Dziegielewski v Advanced Intergrative Wellness, LLC
2010 NY Slip Op 33047(U)
October 22, 2010
Supreme Court, Nassau County
Docket Number: 18467/06
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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CAROLYN DZIEGIELEWSKI,

Plaintiff(s),

-against-

ADVANCED INTERGRATIVE WELLNESS, LLC, d/b/a HEALTHBRIDGE MEDICAL ASSOCIATES, P.C., HEALTHBRIDGE MEDICAL ASSOCIATES, P.C., ELYSIUM DAY SPA, and DYNATRONICS, INC.,

Defendant(s).

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Index No. 18467/06

Motion Submitted: 8/13/10
Motion Sequence: 007, 008

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................XX
Answering Papers..X
Reply...X
Briefs: Plaintiff's/Petitioner's.......................................
Defendant's/Respondent's.................................XX

This motion by the defendant Dynatronics, Inc. for an order pursuant to CPLR §§ 3211, 3212 granting it summary judgment dismissing the complaint and any and all cross claims against it is granted.

This cross motion by the plaintiff Carolyn Dziegielewski for an order pursuant to 22 NYCRR 130-1.1 granting her costs and sanctions is denied.

The plaintiff in this action alleges that she sustained injuries as a result of "Synergie Cellulite Reduction" services which she received at the defendant Elysium Day Spa ("the

Spa") from November, 2003 until June, 2004. She alleges that the defendant Dynatronics developed, manufactured and distributed the Synergie AMS Device used in treating her. She also alleges that the Spa was a subsidiary of defendants Advanced Integrative Wellness, LLC, d/b/a Healthbridge Medical Associate, P.C., ("Advanced") and Healthbridge Medical Associate, P.C. ("Healthbridge") and that those defendants managed, controlled and operated it. The Spa employee who treated the plaintiff, Valerie Onerato, was in fact on Advanced's payroll for a brief period while she was treating the plaintiff.

The plaintiff alleges that advertisements for the treatment as well as conversations with Onerato were materially misleading in that they represented that the Synergie AMS Device had been "approved" and "cleared" by the Federal Drug Administration and that certain results would be achieved which were unsubstantiated; that the defendants knowingly made those false representations intending to fraudulently induce consumers like her to undergo treatment with Dynatronics' Synergie AMS Device; and, that she justifiably relied on those representations to her detriment. She alleges that had she not been so induced by the defendants, she would not have undertaken treatment by the defendants with Dynatronics' product and that she sustained psychological and medical injuries as a result.

The plaintiff advances causes of action sounding in *res ipsa loquitur,* negligence, deceptive acts and false advertising in violation of General Business Law §§ 349, 350 and common law fraud. The injuries for which she seeks to recover are chronic myofascial pain syndrome, numbness and tingling in her lower extremities, insomnia, depression and anxiety.

The defendants Advanced and Healthbridge have cross claimed against Dynatronics seeking contribution.

The defendant Dynatronics presently seeks summary judgment dismissing the complaint and any and all cross claims against it. Although it also sought dismissal of the fraud claim as untimely pursuant to CPLR §3211(a)(5), that request has been withdrawn, rendering the plaintiff's motion pursuant to 22 NYCRR 130-1.1 moot.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." ***Sheppard-Mobley v. King***, 10 A.D.3d 70, 74, 778 N.Y.S.2d 98 (2d Dept., 2004), citing ***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Winegrad v. New York Univ. Med. Ctr.***, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (***Sheppard-Mobley v. King, supra***, at p. 74; ***Alvarez v. Prospect Hosp., supra; Winegrad v. New York Univ. Med. Ctr., supra***).

Once the movant's burden is met, the burden shifts to the opposing party party to establish the existence of a material issue of fact. (***Alvarez v. Prospect Hosp., supra***, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (*See*, ***Demshick v. Community Housing Management Corp.***, 34 A.D.3d 518, 521, 824 N.Y.S.2d 166 (2d Dept., 2006), *citing* ***Secof v. Greens Condominium***, 158 A.D.2d 591, 551 N.Y.S.2d 563 [2d Dept., 1990]).

By order dated March 9, 2010, this court directed that the plaintiff is precluded from offering any evidence or testimony regarding the defendants' statements or advertising that allegedly misled her as well as any evidence of medical treatment received on account of her alleged injuries that had not been previously disclosed.

The plaintiff testified at her examination-before-trial that she first went to the Spa in August 2003 after seeing an advertisement in North Shore Today for hypnosis treatment. While waiting in the waiting room, she reviewed information regarding the Synergie AMS Device which she discussed with Onerato, who both performed hypnosis at the spa and treated customers with the Synergie AMS Device. The plaintiff testified that before undergoing treatment with Dynatronics' device, she undertook to investigate it on her own by reviewing the Spa's cellulite price list as well as internet research. She testified that she reviewed Healthbridge's website as well as others because she wanted to be sure that the Synergie AMS device was "approved" by the Food and Drug Administration. At her examination-before-trial, she testified that she had read that the Synergie AMS device was "cleared" by the Food and Drug Administration but said she did not know the difference between "cleared" and "approved." Her first complaint regarding her legs was made to Onerato at the Spa in May 2004. Her first medical visit regarding her symptoms which were allegedly caused by Dynatronics' Synergie AMS Device occurred on June 4, 2004 when she saw Dr. Edelson of Advanced and Healthbridge, to whom Onerato had referred her when she complained of pain. When she saw Dr. Edelson, the plaintiff complained of her legs' appearance and she inquired about a leg lift. Dr. Edelson found nothing wrong with the plaintiff and referred her to a plastic surgeon. When she saw Dr. Greenberg in 2004, he told her that she did not need a leg lift and he found nothing wrong with her, either. The plaintiff saw her own doctor, Dr. Livotti in July 2004 for pain and burning.

The plaintiff has acknowledged that her first cause of action sounding in negligence and *res ipsa loquitur* fails as against Dynatronics. In fact, the *res ipsa loquitur* claim fails *vis-a-vis* Dynatronics because the Synergie AMS Device, which was used to treat the plaintiff was not within its exclusive control. (*See*, ***Dermatossian v. New York City Transit Authority***, 67 N.Y.2d 219, 226, 492 N.E.2d 1200, 501 N.Y.S.2d 784 [1986]). And, her negligence claim also fails as against Dynatronics because Dynatronics did not use its product on the plaintiff. In any event, the plaintiff has not supplied a Bill of Particulars

regarding the manner in which the equipment was improperly operated and maintained and via this court's orders dated July 22, 2008 and March 2, 2010, she has been precluded from submitting any such evidence.

To recover under General Business Law § 349, " a plaintiff must establish that the defendant has engaged 'in an act or practice that is deceptive or misleading in a material way and that [she] has been injured by reason thereof.' " ***(Wilner v. Allstate Ins. Co.***, 71 A.D.3d 155, 162, 893 N.Y.S.2d 208 (2d Dept., 2010), quoting ***Small v. Lorillard Tobacco Co., Inc.***, 94 N.Y.2d 43, 55, 720 N.E.2d 892, 698 N.Y.S.2d 615 (1999), quoting ***Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.***, 85 N.Y.2d 20, 25, 647 N.E.2d 741, 623 N.Y.S.2d 529 [1995]). And, the misleading and/or deceptive act or practice must be aimed at the consuming public at large, e.e., it must be consumer-oriented misconduct. (***Wilner v. Allstate Ins. Co., supra*** at p. 161-162; see also, ***Stutman v Chemical Bank***, 93 N.Y.2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000); ***Small v. Lorillard Tobacco, Co., supra***, at p. 55; ***Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., supra*** at p. 25; ***New York University v. Continental Ins. Co.***, 87 N.Y.2d 308, 662 N.E.2d 763, 639 N.Y.S.2d 283 (1995); see also, ***Lonner v. Simon Property Group, Inc.***, 57 A.D.3d 100, 866 N.Y.S.2d 239 (2d Dept., 2008), citing ***Singh v. Queens Ledger Newspaper Group***, 2 A.D.3d 703, 704, 770 N.Y.S.2d 99 [2d Dept., 2003]). Furthermore, to be actionable, "the alleged deceptive acts, representations or omissions must be misleading to a 'reasonable consumer.'" (***Goshen v. Mut Life Ins. Co. of New York***, 98 N.Y.2d 314, 344, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (2002) citing ***Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., supra***, at p. 25; ***Karlin v. IVF America, Inc.***, 93 N.Y.2d 282, 712 N.E.2d 662, 690 N.Y.S.2d 495 (1999); ***Gaidon v. Guardian Life Ins. Co. of America***, 94 N.Y.2d 330, 725 N.E.2d 598, 704 N.Y.S.2d 177 [1999]). Neither intent to defraud nor justifiable reliance are elements of this statutory cause of action ***Wilner v. Allstate Co., supra***, at p. 162, citing ***Small v. Lorillard Tobacco Co., supra***, at p. 55. "However, proof that 'a material deceptive act or practice *caused actual although not necessarily pecuniary harm*' is required to impose compensatory damages." (***Wilner v. Allstate Ins. Co., supra***, at p. 162, quoting ***Small v. Lorillard Tobacco Co., supra***, at p. 55-56, quoting ***Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., supra***, at p. 26, and citing ***Baron v. Pfizer, Inc.***, 42 A.D.3d 627, 840 N.Y.S.2d 445 [3d Dept., 2007]). And, deception may not serve as both the act and the injury for recovery under General Business Law § 349. (***Wilner v. Allstate Ins. Co., supra***, at p. 162, citing ***Baron v. Pfizer, Inc., supra***, at p. 629). And, General Business Law § 349 does not apply to "private contract disputes unique to the parties." (***Wilner v. Allstate Ins. Co., supra*** at p. 163, citing ***Anesthesia Assoc. of Mount Kisco, LLP v. Northern Westchester Hosp. Ctr***., 59 A.D.3d 481, 873 N.Y.S.2d 202 (2d Dept., 2009); ***Flax v. Lincoln Nat. Life Ins. Co.***, 54 A.D.3d 992, 994-995, 864 N.Y.S.2d 559 [2d Dept., 2008]).

To recover under General Business Law § 350, "a plaintiff must demonstrate that [an] advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury." (***Andre Strishak & Associates, P.C. v. Hewlett Packard Co.***, 300 A.D.2d 608, 609, 752 N.Y.S.2d 400 (2d Dept., 2002), citing ***Scott v. Bell Atlantic Corp.***, 282 A.D.2d 180, 183-184, 726 N.Y.S.2d 60 (1st Dept., 2001), aff'd as mod., 98 N.Y.2d 314 [2002]). And again, to be actionable, "the alleged deceptive acts, representations or omissions must be misleading to a 'reasonable consumer'" (***Goshen v. Mut Life Ins. Co. of New York, supra*** at p. 344 citing ***Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., supra***, at p. 25) and actual damages are required: Deception may not serve as both act and injury (***Donahue v. Ferolito, Vultaggio & Sons***, 13 A.D.3d 77, 786 N.Y.S.2d 153 (1st Dept., 2004), citing ***Small v. Lorillard Tobacco Co., supra; DeRiso v. Synergy USA***, 6 A.D.3d 152, 773 N.Y.S.2d 563 [1st Dept., 2004]). However, in contrast to General Business Law § 349, reliance on the ad is required under General Business Law § 350. (***Gale v. International Business Machines, Corp***., 9 A.D.3d 446, 781 N.Y.S.2d 45 [2d Dept., 2004]; ***Andre Strishak & Associates, P.C. v. Hewelett Packard Co., supra***).

"In order to recover damages for fraud, a plaintiff must prove (1) a misrepresentation or material omission of fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury." (***JAF Partners, Inc. v. Rondout Sav. Bank***, 72 A.D.3d 898, 898 N.Y.S.2d 496 (2d Dept., 2010), quoting ***Shao v. 39 College Point Corp.***, 309 A.D.2d 850, 851, 766 N.Y.S.2d 75 [2d Dept., 2003]). Furthermore, vague representations of expected or hoped for outcomes are not sufficient predicates for a fraud cause of action. (***See International Oil Field Supply Services Corp. v. Fadeyi***, 35 A.D.3d 372, 376, 825 N.Y.S.2d 730 (2d Dept., 2006), citing ***Roney v. Janis***, 53 N.Y.2d 1025, 425 N.E.2d 872, 442 N.Y.S.2d 484 (1981); ***Fitch v. TMF Sys***., 272 A.D.2d 775, 707 N.Y.S.2d 539 (3d Dept., 2000); ***Austin Travel Group, Inc. v. Karson***, 142 A.D.2d 539, 541, 530 N.Y.S.2d 212 [2d Dept., 1988]).

As for the plaintiff's claims for fraud and violations of the General Business Law, while the plaintiff has maintained that she reviewed materials from the Spa and Healthbridge and Advanced's websites, she has only identified Dynatronics' materials which she reviewed **after** she had completed her treatment. While she also testified to having seen a website advertisement, she testified that it belonged to a spa. Because reliance is a required element to recover for both fraud (***Spector v. Wendy***, 63 A.D.3d 820, 881 N.Y.S.2d 465 (2d Dept., 2009) and ***General Business Law § 350*** (***Gale v. International Business Machines Corp., supra,*** citing ***Murrin v. Ford Motor Co.***, 303 A.D.2d 475, 756 N.Y.S.2d 596 (2d Dept., 2003); ***Andre Strishak & Associates, P.C. v. Hewelett Packard Co., supra; McGill v. General Motors Corp.***, 231 A.D.2d 449, 647 N.Y.S.2d 209 [1st Dept., 1996]), in view of the

plaintiff's inability to concretely identify any Dynatronics' materials reviewed prior to her treatment with the Dynatronics' Synergie AMS device, her claims for fraud and violation of General Business Law § 350 as against Dynatronics fail and are dismissed.

While reliance is not required under General Business Law § 349 (***Small v. Lorillard Tobacco Co., supra; Stutman v. Chemical Bank, supra; Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, N.A., supra; Singh v. Queens Ledger Newspaper Group, supra; Hazelhurst v. Brita Prods. Co.***, 295 A.D.2d 240, 744 N.Y.S.2d 31 [1st Dept., 2002]), absent a review of Dynatronics' allegedly misleading materials before undergoing treatment with Dynatronics' Synergie AMS device, the plaintiff simply cannot establish causation, which is still necessary to recover under General Business Law § 349. ***Gale v. International Business Machines Corporation, supra***. The plaintiff's claim for a violation of General Business Law § 349 is also dismissed as against Dynatronics.

Furthermore, while the plaintiff alleges that defendants falsely represented that the Synergie AMS Device was FDA "approved," there is not a scintilla of evidence that Dynatronics ever made any such representation to the plaintiff. Rather, in the materials referred to by the plaintiff, it represented that the Synergie AMS Device was FDA "cleared" and it has in fact established that to be the case as a matter of law.

While the plaintiff also alleges that the defendants fraudulently misrepresented that the product would reduce cellulite, Dynatronics has established that based upon a study by Drs. Pickens and Youngblood regarding the effects of the Synergie AMS Device's reduction of cellulite, it in fact received clearance from the Food and Drug Administration, which was reconfirmed in 2002 to market its device for "temporary reduction in the appearance of cellulite and circumferential body measurements of cellulite treated areas, including local blood circulation, relax muscles locally, and relieve minor aches and pains." Inspections of Dynatronics' headquarters, which included Synergie AMS System's brochures and advertisements received FDA approval in 2002 and Dynatronics was found to be in complete compliance with FDA rules and regulations in 2006 and 2008. This approval and compliance constitutes a complete defense to the plaintiff's claim under General Business Law § 349 as against Dynatronics. (See **General Business Law § 349[d]**).

Furthermore, in any event, through the affidavits of both Mr. Kevin Cullimore, Jr. and Sr., Dynatronics has established that its advertisements and information were not generally distributed to or aimed at the general public. The purchaser/owner/user of the device were business entities like the Spa, which acted as the intermediary. Direct solicitation by Dynatronics to the general public is lacking. Therefore, Dynatronics' allegedly deceptive representations via ads or communications were not aimed at the consuming public and recovery under General Business Law §§ 349, 350 does not lie. Simply put, this was not the modest transaction at which the statutes are aimed. It boils down to a private dispute

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between plaintiff and the supplier of the device's services. (***St. Patrick's Home for Aged and Infirm v. Laticrete Intern., Inc.***, 264 A.D.2d 652, 655, 696 N.Y.S.2d 117 (1st Dept., 1999), citing ***Teller v. Bill Hayes, Ltd.*** 213 A.D.2d 141, 146-147, 630 N.Y.S.2d 769 (2d Dept., 1995), app. dism. in part den. in part, 87 N.Y.2d 947 (1996); ***New York University v. Continental Ins. Co., supra***; see also, ***Weiss v. Polymer Plastics Corp.***, 21 A.D.3d 1095, 802 N.Y.S.2d 174 (2d Dept., 2005); ***Medical Soc. of State of New York v. Oxford Health Plans, Inc.***, 15 A.D.3d 206, 206-207, 790 N.Y.S.2d 79 (1st Dept., 2005); ***Ludl Electronics Products, Ltd. v. Wells Fargo Financial Leasing, Inc.***, 6 A.D.3d 397, 775 N.Y.S.2d 59 [2d Dept., 2004]).

