

Gati v Toothsavvers Dental Servs., P.C.

2011 NY Slip Op 31957(U)

June 17, 2011

Sup Ct, NY County

Docket Number: 117667/09

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis PART 6

Index Number : 117667/2009

GATI, MARIA ROZSA

vs
TOOTHSAVERS DENTAL SERVICES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 4/5/11

MOTION SEQ. NO. _____

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 _____

PAPERS NUMBERED	
1-15	
16-24	
17	

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

Dated: 6/17/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

5

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

-----X
MARIA ROZSA GATI,

Plaintiff, |

Index No. 117667/09

-against-

Decision and Order

TOOTHSAVERS DENTAL SERVICES, P.C.,
SOL S. STOLZENBERG, D.M.D., SOL S.
STOLZENBERG, D.M.D., P.C. doing business
as TOOTHSAVERS DENTAL SERVICES, P.C.,
SOL S. STOLZENBERG, D.M.D., P.C. doing business
as TOOTHSAVERS, TOOTHSAVERS DENTAL
CARE, TOOTHSAVERS DENTAL LABORATORY,
INC., TOOTHSAVERS DENTAL MANAGEMENT,
INC., JERRY LYNN, P.C., JERRY LYNN,
ROBERT WINEGARDEN, D.D.S., and LEONID S.
ITSKOV, D.D.S. a/k/a DR. LEO ITSKOV a/k/a
SIMON ITSKOV,

FILED

JUN 20 2011

NEW YORK
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Defendant(s).

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

Defendants Sol S. Stolzenberg, D.M.D., Sol S. Stolzenberg, D.M.D., P.C. d/b/a
Toothsavers, and Sol S. Stolzenberg, D.M.D., P.C., d/b/a Toothsavers s/h/a "Sol S. Stolzenberg,
D.M.D., P.C. d/b/a Toothsavers Dental Services, P.C." move for partial summary judgment and/or
summary judgment on a variety of issues. On April 4, 2011, the parties stipulated that the case be
discontinued against Sol S. Stolzenberg, D.M.D., individually; Sol S. Stolzenberg, D.M.D, P.C. d/b/a
Toothsavers Dental Services, P.C.; and Toothsavers Dental Services, P.C. Therefore, the only
remaining moving defendant at this time is Sol S. Stolzenberg, D.M.D., P.C. d/b/a Toothsavers
("Toothsavers"), who moves, pursuant to C.P.L.R. Rule 3212, for an order dismissing plaintiff's
claims sounding in vicarious liability; dismissing plaintiff's claims sounding in vicarious liability
for unlicensed treatment, battery, fraud, and intentional tort; and dismissing plaintiff's claims

sounding in fraud, recklessness, gross negligence, and punitive damages. The court notes that, at the point this motion was made, none of the parties had been deposed.

This case concerns treatment rendered to plaintiff over three days—October 6, 2008 through October 8, 2008.¹ Plaintiff states that she presented to Toothsavvers for a free consultation on October 6, 2008, and wound up being convinced or tricked into expensive, invasive, painful, and negligently performed x-rays, drilling, extractions, temporary dentures, and the placement of five implants and a dental prosthesis. The records indicate that, for a treatment plan charged at \$20,000 on the same day as her initial “free consultation,” plaintiff paid Toothsavvers \$5,000 from a “Wells [Fargo]” credit account; \$5,000 from a “Citi[bank]” credit card; and \$5,000 from another source of funding.

Toothsavvers moves for partial summary judgment on the issue of whether it is vicariously liable for the acts and/or omissions of the dentists who treated plaintiff. Toothsavvers asserts that these dentists were independent contractors and, as such, no vicarious liability can exist. Dr. Stolzenberg, in an affidavit, asserts that the four dentists who actually treated plaintiff (two of whom are sued herein) were independent contractors; that neither he nor Toothsavvers supervised their work; and that “it would always be made crystal clear to the patients, *including plaintiff*, and understood from the outset, that he or she would be put in touch with and treated by different and separate *Independent Contractor* dentists who would all exercise their own independent judgment

¹ Apparently, for reasons that are unclear to the court, plaintiff also slept at Toothsavvers’ offices over this period of time.

and be individually responsible." (Emphasis in original). Dr. Stolzenberg also states that he, himself, never met, spoke to, or treated plaintiff in any capacity.

