

Fernandes v Bronsky
2007 NY Slip Op 33605(U)
November 5, 2007
Supreme Court, New York County
Docket Number: 0104568/2007
Judge: Sheila Abdus-Salaam
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHEILA ABDUS-SALAAM
Justice

PART 13

Verona Fernandes

INDEX NO. 104568/07

MOTION DATE 6/18/07

MOTION SEQ. NO. 001

- v -

Mark J. Bronsky, et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
PAPERS NUMBERED
NOV 08 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendant Mark J. Bronsky and the cross-motion by defendant Arthur C. Elias¹ to dismiss, pursuant to CPLR 3211 (a) for failure to state a cause of action, the third and fourth causes of action of plaintiff's complaint for fraud and breach of contract, respectively, are granted to the extent of dismissing the fraud cause of action against both defendants and dismissing the breach of contract cause of action as against defendant Elias only.

In this dental malpractice action, plaintiff alleges that in January 2001

¹The cross-motion is procedurally defective in that defendant has improperly cross-moved for relief from a nonmoving party (see CPLR 2215). But because plaintiff was given proper notice and an opportunity to respond to the cross-motion, I have considered it (see Sheehan v. Marshall, 9 AD3d 403 [2004]; Volpe v. Canfield, 237 AD2d 282 [1997], lv denied 90 NY2d 802 [1998]); compare Mango v. Long Island Jewish-Hillside Medical Center, 123 AD2d 843 [1986]).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

she consulted defendant Dr. Bronsky, an orthodontist, concerning the possible correction of her dental malocclusion caused by a Temporomandibular Joint or TMJ condition that caused her upper teeth to protrude and her lower jaw to cant in an aesthetically displeasing manner that also interfered with her bite. Plaintiff's complaint, supplemented by plaintiff's affidavit in opposition to the motion and cross-motion, alleges that before beginning any work on her mouth, Dr. Bronsky told her that it would be a "piece of cake" to correct her bite and improve her appearance through the use of orthodontic appliances (wire braces on the upper and lower jaws); that there would be minimal risk that the medical procedures he undertook would in any way impact her ability to perform in her profession either during the course of treatment or thereafter, and that her mouth would adjust to the changes; that he would communicate with her then treating dentist, make a specific diagnosis of her condition and offer a proposed treatment plan; that her treatment would take 18-24 months to complete; that after her treatment was completed, she would be "beautiful" and "a new person"; that some preliminary TMJ surgery should be done to assure that her jaw joints were positioned correctly to receive the orthodontia being proposed, and that some minor surgery might be needed after the braces were removed to make final adjustments to the jaw position; and that Dr. Elias (an oral and maxillofacial surgeon) would be a good choice to do the preliminary surgery.

After Dr. Elias performed the preparatory surgery, Dr. Bronsky installed the braces he had prescribed. Plaintiff then saw Dr. Bronsky monthly for adjustments to the braces and saw Dr. Elias monthly to monitor her progress.

Plaintiff alleges that during the course of her treatment with both defendants, each of them repeatedly and specifically assured her that her TMJ condition could be successfully rectified if she accepted the course of treatment they recommended - - TMJ surgery to reposition the jaw joints and

then six months later, to have the braces installed on her upper and lower jaws to reposition the teeth for a period of about 18 months to two years. Plaintiff also alleges that month after month, defendants reassured her that she was making excellent progress and that it was only a matter of time before the treatment would achieve the specific goals she was expecting and that were promised at the outset - - straightened teeth, a proper bite, realignment of a protuberant upper mandible, correction of the lower jaw line and facial symmetry.

By early 2003 plaintiff claims she was having increasing difficulty performing her job because her jaws were so misaligned that saliva would fly out of both sides of her mouth, her tongue was severely lacerated, and she could not eat properly or sleep without pain killers and other medications. When Dr. Bronsky allegedly ignored her pleas for assistance, plaintiff asked Dr. Elias to intervene on her behalf. According to plaintiff, it was at this point that Dr. Elias told her that she would need additional surgery to break and reset her jaw bones to correct her condition and that such radical surgery was always going to have been necessary to deal with her condition, but that neither he nor Dr. Bronsky had told plaintiff this fact because if they had done so, she would not have undergone the procedures they had recommended.

