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Decided on April 1, 2008

Supreme Court, Queens County

Jose Adames, Plaintiff,

against

Rafael Nino Velasquez, Rafael Nino, Kathy Nino, D.D.S. d/b/a Dental Care, Kathy Nino as a partner in the business known as Dental Care, Kathy Nino individually, Kelly Nino, D.D.S., Kelly Nino d/b/a Dental Care, Kelly Nino as a partner in the business known as Dental Care, Kelly Nino, individually, and Dental Care, Inc., Defendants.

13317/2007

For the Plaintiff: Law Offices of Linda F. Fedrizzi, P.C., by Linda Fedrizzi, Esq., 25-84 Steinway Street, Astoria, New York 11103

For the Defendants: Kaufman Borgeest & Ryan, LLP, by David J. Varriale, Esq., 200 Summit Lake Drive [1st floor], Valhalla, NY 10595

Charles J. Markey, J.

New York Education Law section 6602 states: "Only a person licensed or otherwise authorized to practice under this article shall practice dentistry or use the title dentist'." The unique question posed by this decision, not encountered previously in New York's

case law, is whether the plaintiff, who allegedly sustained injuries to his teeth by the actions of an unlicensed dentist or imposter and who waited almost six years before bringing any action, can state a cause of action on a legal theory that carries a six year statute of limitations.

The defendants have moved for an order (1) dismissing the complaint pursuant to CPLR 3211(a)(5) and CPLR 214-a on Statute of Limitations grounds and (2) dismissing the complaint pursuant to CPLR 3211(a)(7) and CPLR 3013 for failure to state a cause of action.

The power of states to regulate professions is well-grounded. The United States Supreme Court declared: "There is no right to practice medicine which is not subordinate to the police power of the states" (*Lambert v. Yellowley*, 272 US 581, 596 [1926], quoted with approval in *Armstrong v. North Carolina State Board of Dental Examiners*, 129 N.C. App. 153, 159-160, 499 S.E.2d 462, 468 [1998] [reversing trial court, appellate court upheld suspension of dentist who hired another dentist who was unlicensed to practice in the state of North Carolina]). By amendments that became effective during 2007, New York fortified Article 133 of the Education Law, governing "Dentistry and Dental Hygiene," in several important and progressive ways. The Article sets forth an elaborate definition of dentistry (Education Law § 6601), imposes requirements to obtain a license as a dentist in New York (*id.* § 6604), mandates 60 hours of continuing education for dentists in each triennial period (*id.* § 6604-a), defines the practice of dental hygiene (*id.* § 6606) and provides the requirements for getting a license as a dental [*2]hygienist (*id.* § 6609), defines the practice of certified dental assisting (*id.* § 6608) and imposes requirements for certification as a certified dental assistant (*id.* § 6608-b), and, by statute, immunizes persons and entities from a defamation action regarding the qualifications of a dentist, or lack thereof, when reported to a governmental society, hospital, or dental society, unless both falsehood and malicious intent can be demonstrated (*id.* § 6611[9]). The overall policy, gauged by a plain reading of the sections in Education Law's article 133, reveals an intent to protect the public from bodily harm. The Legislature obviously saw a need to strengthen the laws in order to protect the public from the unbounded rapacity of ruthless individuals, who, without skill and license in the profession of dentistry, would go so far as to imperil a patient's life and to destroy his or her teeth. As ably stated by the court in *Nugent v. Stokes*, 313 Ky. 131, 133, 230 S.W.2d 609, 610 [1950]: "It is a well[-]known fact that modern methods of treatments of those needing the services of a dentist require great skill and those entrusted with this skill should be qualified for the purpose, and it is the intention of the statutes to require this."

Some skeptical and cynical commentators question licensing requirements. In a recent opinion column published in *The Wall Street Journal*, a well-respected newspaper known for promoting conservative, free enterprise policies, two scholars, Charles Wheelan and Morris Kleiner, state:

. . . . Licensure has . . . basic problems. First, any kind of regulation makes it harder to enter a profession; that's the point of it. But restricting entry raises the cost of service, which means that some people will either skip the service or try to do it themselves.

A study of dentists by Morris Kleiner and Robert Kudrle of the University of Minnesota in 2000 found that more stringent state licensing requirements had no impact on the dental health of a national sample of patients (Air Force recruits), or of the general population - - but it did raise prices and the earnings of dentists. States with more rigorous requirements may have better dentists, but some people can't afford to have their teeth fixed (Wheelan & Kleiner, "We Don't Need a Mortgage Guild," *Wall St. J.*, Mar. 24, 2008, at A14, col.3).

Indeed, in the present case, plaintiff Jose Adames ("Adames") maintains that he was trying to save money when he hired defendant Rafael Nino Velasquez ("Velasquez"), whom he believed to be a licensed dentist, to work on his teeth. Even aside from his sworn affidavit in opposition to the defendants' motion to dismiss, Adames's recitals in the complaint are deemed to be true for purposes of this motion to dismiss (*Nonnon v. City of New York*, 9 NY3d 825 [2007]; *Wieder v. Skala*, 80 NY2d 628, 631 [1992]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]; *see, Operative Cake Corp. v. Nassour*, 21 AD3d 1020 [2d Dept 2005]).

Adames allegedly met defendant Velasquez prior to November 15, 2001, who falsely represented that he was a dentist. Upon learning that Adames had dental problems, Velasquez offered his services at a rate discounted from that charged by his wife, defendant Dr. Ketly Nino, sued herein as Kelly Nino and Kathy Nino ("Nino"), who is a dentist, provided the plaintiff went to the office at night. On or about November 15, 2001, Adames went to the office located at 184-02 Hillside Avenue, Jamaica, New York, where he agreed to pay Velasquez in cash at each visit for all services then provided. On that evening and for several evenings thereafter, defendant Velasquez filled cavities in about 11 of the plaintiff's teeth, receiving cash for his work. Velasquez must have thought highly of his own abilities because, according to Adames, [*3]he took no x-rays of Adames's teeth before undertaking the massive dental work.

After experiencing pain in the teeth that defendant Velasquez had treated, Adames sought care from several dentists, one of whom informed him that Velasquez had filled the cavities improperly. Adames's teeth are sensitive to hot and cold temperatures, and licensed dentists have reportedly subsequently advised him that he may lose his teeth as a consequence of Velasquez's shoddy dental work. In or about October 2004, Adames's neighbors advised him that defendant Velasquez is not a dentist and does not hold a license to practice dentistry. Defendant Velasquez is a lab technician. Defendant Nino and defendant Dental Care, who employed defendant Velasquez, permitted him to falsely represent himself to be a licensed dentist.

Defendant Ketly F. Nino, D.D.S., submitted an affidavit in support of the motion to dismiss, swearing that Adames never received any dental care or treatment from her, Velasquez, or Dental Care. To reiterate the point, on January 28, 2008, over a month after the submission of the motion papers, defense counsel sent to the Court the affidavit of defendant Velasquez, also vigorously denying Adames's allegations and denying that Adames received any dental care or treatment from him or any of the other defendants.

On or about May 23, 2007, about 5 ½; years after Velasquez performed his dental "services," Adames commenced this action against defendants Velasquez, Nino, and Dental Care, allegedly a partnership or a corporation. The complaint is an example of poor draftsmanship, and plaintiff's counsel, in opposing this motion to dismiss, rather than react defensively, commendably concedes the point. Separate causes of action are not separately stated and numbered (*see*, CPLR 3014; *David J. Cogan Management Co. v. Lipset*, 79 AD2d 918 [1st Dept 1981]), and the paragraphs are often a jumble of allegations. Within the framework of only two causes of action, plaintiff offers a smorgasbord of numerous legal theories, whose necessary legal elements are thrown in desultory and disjointed fashion. The first cause of action is for negligence, medical malpractice, and fraud. The second cause of action is for breach of contract and fraud.

This is a case of first impression in this State. The Court has not been informed of any cases arising in New York where an individual injured by another engaged in the unlicensed practice of dentistry has brought a civil action for damages. However, several relatively old New York cases, where plaintiffs have brought actions for injuries based on the practice of medicine by unlicensed health care practitioners do exist (*see*, 76 NY Jur 2d, "Malpractice" § 115), and other cases have been brought in other jurisdictions (*see*, 61 Am Jur 2d, "Physicians, Surgeons, Etc." § 210).

In *Brown v. Shyne* (242 NY 176 [1926]), the plaintiff sought treatment for her disease or physical condition from a chiropractor who had no license to practice medicine. The plaintiff sued, claiming that the treatment resulted in her paralysis. The New York Court of Appeals, viewing the case as sounding in negligence or malpractice, held that if the violation of a statute prohibiting the unlicensed practice of medicine was the proximate cause of her injury, she could recover damages. "In order to show that the plaintiff has been injured by defendant's breach of the statutory duty, proof must be given that defendant in such treatment did not exercise the care and skill which would have been exercised by qualified practitioners within the state, and that such lack of skill and care caused the injury" (*Brown v. Shyne, supra* , 242 NY at 181).

Hoffson v. Orentreich (168 AD2d 243 [1st Dept 1990]) was an action for medical [*4]malpractice and negligence arising from the scarring of a patient's face allegedly caused by a procedure performed by a registered nurse. The Appellate Division held that the trial court did not commit error when it charged the jury, concerning sections of the

Education Law, that it had to decide whether the nurse "acted in accordance with proper nursing standards or engaged in the practice of medicine without a license" (*id.* at 245). Cases arising in New York and other jurisdictions show that individuals injured by others engaged in the unlicensed practice of medicine have sued on a variety of grounds, such as negligence and malpractice (*see*, Annot., "Liability to patient for results of medical or surgical treatment by one not licensed as required by law," 57 ALR 978) and even fraud (*see, e.g., Stevens v. Superior Court*, 180 Cal App 3d 605, 225 Cal Rptr 624 [Cal App 2d Dist], *review denied*[1986]; *Harris v. Graham*, 124 Okla 196, 255 P. 710 [1926]).

Turning to the complaint brought by Adames, a cause of action for personal injury based on negligence is controlled by CPLR 214(5), a three-year Statute of Limitations (*see, Snyder v. Town Insulation, Inc.*, 81 NY2d 429 [1993]; *Bleiler v. Bodnar*, 65 NY2d 65 [1985]; *Paladino v. Time Warner Cable of New York City*, 16 AD3d 646 [2d Dept 2005]; *Harley v. Druzba*, 169 AD2d 1001 [3rd Dept 1991]). A cause of action for medical malpractice is controlled by CPLR 214-a, a two-years and six-months Statute of Limitations (*see, Morales v. Carcione*, ___ AD3d ___, 852 NYS2d 343 [2d Dept 2008]; *Sarjoo v. New York City Health and Hospitals Corp.*, 309 AD2d 34 [1st Dept 2003], *appeal denied*, 1 NY3d 506 [2004]; *Doyaga v. Columbia Presbyterian Medical Center*, 307 AD2d 333 [2d Dept 2003]). The Statute of Limitations on the plaintiff's causes of action for negligence began to run in or about November 2001, the date of injury (*see, Snyder v. Town Insulation, Inc., supra*, 81 NY2d 429; *Paladino v. Time Warner Cable of New York City, supra*, 16 AD3d 646), and the Statute of Limitations on the plaintiff's causes of action for medical malpractice also began to run in or about November 2001, the date of the alleged wrongful conduct (*see, Massie v. Crawford*, 78 NY2d 516 [1991]; *Nykorchuck v Henriques*, 78 NY2d 255 [1991]). The plaintiff did not bring this action until on or about May 23, 2007, approximately 5 ½; years later. The Court notes that the continuous treatment doctrine, pursuant to which the running of the Statute of Limitations for medical and dental malpractice is stayed until the end of a course of treatment for the condition that gives rise to the lawsuit (*see, Nykorchuck v. Henriques, supra*, 78 NY2d 255; *McDermott v. Torre*, 56 NY2d 399 [1982]; *Iazzetta v. Vicenzi*, 200 AD2d 209 [3rd Dept 1994] [dental], *lv. to appeal dismissed*, 85 NY2d 857 [1995]), does not apply in the case at bar.

