

Krobath v South Nassau Communities Hosp.

2015 NY Slip Op 32710(U)

October 16, 2015

Supreme Court, Nassau County

Docket Number: 602113/15

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

Justice

TRIAL/IAS PART 12

ERIC KROBATH, on behalf of himself and
all others similarly situated

Index No.: 602113/15
Motion Seq....01
Motion Date...08/25/15

Plaintiff,

-against-

SOUTH NASSAU COMMUNITIES HOSPITAL,
a New York Corporation; and DOES 1 through
25 inclusive,

Defendants.

Papers Submitted:
Notice of Motion.....X
Memorandum of Law.....X
Declaration in Opposition.....X
Memorandum of Law.....X
Affirmation in Further Support.....X
Reply Memorandum of Law.....X

Upon the foregoing papers, the motion by the Defendant, South Nassau
Communities Hospital (“the Hospital”) seeking a judgment dismissing the Complaint
pursuant to CPLR § 3211 (a) (1) and (a) (7) is determined as hereinafter provided.

The Plaintiff, Eric Krobath, received treatment at the Defendant Hospital’s
emergency room on October 9, 2014 (See Complaint, attached to the Notice of Motion as
Exhibit “1” at par. 38). He was a self-pay patient at the time (*Id.*). After his discharge, the

Hospital billed Mr. Krobath the sum of \$7,137.79 (exclusive of physicians' charges, other non-hospital charges, and state-mandated charges) (*Id.* at par. 40). Mr. Krobath refused to pay the bill, claiming that it was grossly excessive, unfair, and unconscionable. (*Id.*) He commenced this action, alleging claims against the Hospital for negligent concealment, intentional concealment, unfair and deceptive business acts in violation of N.Y. General Business Law § 349, and also seeking a declaratory judgment declaring that self-pay patients may only be charged the reasonable value of the services rendered. The Plaintiff seeks to represent the class of all patients similarly situated. (*Id.* at par. 41)

At the time the Hospital rendered services to Mr. Krobath, he was required to, and did, sign an Emergency and Admission Consent Authorization ("the Agreement") which contains, *inter alia*, the following provision:

5. FINANCIAL AGREEMENT: I, the undersigned agrees (sic), whether I sign as agent or as patient, that in consideration for the services rendered to me (the patient), I agree to pay all amounts for which I am financially responsible, due for services presented **in accordance with the rates and terms of the Hospital**. I understand that to the extent permitted by law, where insurance or other third party benefits are insufficient to pay for all of my (the patient's) Hospital and /or practitioner services rendered, that I will be responsible for the payment of any balances due as determined by the respective provider of services, including deductibles, copayments, coinsurance, and or other fees required by insurer, HMO or other benefit plan. (Emphasis added). (*See* Agreement, annexed as Exhibit "2" to the Notice of Motion).

Mr. Krobath characterizes the entire document as a "standard adhesive Contract" and describes the Agreement as "vague, ambiguous, and unintelligible" (*See* Complaint, par. 24). Under these circumstances, he argues that the law implies a contractual

obligation on behalf of self-pay patients to pay the reasonable value of the services rendered by the Hospital. (*Id.* at par. 27)

Mr. Krobath asserts that commercial insurers (ie. Blue Cross, Aetna, etc.) negotiate reduced payment rates with the Hospital, and that because self-pay patients have no negotiated reduction, they are required to pay the Hospital's "Chargemaster rates". (*Id.* at par. 24) The "Chargemaster rates" are three times higher than the negotiated rates, as well as three times higher than the Hospital's actual costs in providing such services ((*Id.* at pars. 24, 28, 33). Mr. Krobath alleges that these "Chargemaster rates" are not published on the Hospital's website or elsewhere. (*Id.* at par. 25). According to Mr. Krobath, the purpose of the artificially inflated "Chargemaster rates" is to boost third party reimbursement rates, as well as "to reflect a higher level of charity contribution and financial assistance given to the local community" (*Id.* at par. 33). The Hospital now seeks a judgment dismissing the Complaint pursuant to CPLR § 3211 (a) (1) and (a) (7), on the grounds that the Plaintiff cannot state any claim upon which relief can be granted, and the Agreement unambiguously sets forth the Plaintiff's obligations thereunder.

On a motion to dismiss pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 227 [2011], quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]).

A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]). While an unambiguous contract that indisputably undermines the plaintiff’s causes of action may constitute documentary evidence for the purposes of CPLR § 3211 (a) (1) (*McMahan v. McMahan*, 131 A.D.3d 593, 594 [2d Dept. 2015]; see *Jackson v. YAM Holding Corp.*, 97 A.D.3d 637 [2d Dept. 2012]), where a contract is ambiguous (see generally *Fontanetta v. John Doe 1*, 73 A.D.3d 78 [2d Dept. 2010]), or where a contract does not “utterly refute” the plaintiff’s allegations (*Attias v. Costiera*, 120 A.D.3d 1281 [2d Dept. 2014]; *Burnside 711 LLC v. Amerada Hess Corp.*, 109 A.D.3d 860 [2d Dept. 2013]; *Great Eagle Intl. Trade, Ltd. v. Corporate Funding Partners, LLC.*, 104 A.D.3d 731 [2d Dept. 2013]; *Guido v. Orange Regional Med. Ctr.*, 102 A.D.3d 828 [2d Dept. 2013]), dismissal pursuant to CPLR § 3211 (a) (1) must be **DENIED**.

Where a party offers evidentiary proof on a motion pursuant to CPLR § 3211 (a) (7), the criterion is whether the proponent of the pleading has a cause of action (*Leon, supra* at 88; *Randazzo v. Nelson*, 128 A.D.3d 935, 936 [2d Dept. 2015]).

The Hospital’s attorney states that every patient entering the Hospital is required to sign the Agreement, and the Hospital’s rates are available to patients upon request (See Breitenbach Affirmation at par. 10). In contrast, Mr. Kroboth alleges that the Hospital does not publish its Chargemaster rates on its website or elsewhere (See Complaint at par.

25), and self-pay patients are given no warning that they will be required to pay the Chargemaster rates. These conflicting contentions are not properly considered on a motion for dismissal pursuant to CPLR § 3211.

The Hospital argues that the Agreement is clear and enforceable and resolves all issues raised by the Plaintiff. The question presented is the meaning of the phrase “in accordance with the rates and terms of the Hospital.” On this record, the meaning of the phrase is unclear. While a hospital is entitled to contract with an insurer for payment of its charges at a rate less than that charged to uninsured patients (*Albany Med. Ctr. Hosp. v. Huberty*, 76 A.D.2d 949 [3d Dept. 1980]), the Hospital nonetheless must have some obligation to provide patients in general, and self-pay patients in particular, with the ability to determine the nature and extent of the hospital’s charges. No information is provided to the Court by a person with knowledge of where to find the “rates and terms of the Hospital.” For this reason, the Court is compelled to conclude that the Agreement does not resolve the issues presented, and consequently dismissal pursuant to CPLR § 3211 (a) (1) must be **DENIED**.

A cause of action for intentional or fraudulent concealment requires scienter, reliance, damages and a showing that there was a fiduciary or confidential relationship between the parties which would impose a duty of disclosure (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 179 [2011]; *Kevin Kerveng Tung, P.C. v. JP Morgan Chase & Co.*, 105 A.D.3d 709, 711 [2d Dept. 2013], lv. app. dsmd 22 N.Y.3d 949 [2013];

Consolidated Bus Tr., Inc. v. Treiber Group, LLC, 97 A.D.3d 778, 779 [2d Dept. 2012]).

There is no such duty between a hospital and a self-pay patient, and therefore the Second Cause of Action for intentional concealment must be **dismissed** pursuant to CPLR § 3211 (a) (7).

A cause of action for negligent concealment or omission requires the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; that the information was withheld; and a reasonable reliance on the omission (see *High Tides, LLC v. DeMichele*, 88 A.D.3d 954 [2d Dept. 2011]). A special relationship does not arise out of an ordinary arm's length business transaction between two parties (*High Tides, LLC, supra* at 960).

Nevertheless "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified". (*Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 [1996]) Lawyers, engineers and accountants have such special relationships with their clients (*Kimmell* at 263-264). Whether the nature and caliber of Mr. Krobath's relationship to the Hospital is such that Mr. Krobath's reliance on a negligent omission is justified raises an issue of fact (*Kimmell, supra* at 264). Consequently, dismissal of the First Cause of Action for negligent concealment pursuant to CPLR § 3211 (a) (7) must be **DENIED**.

To state a cause of action under General Business Law § 349, the complaint

must allege “that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice” (*Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 [2012] quoting *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 621 [2009]). General Business Law § 349 applies to virtually all economic activity (*Karlin v. IVF Am.*, 93 N.Y.2d 282, 290 [1999]; *North State Autobahn, Inc., v. Progressive Ins. Group Co.*, 102 A.D.3d 5, 11 [2d Dept. 2012]), and applies where the defendant’s conduct was a standard practice that “potentially affect [ed] similarly situated consumers” (*North State Autobahn, Inc., supra* at 12). There is no blanket exemption for providers of medical services (*Karlin, supra* at 291).

While the statute does not require justifiable reliance, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual harm (*Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 [1995]). The statute does not require businesses to guarantee that each consumer has all relevant information specific to its situation, but where the business alone possesses material information that is relevant to the consumer and fails to provide this information, “the scenario is quite different” (*Oswego, supra* at 26). The deceptive act or practice must be “likely to mislead a reasonable consumer acting reasonably under the circumstances”. (*Id.*)

The allegations of deceptive conduct here include that the Hospital charges self-pay patients rates which are significantly higher than the reasonable value of the

treatment and services provided, and conceals this practice from self-pay patients by having all patients sign the Agreement referring to unidentified “rates and terms of the Hospital.” Use of the Agreement suggests “fixed standards” for charging all patients in the same manner, in contrast to the much higher Chargemaster rates billed to self-pay patients for the exact same services (*See* Complaint at pars. 79-80). These allegations suffice to state a cause of action under General Business Law § 349. Whether Mr. Krobath could reasonably have obtained the Chargemaster rates for the services he received is disputed, and not a ground for dismissal pursuant to CPLR § 3211.

A motion to dismiss a cause of action for a declaratory judgment prior to service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration (*State Farm Mut. Auto Ins. Co. v. Anikeyeva*, 89 A.D.3d 1009, 1011 [2d Dept. 2011]; *Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d 1148, 1150 [2d Dept. 2011]). The question presented is whether the cause of action is sufficient to invoke the court’s power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy (CPLR § 3001; *State Farm Mut. Auto Ins. Co., supra*; *Matter of Tilcon N.Y., Inc., supra*).

Here, the Defendant has not established the lack of a justiciable controversy, and this Court is a court of general jurisdiction, competent to entertain all causes of action unless its jurisdiction is specifically proscribed. (*Wells Fargo Bank Minn., N.A. v.*

Mastropaolo, 42 A.D.3d 239, 244 [2d Dept. 2007] The Plaintiff has alleged a cognizable claim, and consequently, dismissal of the Fourth Cause of Action for declaratory relief must be **DENIED**.

Accordingly, it is hereby

ORDERED, that the Defendants' counsel shall serve the Plaintiff's counsel with an answer to the Verified Complaint within thirty (30) days of the date of this Order; and it is further

ORDERED, that a Preliminary Conference (see 22 NYCRR 202.12) in this matter shall be held at the Preliminary Conference Part, located at the Nassau County Supreme Court on **November 24, 2015, at 9:30 a.m.** This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require; and it is further

ORDERED, that the Plaintiff's counsel shall serve a copy of this Order upon the Defendant's counsel pursuant to CPLR § 2103 (b) 1, 2 or 3 within ten (10) days of the date of this Order. **PROOF OF SERVICE MUST BE FILED WITH THE COURT.**

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
October 16, 2015



Hon. Randy Sue Marber, J.S.C.

ENTERED

OCT 23 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE