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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS Justice

PART 6

Freeman, Iona

- v -

HABER, M.D., Gregory

INDEX NO. 800432/11

MOTION DATE 4/16/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to [40], were read on this motion to/for dismiss (pre-answer)

Notice of Motion / Order to Show Cause – Affidavits – Exhibits + 3 cross mots.	No(s). 1-4; 5-8; 9-12; 13-18
Answering Affidavits – Exhibits	No(s). 19-22; 23-25
Replying Affidavits	No(s). 26-35; 36; 37
	further reply 38-40

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION and Order

FILED
JUL 06 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/29/12

JOAN B. LOBIS, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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IONA FREEMAN,

Plaintiff,

Index No. 800432/11

-against-

Decision and Order

GREGORY HABER, M.D., DAVID H. ROBBINS, M.D., CHRISTOPHER J. GOSTOUT, M.D., JONATHAN COHEN, M.D., LENOX HILL HOSPITAL,

Defendants.

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

Motion Sequence Numbers 001 and 002 are hereby consolidated for disposition. Defendants Lenox Hill Hospital ("LHH") (Motion Sequence 001) and Gregory Haber, M.D., (Motion Sequence 002) move, pursuant to C.P.L.R. § 3211(a)(7), for orders dismissing plaintiff's fifth, sixth, and seventh causes of action for failure to state a cause of action. Defendants Christopher J. Gostout, M.D., and David H. Robbins, M.D., cross-move for similar relief. Defendant Jonathan Cohen, M.D., also cross-moves for similar relief and for an order, pursuant to C.P.L.R. § 3212, granting him summary judgment on all remaining causes of action. Plaintiff Iona Freeman opposes all motions.

This medical malpractice action arises out of the performance of a polypectomy on December 18, 2009, which was simultaneously broadcast at the New York Society for Gastrointestinal Endoscopy's 33rd Annual Course, entitled "Tough Challenges, Practical Solutions." The complaint sets forth that prior to the surgery, plaintiff was referred to Dr. Robbins at LHH to

remove her large 4-centimeter polyp. On December 16, 2009, plaintiff was seen by Nithin Karanth, M.D., who represented himself to be Dr. Robbins' assistant and scheduled her surgery for December 18, 2009. Plaintiff's complaint sets forth that on the date of the surgery, plaintiff was taken into the operating room at LHH, where she observed two manufacturing representatives dressed in business suits. When plaintiff asked for Dr. Robbins, Dr. Haber appeared, told plaintiff that he was Dr. Robbins' partner, and introduced Dr. Gostout to her as the doctor who would be performing her surgery. The complaint alleges that after the surgery, plaintiff suffered from rectal bleeding and underwent additional treatment.

Plaintiff commenced this action by filing a summons and verified complaint on or about December 29, 2011. In her verified complaint, plaintiff asserts seven causes of action: medical malpractice, lack of informed consent, negligent hiring, inadequate staffing, fraud and deceit, violation of the Education Law, and violation of Gen. Bus. L. § 349. Plaintiff also seeks punitive damages. Only defendants Dr. Cohen and Dr. Gostout have answered the complaint. Defendants now seek dismissal of plaintiff's causes of action alleging fraud and deceit, violation of the Education Law, and violation of Gen. Bus. L. § 349, and Dr. Cohen moves for summary judgment on all remaining causes of action as against him.

C.P.L.R. § 3211(a)(7) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action[.]" On such a motion, "the pleading is to be afforded a liberal construction." Leon v. Martinez, 84 N.Y.2d 83, 87 (1994) (citation omitted). "We accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine

only whether the facts as alleged fit within any cognizable legal theory." Id. (citations omitted). However, "[b]are legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." Simkin v. Blank, 19 N.Y.3d 46, 52 (2012) (citation omitted). "[T]he criterion is whether the proponent has a real cause of action, not whether she has stated one." Leon, 84 N.Y.2d at 88, citing Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977).

As to her fraud and deceit cause of action, plaintiff alleges, inter alia, that defendants falsely represented to plaintiff the following: that her polyp could be safely removed from her body by polypectomy surgery; that Dr. Haber performed the surgery on December 18, 2009; that manufacturing representatives were not present in the operating room during her surgery; that Dr. Gostout was licensed to practice medicine in New York State; and that there was no delay in recognizing the perforated colon. Plaintiff also alleges that defendants concealed the "experimental nature" of the surgery, as the medical device used was allegedly not approved by the Food and Drug Administration. Further, plaintiff alleges that as a result of defendants' false representations, she sustained serious and severe personal injuries, including the need for additional surgery, peritonitis, emphysema, rectal bleeding, possible spread of cancer, weakness, and pain.

Defendants seek to dismiss plaintiff's cause of action for fraud and deceit on the grounds that it fails to state a cause of action because plaintiff does not allege damages that are separate and distinct from those claimed in her medical malpractice cause of action, and because plaintiff fails to plead with specificity the requirements for alleging fraud. Defendants point out that

plaintiff's alleged damages all stem from the alleged medical malpractice. Also, defendants argue that plaintiff fails to distinguish the defendants in her pleading; fails to identify the source, content, time, or location of the alleged misrepresentations; and fails to identify what rendered the statements fraudulent. Defendants further argue that plaintiff fails to claim that defendants engaged in fraudulent behavior with the intent to induce plaintiff to undergo a polypectomy.

In opposition, plaintiff asserts that she properly pled her cause of action for fraud and deceit. Attached to her opposition papers is an amended verified complaint, in which she adds various other incidents that she alleges constitute fraud.[1] The amended complaint adds allegations that Dr. Gostout withheld the make, model, serial number, and manufacturer of the medical device that he used during plaintiff's surgery; that LHH, Dr. Gostout, and Dr. Haber concealed the fact that a manufacturing representative was present in the operating room; that defendants concealed the fact that Dr. Cohen participated in the surgery by failing to identify him as a surgeon; and that, on January 14, 2010, Dr. Haber willfully withheld her medical records to avoid a malpractice claim, which forced plaintiff to bring a pre-action disclosure proceeding. In her amended complaint, plaintiff also adds damages for breach of fiduciary duty of confidentiality; breach of plaintiff's trust in physicians; emotional and mental anguish; and invasion of privacy. Plaintiff contends that these damages are separate and distinct from her medical malpractice damages. Furthermore, plaintiff argues that the requirement that the elements of fraud be pleaded with specificity need not be so strictly construed as to prevent an otherwise valid cause of action in a situation, like this, where it

[1] The court considers plaintiff's service of her amended complaint to be timely under C.P.L.R. § 3211(f).

may be impossible to state in detail the circumstances constituting fraud. In reply, defendants argue that even the amended complaint fails to allege damages that are separate and distinct from the medical malpractice cause of action and lacks the necessary elements for a fraud cause of action.

While plaintiff is correct in arguing that a fraud claim may exist in addition to a medical malpractice claim, the pleadings here fail to set forth facts that support distinct claims. It is well established that a plaintiff may only allege fraud in conjunction with a medical malpractice claim when the fraud gives rise to damages that are separate and distinct from those flowing from the alleged malpractice. The cases for fraud that have been allowed to proceed usually allege a coverup or intentional misrepresentations after the commission of medical negligence. The elements of such a fraud have been enumerated by the Court of Appeals. A complaint properly states two causes of action, one sounding in fraud and the other in medical malpractice, when (1) the physician knew or had reason to know of his malpractice and an injury suffered by patient as a consequence thereof, (2) the physician subsequently made a knowingly false factual misrepresentation to the patient with respect to the malpractice and the therapy appropriate to remedy the problem, (3) the patient justifiably relied on that misrepresentation, (4) and there was an efficacious or available remedy or cure which the plaintiff was "diverted from undertaking in consequence of the intentional, fraudulent misrepresentation." See Simcuski v. Saeli, 44 N.Y.2d 442, 452-53 (1978); Harkin v. Culleton, 156 A.D.2d 19, 21 (1st Dep't 1990). Moreover, damages for fraud must be as a result of a harm subsequent to the medical malpractice and are limited to "pecuniary loss directly attributable to the alleged fraud." Juman v. Louise Wise Svcs., 3 A.D.3d 309, 309 (1st Dep't 2004) (citation omitted).

Here, plaintiff's pleadings fail to satisfy the requirements for a separate claim for fraud. Plaintiff's claim that defendants falsely represented that the polyp could be safely removed is duplicative of her medical malpractice claims. Plaintiff's claim that defendants falsely represented who would be performing the surgery is unsupported by the facts, as the Consent to Surgery Form indicates that plaintiff authorized Dr. Gostout and his associates to perform her surgery. Plaintiff's claim that defendants misrepresented to her that Dr. Gostout was licensed to practice law in New York is also unsupported by the facts, as LHH's reply papers state that he was credentialed prior to performing plaintiff's surgery. Plaintiff's claims that defendants withheld the name, make, and model of the medical device used during her surgery and her medical records do not state the necessary elements for fraud. The only claims that resemble a viable cause of actions for fraud are that, after the surgery, Dr. Haber misrepresented that (1) no manufacturers were present during the surgery, and (2) there was no delay in recognizing that plaintiff's colon was perforated. However, these pleading are still insufficient, as they fail to state the essential elements for a fraud cause of action, i.e., a redressable harm resulting from misrepresentations upon which plaintiff relied. Plaintiff's injuries of emotional and mental anguish are not permitted on a fraud cause of action. See Scivoli v. Levit, 45 A.D.3d 667, 668 (2d Dep't 2007). Plaintiff's remaining damages (breach of fiduciary duty, invasion of privacy, loss of trust in medical professional, and fear of spread of cancer) are not damages that flow specifically from the events that occurred after the surgery. Those damage claims for fraud are duplicative of her allegations of damages from the medical malpractice. Accordingly, the court dismisses plaintiff's fifth cause of action for fraud and deceit against all defendants.

In her sixth cause of action, plaintiff alleges that defendants violated Educ. L. § 6514, by fostering Dr. Gostout's alleged unlicensed practice of law. Defendants state that plaintiff fails to state a cause of action because, as a private citizen acting on her own behalf, plaintiff lacks standing to prosecute under this statute. In opposition, plaintiff asserts that she does not seek to enforce this law; rather, she seeks damages for defendants' violation of this law. In reply, defendants assert that the provision does not permit for a private individual's recovery of monetary damages.

Education Law § 6514, entitled "Criminal Proceedings," specifies that all alleged violations of section 6512 or 6513 of this article (both of which proscribe the unauthorized practice of a profession or use of a professional title) shall be reported to the department for investigation, and shall be subject to prosecution by the attorney general or district attorney in a criminal court. Plaintiff concedes that she does not seek to enforce this section, as she lacks standing. There is nothing in the complaint or in plaintiff's opposition papers to suggest that she is entitled to monetary damages under section 6514. Accordingly, the court dismisses plaintiff's sixth cause of action against all defendants.

In her seventh cause of action, plaintiff alleges that defendants violated Gen. Bus. L. § 349, by engaging in deceptive acts and practices. Defendants assert that plaintiff fails to state a cause of action because her claim is not consumer-oriented, as it is merely a dispute between individual parties, and because plaintiff fails to specify the representations or omissions—such as advertisements, literature, websites or other media— that she relied upon which caused her

alleged injuries. In opposition, plaintiff argues that a prima facie claim under this statute does not require plaintiff to cite the advertisement or other literature that she relied upon. Plaintiff states that she incorporates into this cause of action the same allegations she made for fraud and deceit. Further, plaintiff states that even a dispute between individuals can have broad impact on consumers as a whole, and that such conduct need not be repetitious.

Gen. Bus. L. § 349 makes it unlawful for any party to engage in "[d]eceptive acts of practices in the conduct of any business, trade, or commerce or in the furnishing of any service in [New York.]" The statute also permits "any person who has been injured by reason of any violation of this section" to bring an action to enjoin the practice, or recover compensatory damages, or both. As a threshold matter, plaintiff's "claims must be predicated on a deceptive act or practice that is 'consumer oriented.'" Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 344 (1999); citing Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 24-25 (1995).

As with her cause of action for fraud and deceit, discussed above, plaintiff fails to show actual damages resulting from the alleged misrepresentations which are unrelated to her medical malpractice action. Additionally, plaintiff fails to demonstrate that defendants' actions are consumer-oriented. The court finds unpersuasive plaintiff's assertion that because the surgery occurred at LHH, the alleged misrepresentations have the potential to impact consumers at large. Such an allegation is conclusory and does not demonstrate that defendants' conduct is one that section 349 is intended to govern. Accordingly, the court dismisses plaintiff's seventh cause of action against all defendants.

Dr. Cohen seeks summary judgment dismissal on all remaining causes of action.[2] As established by the Court of Appeals in Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986), and as has recently been reiterated by the First Department, it is "a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep't 2012), citing Winegrad, 64 N.Y.2d at 853. Summary judgment is a drastic remedy, "which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Gibson v. American Export Isbrandsten Lines, Inc., 125 A.D.2d 65, 74 (1st Dep't 1987) (internal citations omitted).

As to plaintiff's allegation sounding in medical malpractice, Dr. Cohen argues that no issues of facts exist, as he neither examined nor treated plaintiff, and that a physician-patient relationship never existed between him and plaintiff. In support of his motion, Dr. Cohen submits a DVD that contains a recording of plaintiff's procedure that was broadcast live and his own affirmation.[3] In his affirmation, Dr. Cohen states that he is duly licensed to practice medicine in the State of New York; that on December 18, 2009, he was a faculty member of New York Gastroenterological Society Presentation; and that his role in the procedure was non-surgical. He

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[2] Dr. Cohen does not move to dismiss plaintiff's punitive damages claim.

[3] The court notes that, as a party-defendant to this action, Dr. Cohen was required to submit an affidavit. C.P.L.R. § 2106.

states that his only contact with surgical instruments and medication was to hold them up to the camera, for the benefit of the viewing audience.

Dr. Cohen fails to meet his prima facie burden for summary judgment on the first cause of action sounding in medical malpractice. The DVD recording in support of his motion is wholly inadequate to eliminate all issues of fact. The recording showcases four (4) surgeries occurring concurrently. Plaintiff's surgery begins at time 13:00 and goes on intermittently between the other three surgeries until the end. Additionally, the recording does not depict the end of plaintiff's surgery, as all four surgeries were left unfinished. Further, plaintiff states that her surgery lasted for nearly two hours and the recording, in its entirety, is only one hour long. Due to the incompleteness of the recording, summary judgement is unwarranted at this juncture. Moreover, there are various comments made by Dr. Cohen that indicate that his role was more than a mere moderator, such as: at time 28:00, he states "it's a good thing we took a look at this and created a strategy, where we are going to start and work our way," and at time 29:00, referring to the snare, he states, "let it burn a little before you squeeze." The first comment suggests that he, along with Dr. Gostout, was involved in the decision making for plaintiff's surgery. The second comment suggests that he was directing the surgical technique. Accordingly, as Dr. Cohen failed to eliminate all questions fact regarding his role in plaintiff's surgery, the court denies summary judgment dismissal of plaintiff's first cause of action for medical malpractice.

As to plaintiff's second cause of action for lack of informed consent, Dr. Cohen argues that no issues of fact exist. Dr. Cohen cites his above arguments and asserts that, as plaintiff

was never his patient, he had no reason or obligation to obtain her informed consent for any procedure. As to the third cause of action for negligent hiring and retention, and fourth cause of action for inadequate staffing, Dr. Cohen argues that no issues of fact exist because these causes of action are not directed at him. He argues that, as a physician in private practice, he is under no duty to train, hire, or staff a hospital operating room. These branches of Dr. Cohen's summary judgment motion are granted, unopposed by plaintiff. Accordingly, it is hereby

ORDERED that the motions of Gregory Haber, M.D., David H. Robbins, M.D., Christopher J. Gostout, M.D., and Lenox Hill Hospital are granted, and plaintiff's fifth cause of action for fraud and deceit, sixth cause of action for violation of the Education Law, and seventh cause of action for violation of Gen. Bus. L. § 349 are dismissed; and it is further

ORDERED that the portion of Jonathan Cohen, M.D.'s motion seeking to dismiss plaintiff's fifth cause of action for fraud and deceit, sixth cause of action for violation of the Education Law, and seventh cause of action for violation of General Business Law § 349 is granted; and it is further

ORDERED that the portion of Jonathan Cohen, M.D.'s motion seeking summary judgment on plaintiff's second cause of action for lack of informed consent, third cause of action for negligent hiring and retention, and fourth cause of action for inadequate staffing is granted, without opposition, and these causes of action are dismissed as against Jonathan Cohen, M.D.; and it is further

ORDERED that the portion of Jonathan Cohen, M.D.'s motion seeking summary judgment on plaintiff's first cause of action for medical malpractice, is denied; and it is further

ORDERED that defendants shall serve their answers to the surviving causes of action in the amended complaint, to the extent that they have not already done so, within twenty (20) days of service of this decision and order with notice of entry; and it is further

ORDERED that the parties shall appear for a status conference on August 7, 2012, at 9:30 a.m.

Dated: June 29, 2012

ENTER:

JOAN B. LOBIS, J.S.C.