

**Henry v Perfect Body Image LLC**

2018 NY Slip Op 34255(U)

November 16, 2018

Supreme Court, Nassau County

Docket Number: Index No. 605716/18

Judge: Roy S. Mahon

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

**JENNIFER HENRY,**

**TRIAL/IAS PART 3**

**INDEX NO. 605716/18**

**Plaintiff(s),**

**MOTION SEQUENCE**

**- against -**

**NO. 1 & 2 & 3**

**PERFECT BODY IMAGE LLC, d/b/a PERFECT  
BODY LASER AND AESTHETICS, JANE DOE  
JANE DOE #2, JANE DOE #3, JANE DOE #4,  
JANE DOE #5, JOHN DOE,**

**MOTION SUBMISSION  
DATE: October 4, 2018**

**Defendant(s).**

**The following papers read on this motion:**

<b>Notice of Motion</b>	<b>XX</b>
<b>Notice of Cross Motion</b>	<b>X</b>
<b>Affirmation</b>	<b>X</b>
<b>Reply</b>	<b>X</b>

This is an action for personal injuries plaintiff allegedly sustained as a result of a hair removal procedure performed by defendants at a clinic known as American Laser Center located at 871 Fifth Avenue in New York, New York.

**I: DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO SERVE A COMPLAINT AND PLAINTIFF'S MOTION FOR LEAVE TO SERVE THE COMPLAINT (MOTION SEQ: 001 & 002)**

By a notice of motion dated, July 17, 2018, defendants' moved to dismiss pursuant to CPLR §§3211 and 3012(b) for failure to serve a complaint. The defendants allege the plaintiff served a summons and notice on May 25, 2108. The defendants served a notice of appearance and demand for complaint on June 1, 2018. Upon the plaintiff's failure to serve the complaint, defendants moved to dismiss. The plaintiff cross-moves to compel defendants' to accept the verified complaint, amend the caption to amend spelling of the plaintiff's name and for denial of defendants' motion. The plaintiff argues that it served a complaint, though defective, on July 23, 2018. The plaintiff argues law office failure and a meritorious action.

"To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012(b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a potentially meritorious cause of action" (*see Carducci v Russell*, 120 AD3d 1375 [2d Dept 2014] ). It is generally within the sound discretion of the court to determine what constitutes a reasonable excuse for the delay in serving the complaint (*see Adams v Alexander*, 291

AD2d 467 [2d Dept 2002]; *Bravo v New York City Hous. Auth.*, 253 AD2d 510 [2d Dept 1998]). In exercising its discretion, the court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and lack of an intent to abandon the action (see *Mitrani Plasterers Co., Inc. v SCG Contr. Corp.*, 97 AD3d 552 [2d Dept 2012]). The court has the discretion to excuse delay based on law office failure (see CPLR §2005; *Pollack v Eskander*, 191 AD2d 1022, 1023 [4th Dept 1993], *appeal dismissed*, 81 NY2d 1067 [1993]).

In view of the short delay, absence of any prejudice to the defendants, the lack of intent to abandon, and the strong public policy in favor of resolving cases on the merits, the Court exercises its discretion and accepts the plaintiff's excuse for its delay as reasonable. The plaintiff has also demonstrated the potential merit to this action though she has failed to state all causes of action asserted in the complaint attached to her motion<sup>1</sup>. Based on the foregoing, the defendants' motion for dismissal pursuant to CPLR 3012(b) is denied and the plaintiff's cross-motion is granted in its entirety and the complaint is deemed served.

II: DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE CAUSE ACTION (MOTION SEQ: 003)

By a motion dated, September 5, 2018, the defendants moved to dismiss pursuant to CPLR 3211(a)7 for failure to state a cause of action for medical malpractice, lack of informed consent, consumer fraud, deceptive business practices and punitive damage. Defendants' also seek to dismiss the causes of actions in the complaint beyond the negligence action noted in the summons and notice arguing prejudice.

*Leave to amend pleadings*

Defendants seek denial of the additional causes of action asserted in the complaint to the extent they were not alleged in the notice of summons. The decision whether to grant leave to amend a complaint is committed to the sound discretion of trial court (McKinney's CPLR 3025(b)). It is well settled that leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit (see *CPLR 3025(b)*; *Coleman v Worster*, 140 AD3d 1002, 1003 [2d Dept 2016]; *Davis v South Nassau Communities Hospital*, 26 NY3d 563, 580 [2015]). "Mere lateness is not a barrier to an amendment and significant prejudice must be demonstrated to justify the denial" (see 275 AD2d 310, 311-312 [2d Dept 2000]).

Here, the defendants fail to demonstrate how they would be prejudiced by the amendment to assert additional causes of actions asserted in the complaint attached to the plaintiff's cross-motion. The defendants have not interposed an answer nor has any discovery been commenced. To the extent the plaintiff has failed to state some of the causes of action, the Court addresses the same below.

*Standard for motion to dismiss pursuant to CPLR §3211(a)7*

"On a motion to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (see *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion

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<sup>1</sup> The Court addresses the particular causes of actions below in connection with the defendants' motion to dismiss for failure to state a cause of action.

to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]; see also *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

*Medical Malpractice Claim*

*(first cause of action which also alleges negligence)*

Though the first cause of action asserts claims of negligence and medical malpractice, the defendants move to dismiss only the medical malpractice claim.

While medical malpractice is simply a form of negligence, conduct may be deemed malpractice, rather than ordinary negligence, when it constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician (see *Scott v Uljanov*, 74 NY2d 673, 674-675 [1989], quoting *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). The distinction between ordinary negligence and medical malpractice turns on whether the acts or omissions complained of by the plaintiff involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of facts. When the complaint challenges the performance of functions that are an integral part of the process of rendering medical treatment and diagnosis to a patient, it sounds in medical malpractice (see *D'Elia v Menorah Home & Hosp. for the Aged & Infirm.*, 51 AD3d 848, 851 [2d Dept 2008]).

Applying the foregoing analysis to the facts alleged, the Court concludes that the alleged laser hair removal procedure to remove hair from the plaintiff's face does not constitute medical treatment. Nor was it substantially related to the rendition of a medical treatment to the plaintiff by a licensed physician (see *Davis v South Nassau Communities Hospital*, 26 NY3d 563 [2015]). To the contrary, the allegations show that the procedure was purely cosmetic in nature and bears no relationship to any medical condition or treatment. Accordingly, the medical malpractice claim is dismissed.

*Res Ipsa Loquitur (second cause of action)*

The plaintiff has pleaded *res ipsa loquitur* as a separate cause of action aside from the negligence cause of action. The doctrine of *res ipsa loquitur* is not a separate theory of liability but "is an evidentiary rule and as such does not constitute a separate cause of action" apart from the negligence claim (see *Frew v Hospital of Albert Einstein Coll. of Med. Div. of Montefiore Hosp. & Med. Ctr.*, 76 AD2d 826, 826 [2d Dept. 1980]). Accordingly, the cause of action for *res ipsa loquitur* is dismissed.

*Lack of Informed Consent (third cause of action)*

New York's Public Health Law places causes of action for lack of informed consent within the category of medical, dental, or podiatric malpractice claims (see *N.Y. Pub. Health Law § 2805-d(1)*; *Karlin v IVF America, Inc.*, 93 NY2d 282 [1999]).

Here, the Court has already determined that no medical malpractice cause of action is stated for the alleged improperly performed laser hair removal procedure. As the statute limits causes of action for lack of informed consent to the category of medical, dental, or podiatric malpractice claims, the lack of informed consent cause of action is also dismissed.

*Consumer fraud and deceptive business practices*

*(fourth cause of action)*

The defendants construe the inartfully pled fourth cause of action as one for consumer fraud and another based on New York General Business Law §349 violation. However, this confusion is resolved in the plaintiff's opposition papers where she only argues under New York Gen. Bus. Law §349 which prohibits deceptive acts and practices. Moreover, the allegations in the complaint only refer to the Gen.

Bus. Law §349 violation and do not set forth allegations of fraud. Accordingly, the Court will address the fourth cause of action as a single cause of action.

To successfully assert a claim under General Business Law §349, a party must allege that its adversary has engaged in consumer-oriented conduct that is materially misleading, and that the party suffered injury as a result of the allegedly deceptive act or practice (see *Yellow Book Sales & Distrib. Co., Inc. v Hillside Van Lines, Inc.*, 98 AD3d 663, 664-65 [2d Dept 2012]). The claim must pertain to practices that have broad impact on consumers at large. Thus, private contractual disputes which are unique to the parties do not fall within the ambit of the statute (see *Yellow Book Sales and Distribution Co., Inc. v Hillside Van Lines*, 98 AD3d at 665). In determining whether a representation or an omission is a deceptive act, the test is whether such act is "likely to mislead a reasonable consumer acting reasonably under the circumstances" (see *Andre Strishak & Assoc. v Hewlett Packard Co.*, 300 AD2d 608, 609 [2d Dept 2002] quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]). Puffery is not actionable under Gen. Bus. Law §349 (*Verizon Directories Corp. v Yellow Book USA, Inc.*, 309 FSupp2d 401, 405 [EDNY 2004]).

Here, the plaintiff alleges that the "before and after" pictures in the defendants' promotion materials and website are highly deceptive because, upon information and belief, they represent work of entities that are strictly distinct from the defendants. It further alleges that the photos in the defendants' promotional materials and website do not credit other entities or mention their author or owner and that the plaintiff was injured as a result of the alleged deceptive acts or practices.

The Court agrees that the alleged conduct is "consumer oriented" and finds that plaintiff has stated a cause of action for a Gen. Bus. Law §349 violation. In defense, the defendants point to the disclaimer language<sup>2</sup>. The disclaimer, however, does not explicitly state that the pictures do not represent the product of the defendants' work. At this juncture, the Court does not decide if the language is misleading in a material way. The Court's role at this stage is only to look at the allegations to see if they state a potential claim. Thus, the defendants' argument that the alleged deceptive statements are true and can be substantiated are irrelevant at this juncture. Accordingly, the defendants' application for dismissal of the fourth cause of action is denied. The Court also denies defendants' motion to strike punitive damages since the complaint states a cause of action for Gen. Bus. Law §349 violation which permits recovery for punitive damages.

Based on the foregoing, the Court grants the defendants' motion to dismiss pursuant to CPLR §3211(a)7 to the extent of dismissing the plaintiff's causes of action for medical malpractice, *res ipsa*

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<sup>2</sup> The disclaimer states: "The men and women depicted in the photographs are non-compensated and have given their permission to appear. Photos and website information are for illustrative purposes only and do not constitute a promise, guarantee or representation of any particular outcome or experience. Results of procedures and products will vary from person to person and are not guaranteed. Each client's experience and results will be unique depending on their skin, age, health and other individual factors." [Defendants motion to dismiss, dated September 5, 2018, Exhibit "D"].

*loquitur* and lack of informed consent. The only remaining actions are negligence and New York Gen. Bus. Law §349 violation.

**The Court will conduct a Discovery Conference on January 23, 2019.**

This constitutes the decision of this Court.

DATED: *11/16/2018*

*Roy S. Waker*  
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J.S.C.

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE