

**Guy v Stein**

2018 NY Slip Op 34520(U)

November 20, 2018

Supreme Court, Bronx County

Docket Number: Index No. 21178/18

Judge: Joseph E. Capella

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART: 23

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GUY, HERMAN

Index No. 0021178/2018E

-against-

Hon. JOSEPH CAPELLA,

STEIN, M.D., MARK

Justice Supreme Court

-----X

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, (Seq. No. 1) for  
**DISMISSAL**, noticed on **August 07 2018**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is *and cross-motion are granted + action dismissed as per decia order dated November 20, 2018.*

Motion is Respectfully Referred to Justice:  
Dated: \_\_\_\_\_

Dated: 11/20/18

Hon.   
JOSEPH CAPELLA, J.S.C.

- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT

NEW YORK SUPREME COURT - COUNT OF BRONX  
PART 23

Case Disposed   
Settle Order   
Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Index #: 21178/18

-----X  
HERMAN GUY,

DECISION/ORDER

Plaintiff,

Present:

- against -

Hon. Joseph E. Capella  
J.S.C.

MARK STEIN, MD, and INTEGRATED MEDICAL  
PROFESSIONALS, PLLC,

Defendants.

-----X  
The following papers numbered 1 to \_\_\_ read on this motion and cross-motion, submitted on  
September 11, 2018, as no. \_\_\_ on the Motion Calendar of \_\_\_\_\_.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIDAVITS AND EXHIBITS	1
ANSWERING AFFIDAVIT AND EXHIBITS	3
REPLY AFFIDAVIT AND EXHIBITS	4-5
CROSS-MOTION AND AFFIDAVITS AND EXHIBITS	2

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THIS MOTION AND  
CROSS-MOTION IS DECIDED AS FOLLOWS:

In this action, commenced January 30, 2018, the plaintiff alleges three causes of  
action. The first is medical malpractice, in which plaintiff alleges that defendants were  
negligent in their treatment of plaintiff's circumcision procedure that took place on July  
11, 2014. The second is a failure to promulgate and comply with rules, regulations and  
protocols that allegedly resulted in various physical injuries. And lastly, plaintiff alleges  
that defendants failed to obtain informed consent of the circumcision procedure. The  
defendants seek dismissal (CPLR 3211(a)(5)) of plaintiff's first and third cause of action  
on the premise that said claims are time-barred by the two year and six month statute of

limitations imposed pursuant to section 214-a of the CPLR.<sup>1</sup> (*Scott v Uljanov*, 74 NY2d 673 [1989]; *DeLeon v Hospital of Albert Einstein*, 164 AD2d 743 [1<sup>st</sup> Dept 1991].) According to Dr. Stein's affidavit and medical records, the last date of treatment provided to plaintiff as it relates to his circumcision procedure was March 30, 2015. And as such, the statute of limitations ended on September 30, 2017. The complaint, however, was not filed until January 30, 2018, some four months past the statute of limitation's deadline. The plaintiff's second cause of action, which alleges a failure to promulgate and comply with rules, regulations and protocols, is derivative in nature in that it is predicated upon the underlying medical malpractice claim. (*Camadeo v Leeds*, 290 AD2d 355 [1<sup>st</sup> Dept 2002].) Hence, if plaintiff's malpractice claim is dismissed based on the statute of limitations, then this derivative claim must likewise be dismissed. (*Balestrero v Prudential*, 283 AD 794 [2<sup>nd</sup> Dept 1954], *affirmed* 307 NY 709 [1954].) Given the aforementioned, the burden now shifts to plaintiff to establish that he received continuous treatment after March 30, 2015, in order to avail himself of the tolling provision provided by same (*Massie v Crawford*, 78 NY2d 516 [1991]; *Plummer v NYC Health & Hospital*, 98 NY2d 263 [2002]).

In opposition, the plaintiff alleges that after the July 2014 circumcision, he mentioned to Dr. Stein that "there was still quite a bit of foreskin." He was allegedly told that Dr. Stein "did leave some excess foreskin because he felt that a tight circumcision could be uncomfortable." According to plaintiff, after March 2015, he "continued to visit Dr. Stein until August 2015 and, at every visit, [he] mentioned the presence of the excess foreskin." However, the plaintiff's affidavit is devoid of any specific dates, and the medical records do not reflect any such conversations taking place after March 2015. Such a vague and conclusory affidavit that conspicuously fails to mention specific dates of continuous treatment or the substance of these alleged conversations with the doctor is


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<sup>1</sup> The defendant, Mark Stein, MD, moves by notice of motion, and defendant, Integrated Medical Professionals, PLLC, moves by notice of cross-motion.

insufficient to rebut documentary evidence to the contrary. (*Flego v Vilasi*, 154 AD2d 434 [2<sup>nd</sup> Dept]; *Boyle v Fox*, 51 AD3d 1243 [3<sup>rd</sup> Dept 2008].) Moreover, the omission of specific dates is fatal when opposing a defense based on statute of limitations, which itself is predicated on the establishment of dates and the calculation of time. (*Sherry v Queens Kidney*, 117 AD2d 663 [2<sup>nd</sup> Dept 1986].) Having failed to establish that he received continuous treatment after March 30, 2015, the plaintiff cannot avail himself of the tolling provision provided by same. (*Massie*, 78 NY2d 516; *Plummer*, 98 NY2d 263].) Therefore, the defendants' motions are granted, this action is dismissed, and the clerk shall enter judgment accordingly.

Defendants are directed to serve a copy of this decision/order with notice of entry by first class mail upon plaintiff within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

11/20/18  
Dated

Hon.   
Joseph E. Capella, J.S.C.