An interesting issue, with which another court will have to wrestle, is whether the medical statute of limitations would be available to an alleged unlicensed dental impostor where the actions occurred after CPLR 214-a's two-years and six-months limitations period for medical or dental malpractice, but before CPLR 214(5)'s three-year limitations period for negligence. Specifically, provided that all parties do not dispute that an impostor or unlicensed dentist provided dental services, the issue would be whether or not an unlicensed dentist should be permitted to be shielded by the shorter medical/dental Statute of Limitations set forth in CPLR 214-a. Such a question need not be addressed by this decision since the plaintiff failed to file suit for many years after both the medical/dental

malpractice and negligence limitations periods had expired.

Accordingly, those branches of the motion seeking an order pursuant to CPLR 3211(a)(5) dismissing the causes of action for negligence and medical malpractice on Statute of Limitations [*5] grounds are granted.

In regard to the causes of action for breach of contract, CPLR 213(2), a six-year Statute of Limitations, controls (*see, Gibraltar Management Co., Inc. v. Grand Entrance Gates, Ltd.*, 46 AD3d 747 [2d Dept 2007]), and the causes of action began to run from the time of the breach in November 2001 (*see, Mainline Elec. Corp. v. East Quogue Union Free School District*, 46 AD3d 859 [2d Dept 2007]). Although the purported claims for breach of contract are timely asserted, the plaintiff has failed to adequately state causes of action for breach of contract against defendant Ketly Nino and the defendant businesses. "A cause of action to recover damages for breach of contract based on medical services rendered by a physician is legally sufficient only when that cause of action is based upon an express special promise to effect a cure or accomplish a definite result" (*Varone v. Delman*, 272 AD2d 320 [2d Dept 2007]; *see, Nicoleau v. Brookhaven Mem. Hosp. Ctr.*, 201 AD2d 544 [2d Dept 1994]). "A breach of contract claim in relation to the rendition of medical or dental services by a physician or dentist will withstand a test of its legal sufficiency only when based upon an express special promise to effect a cure or accomplish some definite result" (*Clarke v. Mikail*, 238 AD2d 538 [2d Dept 1997] [dentist]; *accord, Iazzetta v. Vicenzi, supra*, 200 AD2d 209 [dentist]; *Blum v. Yuabov*, 2006 WL 1892276 [App T 2d Dept 2006] [dentist]).

In the present case, Adames does not allege that a special promise was made to him, and the causes of action for breach of contract asserted against defendant Dr. Nino and her business known as "Dental Care," allegedly an individual proprietorship or partnership, or "Dental Care, Inc." are insufficient for that reason. Indeed, Adames could hardly have formed a contract with Nino, since he was enticed to make a private arrangement, in stealth, with Velasquez, her husband. The aforementioned rule concerning a promise to effect a cure or a particular result has no application to a non-professional such as defendant Velasquez, who is not a dentist, yet agrees to render dental services. Adames has adequately stated the ordinary elements of a cause of action for breach of contract against defendant Velasquez (*see, Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]; *WorldCom, Inc. v. Sandoval*, 182 Misc 2d 1021 [Sup Ct NY County 1999]; *Lehmann v. Lehmann*, 182 Misc 2d 22 [NYC Civ Ct Kings County 1999]).

Accordingly, those branches of the motion which are for an order, pursuant to CPLR 3211(a)(5), dismissing the causes of action for breach of contract on Statute of Limitations grounds are denied.

Those branches of the motion seeking an order, pursuant to CPLR 3211(a)(7), dismissing

the causes of action for breach of contract as insufficiently stated are granted as to defendant Nino and the defendant businesses, but are denied as to defendant Velasquez.

Turning to the causes of action for fraud, CPLR 213(8), a six-year Statute of Limitations, controls (*see, Giarratano v. Silver*, 46 AD3d 1053 [3rd Dept 2007]; *Oggioni v. Oggioni*, 46 AD3d 646 [2d Dept 2007]), and Adames has timely asserted his claims for fraud. Adames has also adequately pleaded the elements of a cause of action for fraud against defendant Velasquez by alleging that (1) defendant Velasquez made material representations that were false or concealed a material existing fact, (2) defendant Velasquez knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff was deceived, (4) the plaintiff justifiably relied on the representations made by defendant Velasquez, and (5) the plaintiff was injured as a result of the representations made by defendant Velasquez (*see, Lama Holding Co. v. Smith Barney*, 88 NY2d 413 [1996]; *New York Univ. v. Continental Ins. [*6] Co.*, 87 NY2d 308 [1995]; *Watson v. Pascal*, 27 AD3d 459 [2d Dept 2006]; *Cerabono v. Price*, 7 AD3d 479 [2d Dept 2004]; *New York City Transit Authority v. Morris J. Eisen, P.C.*, 276 AD2d 78 [1st Dept 2000]; *American Home Assur. Co. v. Gemma Const. Co., Inc.*, 275 AD2d 616 [1st Dept 2000]; *Swersky v. Dreyer & Traub*, 219 AD2d 321 [1st Dept 1996]).

In *Batty v. Arizona State Dental Board* (57 Ariz. 239, 112 P.2d 870 [1941]), the Supreme Court of Arizona, beautifully articulated the nature of the fraud and deception, stating:

The purpose and the only justification of the various statutes regulating the practice of medicine in its different branches is to protect the public against those who are not properly qualified to engage in the healing art, and one who is not licensed under such statutes is conclusively presumed to be unqualified. When a patient employs a physician he has the right to assume the latter will advise him properly in all matters pertaining to his ailments, and this certainly includes advice as to who are properly qualified to assist in his treatment. Fraud may be committed by a failure to speak, when the duty of speaking is imposed, as much as by speaking falsely.

(*id.* at 254, 112 P.2d at 877; *State Dental Council and Examining Board v. Pollock*, 457 Pa. 264, 274 n.6, 318 A.2d 910, 916 n.6 [1974] ["(I)t is a fraud on members of the public who expect and pay for the services of a licensed dentist"]). In the present case, Adames's account that Velasquez insisted on cash shows a mercenary motive. As a matter of law, an action for fraud may be asserted regardless of whether Velasquez accepted remuneration for his offered "services" (*see, e.g., Lewis v. Kentucky State Board of Dental Examiners*, 300 S.W.2d 241 [Ky. Ct. App. 1957] [well-intentioned and charitable unlicensed dentist, engaged in training religious missionaries in "practical dentistry," was barred from doing so; court stated: "Nor can we accept the appellant's proposition that the statutes are only aimed at masqueraders and quacks who prey upon the public for compensation." *Id.* at 244]).

Pursuant to the doctrine of respondeat superior (*see, Sports Car Centre of Syracuse, Ltd. v. Bombard*, 249 AD2d 988 [4th Dept 1998]; *Ellis v. Metlife Sec. Ins. Co. of New York*, 130 AD2d 951 [4th Dept 1987]), Adames has also adequately stated a cause of action for fraud against defendant Nino and the defendant businesses by alleging, inter alia, that defendant Velasquez was their employee who held himself out as a dentist, with their permission. If defendant Velasquez is found to have committed a fraud, liability could also attach to defendant Dr. Nino and the defendant businesses. In *Armstrong v. North Carolina State Board of Dental Examiners* (*supra*, 129 N.C. App. 153, 499 S.E.2d 462), the appellate court eloquently stated:

[T]he legislature could have reasonably believed that the statute would promote these ends by placing the burden to determine whether employees are properly licensed on the hiring dentist. Such an individual is in the best position to ensure that employees are properly licensed, and it is not unreasonable or irrational to require a hiring dentist to ensure that employees are properly licensed. The Dental Board further argues that if due diligence is exercised by a dentist, then the dentist can insulate him or herself from liability.

(*Id.* at 161, 499 S.E.2d at 469; *accord, Simpson v. Hubert*, 35 Mich. App. 523, 528, 193 N.W.2d 68, 71 [1971] ["(M)alpractice is not the exclusive theory" where a patient was harmed by the actions of an impostor, unlicensed dentist]).

As well-expressed by the North Carolina appellate court in *Armstrong*, employers are in [*7]the best position to ensure that their employee professionals are properly licensed before they provide services to the public. Whether it is a dental practice hiring a dentist, a hospital hiring a doctor, or a law firm hiring an attorney, the firm's administrator or managing director can easily check the licensing credentials of its employees and thus insulate the entity from liability on a fraud cause of action based upon a quack who masquerades as a licensed professional.

States, pursuant to their police powers, have rationally chosen certain professions for licensing requirements. Television news reporters, journalists, and theater, restaurant, art, and music reviewers all require certain skills in written or oral presentations, coupled with an adept knowledge of their subject matter, and serve an important, even vital, societal function, but they are not obligated to be licensed, presumably because any error they make in reporting or critiquing is not a grave threat to the public. The work done by doctors, dentists, lawyers, and similar professionals, on the other hand, is of such nature that states must impose licensing requirements because the harm done by an unlicensed impostor can imperil lives, health, liberty, and fortunes.

A fraud cause of action needs to be available to protect the public as long as the inventiveness of con artists, pathological liars, and even simply greedy individuals

continue to plague society. In the present case, a lab technician, as maintained by plaintiff, allegedly posed, masqueraded, and performed work as a dentist, although the imposter was unlicensed. Other reported cases have shown a dramatic surge in acts of deception and manipulation, by omission, concealment, and commission, by even licensed professionals. In *Positive Software Solutions, Inc. v. New Century Mortgage Corp.* (337 F. Supp. 862 [N.D. Tex. 2004], *aff'd as modified*, 436 F.3d 495 [5th Cir. 2006], *rev'd*, 476 F.3d 278 [5th Cir.] [en banc; 11-5 opinion], *cert. denied*, 127 S. Ct. 2943 [2007]), lawyer Peter J. Shurn III, in undertaking to serve as the sole arbitrator of a major commercial dispute, made repeated false and misleading statements on disclosure forms. For instance, Shurn was asked on one form: "Have you had any professional or social relationship with counsel for any party in this proceeding or with the firms for which they work?" (436 F.3d at 497; panel opinion by Judge Thomas M. Reavley). Shurn falsely insisted several times, and one time under written oath, that he had nothing to disclose (petition for a writ of certiorari, 2007 WL 1093508). Despite an en banc ruling by the United States Court of Appeals for the Fifth Circuit refusing to overturn the arbitration result, over the powerful dissents of Judges Thomas M. Reavley and Jacques L. Wiener, Jr., Shurn's deception on the form is a matter of record (see excellent discussion in Howard L. Wieder, "Subversion of ADR: Nondisclosure of Ties by Appointed and Aspiring Arbitrators," *Queens Bar Bulletin* [Dec. 2007; vol. 71, no. 3], p.1 [found at www.qcba.org under "Publications"]).

Pulitzer Prize-winning economics and financial affairs commentator Gretchen Morgenson, in "When Arbitrators Are Their Own Judges" (NY Times, Aug 12, 2007, at Business section, p. 1), discusses the case of Harley McDonald, a retired lawyer, and his wife, Carol, who had a retirement account valued at \$60 million. Their investment advisers at Piper Jaffray ("Piper") gave advice that resulted in the nest egg losing 80% of its value. Unlike in *Positive Software*, in which the arbitration was heard by Shurn acting as a sole arbitrator, the McDonalds' dispute was to be submitted to a panel of arbitrators. With only three-four days left to the start of the arbitration, the McDonalds' lawyer discovered that the chairman of the panel, attorney Mark F. Marshall, failed to disclose that his law firm, Davenport, Evans, Hurwitz & Smith in South Dakota, represented Piper, the defendant in the arbitration on numerous, repeated [*8] occasions.

In those cases involving lawyers Shurn and Marshall - - licensed professionals, false statements were made by lawyers for the purpose of serving as an arbitrator. Deception and concealment can also cost lives. Articles in *The New York Times* detailed how a plastic surgeon's false representations about his credentials in a marketing piece and his failure to disclose that he was barred by New York authorities from performing nasal plastic surgeries without the supervision of another surgeon cost a woman from Ireland her life (*see*, Warren St. John, "Face-Lift Played Major Part in Woman's Death, City Finds," NY Times, May 25, 2005, and Anthony Ramirez, "Plastic Surgeon Sued By Dozens Surrenders His Medical License," NY Times, Mar. 7, 2008 [concerning former

physician Michael Evan Sachs]).

