

Starkand v Goldfarb

2010 NY Slip Op 30912(U)

April 16, 2010

Supreme Court, Suffolk County

Docket Number: 22202/2007

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 22202/2007

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

BETH L. STARKAND AND GARY
 STARKAND,

Plaintiff(s),

-against-

STEVEN R. GOLDFARB, M.D. AND MDVIP,
 INC.,

Defendant(s).

ORIG. RETURN DATE: December 5, 2007

FINAL RETURN DATE: August 11, 2008

MTN. SEQ. #: 001-MotD

002-MotD

003-MD

PLTF'S ATTORNEY:

SILBERSTEIN, AWAD & MIKLOS, PC
 600 OLD COUNTRY RD, STE 412
 GARDEN CITY, NY 11530

DEFT'S ATTORNEY FOR GOLDFARB:

GEISLER & GABRIELE, LLP.
 100 QUENTIN ROOSEVELT BLVD
 GARDEN CITY, NY 11530

DEFT'S ATTORNEY FOR MDVIP:

RIVKIN RADLER LLP
 926 RXR PLAZA
 UNIONDALE, NY 11556

Upon the following papers numbered 1 to 121 read on this motion to dismiss, cross motion to dismiss and cross motion to amend pleadings: Notice of Motion and supporting papers 1 - 31; Reply Affirmation/Affirmation in Opposition to Cross Motion and supporting papers 32 - 53; Notice of Cross Motion and supporting papers 54 - 65; Reply Affirmation/Affirmation In Opposition to Cross Motion and supporting papers 66 - 73; Notice of Cross Motion/Opposition to Motion and Cross Motion and supporting papers 74 - 116; Reply Affirmation 117 - 121; it is,

ORDERED that the motion (001) by the defendant MDVIP, Inc. for dismissal of the complaint (as amended as of right) as to it pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted; and it is further

ORDERED that the defendant MDVIP, Inc. is hereby severed from the caption and this action shall continue only as against the remaining named defendant, Steven R. Goldfarb, M.D.; and it is further

ORDERED that that part of the cross motion (002) by the defendant Steven R. Goldfarb, M.D. for dismissal of the complaint (as amended as of right) as to him pursuant to CPLR 3211(a)(1), CPLR 3211(a)(7) and CPLR 3126 is granted only to the extent that the causes of action sounding in deceptive business practices in violation of GBL §349 (second cause of action), false advertising in violation of GBL §350 (third cause of action), breach of contract (fourth cause of action) and fraud (fifth cause of action) are dismissed; and it is further

ORDERED that that part of the cross motion (002) seeking an order to compel or to preclude is decided to the extent that pursuant to 22 NYCRR 202.8(f), the remaining parties are directed to appear for a preliminary conference on May 19, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.; said date allowing time for the remaining defendant to serve an answer; and it is further

ORDERED that the cross motion (003) by the plaintiffs for leave to amend the complaint is denied as moot in view of the plaintiffs having the right as a matter of law to amend the complaint without leave of the court pursuant to CPLR 3025(a).

The gravamen of this action is a medical malpractice claim against the defendant Steven R. Goldfarb, M.D. (hereinafter Dr. Goldfarb). The amended complaint includes claims against Dr. Goldfarb for violations of General Business Law sections 349 (deceptive business practices) and 350 (false advertising), breach of contract, common law fraud, lack of informed consent and loss of consortium.

Each of these claims is also made against the co-defendant MDVIP, Inc. (hereinafter MDVIP).

Background

The plaintiff Beth L. Starkand (hereinafter Starkand) (her husband, Gary Starkand, has the derivative claim) states in an affidavit accompanying her cross motion (003) that she learned of Dr. Goldfarb from a friend of hers who recommended him highly. Starkand then contacted Dr. Goldfarb's office to become a patient and was told that she first had to register with MDVIP.

MDVIP is a so-called concierge medical care group which, for an annual fee (in this case, \$1,500.00), provides its "members" access to an affiliated physician who will, inter alia, provide an annual physical examination, a health risk assessment, certain lab and diagnostic testing, a CD-ROM with the patient's medical information and certain other amenities such as 24-hour physician availability, quick appointments and unhurried office visits. Membership is obtained through a Membership Agreement and the payment of the fee.

The affiliated physicians, according to MDVIP, are independent medical care providers who, if accepted by MDVIP, become affiliated via a Participation Agreement in which the affiliated physicians agree to limit their practices to no more than 600 patients in order to provide the medical services and amenities offered to MDVIP members.

Any medical services provided beyond the specific areas covered in the Membership Agreement, are the responsibility of the patient and his or her medical insurance coverage.

Starkand also claims that she relied upon representations by MDVIP and Dr. Goldfarb that MDVIP members would be provided the highest quality medical services by exceptional physicians and that she "thought" Dr. Goldfarb "worked for MDVIP" (Starkand affidavit, §11).

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MDVIP's Motion to Dismiss

MDVIP brings its motion to dismiss (001) based upon its contentions that MDVIP is not a medical provider and, therefore, cannot be held liable for medical malpractice; MDVIP has no control or supervision of the medical services provided by its affiliated physicians and, thus, cannot be vicariously liable for the malpractice of its affiliated physicians; there was no reliance upon MDVIP representations which induced Starkand to become a member and, in any event, MDVIP's web page and literature contained no misrepresentations.

In seeking this dismissal, MDVIP relies on the grounds of documentary evidence (CPLR 3211[a][1]), failure to state a cause of action (CPLR 3211[a][7]) and failure to particularize the fraud claims (CPLR 3016[b]).

In support of this motion, MDVIP submits, inter alia, an exemplar of the purported Membership Agreement between Starkand, her husband and MDVIP, the Participation Agreement between MDVIP and Dr. Goldfarb, copies of MDVIP web pages and an affidavit from an MDVIP Executive Vice-President, Andrew Ripps.

In order to prevail on a motion to dismiss on the basis of documentary evidence (CPLR 3211[a][1]), the admissible documents must conclusively resolve factual issues raised in the pleadings in favor of the moving party (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573 [2005]; *New York Schools Ins. Reciprocal v Gagliotti Assocs.*, 305 AD2d 563, 759 NYS2d 372 [2d Dept 2003]).

As to the exemplar Membership Agreement, MDVIP (which does not deny it was sent the original signed Membership Agreement by the Starkands) fails to submit a copy of the actual agreement and, moreover, provides no excuse or explanation for this omission. Notwithstanding Mr. Ripps' representation that the Starkands could not have become MDVIP members without signing an exact duplicate of the exemplar agreement, in the absence of any explanation for the production of at least a copy of the actual agreement, the court declines to accept the exemplar as documentary evidence of the Membership Agreement for purposes of a motion to dismiss pursuant to CPLR 3211(a)(1).

The other documents submitted, however, which include the MDVIP web pages (also alluded to by the Starkands) and the Participation Agreement with Dr. Goldfarb, conclusively establish that MDVIP is not a provider of medical services, does not employ physicians but affiliates with independent physicians who meet their standards and who agree to provide the specific services and amenities that MDVIP members are entitled to, and does not control or supervise to any degree the medical services provided by its affiliated physicians (*see Roberts v El-Hajal*, 23 AD3d 733, 734, 804 NYS2d 819 [3d Dept 2005]; *Nagengast v Samaritan Hosp.*, 211 AD2d 878, 878-879, 621 NYS2d 217 [3d Dept 1995]).

Under such circumstances, the documents considered on this application conclusively establish that MDVIP cannot be held vicariously liable for the alleged medical malpractice of Dr. Goldfarb.

As to that part of this motion seeking a dismissal for failure to state a cause of action, in general, in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12). In addition, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]).

The causes of action based upon violations of the General Business Law sections pertaining to deceptive business practices (GBL §349) and false advertising (GBL §350) require a showing that the acts in question impacted upon consumers at large (*see Karlin v IVF America, Inc.*, 93 NY2d 282, 294, 690 NYS2d 495 [1999]). Moreover, in the context of a medical malpractice action, these sections of the General Business Law are not intended to supplant or augment what is essentially a medical malpractice claim (*see Gotlin v Lederman*, 367 F Supp 2d 349 [EDNY 2005]; *Karlin v IVF America, Inc., supra*).

As to the cause of action for breach of contract, this too is inappropriate where the underlying claim is for medical malpractice.

The cause of action sounding in common law fraud must also be dismissed. This claim is also inappropriate in a medical malpractice action unless the plaintiffs can show injuries caused by the alleged fraud are different from the injuries alleged to be caused by the malpractice (*see Vigliotti v North Shore Univ. Hosp.*, 24 AD3d 752, 810 NYS2d 82 [2d Dept 2005]). Such a showing is absent here. In any event, based upon Starkand's own affidavit, she chose Dr. Goldfarb as her physician and joined MDVIP not on the basis of any representations made by either Dr. Goldfarb or MDVIP but upon the recommendation of a "friend." Accordingly, by her own admission, Starkand cannot claim to have relied on representations, even if false, made by MDVIP or Dr. Goldfarb.

The cause of action sounding in lack of informed consent can only be viable against MDVIP if MDVIP can be found to be vicariously liable. As discussed above, there is no basis for finding that MDVIP is vicariously liable here.

In opposition, Starkand argues that after contacting Dr. Goldfarb to become a patient and then after contacting MDVIP to become a member so she could avail herself of Dr. Goldfarb's medical services, she joined MDVIP based upon her belief and understanding that MDVIP "was providing these physicians as its own (Starkand affidavit, ¶7). She also refers to MDVIP's website and other literature as providing allegedly false representations which induced her to join MDVIP and to select Dr. Goldfarb.

It is clear, however, from Starkand's own words, that she became a member of MDVIP because she wanted Dr. Goldfarb to be her physician and that she wanted Dr. Goldfarb to be her physician based upon the recommendation of a "friend." Even though the website and literature make no promises or guarantees as to preventing illnesses, she, in any event, did not rely upon them in joining MDVIP or in selecting Dr. Goldfarb.

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Accordingly, based upon the documentary evidence accepted on this motion - which “flatly” contradicts the allegations in the amended complaint (*Ullman v Norma Kamali, Inc.*, 207 AD2d 691, 692, 616 NYS2d 583 [1st Dept 1994]), a review of the entirety of the complaint, a reading of the Starkand affidavit in opposition to this motion to dismiss and upon consideration of the arguments in opposition, the court finds that it is conclusively established that there are no viable causes of action against MDVIP (*see also Parola, Gross & Marino, P.C. v Suskind*, 43 AD2d 1020, 1021-1022, 843 NYS2d 104 [2d Dept 2007]). Therefore, the complaint is dismissed in its entirety as to MDVIP

Dr. Goldfarb’s Cross Motion to Dismiss, etc.

Dr. Goldfarb cross-moves (002) for dismissal of the complaint (as amended) on the same grounds as MDVIP. In addition, Dr. Goldfarb seeks an order to compel pursuant to CPLR 3124 and CPLR 3042(c) and to preclude pursuant to CPLR 3126.

Unlike MDVIP, Dr. Goldfarb is a physician and a provider of medical services. Indeed, Dr. Goldfarb is the treating physician whose medical services, it is claimed, were the basis for the medical malpractice claim.

A review of the complaint in its entirety, affirmations from physicians, as well as the affidavit submitted by Starkand, shows adequate support for claims of malpractice and lack of consent against Dr. Goldfarb.

The General Business Law claims are insufficient for the same reasons as stated with regard to MDVIP’s motion to dismiss. This also applies to the causes of action for breach of contract and fraud.

Accordingly, the second (GBL §349), third (GBL §350), fourth (breach of contract) and fifth (fraud) causes of action are dismissed as to Dr. Goldfarb. The remaining causes of action - first (malpractice), sixth (lack of informed consent) and seventh (derivative) - are not dismissed as to Dr. Goldfarb.

Plaintiffs’ Cross Motion to Amend Pleadings

The plaintiffs cross-move (003) and ask the court to deem that there is subject matter jurisdiction, personal jurisdiction and that the parties agree to applying New York law. The plaintiffs also cross-move for leave to amend the complaint as to the causes of action alleging deceptive business practices (second cause of action), false advertising (third) and fraud (fifth).

The first part of this cross motion seeks relief for matters not in issue, to wit: subject matter jurisdiction, personal jurisdiction and the application of New York law. Accordingly, this request is denied as moot. Indeed, the defendants not only do not raise these issues but, at least with regard to MDVIP, affirmatively state that it agrees that there is subject matter jurisdiction, personal jurisdiction and the laws of New York apply.

With regard to seeking leave to amend, the plaintiffs, as a matter of law, have the right to amend their pleadings without leave of the court since the time for responding to the original verified complaint has not expired (*see* CPLR 3026[a]). Accordingly, since, as a matter of law, there is no need for the court’s leave to amend the pleadings, the court denies that request as academic.

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The court also notes that the amended parts of the amended verified complaint do not change the causes of action and do not alter the legal arguments in the motion (001) and cross Motion (002) to dismiss (see *EDP Hosp. Computer Sys., Inc. v Bronx-Lebanon Hosp. Ctr.*, 212 AD2d 570, 622 NYS2d 557 [2d Dept 1995]).

This constitutes the decision and order of the court.

Dated:

April 16, 200

HON. PAUL J. BAISLEY, JR.
HON. PAUL J. BAISLEY, JR., J.S.C.