Skokan v Peredo
2015 NY Slip Op 31416(U)
July 23, 2015
Supreme Court, Suffolk County
Docket Number: 09-42254
Judge: W. Gerard Asher
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SHORT FORM ORDER

INDEX No. 09-42254

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 10-21-14
ADJ. DATE 1-13-15
Mot. Seq. # 007 - MotD
008 - XMD

TARYN SKOKAN,

Plaintiff,

- against -

DR. MARINA PEREDO, M.D., SPATIQUE, INC., d/b/a SPATIQUE MEDICAL SPA and LONG ISLAND IMAGE PUBLICATIONS, INC.,

Defendants.

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Upon the following papers numbered 1 to 52 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers 24 - 48 ; Answering Affidavits and supporting papers 49 - 50 ; Replying Affidavits and supporting papers 51 - 52 ; Other memorandum of law 26 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Dr. Marina Peredo, M.D. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that the first and second causes of action in the complaint are dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment as to the liability of the defendant Dr. Marina Peredo, M.D. as to the first and third causes of action in the complaint is denied.

This is an action to recover damages allegedly suffered by the plaintiff when the defendants published photographs of the plaintiff in a local health and beauty magazine without her consent. It is undisputed that the plaintiff was treated by the defendant Dr. Marina Peredo, M.D. (Peredo) for severe acne beginning on June 5, 2008, that employees of Peredo took "before and after" photographs documenting the plaintiff's progress during treatment, and that said photographs appeared in the Spring 2009 edition of Long Island Image Magazine (magazine), published by the defendant Long Island Image Publications, Inc. (LIIP). The photographs of the plaintiff's entire face were included within a magazine piece entitled "Teen Self-Esteem, Erasing Acne" (the article)[1] despite the fact that the plaintiff was approximately 26 years old at the time, and said photographs permitted her to be identified by the public. It is also undisputed that Peredo is the owner of the defendant Spatique, Inc., d/b/a Spatique Medical Spa (Spatique)[2], and that Peredo provided the photographs to LIIP.

In her complaint, the plaintiff sets forth four causes of action. In the first cause of action, the plaintiff alleges that the defendants' invaded her right to privacy in violation of Civil Rights Law 51. In her second and third causes of action, the plaintiff respectively alleges that CPLR 4504 prohibits a physician's disclosure of patient information and that Peredo breached the implied duty to keep in confidence matters uncovered during treatment, and in her fourth cause of action she alleges that Peredo profited at her expense and was unjustly enriched. The complaint also includes a request for exemplary/punitive damages.

Peredo now moves for summary judgment on the grounds that the plaintiff consented to the use of the photographs, that the use of the photographs in the article did not require the plaintiff's consent pursuant to the Civil Rights Law, and that the plaintiff has not shown that Peredo was enriched at the plaintiff's expense. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proff in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

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[1] The parties dispute whether the subject "piece" is a "newsworthy article" or an "advertisement in disguise," a distinction that will become apparent herein. The use of the term "article" at this point is not intended to determine the issue herein.

[2] The computerized records maintained by the Court reflect that the plaintiff has discontinued her action against Spatique pursuant to a stipulation of discontinuance dated July 22, 2010 filed with the Clerk of the Supreme Court on October 28, 2011 (*see* CPLR 3217 [a], [b]; Uniform Rules for Trial Cts [22 NYCRR] § 202.28).

In support of her motion, Peredo submits, among other things, the pleadings, the depositions of the parties, the deposition and an affidavit of a nonparty witness, certain consent forms, various emails, and a copy of the subject magazine article. At her deposition, the plaintiff testified that she was treated by Peredo for a bad case of acne, that she saw Peredo once a month for about a year, and that Peredo prescribed Accutane treatment[3] along with cortisone shots for her condition. She stated that she was happy with the results, that she signed a consent form when she received "the cortisone shot," and that in the Spring of 2009 she saw her photographs in the magazine while at Peredo's office. The plaintiff further testified that she was shocked by the fact that the photographs were in the magazine, that she spoke with Peredo about the issue, and that she told Peredo that she did not understand why her photographs were in the magazine when nothing had been discussed. She indicated that the only time she was asked if her pictures could be used was when she first started treatments, and that Peredo told her the photographs would only be used in an album of "before and after" photographs of "people on Accutane." The plaintiff further testified that she agreed on the condition that the photographs would only be used for the patients in Peredo's office.

Peredo was deposed on July 25, 2012 and testified that when the plaintiff first came to see her on June 5, 2008 she started the plaintiff on one medication and "registered" the plaintiff to start on Accutane. She stated that it takes approximately one month to complete the process required by "the government" to get clearance to start a patient on Accutane, that the plaintiff signed a consent form in July 2008 for the Accutane treatments (July Consent), and that said form did not refer to the use of any photographs. She indicated that the plaintiff's next visit was on August 4, 2008, and that the plaintiff received Accutane treatment and a cortisone shot. Peredo further testified that the plaintiff visited her offices on September 4, 2008, September 15, 2008, and September 19, 2008, and that the plaintiff received cortisone injections and signed consent forms regarding said injections on each of the three dates (September Consents). She stated that the September Consents are "all-inclusive" forms not just for cortisone shots, that photographs are normally taken when a patient receives Accutane treatment, not when cortisone injections are given, and that her office does not have a special consent form just for the taking of photographs. She indicated that her medical assistant, Kim Distefano (Distefano), took the subject photographs of the plaintiff, and that the plaintiff and Distefano were friends who went to high school together. Peredo further testified that a reporter from LIIP approached her about writing a story about acne and asked if her offices had any photographs "of successful treatment, that she asked Distefano to call the plaintiff for permission to use her photographs, and that Distefano reported to her that the plaintiff "said that it was okay to use the photographs in the magazine." She stated that the article and a paid advertisement for her offices appeared in the Spring 2009 edition of the magazine, that it was her decision to provide the plaintiff's photographs to the magazine, and that she would not have used said photographs if the plaintiff had not given her verbal consent for their use. She indicated that she did not recall if she knew beforehand that the article would be placed in the teen section of the magazine, and that she did not believe that it mattered as acne affects teens and adults. Peredo further testified that, on the plaintiff's last visit to her offices on June 8, 2009, the plaintiff saw the magazine and said she was "not happy with the pictures." She acknowledged that the September Consent forms

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[3] Accutane is a drug taken by mouth, usually once or twice a day for about sixteen to twenty weeks. It helps prevent extensive scarring in patients with severe acne and typically clears the acne by the end of the treatment period.

indicate that a patient "give[s] permission for all photographs of all treated sites to be used for lectures, teaching purposes and for display in the office photo album." She stated that it is her interpretation that the phrase "treated sites" could mean the face, back, leg, chest, arms, and that it is possible to edit photographs without showing a patient's entire face unless the entire face was a problem. She indicated that she had obtained "photo consent forms" different than the September Consents from four other patients whose photographs were included in a different magazine than the LIIP magazine. Peredo further testified that she did not recall the dates on which the plaintiff's photographs were taken, and that when a patient is initially placed on Accutane their acne worsens.

The editor in chief of LIIP, Donna Halperin (Halperin) testified that the magazine is a medical/ beauty regional publication which includes articles about various medical conditions and receives all of its revenue from advertisements. She stated that the magazine never includes "advertorials," which she described as paid articles written on a topic and is essentially a paid advertisement that should be labeled as such at the top.[4] She indicated that her magazine invites doctors on a rotating basis to contribute written articles or be interviewed for an article, which may be appealing to the doctors, but is not discussed when the magazine sells advertisements. Halperin further testified that 90% to 95% of the time that a doctor contributes an article the doctor also takes an advertisement in the magazine, that said articles are not paid for by the doctors, and that LIIP has never had a client cancel an advertisement when an article is not published. She stated that, in this instance, she believes that she contacted the magazine's outside editor indicating that the magazine wanted an article about acne, and that the outside editor obtained a free-lance writer to interview Peredo and write the subject article. She indicated that the difference between an article and an advertorial is that the former provides information, while in the latter the doctor writes or talks about themselves and how they treat a condition, that their treatment is the best, and that the reader should come to them for treatment. Halperin further testified that she thinks that the article "is fine" in that it does not give Peredo's phone number, address, website, or mention the services that Peredo provides for treating acne even though it mentions the town where Peredo practice is located and some products that are sold at Spatique.

In her affidavit dated November 4, 2010, Distefano swears that she was employed at Peredo's medical offices on that date, and was present on several occasions when the plaintiff received treatment. She states that, upon completion of her treatment, the plaintiff was asked if the photographs taken before and after her treatment could be used, as the results were outstanding, and that she was present when the plaintiff gave her verbal consent to the use of said photographs.

At her deposition on March 25, 2013, nonparty witness Distefano testified that she was previously employed by Peredo as a medical assistant, and that she took photographs of the plaintiff on two separate occasions to show the plaintiff's progress during treatment. She stated that her affidavit of November 4, 2010 refers to a conversation between Peredo and the plaintiff in her presence wherein Peredo said how happy she was with the plaintiff's results and asked the plaintiff if she could use the plaintiff as her "poster child." She indicated that the plaintiff said "absolutely," and that, because

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[4] The parties appear to use the terms "advertorial" and "advertisement in disguise" without distinguishing any difference. While the case law uses the latter term, the undersigned will use the terms interchangeably without intending to indicate anything thereby.

nothing was specifically stated, she did not know what the plaintiff understood the request to mean. Distefano further testified that she did not recall if she called by telephone to ask for the plaintiff's permission to use the photographs, and that if she had called she would have documented it in the patient's account maintained in the office computer.

The subject magazine article is entitled "Erasing Acne," and is sub-titled "Acne - it's the scourge of the teen years ..." It appears with the byline "By Irene Prokop, Interviewing Dr. Marina Peredo." The article's first paragraph sets the stage and asks the question what can be done about "skin eruptions," the second paragraph states "[for] answers to these ... questions [LIIP] contacted [Peredo], a board-certified dermatologist who practices in Smithtown." The next seven paragraphs contain general information, and comments by Peredo, on acne and skin care. In the tenth and eleventh paragraphs the reporter references "Spatique, where Dr. Peredo has her office," and indicates that the subject photographs show "the skin conditions of some clients before and after Dr. Peredo worked her magic." The writer goes on to state that consulting a professional is the best way to get lasting results, that good skin "exudes health and increases confidence. And that's good news no matter what our age."

In order to recover damages in a cause of action under Civil Rights Law 51, the plaintiff must establish that the defendant used the plaintiff's name, portrait, picture or voice, within the state of New York, for the purposes of advertising or the purposes of trade, without plaintiff's written consent (***Cohen v Herbal Concepts, Inc.***, 63 NY2d 379, 473 NYS2d 426 [1984]; ***LoRiggio v Sabba***, 69 AD3d 446, 892 NYS2d 387 [1st Dept 2010]). Pursuant to said statute, the unauthorized use of an individual's name or picture for advertising purposes is a concept separate and distinct from the use of said name or picture for the purposes of trade (***Beverley v Choices Women's Med. Ctr.***, 78 NY2d 745, 579 NYS2d 637 [1991]; ***Delan v CBS, Inc.***, 91 AD2d 255, 258, 458 NYS2d 608, 613 [2d Dept 1983]). In general, use for advertising purposes "requires a use in, or as part of, an advertisement or solicitation for patronage" (***Delan v CBS, Inc.***, *id.*, citing ***Flores v Mosler Safe Co.***, 7 NY2d 276, 196 NYS2d 975 [1959]). The term "purposes of trade" is defined as "use which would draw trade to the [defendant's] firm" (***Kane v Orange County Publs.***, 232 AD2d 526, 527, 649 NYS2d 23, 25 [2d Dept 1996], *see also* ***Davis v High Soc. Mag.***, 90 AD2d 374, 457 NYS2d 308 [2d Dept 1982], and encompasses use for the purpose of making profit (***Delan v CBS, Inc.***, *supra*).

Use of a person's name, portrait, picture or voice is considered use for advertising purposes "if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service" (***Beverley v Choices Women's Med. Ctr.***, 78 NY2d at 751, 579 NYS2d at 640). Because a literal application of Civil Rights Law 51 would often conflict with the protections in the First Amendment to the United States Constitution afforded to the dissemination of news and matters of public interest, the Court of Appeals has held that "[a] picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute ... unless it has no real relationship to the article ... or unless the article is an advertisement in disguise" (***Murray v New York Mag. Co.***, 27 NY2d 406, 409, 318 NYS2d 474, 476 [1971], quoting ***Dallesandro v Holt & Co.***, 4 AD2d 470, 471, 166 NYS2d 805 [1st Dept 1957]; *see also* ***Messenger v Gruner + Jahr Print. & Publ.***, 94 NY2d 436, 706 NYS2d 52 [2000]).

This "newsworthy exception" is broadly construed (***Messenger v Gruner + Jahr Print. & Publ.***, *id.*), and applies "not only to reports of political happenings and social trends ...and to news stories and articles of consumer interest such as developments in the fashion world ... but to matters of scientific and biological interest ... as well" (***Finger v Omni Publs. Intl.***, 77 NY2d 138, 564 NYS2d 1014 [1990] [citations omitted]). The question whether a matter is "newsworthy" is a question of law for the court to decide (***Freihofer v Hearst Corp.***, 65 NY2d 135, 490 NYS2d 735 [1985]; ***Walter v NBC Television Network, Inc.***, 27 AD3d 1069, 811 NYS2d 521 [4th Dept 2006]). It is determined that the article on teen acne is a newsworthy matter and a matter of public interest.

The "advertisement in disguise" exception to Civil Rights Law 51 has been very narrowly construed (***Cruz v Latin News Impacto Newspaper***, 216 AD2d 50, 627 NYS2d 388 [1st Dept 1995]). Where a magazine received no payment for inclusion of an article and it contains information of "legitimate reader interest", said article is not an advertisement in disguise, even if some information that would normally be included in an advertisement is included therein (***Stephano v News Group Publs.***, 64 NY2d 174, 485 NYS2d 220 [1984]). This is true even if the use of the plaintiff's name, portrait, picture or voice leads to an incidental promotional effect as a result of said use (***Heller v Family Circle***, 85 AD2d 679, 445 NYS2d 513 [2d Dept 1981]; ***Lopez v Triangle Communications***, 70 AD2d 359, 421 NYS2d 57 [1st Dept 1979] [in article concerning grooming and makeup tips, brand names of products used were incidental to both article and picture]).

It is determined that the references to Peredo and Spatique within the article are incidental to the information of public interest contained therein. Thus, Peredo has established her prima facie entitlement to summary judgment dismissing the first cause of action claiming a violation of Civil Rights Law 51.

In opposition to the motion, the plaintiff does not dispute the fact that the information contained in the article is of legitimate public interest, and only offers her speculative belief that certain emails between LIIP and Peredo indicate that her photographs were included in the article for advertising purposes or perhaps to promote additional advertising by Peredo in the magazine. The latter contention is without merit and fails to raise an issue of fact to defeat summary judgment. In addition, the plaintiff contends that, because she was approximately 26 years old at the time that the photographs appeared in this article on teen acne, her photographs do not bear a real relationship to the article. However, it is well settled that, even where a photograph may create a false impression, there is no liability under Civil Rights Law 51 if the photograph bears a real relationship to the article ((***Finger v Omni Publs. Intl.***, *supra*, ***Messenger v Gruner + Jahr Print. & Publ.***, *supra*). Here, Peredo testified that acne affects individuals of all ages, the plaintiff has failed to submit any evidence to indicate that said testimony is false, and the article contains information about acne applicable to readers of all ages. Accordingly, that branch of Peredo's motion which seeks to dismiss the first cause of action is granted.

Turning to that branch of Peredo's motion which seeks to dismiss the plaintiff's second cause of action, it is determined that the plaintiff's second cause of action alleging that Peredo violated CPLR 4504 is duplicative of her third cause of action for breach of fiduciary duty. CPLR 4504 provides in pertinent part that "[u]nless the patient waives the privilege, a person authorized to practice medicine, ... shall not be allowed to disclose any information which he acquired in attending a patient in a

professional capacity, and which was necessary to enable him to act in that capacity." It is well settled that a plaintiff's right to recover for the unauthorized disclosure of his or her medical information is rooted in both the statutes of the State of New York and a common-law cause of action for breach of fiduciary duty (***Burton v Matteliano***, 81 AD3d 1272, 916 NYS2d 438 [4th Dept 2011]; ***MacDonald v Clinger***, 84 AD2d 482, 446 NYS2d 801 [4th Dept 1982]; ***Anderson v Strong Mem. Hosp.***, 140 Misc2d 770, 531 NYS2d 735 [Sup Ct, Monroe County 1988]). Accordingly, the plaintiff's second cause of action is dismissed.

Turning to the plaintiff's third cause of action for breach of fiduciary duty against Peredo resulting from the unauthorized disclosure of medical records, it has been held that a photograph taken during the course of a patient's treatment constitutes privileged information (*see* ***Ruffino v Neiman***, 17 AD3d 998, 794 NYS2d 558 [4th Dept 2005]; ***Anderson v Strong Mem. Hosp.***, *supra*). A physician's only defense to a cause of action for breach of implied duty to keep in confidence matters disclosed during a patient's treatment are permission from the patient, waiver, and legal justification (*see* ***Doe v Community Health Plan-Kaiser Corp.***, 268 AD2d 183, 709 NYS2d 215 [3d Dept 2000], *rejected on other grounds* ***Doe v Guthrie Clinic, Ltd.***, 22 NY3d 480, 982 NYS2d 431 [2014]). Here, Peredo asserts as her sole defense that the plaintiff provided consent for use of the photographs in the magazine.

Peredo has failed to establish her prima facie entitlement to summary judgment regarding the plaintiff's third cause of action. There are issues of fact whether the September Consents can be deemed consent for use of the subject photographs in the magazine. Said written consents provide consent for use of the plaintiff's photographs for "all treated sites to be used for lectures, teaching purposes and for display in the office photo album." Peredo's submission fails to establish as a matter of law that the photographs where used for educational purposes, or to establish what a reasonable person would understand that term to mean when signing such a consent form. In addition, there are issues of fact as to whether the photographs were taken before the September Consents were signed by the plaintiff, whether said consents cover the cortisone injections only, and whether the plaintiff's entire face can be considered a "treated site."

With regard to the allegation that the plaintiff provided verbal consent to use the photographs in the magazine, there are issues of fact as to whether the plaintiff agreed to allow Peredo to use her likeness as the "poster child" for the doctor's practice, and what the plaintiff understood that to mean. In addition, there are issues of fact whether Distefano called the plaintiff and received her verbal consent to use the photographs, whether Distefano informed Peredo that the plaintiff had consented to such use, and whether, if so informed, Peredo reasonably relied on Distefano's alleged conversation with the plaintiff.

Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, that branch of Peredo's motion which seeks to dismiss the plaintiff's third cause of action is denied.

In her fourth cause of action the plaintiff alleges that Peredo was unjustly enriched by the allegedly unauthorized use of her photographs. In order to succeed on a claim for unjust enrichment, a plaintiff must establish that the defendant was enriched at the plaintiff's expense, and that "it is against

equity and good conscience to permit the defendant to retain what is sought to be recovered" (***Paramount Film Distrib. Corp. v State of New York***, 30 NY2d 415, 421, 334 NYS2d 388 [1972], *cert. denied* 414 US 829, 94 S Ct 57 [1973]; *see* ***Whitman Realty Group v Galano***, 41 AD3d 590, 838 NYS2d 585 [2d Dept 2007]; ***Cruz v McAneney***, 31 AD3d 54, 816 NYS2d 486 [2d Dept 2006]).

In her motion, Peredo contends that the plaintiff's fourth cause of action should be dismissed because the plaintiff "has not shown that Dr. Peredo ... [was] in any way (1) enriched; (2) or ... enriched at plaintiff's expense; or (3) that Dr. Peredo ... retained anything that plaintiff has sought to recover." A defendant moving for summary judgment cannot satisfy his or her initial burden of establishing entitlement thereto merely by pointing to gaps in the plaintiff's case (***Coastal Sheet Metal Corp. v Martin Assoc., Inc.***, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; *see also* ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]). Accordingly, that branch of Peredo's motion seeking to dismiss the plaintiff's fourth cause of action is denied.[5]

Finally, Peredo seeks to dismiss the plaintiff's request for exemplary/punitive damages on the ground that there is no evidence that Peredo did anything knowingly or deliberately, or that Peredo acted with "conscious indifference" or "utter disregard" of the plaintiff's rights. Again, Peredo cannot obtain summary judgment by citing to gaps in the plaintiff case (citations omitted), and all legal issues regarding the question of damages are reserved for the Justice presiding at trial. In addition, Peredo's contention that the plaintiff cannot succeed in this action as the plaintiff cannot prove that she sustained any economic damages is without merit. Accordingly, Peredo's motion for summary judgment dismissing the complaint is granted to the extent that the first and second causes of action in the complaint are dismissed, and is otherwise denied.

The plaintiff cross-moves for summary judgment as to the liability of Peredo on her first cause of action alleging a violation of Civil Rights Law 51, and her third cause of action for breach of fiduciary duty. This is the second time that the plaintiff has moved for partial summary judgment, and Peredo opposes the motion on that ground, among other things. There is a "general proscription against successive summary judgment motions" ***Auffermann, v Distl***, 56 AD3d 502, 867 NYS2d 527 [2d Dept 2008]; *see also* ***Central Equities Credit Corp. v B & N Props.***, 66 AD3d 943, 888 NYS2d 107 [2d Dept 2009]). However, a successive motion for summary judgment does not violate the general proscription when, as here, it is based on deposition testimony elicited after the prior order, or it is supported by newly discovered evidence (***North Fork Preserve v Kaplan***, 68 AD3d 732, 890 NYS2d 93 [2d Dept 2009]; ***EDP Hosp. Computer Sys. v Bronx-Lebanon Hosp. Ctr.***, 63 AD3d 665, 880 NYS2d 349 [2d Dept 2009]). Here, the plaintiff's first motion for summary judgment was made prior to the completion of discovery herein, and the undersigned will consider the cross motion.

For the reasons set forth above, that branch of the plaintiff's motion seeking summary judgment on her first cause of action is denied. In addition, the plaintiff has failed to establish her prima facie entitlement to summary judgment on her third cause of action. As set forth above, there are issues of

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[5] Peredo has not addressed the issue whether the plaintiff's fourth cause of action is duplicative of the plaintiff's cause of action seeking damages for breach of fiduciary duty for unauthorized disclosure of medical information.

fact regarding both the written and alleged verbal consent for use of the photographs in the magazine. While Distefano does not recall making a telephone call seeking the plaintiff's verbal consent, and it may well be the case that there is no notation of said call in the plaintiff's chart or computer file, there is conflicting testimony whether Peredo received the plaintiff's verbal consent. Moreover, the plaintiff does not address whether she agreed to Peredo's request to use her photographs as the "poster child" for the doctor's offices and, if she so agreed, what that meant to her at the time.

Finally, the plaintiff's contention that Peredo and Distefano's deposition testimony establishes as a matter of law that Peredo had a specific "photo release form" in 2008-2009, and that because said form was not presented to the plaintiff the lack of necessary consent to use the plaintiff's photographs is established, is without merit. Distefano testified that photographs of her treatment by Peredo appeared in a different magazine in 2011 or 2012, and that the aforesaid form was different than the September Consents signed by the plaintiff. Peredo testified that she had used the photographs of four patients beside the plaintiff in that different magazine. Neither Distefano nor Peredo testified as to when that specific photo release form was first utilized. Regardless, the issue is whether the September Consents or the verbal consent, if any, gave Peredo permission to use the plaintiff's photographs in the magazine. As set forth above, there are issues of fact regarding those two questions that preclude the granting of summary judgment on the issue of Peredo's liability for breach of fiduciary duty not to disclose the plaintiff's medical information.

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; ***Elzer v Nassau County***, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; ***Cohen v Herbal Concepts, Inc.***, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]). Accordingly, the plaintiff's cross motion is denied.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: July 23, 2015

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**