

**Doe v Hirsch**

2011 NY Slip Op 30689(U)

March 16, 2011

Sup Ct, NY County

Docket Number: 105991/10

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: HON. JOAN B. LOBIS PART 6  
*Justice*

"JANE DOE",

Plaintiff,

- v -

HARVEY S. HIRSCH, M.D.,

Defendant.

INDEX NO. 105991/10

MOTION DATE 1/4/11

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 12 were read on this motion to amend.

Notice of Motion / Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying Affidavits

PAPERS NUMBERED

1-3

X. Mot. 4-10

11-12

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying decision and order.

**FILED**  
MAR 18 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/16/11

*JBL*  
JOAN B. LOBIS, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
"JANE DOE",

Plaintiff,

Index No. 105991/10

-against-

**Decision and Order**

HARVEY S. HIRSCH, M.D.,

**FILED**

Defendant.

-----X  
JOAN B. LOBIS, J.S.C.:

MAR 18 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant moves for an order directing plaintiff to amend the complaint and replace the pseudonym "Jane Doe" with her true name and an order, pursuant to C.P.L.R. Rule 3211(a)(7), dismissing plaintiff's third cause of action for fraud and concealment. Plaintiff cross-moves for permission to file a late notice of medical malpractice. For the reasons stated below, both defendant's motion and plaintiff's cross-motion are granted in full.

This action arises out of a course of psychiatric treatment that plaintiff undertook with defendant from July 2007 to April 2008. Plaintiff alleges causes of action for medical malpractice, lack of informed consent, and fraud and concealment. As a preliminary matter, plaintiff's cross-motion for permission to file late notice of medical malpractice is granted, without opposition. See Tewari v. Tsoutsouras, 75 N.Y.2d 1, 12-13 (1989); C.P.L.R. §§ 2004 and 2005.

Turning to the contested issues, defendant argues that the use of a "Jane Doe" caption is only permissible pursuant to Civil Rights Law § 50-b in cases alleging a sexual offense or when the plaintiff can demonstrate that a substantial privacy right is a stake if her name is revealed, so that it is permissible to overcome the presumption favoring openness in judicial proceedings. Defendant

argues that plaintiff does not fit either criteria. With respect to that branch of the motion seeking dismissal of the third cause of action for fraud and concealment, defendant asserts that the fraud and concealment cause of action is a “mere regurgitation of [plaintiff’s] allegations of psychiatric malpractice” and should be dismissed. Defendant maintains that the concealment or fraud must occur separately from and subsequent to the malpractice. Kremen v. Brower, 16 A.D.3d 156 (1st Dep’t 2005), appeal denied, 5 N.Y.3d 705 (2005); Coopersmith v. Gold, 172 A.D.2d 982 (3rd Dep’t 1991). Defendant further argues that the damages sought for the fraud and concealment cause of action must be separate and that such damages sought must be economic, not pain and suffering.

In opposition to that branch of the motion concerning her use of a pseudonym, plaintiff maintains that this case involves the disclosures that she made to defendant about her psychiatric history, including her “most private thoughts and feelings . . . [and revelations about] deeply private and traumatic experiences.” Plaintiff maintains that this psychiatric history would become part of a discoverable public record; that an anonymous caption protects her from ridicule, embarrassment, and attendant mental and psychological harm; and that disclosure of her name would “compromise [her] privacy and damage [her] in ways very similar to . . . the ways in which [she has] already been damaged by defendant’s prior acts of psychiatric malpractice.” Plaintiff further asserts that if she is ordered to identify herself in the caption, she will withdraw the case.

As to the branch of defendant’s motion seeking dismissal of the fraud and concealment cause of action, plaintiff maintains that the fraud and concealment cause of action concerns defendant’s efforts to seek and ultimately obtain payments for several psychiatric sessions

from plaintiff's parents, without plaintiff's knowledge. According to the complaint, plaintiff alleges that defendant also "fraudulently induced [her] into a false sense of belief" that he was rendering proper psychiatric care. Plaintiff sets forth that the cause of action for fraud and concealment is sufficiently pled in the complaint and that the fraud does not involve malpractice, but rather defendant's billing practices after the doctor-patient relationship terminated. If the court dismisses the fraud cause of action, plaintiff requests leave to replead.

In reply, defendant argues that the possibility of embarrassment alone is not sufficient to allow an anonymous caption. In opposition to plaintiff's argument that disclosure of her name would damage her in ways similar to the ways she was damaged by defendant's malpractice, defendant maintains that this is not a case where the "injury litigated against would occur as a result of the disclosure of the plaintiff's identity." Doe v. Szul Jewelry, Inc., 2008 N.Y. Slip Op. 31382(U), \*17 (Sup. Ct. N.Y. Co. 2008) (claim litigated against was use of plaintiff's likeness for advertising and trade purposes without written consent), quoting Doe v. New York Univ., 6 Misc. 3d 866, 879 (Sup. Ct. N.Y. Co. 2004). Rather, defendant argues, in this case, plaintiff's claim is psychiatric malpractice, which would not reoccur as a result of the disclosure of her name. Defendant further maintains that the alleged fraud is not separate from the malpractice and that plaintiff has not alleged pecuniary damages for her fraud and concealment cause of action, rather she alleges pain and suffering. Such damages, defendant argues, are not recoverable for fraud.

Other than setting forth that the case involves psychiatric treatment and general statements about the care rendered, plaintiff has failed to demonstrate that an anonymous caption is

warranted. See Doe v. Kidd, 19 Misc. 3d 782, 787-88 (Sup. Ct. N.Y. Co. 2008); Doe v. Del Rio, 241 F.R.D. 154, 157 (S.D.N.Y. 2006). Her claim is not pursuant to the Civil Rights Law. Furthermore, all cases involving psychiatric malpractice require evidence about the plaintiff's emotional make-up. They are not all prosecuted with an anonymous caption. The reasons for seeking psychiatric treatment vary from patient to patient and the court cannot assume that the unidentified disclosures made by plaintiff require an anonymous caption. Given the lack of details of the matters discussed with defendant, plaintiff has not demonstrated that the circumstances of her case warrant an exception to the presumption favoring openness in judicial proceedings.

Turning to the branch of the motion seeking dismissal of the fraud cause of action, plaintiff has not alleged the elements of common law fraud. In order to plead a cause of action for fraud, plaintiffs must state "the circumstances constituting the wrong . . . in detail." C.P.L.R. Rule 3016(b). Courts have construed this rule to require that plaintiffs set forth specific facts that evince "(1) a misrepresentation or omission of material fact; (2) that the defendant knew to be false (scienter); (3) that the defendant made with the intention of inducing reliance; (4) upon which plaintiff reasonably relied and (5) damages." Starr Found. v. Am. Intl. Group, Inc., 76 A.D.3d 25 (1st Dep't 2010) (citations omitted). In pleading a claim for fraudulent concealment, plaintiffs must also set forth "that the defendant had a duty to disclose material information." Swersky v. Dreyer and Traub, 219 A.D.2d 321, 326 (1st Dep't 1996) (internal citation omitted). Damages for fraud include only "pecuniary loss directly attributable to the alleged fraud." Juman v. Louise Wise Svcs., 3 A.D.3d 309, 309-10 (1st Dep't 2004) (citation omitted). Plaintiffs cannot recover for emotional distress or pain and suffering on a fraud cause of action. See Scivoli v. Levit, 45 A.D.3d 667, 668 (2d Dep't 2007).

Plaintiff has failed to demonstrate pecuniary damages resulting from her reliance on the misrepresentation. The fact that she was told that certain psychiatric sessions were free, yet defendant sought and obtained payments for such sessions from her parents, without telling plaintiff, does not create any economic loss for plaintiff. To the extent that plaintiff alleges that defendant fraudulently convinced her that the psychiatric treatment that he rendered was proper, this a restatement of the medical malpractice claim and not a separate cause of action. Kremen, 16 A.D.3d at 156; McNamara v. Droesch, 49 A.D.3d 511 (2d Dep't 2008). Although plaintiff fails to properly allege fraud, the court will permit plaintiff leave to replead the fraud cause of action if the court misconstrued the nature of the wrong alleged and plaintiff can plead a true fraud claim. Accordingly, it is hereby

ORDERED that defendant's motion is granted and plaintiff shall amend her complaint and replace "Jane Doe" with her true name; and it is further

ORDERED that defendant's motion to dismiss is granted and plaintiff's third cause of action for fraud and concealment is dismissed; and it is further

ORDERED that plaintiff is granted leave to replead the third cause of action for fraud and concealment; and it is further

ORDERED that plaintiff shall serve an amended complaint reflecting the replacement of "Jane Doe" with her true name and, if she so chooses, repleading the third cause of action for

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fraud and concealment, upon defendant within thirty (30) days of the date of entry of this order and file the same with the County Clerk; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint repleading the third cause of action for fraud and concealment within such time, leave to replead shall be deemed denied; and it is further

ORDERED that defendant has twenty (20) days from the date of service of the amended complaint to serve an amended answer; and it is further

ORDERED that the notice of medical malpractice action attached to the motion papers is deemed served on defendant and filed with this Court, *nunc pro tunc*; and it is further

ORDERED that the parties shall appear for a preliminary conference on Tuesday, May 24, 2011, at 9:30 a.m., in Part 6, Courtroom 345, at 60 Centre Street, New York, New York.

Dated: March 16, 2011

  
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JOAN B. LOBIS, J.S.C.

**FILED**

MAR 18 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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