In general, unlike in an employer-employee relationship, a party who retains an independent contractor is not liable for an independent contractor's negligent acts. However, under the theory of apparent or ostensible agency, a medical or dental facility may be liable to a patient who sought care at the facility rather than from any particular treater, even though the treater whose alleged negligence injured the patient was the facility's employee. See Hill v. St. Clare's Hosp., 67 N.Y.2d 72, 80-81 (1986). When the treater is provided to the patient by the facility and the patient reasonably believes that the treater is working at the facility's behest, the facility may be held vicariously liable for the acts of that independent contractor. See Sarivola v. Brookdale Hosp. & Med. Ctr., 204 A.D.2d 245 (1st Dep't 1994), app. denied, 85 N.Y.2d 805 (1995). As pertains to a summary judgment on the issue of apparent or ostensible agency, a defendant must first demonstrate that there was no actual agency, and then the burden shifts to plaintiff to raise a triable issue of fact as to apparent or ostensible agency. Warden v. Orlandi, 4 A.D.3d 239, 241-42 (1st Dep't 2004).

Defendants failed to meet their burden in demonstrating, through competent evidence, that there was no actual agency between Toothsavers and the dentists who worked on plaintiff. Dr. Stolzenberg's self-serving affidavit is unsupported by any evidence regarding the employment relationship between Toothsavers and the dentists who treated plaintiff. There are no statements from the dentists as to their legal relationship to Toothsavers. As defendants have failed to demonstrate a prima facie entitlement to summary judgment on this issue by eliminating all issues

of fact, summary judgment on the issue of Toothsavvers' vicarious liability for the acts of plaintiff's treaters is denied.

Regardless of Toothsavvers' failure to demonstrate a prima facie entitlement to summary judgment, a review of the records indicates that plaintiff was informed that Toothsavvers would be treating her, not necessarily a particular independent contractor. In the consent form on Toothsavvers' letterhead dated October 6, 2008, plaintiff authorized Toothsavvers to perform the treatment procedures, not an individual dentist. A second consent form, on Toothsavvers letterhead and dated the same day, states "Dr. _____ has explained the benefits and risks of tooth removal to me." The blank space was never filled in, indicating that plaintiff chose no particular dentist to remove her teeth. On a third consent form (on which the date is illegible), plaintiff certified that the dental implant surgery and restoration would be performed by "Toothsavvers and Dr. Leo Itskov[,]'" indicating, again, that plaintiff understood that Toothsavvers would be performing the dental implant surgery, possibly in conjunction with Dr. Itskov. It appears from these documents that plaintiff sought treatment from Toothsavvers in general, not a particular treater. At the very least, issues of fact remain unresolved as to the legal relationship between Toothsavvers and the dentists who treated plaintiff, as to whether plaintiff sought care from Toothsavvers or particular caregivers, and as to whether plaintiff was fully informed of the dentists' statuses as independent contractors or whether she reasonably believed that they were employed by Toothsavvers.

Toothsavvers also moves for partial summary judgment on the issue of Toothsavvers' vicarious liability for "unlicensed treatment" and other intentional torts. Apparently, this claim

relates to alleged treatment by Jerry Lynn, a formerly licensed dentist. Plaintiff claims that Mr. Lynn presented himself as a "retired dentist," consulted with her at Tothsavers regarding the treatment plan, and arranged for payment.² Plaintiff alleges that Tothsavers knowingly allowed Mr. Lynn to practice dentistry without a license. Tothsavers maintains that Mr. Lynn is not an employee of Tothsavers but argues that, even if he were an employee, Tothsavers would not be vicariously liable for his unlicensed treatment because there is no evidence that Tothsavers had notice that he was practicing unlicensed dentistry and because case law provides that dental centers cannot be held vicariously liable for intentional torts or acts outside the scope of employment, such as unlicensed dentistry. In support of Tothsavers' claim that summary judgment on this issue is warranted, again, the only "evidence" is Dr. Stolzenberg's affidavit, wherein he states that Tothsavers did not permit Mr. Lynn to examine plaintiff, prescribe her treatment, and develop her treatment plan, and claims that Robert Winegarden, D.D.S., made the initial treatment plan and Dr. Itskov performed the implant procedure. Dr. Stolzenberg sets forth no basis for these statements. Given that Dr. Stolzenberg denies knowing plaintiff (outside this lawsuit), that none of notes in the treatment records appear to be signed by anyone, and that Dr. Stolzenberg provides no basis for his conclusions that Jerry Lynn played no role in plaintiff's treatment, his sworn statements have very little weight and fail to meet the burden on summary judgment. Regardless, plaintiff submits a sworn statement to the contrary, maintaining that Mr. Lynn examined plaintiff's mouth, procured her signature on a number of forms, and played a part in formulating her treatment plan. Given that gross questions of fact remain unresolved, summary judgment on this issue is denied.

² As to the payment, plaintiff alleges that Tothsavers and/or Jerry Lynn forged her signature and fraudulently invaded her line of credit to steal money to fund the dental work that was provided to her at Tothsavers.

Toothsavers further moves for partial summary judgment to dismiss plaintiff's claims sounding in fraud, recklessness, and gross negligence, and claims for punitive damages. Counsel for Toothsavers argues that plaintiff's treatment was "clearly indicated" (emphasis in original); she approved and made significant payments towards the planned treatment; the dentists who performed the work were independent contractors; and plaintiff abandoned treatment before it could be finished. Toothsavers also claims that plaintiff stole her dental chart³ and altered the records. Regardless, Toothsavers maintains that, at most, plaintiff has only alleged ordinary negligence, not rising to the level of punitive damages. Counsel further maintains that plaintiff failed to make out a cause of action for fraud.

The fraud claim alleges that Mr. Lynn and Toothsavers represented to plaintiff that she would have a free consultation and then they deceived her into accepting dental treatment that she did not want. As a result of the fraud, she claims she experienced pain, suffering, and permanent injuries.

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). "[T]he complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury." Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 57 (1999). In pleading a claim for fraudulent concealment, plaintiffs must also set forth "that the defendant had a duty to disclose material

³ Plaintiff claims that an employee at Toothsavers put a nondescript envelope—which, unbeknownst to plaintiff at the time, contained her dental chart—in her bag as she left Toothsavers for the last time.

* 8]

information.” Swersky v. Dreyer & 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 not alleged the elements of common law fraud, nor does she argue so in her opposition papers. She has not pled a misrepresentation or omission of material fact, nor has she alleged pecuniary loss not attributable to the injuries resulting from the alleged dental malpractice. Even looking at her claim for fraud in a light most favorable to plaintiff, the fraud claim is simply a restatement of her dental malpractice claim and is insufficient as an independent cause of action. See 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, 986 (3rd Dep’t 1991).

However, the pleadings are sufficient to maintain plaintiff’s allegations of gross negligence, recklessness, and punitive damages. Given that discovery remains outstanding, that no party has been deposed, and that issues of fact as set forth above remain unresolved, summary judgment on plaintiff’s allegations of gross negligence, recklessness, and punitive damages is premature at this juncture. Plaintiff should be permitted the opportunity to proceed to discovery. See C.P.L.R. Rule 3212(f).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is partially granted, only to the extent that plaintiff's third cause of action for fraud is dismissed; and it is further

ORDERED that the action shall bear the following caption, as reflected in the stipulation of discontinuance so-ordered by this court on April 5, 2011:

-----X
MARIA ROZSA GATI,

Plaintiff,

-against-

SOL S. STOLZENBERG, D.M.D., P.C. doing business
as TOOTHSAVERS, TOOTHSAVERS DENTAL
CARE, TOOTHSAVERS DENTAL LABORATORY,
INC., TOOTHSAVERS DENTAL MANAGEMENT,
INC., JERRY LYNN, P.C., JERRY LYNN,
ROBERT WINEGARDEN, D.D.S., and LEONID S.
ITSKOV, D.D.S. a/k/a DR. LEO ITSKOV a/k/a
SIMON ITSKOV,

Defendants.

-----X

; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the discontinuances against Sol S. Stolzenberg, D.M.D., individually; Sol S. Stolzenberg, D.M.D, P.C. d/b/a Toothsavers Dental Services, P.C.; and Toothsavers Dental Services, P.C.; and it is further

ORDERED that the parties shall appear for a previously scheduled status conference on Tuesday, June 28, 2011, at 9:30 a.m., in Part 6, Courtroom 345, at 60 Centre Street, New York, New York.

Dated: June 17, 2011



JOAN B. LOBIS, J.S.C.

FILED

JUN 20 2011

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