

Temán v Braverman
2016 NY Slip Op 32417(U)
November 22, 2016
Supreme Court, New York County
Docket Number: 805410/2014
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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ARI TEMAN,

Plaintiff,

-against-

ERIC BRAVERMAN, M.D., RICHARD SMAYDA, D.O.,
SANDIP BUCH, M.D., ANUPAMA REDDY, M.D., PATH
MEDICAL, P.C., DARYA BRAVERMAN, and TOTAL
HEALTH NUTRIENTS,

Defendants.
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JOAN B. LOBIS, J.S.C.:

In this motion, sequence 006, defendants Eric Braverman, M.D., Sandip Buch, M.D., and PATH Medical, P.C. (the moving defendants) seek an order dismissing plaintiff's claims for fraud, negligent infliction of emotional distress, and violation of N.Y. Gen. Bus. L. § 349; granting a protective order prohibiting the production of Dr. Braverman for a deposition until the resolution of an ongoing criminal action in which he is the defendant; staying the case until the resolution of the criminal action; granting a protective order precluding questions regarding other civil claims against Dr. Braverman at the time of his deposition; and transferring this action to a venue outside of New York City to ensure Dr. Braverman receives an impartial trial. Plaintiff alleges that Dr. Reddy and other employees of PATH Medical, P.C. misdiagnosed his obstructive sleep apnea as psychiatric disorders and that defendants Dr. Braverman and PATH Medical sold him unnecessary supplements from defendant Total Health Nutrients.

The moving defendants argue that plaintiff's fraud claims are duplicative of his medical malpractice claims and that the fraud claims are deficient because plaintiff fails to make

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specific allegations against each party and to plead scienter with particularity. They assert that plaintiff does not allege extreme and outrageous conduct as is necessary for his claim of negligent infliction of emotion distress. They argue that plaintiff's cause of action for deceptive acts and practices under N.Y. GBL § 349 fails because plaintiff does not allege consumer-oriented conduct. In support for their request to stay the case, they argue that it would be prejudicial to force Dr. Braverman to assert his Fifth Amendment rights at deposition when the criminal charges against him may ultimately be dismissed. The moving defendants state that the Court should preclude questioning about Dr. Braverman's pending matrimonial action which involves co-defendant Darya Braverman, about Dr. Braverman's petty larceny conviction, about the Attorney General investigation of PATH Medical, P.C., and questions about actions commenced by out-of-state medical licensing entities. Additionally, they contend that this case must be transferred to a different venue because the media coverage obviates a fair trial.

In opposition plaintiff asserts that his fraud claim is separate and distinct from his medical malpractice claim because it alleges a scheme by Dr. Braverman to induce plaintiff to purchase unnecessary medication. He asserts that a doctor can be liable for fraud when, as here, a doctor intentionally misrepresents that treatment is appropriate when he knows it is not and causes damage. Plaintiff states that defendants fraudulently provided unnecessary medical services in an effort to profit off of plaintiff's debilitated mental and physical state and caused him damage by overcharging him. Even if his fraud claim is not separate from his medical malpractice claim, he asserts, the fraud claim should survive because he pled it in the alternative. Additionally, he contends that it is premature to dismiss his fraud, negligent infliction of emotional distress, and N.Y. Gen. Bus. L. § 349 claims when defendants have not demanded a bill of particulars

elaborating on those claim. He asserts that defendants engaged in extreme and outrageous conduct rising to the level of negligent infliction of emotion distress by falsely informing plaintiff's parents that plaintiff was suffering from borderline personality disorder and refusing to treat plaintiff unless he became a patient of Silver Hill Hospital. He argues that N.Y. Gen. Bus. L. § 349 can apply to the provision of medical treatment. He asserts that defendants routinely engaged in the provision of unnecessary treatment and thus engaged in acts that were materially deceptive to the consumers, their patients, in the form of improper treatment. Plaintiff then argues that he will be prejudiced if the case is stayed and that there are other less harmful ways to preserve Dr. Braverman's fifth amendment rights. He asserts that the motion to stay is premature as he has not deposed Dr. Braverman and the privilege against self-incrimination may not be asserted in advance of questioning. He argues that he may question Dr. Braverman as to his pending lawsuits, actions commenced by out-of-state licensing entitles, his petty larceny conviction, and the Attorney General investigation of PATH medical. Further, he asserts that once the criminal case is concluded he reserves the right to re-depose Dr. Braverman regarding his Class D felony. He asserts that the case should not be transferred, especially because the moving defendants did not make their request until three years after the media coverage ended.

Defendant Richard Smayda cross-moves, arguing that discovery should be stayed to avoid wasting judicial resources and prejudice to defendants. In reply, the moving defendants argue that the Court should disregard plaintiff's opposition because he filed it two days late. They assert that plaintiff's argument that it is premature to dismiss causes of action before he served bills of particulars on them is not persuasive because the causes of action at issue were not adequately pled in the complaint.

Preliminarily, the Court considers plaintiff's opposition despite plaintiff's two-day delay in filing it. Though all parties are obligated to abide by the Court's deadlines, the prejudice that plaintiff would incur if the Court rejected his opposition outweighs countervailing considerations. The Court notes that both defendants had the opportunity to, and did, respond to the opposition. The causes of action for fraud, negligent infliction of emotional distress, and violation of N.Y. Gen. Bus. L. § 349 are dismissed. Despite plaintiff's contention, he has not alleged damages separate from those arising from his medical malpractice claim. See Atton v. Bier, 12 A.D.3d 240, 24 (1st Dep't 2004) (citation and internal quotation marks omitted).

As defendants point out, even his assertion that he spent money on unnecessary supplements arises from Dr. Braverman's medical determination that the supplements are necessary. Additionally, plaintiff does not allege the egregious conduct necessary to support a claim for negligent infliction of emotional distress. Plaintiff asserts that Dr. Braverman purposely kept him medicated as a way to impair his judgment so that he would keep purchasing supplements from PATH Medical. Plaintiff does not provide any support for this theory that is not pure speculation. This is insufficient to overcome a motion for summary judgment. Pu v. Bruni, 24 Misc.3d 1245(A) (Sup Ct, NY County 2009). Finally, plaintiff has not satisfied the requirements under N.Y. Gen. Bus. L. § 349. Plaintiff does not show that the alleged conduct was consumer-oriented or allege that defendants' actions were misleading, except to the extent that they recommended incorrect treatment.

The Court denies the portion of the motion which seeks a stay, a protective order, and a transfer of this action to another venue. The Court also denies the cross-motion as it seeks that same relief. Defendants have not demonstrated that Dr. Braverman will be prejudiced absent those forms of relief. The Court will not make anticipatory rulings as to Dr. Braverman's deposition. All parties must abide by the Uniform Rules for the Conduct of Depositions to determine what defendants may ask. Dr. Braverman may assert his privilege against self-incrimination where appropriate. If an issue arises at the time of deposition, the parties may call the Court for a ruling. The Court has considered the remainder of the parties' arguments and they do not change the outcome.

Accordingly, it is

ORDERED that the motion is granted to the extent it requests dismissal of plaintiff's claims for fraud, negligent infliction of emotional distress, and violation of N.Y. Gen. Bus. L. § 349; and it is further

ORDERED that the motion is denied to the extent that it seeks a stay, a protective order, and a venue transfer; and it is further

ORDERED that the cross-motion is denied.

The Clerk is directed to enter judgment accordingly.

Dated: *Nov. 22*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.