Plaintiff alleges that she undertook a protracted series of consultations with Dr. Elias before agreeing to undergo the second surgery where he guaranteed her that the surgery would correct her condition. Nine weeks after this orthognathic/surgical reconstruction, plaintiff began orthodontic treatment with Dr. Bronsky again. Plaintiff alleges that upon removal of her new set of braces, which she wore for at least six months, Dr. Bronsky told her that she would have to wear a plastic retainer on her upper jaw and a steel retainer on her lower jaw for the rest of her life.

Plaintiff's also alleges that she relied to her detriment on defendants' material misrepresentations of fact and that she was caused to suffer

damages separate and apart from her medical trauma including transportation costs, use of personal leave and lost productivity as a result of the promises made about the prospects for her treatment.

To maintain a cause of action for fraud, "plaintiff must allege a representation of a material existing fact, falsity, scienter, justifiable reliance and damages" (Callas v. Eisenberg, 192 AD2d 349, 350 [1993]).

"Representations that are mere expressions of opinion of present or future expectations are not be considered promises when examining the issue of fraud in the inducement.... Fraud is not a case of prophecy and prediction of something which it is merely hoped or expected will occur in the future" (Goldman v. Strough Real Estate, Inc., 2 AD3d 677, 678 [2003]) (internal quotations and citations omitted). Accepting plaintiff's allegations as true, construing them liberally and according them the benefit of every possible favorable inference as a court must on a CPLR 3211(a) motion to dismiss (see e.g. Goshen v. Mutual Life Insurance Co., 98 NY2d 314, 326 [2002]), the representations attributed to both defendants amount to mere expressions of opinions of future expectations. In plaintiff's own words, defendants statements were "prospects" and "goals" rather than promises that constitute fraud in the inducement. Thus, plaintiff's fraud cause of action must be dismissed.

Plaintiff's fraud cause of action also fails because she has also alleged a dental malpractice cause of action. A plaintiff in a dental malpractice action is entitled to allege and prove a cause of action for intentional tort only when the alleged fraud occurs separately from and subsequent to the malpractice, and then only where the fraud claim gives rise to damages that are separate and distinct from those flowing from the malpractice (see Coopersmith v. Gold, 172 AD2d 982 [1991]). The representations that plaintiff attributes to defendants that were made either before or during her treatment were prior to the alleged malpractice and cannot be the basis for fraud cause of action. And while plaintiff claims that she incurred damages

such as transportation costs and lost productivity in reliance on defendants' representations, these damages are the same as those caused by the alleged malpractice.

Turning to plaintiff's breach of contract action, such a cause of action is "legally redundant, and may not be pursued unless plaintiff can prove that, within the context of medical treatment, defendant expressed a specific promise to effect a cure or to accomplish some definite result (citations omitted)." (Scalisi v. New York University Medical Center, 24 AD3d 145, 147 [2005]). Dr. Bronsky's alleged promise to correct plaintiff's TMJ condition with the application of braces for 18 to 24 months after minor surgery to reposition her jaw is sufficient to maintain a breach of contract action against him (see Robins v. Finestone, 308 NY 543 [1955]; Bobrick v. Bravstein, 116 AD2d 682[1986]). Dr. Elias allegedly made a similarly specific promise when he guaranteed that the complete surgical reconstruction of plaintiff's jaw would correct her condition. But, plaintiff signed a consent form on August 30, 2004 before undergoing the surgery which states, among other things, that "there is no warranty or guarantee as to the result and/or cure". This written consent vitiates Dr. Elias's alleged oral promise and requires dismissal of the breach of contract action against him (Scalisi v. New York University Medical Center, 24 AD3d 145 [2005]).

Accordingly, it is

ORDERED that the third cause of action is dismissed and the fourth cause of action is dismissed as against defendant Arthur C. Elias only.

Dated: November 5, 2007

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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE