

Vale v Bruce Katz, M.D., P.C.
2018 NY Slip Op 30652(U)
April 10, 2018
Supreme Court, New York County
Docket Number: 153321/17
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ELEANOR VALE,

INDEX NO. 153321/17

Plaintiff,

-against-

BRUCE KATZ, M.D., P.C., BRUCE KATZ, M.D.,
JUVA SKIN & LASER CENTER/MEDISPA,

Defendants.

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JOAN A. MADDEN, J.:

Defendants move to dismiss the complaint on the grounds that plaintiff failed to file a Certificate of Merit and a Notice of Medical Malpractice; and in the alternative, to dismiss the the first, third and fourth causes of action for failing to state recognizable claims. Plaintiff pro se opposes the motion arguing that neither a Certificate of Merit nor a Notice of Malpractice is required, since she is not asserting a claim for medical malpractice.¹ Plaintiff also cross-moves to amend her complaint “to clarify the matter.” Defendants oppose the cross-motion. At oral argument, plaintiff agreed to withdraw her original complaint. As result, defendants’ motion to dismiss is moot, and only plaintiff’s cross-motion to amend the complaint remains.

In February 2017, plaintiff met with defendant Dr. Katz regarding the “thin lines” on her nose and between her eyes. Plaintiff alleges Dr. Katz recommended Botox injections for those areas, and also for the wrinkles next to her eyes and on her forehead. Plaintiff agreed to Botox

¹Contrary to defendants’ contention even if plaintiff asserted a medical malpractice claim, a Certificate of Merit would not be required since plaintiff is pro se. CPLR 3012-a(f) expressly provides that the requirements for a Certificate of Merit are “inapplicable to a plaintiff who is not represented by an attorney.”

injections in “all three areas.” When plaintiff asked Dr. Katz when to expect the Botox “to erase my lines,” he responded that a “micro-needling procedure” was needed to “actually erase the lines.” Plaintiff alleges this was the first time Dr. Katz mentioned a two-step process. Dr. Katz explained that the micro-needling procedure could be done immediately after the Botox injections; plaintiff agreed but did not inquire about the cost. After Dr. Katz injected the Botox, an employee applied “gel” on plaintiff’s face explaining it would numb her face against any “discomfort.” The employee then applied a “machine” to her entire face, and when plaintiff questioned why, the employee responded “in order to keep everything even.” Plaintiff states, “I acquiesced, totally confused.” but “a big red flag went up when the employee specifically asked me which part of my face bothered me most, so she would to go over that part again.” Plaintiff states that she “shouted out that all I wanted and expected was the area around eyes, and she was doing ‘too much.’” Plaintiff did not see Dr. Katz again that day, and was charged \$1,297 for the Botox and \$1,030 for “Intensif” procedure. A follow-up appointment was scheduled for March 7, 2017.

Plaintiff alleges that when she arrived home, she “almost immediately” noticed that her “eyebrows had dropped, the lines between my eyes were wider, deeper, more visible, and that my skin above my eyelids dropped giving my eyes a more hooded look and making my eyes appear more narrow.” She explains that her face was “very swollen and as the swelling seemed to recede, it became more crepey . . . as if my facial skin was stretched,” and that the pores on her cheeks were “enlarged.” Plaintiff alleges that on March 6, 2017, the day before the follow-up appointment, she was driving at night, and “had trouble seeing the signs on the road” and her

“night vision was unclear” and “blurry.”

At the March 7, 2017, follow-up visit, plaintiff “complained to Dr. Katz about the changed aspect of my eyes, the crepiness and slackness of my facial skin, my enlarged pores, and the fact that the lines between my eyes and on my nose seemed more, not less, pronounced.” She states that he “brushed aside” her complaints and said the “changes were due to ‘swelling.’” When she complained that the “wrinkles on my nose and between my eyes were worse than before, he tried to convince me to do my whole face again.” and she said “absolutely not.” He suggested just doing the “one spot,” and she agreed to “micro-needling in that one spot” and was charged \$350.00.

Plaintiff alleges that when she was driving to New Hampshire on March 12, 2017, she had “difficulty seeing signs and traffic because I would have bouts of blurry vision,” and it was “worse at night”; she also had “double-vision” when playing ping-pong. She explains that since the “blurry double-vision” began after she saw defendants, she “googled the effects of Botox and Intensif,” and “read that there was a definite relationship between blurry vision and over-dosing or otherwise incorrect administration of Botox,” due to possible “muscle and/or nerve damage.” She also read that the Intensif treatment “was mostly used for acne, and deep scars” and that it was “quite painless,” even though it was “extremely painful” for her. Plaintiff alleges that as of September 2017, her “nose wrinkles are exactly what they were before the two procedures, and the vertical lines between my eyes are as deep and wide as after my Botox treatments and two Intensif procedures.”

Plaintiff commenced this action on April 8, 2017. As noted above, the issue before the Court is plaintiff's cross-motion for leave to amend her complaint. Plaintiff submits a proposed amended complaint asserting four causes of action: 1) negligent misrepresentation; 2) duty to disclose, lack of informed consent; 3) fraud and deceit; and 4) false advertising.

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp v. Sona Realty Co, 18 AD3d 352, 355-356 (1st Dept 2005) (internal citations and quotations omitted). The movant need not establish the merits of the proposed new allegations, but simply submit sufficient support to show that the proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Insurance Corp v. Greystone & Co, Inc, 74 AD3d 499 (1st Dept 2010); see Fairpoint Companies LLC v. Vella, 134 AD3d 645 (1st Dept 2015).

Leave to amend is denied as to the first cause of action for negligent misrepresentation and the third cause of action for fraud and deceit. "[W]hen the duty allegedly breached arises from the physician-patient relationship or is substantially related to medical treatment, the resulting cause of action sounds in medical malpractice." Petrillo v. Leather, 247 AD2d 368 (2nd Dept 1998); see Megally v. La Porta, 253 AD2d 35 (2nd Dept 1998). Here, it cannot be disputed that plaintiff had a physician-patient relationship with Dr. Katz, and that plaintiff's claim of negligent misrepresentation is "substantially related to the medical treatment" provided by Dr. Katz. Plaintiff, therefore, cannot assert a claim for negligent misrepresentation.

With respect to fraud, "only when the alleged fraud occurs separately from and subsequent to the malpractice that a plaintiff is entitled to allege and prove a cause of action for

intentional tort . . . and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the malpractice.” Coopersmith v. Gold, 172 AD2d 982 (2nd Dept 1991); see Abbondandolo v. Hitzig, 282 AD2d 224 (1st Dept 2001). Since plaintiff’s allegations of fraud and deceit are part and parcel of the medical treatment provided by Dr. Katz, and specifically relate to his duty to provide an informed consent, she cannot assert a claim for fraud.

Leave to amend is granted as to the second cause of action for lack of informed consent and the fourth cause of action for false advertising under General Business Law §350. Notably, defendant has not moved to dismiss the lack of informed consent claim as asserted in plaintiff’s original complaint, and does not oppose that claim as asserted in the proposed amended complaint. In any event, plaintiff has sufficiently alleged that Dr. Katz failed fully to apprise her of the “risks associated with the injection of Botox and the application of Intensif,” and “had the defendants given accurate information disclosing any risk and benefit, the plaintiff/and or a reasonably prudent woman would have selected alternative means to accomplish the desired line removal result.” See Public Health Law §§ 2805–d; Orphan v. Pilnik, 15 NY3d 907, 908 (2010); Eppel v. Fredericks, 203 AD2d 152 (1st Dept 1994).

A plaintiff asserting a claim for false advertising under General Business Law §350 “must demonstrate that the advertisement had 1) an impact on consumers at large, 2) was deceptive or misleading in a material way, and 3) resulted in injury.” Andre Strishak & Assocs PC v. Hewlett Packard Co, 300 AD3d 608, 609 (2nd Dept 2002). “[T]he test is whether the advertisement is ‘likely to mislead a reasonable consumer acting reasonably under the circumstances.’” Id

(quoting Oswego Laborers' Loca 214 Pension Fund v. Marine Midland Bank, 85 NY2d 20 [1995]). At this pleading stage in the action, plaintiff has sufficiently stated a claim for false advertising under section 350 of the General Business Law, as she alleges that defendants "engaged in false advertising via emails to plaintiff via Groupon to the public, wherein defendants offer cosmetic services at heavy discounts"; the advertisements "are materially deceptive, in that they guarantee the stated results"; and the advertisements "had impact on consumers at large, and in particular, the plaintiff an ordinary consumer" and "were likely to mislead a reasonable consumer acting reasonably under the circumstances." Plaintiff also quotes from and provides the dates of specific advertisements. Contrary to defendants' assertion, the false advertising claim under GBL §350 is not subsumed in the lack of informed consent claim. See Karlin v. IVF America, 93 NY2d 282 (1999) ("We hold that plaintiffs have properly stated causes of action under these consumer protection statutes [GBL §§349, 350], and are not precluded from pursuing those claims because the alleged misrepresentations related to the provision of medical services."). Accordingly, it is

ORDERED that defendants' motion is denied as moot; and it is further

ORDERED that plaintiff's cross-motion for leave to amend the complaint is granted to the extent of the causes of action for lack of informed consent and false advertising, and is denied as to the causes of action for negligent misrepresentation, and fraud and deceit; and it is further

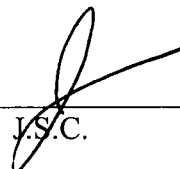
ORDERED that within 10 days of the date of this decision and order, plaintiff shall serve and file an amended complaint that complies with this decision and order; and it is further

ORDERED that within 20 days of the date of said service and filing, defendants shall serve and file an answer to the amended complaint; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 7, 2018 at 11:30 am, in Part 11, Room 351, 60 Centre Street.

DATED: April 10, 2018

ENTER:



J.S.C.