately six months. PET scans were conducted three times and all were negative, as were a bone marrow biopsy and a lumbar puncture. The recipient plaintiff was admitted to Stony Brook two additional times to receive blood transfusions and the last admission related to the kidney transplant occurred on June 6, 2008. The recipient plaintiff was not diagnosed with bacterial or viral meningitis, and never developed cancer.

Defendants Kimberly Fenton, M.D., Salma Syed, D.O., and Daniel Sloniewsky, M.D. now move (005) for summary judgment dismissing the complaint. Andriola moves (006) for an order dismissing the complaint. Frank Darras, M.D. moves (007) for summary judgment dismissing the complaint. Plaintiffs move (008) for an order directing defendant NYU Medical Center ("NYUMC") to provide discovery. Plaintiffs cross-move (009) for leave to amend the complaint to add a cause of action for lack of informed consent.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***Stewart Title Ins. Co. v Equitable Land Servs.***, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Amsler v Verrilli***, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]; ***De Stefano v Immerman,*** 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or , if there was a departure, that the plaintiff was not injured thereby (***Williams v Sahay***, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]).

A physician owes a patient three basic duties of care: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the physician practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Pike v***

Honsinger, 155 NY 201, 49 NE 760 [1898]). Significantly, the rule requiring a physician to use his or her best judgment "does not hold him [or her] liable for a mere error in judgment, provided he [or she] does what he [or she] thinks is best after careful examination" (***Pike v Honsinger***, *supra* at 210; *see* ***Davis v Patel***, 287 AD2d 479, 731 NYS2d 204 [2d Dept 2001]).

The threshold question in determining liability is whether the defendants owed plaintiff a duty of care (***McNulty v City of New York***, 100 NY2d 227, 762 NYS2d 12 [2003]). Generally, a doctor only owes a duty of care to his or her patient. The courts have been reluctant to expand a doctor's duty of care to a patient to encompass nonpatients (*see* ***Eiseman v State of New York***, 70 NY2d 175, 518 NYS2d 608 [1987]). An extension of the duty is warranted in cases where the service performed on behalf of the patient necessarily implicates protection of household members (***Tenuto v Lederle Labs.***, 90 NY2d 606, 665 NYS2d 17 [1997]). Liability does not arise until a duty is found (***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***De Angelis v Lutheran Medical Center***, 84 AD2d 17, 445 NYS2d 188 [2d Dept 1981]).

A plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (***Alvarez v Prospect Hosp.***, *supra*; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

The evidence submitted by Fenton, Syed, and Sloniewsky was sufficient to meet their burden of establishing, as a matter of law, that they did not depart from good and accepted medical practice inasmuch as they had no duty to the recipient plaintiff, and that the treatment they rendered to the donor was not a proximate cause of the recipient plaintiff's alleged injuries (***Eiseman v State***, *supra*; ***McNulty v City of New York***, *supra*). In support of their motion for summary judgment, the defendants submit, *inter alia*, their deposition testimonies, and the joint exhibits. In the bill of particulars, plaintiff alleges that Fenton, Syed, and Sloniewsky departed from accepted medical practice by diagnosing the donor with bacterial meningitis rather than T-cell lymphoma, thereby causing injury to the recipient plaintiff by the subsequent transplantation of the donor's diseased kidney.

The record reveals that Fenton was the attending pediatric intensivist caring for the donor at Stony Brook when the donor was admitted on March 13, 2007, and oversaw his care until March 19, 2007, and resumed the donor's care on March 29, 2007 until March 30, 2007. Thereafter, the staff from the NYODN supervised the organ donation process and Fenton withdrew from the case. Fenton testified that she had no role in determining whether the donor's organs were suitable for transplantation. In addition, she had no contact with any of the transplant centers, and had no knowledge of the recipient plaintiffs' identities. Likewise, Sloniewsky, also an attending pediatric intensivist, testified that he took over the donor's care until March 29, 2007, upon Fenton's return. He testified that his care and treatment of the donor ended before a request was made to donate his organs, and that he had no contact with NYODN, the transplant centers, or the recipient plaintiffs. He also had no involvement in the organ

donation process. Syed, a pediatric infectious disease attending, testified that she was called for a consult on the first day of the donor's admission. She stated that the last day she had contact with the donor was on March 22, 2007. She had no reason to believe that he was suffering from a malignancy, inasmuch as his presentation was consistent with meningitis. She further testified that she had no contact with NYODN, the transplant centers, or the recipient plaintiffs.

As the moving defendants made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Murray v Hirsch***, 58 AD3d 701, 871 NYS2d 673 [2d Dept 2009], *lv den* 12 NY3d 709, 881 NYS2d 18 [2009]). The plaintiffs failed to meet this burden. In opposition, plaintiffs submitted the affidavits of Paul W. Nelson, M.D. and Arnold N. Weinberg, M.D. Dr. Nelson avers that he is licensed to practice medicine in the States of Missouri and Indiana. He is a transplant surgeon and is board certified in surgery. Dr. Weinberg avers that he is a physician duly licensed to practice medicine in the State of Massachusetts and is board certified in internal medicine. These affidavits, however, have no probative value inasmuch as neither expert addresses the alleged departures of the moving defendants. Moreover, there is no legal support for plaintiff's theory that a special relationship arose between the moving defendants and the recipient plaintiff once the recipient plaintiff was identified as a match to the donor's kidney. There was no physician-patient relationship creating a duty, and there were no special circumstances which related the care they provided to the donor with the recipient plaintiff, of whom they had no knowledge. Therefore, the Court declines to extend the common law to create a remedy for the plaintiffs (***McNulty v City of New York***, *supra*; ***Eiseman v State***, *supra*; ***Pulka v Edelman***, *supra*). In addition, the attorney's affirmation is of no probative value on this motion for summary judgment since he has no personal knowledge of the incident (***Zuckerman v New York***, *supra*). Based on the foregoing, the motions by Fenton, Syed and Sloniewsky for summary judgment, dismissing the complaint as asserted against them, is granted.

The evidence submitted by defendant Darras was also sufficient to meet his burden of establishing, as a matter of law, that he did not depart from good and accepted medical practice (***Starr v Rogers***, *supra*; ***Whalen v Victory Memorial Hosp.***, *supra*), and that he used his best judgment in accepting the kidney on behalf of the recipient plaintiff (***Pike v Honsinger***, *supra*; ***Davis v Patel***, *supra*). In the bill of particulars, plaintiffs allege that defendant Darras departed from good and accepted medical and surgical practice by negligently transplanting a diseased kidney contaminated with T-Cell lymphoma into the recipient plaintiff, failing to properly assess the transplant kidney's suitability before implantation, failing to learn the true cause of death of the donor and failing to obtain a proper medical history of the donor before implanting the kidney. In support of the motion, defendant Darras submits the joint exhibits, his deposition testimony, and the affirmation of Robert Montgomery, M.D. Initially, Dr. Montgomery's affirmation lacks probative value inasmuch as he is not authorized by law to practice in the state of New York (see CPLR 2106; ***Worthy v Good Samaritan Hosp. Med. Ctr.***, 50 AD3d 1023, 857 NYS2d 178 [2d Dept 2008]), and his report is not sworn.

Defendant Darras testified that he was employed by Stony Brook Medical School as a clinical associate professor and was also a member of the Urology Department's Division of Transplantation. His specialties are urology and renal transplant surgery. He performed the transplantation of the donor's

kidney into the recipient plaintiff. He stated that it was his decision to accept the donor's kidney for the recipient plaintiff. He obtained all the information from the NYODN through the hospital's transplant coordinator, David Bekofsky. He stated that although the donor was a patient at Stony Brook, according to HIPAA[3] rules, he had no access to the donor's medical record since he was not caring for the donor. For the same reason, he had no conversations with the donor's treating physicians. He stated that he was not aware that other institutions had declined the kidney. He stated that there are no protocols or guidelines regarding whether to accept an organ; however, the transplant program has certain base acceptance criteria that Stony Brook provided to the United Network for Organ Sharing. He accepted the diagnosis of bacterial meningitis and relied on the diagnosis that was made by the pediatric specialists who had been caring for the donor. Although he was aware that the pathogen responsible for the donor's bacterial meningitis was never identified, he felt the information that he received from NYODN was sufficient to accept the organ. He further stated that the recipient plaintiff's initial transplant surgery was uneventful, the nephrectomy was also uneventful, and that the recipient plaintiff made full recoveries from both surgeries. When he learned of the donor's cancer diagnosis, he immediately called the recipient plaintiff back to the hospital and discussed removing the cancerous kidney. Chemotherapy was instituted and the recipient plaintiff did not develop cancer.

Defendant Darras' testimony was sufficient to establish that he did not depart from good and accepted medical practice (***Murray v Hirsch***, 58 AD3d 701, 871 NYS2d 673 [2d Dept 2009]). The burden shifted to the plaintiff to establish the existence of a triable issue of fact (see ***Alvarez v Prospect Hosp.***, *supra*). Plaintiffs failed to meet this burden. In opposition, plaintiffs submit the affidavits of Paul W. Nelson, M.D., and Arnold N. Weinberg, M.D. Dr. Nelson states that defendant Darras departed from good and accepted medical standards in failing to confirm the diagnosis of bacterial meningitis prior to accepting the organ without a positive culture, and failing to obtain and review the donor's Southampton Hospital chart, which diagnosed the donor with viral meningitis. It is Dr. Nelson's opinion that transplant surgeons are ultimately responsible for the decision to accept or reject donated organs. He states that defendant Darras should have rejected the kidney, as other recipient transplant centers had done.

Dr. Weinberg opines, within a reasonable degree of medical certainty, that defendant Darras' decision to accept the kidney constituted a departure from good and accepted standards of medical care. He bases this opinion on the donor's negative cerebral spinal fluid test results, coupled with the length of his hospital course, and the diagnosis of viral encephalitis made at Southampton Hospital which was posted on DonorNet. Dr. Weinberg opines that defendant Darras relied upon an inadequate explanation for ruling out the prior viral diagnosis. According to Dr. Weinberg, all of the factors should have led defendant Darras to conclude that the donor's diagnosis of bacterial meningitis was not accurate.

In reply, defendant Darras contends that Dr. Nelson does not say that it is a departure from the standard of care to accept an organ from a donor diagnosed with partially treated bacterial meningitis. Additionally, defendant points out Dr. Weinberg's admission that bacterial meningitis as a cause of death is not a contraindication to transplantation.

---

[3] HIPAA is the Health Insurance Portability and Accountability Act of 1996 (see Pub L 104-191, 110 U.S. Sat 1936).

The Court finds that plaintiffs failed to raise a triable issue of fact as to defendant Darras' liability, inasmuch as the there was no evidence in the record that the donor had cancer, which was the ultimate cause of the recipient plaintiff's injuries. In this regard, the plaintiffs' experts speculate that defendants should have rejected the kidney based on the suspicion of a viral illness which never materialized. Accordingly, the motion by defendant Darras for summary judgment dismissing the complaint as asserted against him is granted.

Turning to the plaintiffs' motion, the application for an order directing New York University Medical Center to provide discovery was not filed in the proper action. The Court notes that because these actions are to be tried jointly, they retain their individual identities and index numbers (CPLR 602[a]). Consequently, the parties must move for separate relief in each action. Since the instant motion was submitted under Index Number 88388/08 (Action #1), the court shall consider the relief requested only as to Action #1, and denies without prejudice all requested relief as to the related actions. In any event, the Court finds that the motion is denied as academic in light of the above determinations.

Plaintiffs' cross motion for leave to amend the pleadings is denied. It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise (CPLR 3025 [b]; ***Thomas Crimmins Contracting Co. v New York***, 74 NY2d 166, 544 NYS2d 580 [1989]; ***McCaskey, Davies & Associates, Inc. v New York City Health & Hospitals Corp.***, 59 NY2d 755, 463 NYS2d 434 [1983]. "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 99, 840 NYS2d 378 [2d Dept 2007]; ***Trataros Constr., Inc. v New York City Hous. Auth.***, 34 AD3d 451, 452-453, 823 NYS2d 534 [2d Dept 2006]; ***Norman v Ferrara***, 107 AD2d 739, 484 NYS2d 600 [2d Dept 1985]). Here, the proposed claim is palpably insufficient and has no merit. The record reveals that the recipient plaintiff executed a presurgical consent for the transplant procedure. The recipient plaintiff's claim that his transplant surgeon, defendant Darras, should have disclosed the risk of transplanting an organ that might have been exposed to viral meningitis or viral encephalitis is belied by the medical records which reveal that viral studies were performed and were negative, and the donor did not die of a viral disease. Therefore, the viral meningitis diagnosis which was relayed to Darras by NYODN was of no consequence.

In any event, plaintiffs' application was made two years after the action was commenced and eight months after the note of issue was filed. "[W]here a party is guilty of extended delay in moving to amend, the court should insure that the amendment procedure is not abused by requiring a reasonable excuse for the delay and an affidavit of merit" (***Gallo v Aiello***, 139 AD2d 490, 490-91, 526 NYS2d 593 [2d Dept 1988] [emphasis added]; *see also* ***Alexander v Seligman***, 131 AD2d 528, 516 NYS2d 260 [2d Dept 1987]; ***Bertan v Richmond Mem. Hosp. & Health Ctr.***; 106 AD2d 362, 482 NYS2d 492 [2d Dept 1984]), neither of which have been submitted here. "The fact that an informed consent claim necessarily depends on the recollections of the parties which unavoidably diminish over time," the longer the delay in asserting such a claim, the more it stands to reason that the opposing party will be prejudiced (***Evans v Kringstein***, 193 AD2d 714, 715, 598 NYS2d 64, 65 [2d Dept 1993]). Accordingly, the cross motion is denied.

The Court acknowledges the tragic circumstances which led to the commencement of the instant action, and extends its sympathy for everyone involved, including the donor and his parents, the medical providers, the NYODN staff, the recipient plaintiff and his family. In addition, the Court notes that the donor's parents willingly waived HIPAA[4] restrictions (*see* ***Liew v New York University Medical Center***, 55 AD3d 566, 865 NYS2d 278 [2d Dept 2008]), openly provided their son's confidential medical records, and disclosed his ultimate diagnosis in order to help save the recipient plaintiff who obtained further treatment and is alive today as a result. The Court finds that all parties acted responsibly by notifying the recipient plaintiff as soon as it was known that the donor had cancer, affording the recipient plaintiff all possible care and treatment possible to reverse the unfortunate circumstances. Unfortunately, inasmuch as it is not the standard of care to perform a biopsy upon a donor organ prior to transplantation, it was not foreseeable that the donor could have had cancer, this Court is constrained by the law to render this determination.

Under the circumstances presented herein and the prevailing law, the complaint is dismissed. Inasmuch as the causes of action seeking damages on behalf of the recipient plaintiff must be dismissed, the derivative cause of action on behalf of the recipient plaintiff's wife must also be dismissed as against the defendants (*see* ***Cabri v Park***, 260 AD2d 525, 688 NYS2d 248 [2d Dept 1999]).

Dated: March 30, 2012

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

TO:

FUMUSO, KELLY, DEVERNA, SNYDER SWART & FARRELL, LLP
Attorney for Defendant Darras
110 Marcus Boulevard., Suite 500
Hauppauge, New York 11788

BARTLETT, MCDONOUGH, BASTONE & MONAGHAN, LLP
Attorney for Defendant Southampton
670 Main Street
Islip, New York 11751

MITCHELL J. ANGEL, PLLC
Attorney for Defendants Semlear and Pflaster
170 Old Country Road
Mineola, New York 11501

---

[4] HIPAA is the Health Insurance Portability and Accountability Act of 1996 (see Pub L 104-191, 110 U.S. Sat 1936).

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Attorney for New York Organ Donor Network
150 East 42nd Street
New York, New York 10017-5639