In those cases, involving Shurn, Marshall, and Sachs, licensed professionals practiced deception, misrepresentation, and, above all, manipulative concealment of vital information that threatened fortunes and lives. Failure to provide a cause of action in fraud to victims of such treacherous concealment that results in harm invites, in effect, other miscreants to victimize other members of the public. Where a lab technician fails to inform a dental patient that he is not a dentist and then inflicts massive injuries, a fraud cause of action should similarly be made available to protect the public.

In this regard, upholding the cause of action for fraud, under the facts here stated, does not accomplish an end-run on the general rule forbidding such cause of action where it serves merely to restate the claims for medical /dental malpractice or negligence (*see, e.g., Otero v. Presbyterian Hospital in the City of New York*, 240 AD2d 279, 289 [1st Dept 1997]; *Tulloch v. Haselo*, 218 App Div 313 [3rd Dept 1926] [rejecting fraud claim against dentist, as seeking an enhancement of damages]). The deception allegedly practiced by Velasquez, accepted as true for purposes of this motion to dismiss, and if found to be true by a jury, is a different act than negligently rendering dental services. In terms of the injury, the actions of a lab technician posing as a dentist and commencing to drill and to fill cavities, without even taking a set of x-rays, will result in huge aggravated, compounded damage to the plaintiff. If the facts alleged by Adames are accepted at trial as true, both compensatory and punitive damages need to be available to redress the injuries and to deter anyone who thinks upon embarking upon such a depraved scheme to harm the public.

Accordingly, those branches of the defendants' motion which are for an order dismissing the causes of action for fraud are denied.

To summarize, those branches of the defendants' motion seeking an order, pursuant to CPLR 3211(a)(5), dismissing the causes of action for negligence and medical malpractice on Statute of Limitations grounds are granted. Those branches of the motion seeking an order, pursuant to CPLR 3211(a)(5), dismissing the causes of action for breach of contract on Statute of Limitations grounds are denied. Those branches of the motion which are for an order, pursuant to CPLR 3211(a)(7), dismissing the causes of action for breach of contract as insufficiently stated are granted as to defendant Nino and the defendant businesses, but denied as to defendant Velasquez. The branches of the motion seeking to dismiss a fraud cause of action as against all defendants are denied.

In pursuit of the legislative policy expressed in Education Law article 133 and the reporting provision of section 6611[9], this Court, furthermore, without prejudging this case or making any determinations of the credibility of any of the parties, is sending copies of this [*9]decision to:

(1) the Honorable Richard P. Mills, President of the University of the State of New York and Commissioner of Education, Mr. Lawrence H. Mokhiber, the Acting Executive Secretary of the Division of Dentistry, Hon. Robert M. Bennett, Chancellor of the New York State Board of Regents, and Hon. Merryl H. Tisch, Vice Chancellor of the New York State Board of Regents, for any investigative action that they and the New York State Education Department, at 89 Washington Avenue, Albany, NY 12234, may wish, in their discretion, to pursue regarding the individual and corporate defendants named herein, including whether Dr. Ketly F. Nino aided and abetted the actions of an unlicensed dentist (*Matter of Chall v. New York State Board of Regents*, 168 AD2d 706 [3rd Dept. 1990]), and

(2) the Honorable Richard A. Brown, the District Attorney of Queens County, for any investigation he may wish to undertake. In light of the diametrically conflicting affidavits between Adames, who swears that he was treated by Velasquez, and defendant Velasquez, who denies ever treating Adames, the Court hereby advises counsel for the parties that, if, in the course of proceedings and the trial of this case, it becomes clear that one or some parties have committed perjury, the undersigned will make a criminal referral to the District Attorney.

The Court affords plaintiff's counsel an opportunity, if so advised, to serve an amended complaint that conforms to this decision and corrects the hodgepodge allegations of the present pleading. Such an amended pleading should be verified by the plaintiff, in light of the fraud cause of action, and should be served upon defense counsel on or before May 29, 2008. Defense counsel shall serve defendants' answer on or before July 3, 2008.

Plaintiff's counsel shall serve a copy of this decision with notice of entry upon defense counsel, attaching a filed copy of this order.

The foregoing constitutes the decision, order, and opinion of the Court.

Hon. Charles J. Markey

Justice, Supreme Court, Queens County

Dated: Long Island City, New York

April 1, 2008

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