Since Healthbridge did not have any relationship with Dynatronics, its cross claim is dismissed. And, Dynatronics has established its absence of liability to Advanced, as well.

The defendant Dynatronics has established its entitlement to summary judgment, shifting the burden to the plaintiff and the co-defendants Healthbridge and Advanced to establish the existence of a material issue of fact.

The plaintiff errs in averring that it is undisputed that she read materials provided and published by Dynatronics in 2003. Again, she has never been able to identify any such materials and even now relies on materials copyrighted in 2005. In any event, her attempt to expand the [mis]representations by Dynatronics – as well as the other defendants – which she finds objectionable beyond those previously identified fails: Pursuant to this court's orders of preclusion, she may not do so.

The plaintiff's attempt to impose vicarious liability on Dynatronics for the alleged misdeeds of the Spa, Advanced and Wellness fails. There has been no allegation let alone evidence offered that there was an agreement or understanding between Dynatronics and Advanced or Wellness to cooperate in fraudulent or deceptive schemes. (See, ***Soule v. Norton***, 299 A.D.2d 827, 750 N.Y.S.2d 692 (4th Dept., 2002); see also ***Peralta v. Figueroa***, 17 Misc.3d 1128(A), 851 N.Y.S.2d 73 [Supreme Court Kings County 2007]).

In seeking to fault Dynatronics, the plaintiff erroneously relies on a caution by the FDA in March 1999 that it may not make any additional claims without FDA approval and a directive that its claims on its website that its system could be used for "subdermal tissue massage" and "provides optimal stretching" were impermissible. Not only did these events pre-date her treatment with Dynatronics' Synergie AMS Device, more importantly, these materials played no role in her use of Dynatronics' product even if those inappropriate claims continued to be made. Indeed, the misrepresentations for which Dynatronics was cited by the FDA are not related in the least to the alleged misleading misrepresentations on which plaintiff allegedly relied in undergoing treatment with Dynatronics' Synergie AMS Device.

The plaintiff mistakenly relies on Mr. Cullimore's testimony that the audience for Dynatronics' materials is very specific, "it is prepared primarily for people who purchase the equipment . . . ," and that it does "produce a few items that can be purchased for use by the end user." Not only has the plaintiff failed to identify what Dynatronics' materials she saw nor its inaccuracy, per his testimony, Dynatronics' materials were in fact not aimed at "consumers who [use] the product at a facility," but users like "spa[s] or something like that."

The plaintiff also mistakenly relies on Onerato's testimony regarding the Spa's materials. She testified that she "assumed" and "believed" that the information in the Spa's materials came from materials supplied by Dynatronics. Not only is this clearly inconclusive, while Onerato testified that she "compiled something from their literature," the plaintiff has failed to make the critical connection between the Spa's materials and those provided by Dynatronics. Similarly unavailing is the plaintiff's reliance on Onerato's testimony that assuming she provided the content for the Spa's website, that the information must have came from Dynatronics. Again, that she was responsible for the information on Elysium Day Spa's website is not clear and that any alleged misinformation on that site was attributable to material suppled by Dynatronics remains far from clear as well. Onerato's testimony that she gave the plaintiff a pamphlet from Dynatronics fails since the pamphlet that the plaintiff has identified was not published until 2005. Furthermore, her testimony regarding her conversations with Dynatronics' employees fails to impart responsibility for misinformation on Dynatronics. Onerato testified that she did not know specifically what was said but was "certain" that the employees were "targeting the machine to be used in the reduction of the appearance of cellulite," which, in fact, was a claim approved by the FDA.

The defendant Dynatronics' motion is granted and the complaint and any and all cross claims against it are dismissed.

As for Advanced and Wellness, their request for summary judgment dismissing the complaint against them is denied for failure to seek the relief in the right form. CPLR §2214. In any event, they have not established their entitlement thereto.

In view of the foregoing, the plaintiff's motion for costs and sanctions pursuant to 22 NYCRR 130-1.1 is denied.

The foregoing constitutes the Order of this Court.

Dated: October 22, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
OCT 27 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE