Rujiao Ouyang v NYU Hosp. Ctr.
2014 NY Slip Op 33008(U)
November 24, 2014
Sup Ct, NY County
Docket Number: 154107/14
Judge: Peter H. Moulton

[* 1]

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : PART 57

- -X

RUJIAO OUYANG, :

Plaintiff, : Index No.: 154107/14

-against- :

NYU HOSPITAL CENTER, MANHATTAN MAXILLOFACIAL SURGERY, P.L.L.C., DAVID L. HIRSCH, DDS, JAMES P. LEVINE, M.D., NYU PLASTIC SURGERY ASSOCIATES, LLP, :

Defendants. :

- -X

Moulton, Judge

Motion sequence numbers 02 and 03 are consolidated for disposition.

Plaintiff brought on this action by order to show cause, alleging that various medical providers had breached their contract with plaintiff in the delivery of surgical and other medical care to plaintiff. The order to show cause sought a temporary restraining order that would have essentially ordered the ultimate relief sought in the complaint. The relief sought included an order: 1) compelling the named physicians to perform a "second part of the surgery" by May 5, 2014, which was allegedly a medically indicated deadline, 2) enjoining defendants from seeking further fees, 3) enjoining defendants to provide various post-surgical care, and 4) awarding of attorneys fees to plaintiff. The court crossed out the proposed TRO in signing the

order to show cause.

On the return date of the order to show cause, the court denied the preliminary injunction. In a decision spread on the record, familiarity with which is assumed, the court that "[t]he application is so weak as to skirt sanctionable action."

Defendants have now moved to dismiss the complaint. Plaintiff has responded by moving to amend the complaint a second time to add causes of action and additional parties.

BACKGROUND

Plaintiff alleges that she suffers from frontal ameloblastoma which caused abnormal cell growth leading to a benign tumor in her jaw. Plaintiff alleges that she moved from Illinois to New Jersey in November 2013 to receive care for this condition. She avers that she spoke with defendants Dr. David Hirsch and Dr. Jamie Levine concerning a procedure that involved engrafting a piece of bone taken from her leg onto her jaw. During the same procedure "six dental mechanisms" would be installed, she alleges.

According to paragraph 16 of the first amended complaint:

> The surgery also required a second procedure to be completed within 4 months of the initial procedure. The second procedure would complete the overall surgery, and is necessary. Otherwise, the positive advancements of the first part of the surgery may be negated.

Plaintiff alleges that she was informed by defendants that

her insurer had agreed to cover the majority of the cost of the procedure. Plaintiff was allegedly assured that her out of pocket expenses would amount to $24,000.

The surgery went forward on January 2, 2014. Plaintiff alleges that on January 6, 2014, she was informed by the hospital that her insurer had refused to pay for the procedure. She does not state how this information was allegedly conveyed to her. On that same day, plaintiff avers that she suffered a complication from the surgery. Her blood pressure fell and she lost consciousness. She avers that hospital staff failed to act quickly to address her condition.

Plaintiff was discharged from the hospital on January 16, 2014. Because of her insurance company's failure to cover the expense, she did not receive the home health care support that she had anticipated.

Plaintiff contends in her initial papers that the "second part of the surgery" was scheduled for May 5, 2014. She alleges that the hospital refused to go forward with the procedure until plaintiff paid a balance of $27,000. Plaintiff brought her order to show cause on the premise that the surgery must continue on May 5, or the positive results realized from the first stage of the surgery would be lost. In his affidavit in opposition to plaintiff's motion for a preliminary injunction, Dr. Levine states that he was not informed about the lack of insurance coverage

until February 26, 2014. He states that the May 5th date was for a consultation concerning plaintiff's recovery from the surgery - not a date for further surgery. Dr. Levine further asserts in his affidavit that he found on May 5 that plaintiff was qualified to receive the second surgery. According to Dr. Levine, the second surgery involves the placement of dentures and would be performed by a prosthodontist, not by Dr. Levine or Dr. Hirsch. Dr. Levine states that he apprised plaintiff of all these facts, and all other facts concerning her treatment, through a Mandarin interpreter.

Attached to Dr. Levine's affidavit was a Chinese language document signed by plaintiff on November 20, 2013, and an English translation. The document is entitled "NYU Faculty Group Practice Non-participating Financial Agreement" (the "Financial Agreement"). This document begins by stating "I have been advised by NYU School of Medicine that my physician does not participate with my insurance plan and therefore, I will be financially responsible for full payment of services rendered." The letter goes on to state other terms for payment.

Defendants have submitted paperwork from plaintiff's insurer, Humana Insurance Company, that appears to indicate that plaintiff's coverage ended on November 15, 2014, when she left her employer Smoke Brands LLC to move to New Jersey. It is remarkable that plaintiff does not submit an affidavit concerning this

documentation, or the status of her health insurance upon leaving her employer when moving toe New Jersey, or whether she was eligible for COBRA benefits.

Plaintiff's first complaint named only NYU Hospital Center as defendant and contained two causes of action, one for breach of contract and one for a declaratory judgment. On April 30, 2014, she filed an amended complaint with the same two causes of action but naming as additional defendants Manhattan Maxillofacial Surgery, P.L.L.C., NYU Plastic Surgery Associates, LLP, and Drs. Levine and Hirsch. Defendants rely on the Financial Agreement in arguing that they did not breach any contract with plaintiff. As noted above, in response to defendants' motions to dismiss, plaintiff has cross-moved to amend her complaint again.

DISCUSSION

On a motion to dismiss the complaint for legal insufficiency, the court must accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory. (Morone v Morone, 50 NY2d 481, 484.)

The defendants' motions were directed toward the first amended complaint. After the defendants' motions were filed, plaintiff moved to amend the complaint again. Indeed, her cross-motion and opposition contains no substantive opposition to defendants' motions to dismiss the breach of contract and

declaratory judgment claims. Those claims do not reappear in the proposed second amended complaint.

The proposed second amended complaint contains six causes of action. Plaintiff also seeks to add Dr. Laurence E. Brecht, and Humana Insurance Company as parties defendant. In their reply papers defendants contend that the proposed second amended complaint is defective and the motion should be denied. Accordingly, the court must first determine whether the motion to amend should be granted.

While leave to amend "shall be freely given upon such terms as may be just," permission to amend is not automatic. In passing on plaintiffs' motion this court must consider the merits of the proposed amendment. (Wieder v Skala, 168 AD2d 355.)

The first cause of action is that plaintiff did not provide informed consent because defendants failed "to inform the plaintiff of the risks, hazards and alterative [sic] connected to the procedures utilized and/or treatments rendered." The proposed second amended complaint does not state what risks hazards or alternatives defendants failed to inform plaintiff. Her memorandum of law appears to indicate that this cause of action is premised on plaintiff's understanding that all the necessary surgery, including the dental component, was to take place in a single surgery.

If this is the factual basis for the first cause of action,

it runs athwart the position taken by plaintiff in her initial papers: that the work on her jaw and teeth would take place in two different surgeries. In support of her motion to amend plaintiff submits an affidavit stating that "now, as I recall" she understood that the procedure would take place in one day. (Affidavit of Rujiao Ouyang sworn to July 21, 2014, ¶ 40.) This statement flatly contradicts her initial affidavit in which she averred that "the doctors explained that for the NYU surgery to be effective, there must be two separate procedures." (Affidavit of Rujiao Ouyang sworn to April 28, 2014, ¶ 11.) In the absence of some explanation for this complete change of position, or some other factual allegations providing a predicate for a lack of informed consent claim, this cause of action is without merit.

The second cause of action alleges that defendants were negligent. The negligence allegedly arises from defendants' diagnosis, treatment and care of plaintiff and therefore sounds in malpractice. Again, this cause of action is marred by the absence any factual predicate for the cause of action. There is no statement concerning how defendants (and the proposed new party defendant Dr. Brecht) departed from the standard of care. (See Foster-Sturrup v Long, 95 AD3d 726; Fassnacht v Hartman, 67 Ad2d 676.)

The fifth cause of action is entitled "breach of oral contract and promissal [sio] estoppel." In this cause of action,

plaintiff avers that the defendants assured her that Humana would pay all costs for the procedures in excess of $24,000. This claim is barred by the Financial Agreement, signed by plaintiff, which states "I have been advised by NYU School of Medicine that my physician does not participate with my insurance plan and therefore, I will be financially responsible for full payment of services rendered." While the Financial Agreement provides that NYU Hospital Center will provide a "courtesy claim" to plaintiff's insurer, and contemplates that the insurer will pay some amount for out of network care, it does not make any representation regarding payment from plaintiff's insurer. Accordingly, the parol evidence rule bars this claim. (See Scalisi v New York University Med. Center, 24 AD3d 145.) Plaintiff is presumed to have understood the Financial Agreement she signed. (E.g. Poplar Realty, LLC v Po, 3 Misc3d 22.)

The sixth cause of action assert vicarious liability against defendants NYU Hospital Center, Manhattan Maxillofacial Surgery P.L.L.C., and NYU Plastic Surgery Associates LP, presumably for the alleged actions of Drs. Levine, Hirsch and Hecht. As the second amended complaint contains no viable claim against any of these individual defendants, there is no claim for vicarious liability. (Eg Simmons v Brooklyn Hosp. Center, 74 AD3d 1174, lv denied 16 NY3d 707.)

As the first, second, fifth and sixth causes of action are

not viable, the motion to amend is denied with respect to those claims.

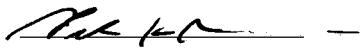
The remaining causes of action sound in breach of contract and negligence against Humana, plaintiff's alleged insurance company. The amended complaint alleges sufficient facts concerning Humana's actions for these two causes of action to justify service of the second amended complaint on Humana. This ruling is based on the liberal standard provided by CPLR 3025. It does not preclude a motion to dismiss by Humana, if plaintiff chooses to proceed with service of the complaint.

CONCLUSION

For the reasons stated, the motions to dismiss of David Hirsch and Maxillofacial Surgery P.L.L.C. and of NYU Hospital Center , Jamie P. Levine, M.D. and NYU Plastic Surgery Associates LLP are granted. The clerk shall enter judgment dismissing the complaint with respect to those defendants. Defendants' applications for costs are denied. Plaintiff's cross-motion to amend the complaint is granted only with respect to the third and fourth proposed causes of action, and only with respect to the proposed defendant Humana Insurance Company. It is denied with respect to the remaining proposed causes of action in the second

amended complaint. This constitutes the decision and order of the court.

DATE: November 24, 2014



Peter H. Moulton, JSC